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FISCAL IMPACT REPORT

SPONSOR: Hurt DATE TYPED: 03/13/03 HB _____

SHORT TITLE: DWI & Parked Vehicles SB 99/aSPAC

ANALYST: Fox-Young

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			Indeterminate - See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Responses Received From
 Corrections Department (CD)
 Department of Public Safety (DPS)
 Attorney General (AG)
 Administrative Office of the District Attorneys (AODA)
 Administrative Office of the Courts (AOC)
 Taxation and Revenue Department (TRD)
 State Highway and Transportation Department (SHTD)
 Public Defender Department (PDD)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee makes the following changes to Senate Bill 99:

- Further amends Sections 66-8-102 and 66-8-107 (Sections 1(A) and 2(C)) to provide that DWI does not apply when a person who is allegedly under the influence of intoxicating liquor is found in a parked motor vehicle and the engine of that motor vehicle is not running; provided that
 - 1) The motor vehicle is not moving;
 - 2) The motor vehicle is not parked on a street or highway;

- 3) The person in the motor vehicle has not exhibited behavior that suggests an intent to elude detection; and
 - 4) There is no evidence that the person has been involved in a motor vehicle accident involving intoxicating liquor.
- Strikes the original bill's amendment to the Implied Consent Act, which would have restricted the situations in which a person is deemed to have given consent to chemical tests of his breath or blood.

Significant Issues

In the second of the four requirements, the meaning of “not parked on a street or highway” is unclear. AOC recommends defining a “parked vehicle” rather than describing where a vehicle may be parked. AOC suggests the following language for Sections 1(A) and 2(C):

The motor vehicle is parked either in a designated parking space in the lot of a commercial establishment, in the owner's driveway, alongside the curb on a street where curbside parking is lawful.

AG notes that there are two potential theories to support DWI liability. They are:

- *Inference of past driving*—i.e., that the facts and circumstances allow an inference that the person had driven from the bar to his driveway while under the influence before the officer arrived on the scene; and
- *Showing of present "actual physical control"*—i.e., that the person was in "actual physical control" when he was found by the officer, sitting in his vehicle, parked in his driveway, with the present ability to put the vehicle into motion again.

AG notes that the amended bill could be interpreted to preclude DWI liability in cases in which a reasonable inference or solid evidence of recent driving indicates such liability. For example, in a case in which a person is intoxicated and in a parked car, no other potential driver is in the vicinity and the vehicle's engine is so hot that it is clear that the vehicle has just been turned off, DWI would not apply. AG reports that if the bill were amended to restrict the circumstances under which a person could be found to be in "actual physical control," this problem could be corrected.

Synopsis of Original Bill

Senate Bill 99 amends the current DWI statute, Section 66-8-102 and the Implied Consent Act, Section 66-8-107, providing that the offense of driving while intoxicated does not apply when a person allegedly under the influence of intoxicating liquor is found in a parked motor vehicle and the engine is off.

The bill also amends Section 66-8-107, restricting the situations in which a person is deemed to have given consent to chemical tests of his breath or blood. The amendment is as follows:

66-8-107. IMPLIED CONSENT TO SUBMIT TO CHEMICAL TEST.--

A. ~~[Any]~~ A person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act, to chemical tests of his breath or blood or both, approved by the scientific laboratory division of the department of health pursuant to the provisions of Section 24-1-22 NMSA 1978, ~~[as determined by a law enforcement officer,~~ ~~or]~~ for the purpose of determining the drug or alcohol content of his blood if arrested for ~~[any]~~ an offense arising out of the acts alleged to have been committed ~~[while]~~ when the person was driving a motor vehicle while under the influence of ~~[an]~~ intoxicating liquor or ~~[drug]~~ drugs.

Significant Issues

The Attorney General (AG) notes that the language of the bill precludes DWI convictions under very broad circumstances. The bill would preclude a DWI conviction when a person drives while intoxicated, gets into an accident, and is in a vehicle that has come to a stop at the side of the road after the collision. Provided the engine is off prior to the arrival of a police officer on the scene, a person would be exempted. Even if that driver does not himself turn the engine off, but the vehicle is damaged enough in the collision so that the engine stops running, the driver would be exempted. The bill would also preclude a DWI conviction when a person who is driving while intoxicated pulls his car to the side of the road and kills the engine before arriving at a roadblock or being stopped by law enforcement. Under current law, a person could be convicted of DWI in any of these situations, because the factfinder could reasonably infer that the person had been driving while intoxicated.

If the bill were amended to provide that a vehicle must not be moving, that the engine of the vehicle must not be running, and that it must be parked off a major thoroughfare, the intent of the law would be clearer. As the bill is drafted, there is no clear definition of "parked motor vehicle."

DPS suggests the bill be amended to clarify that an intoxicated person at the scene of a motor vehicle accident is not exempted, also clarifying that a person who is 'observed in motion or direct control of a vehicle prior to the vehicle being parked and the engine shut off' is not exempted.

The AG notes that the bill's amendments to the Implied Consent Act have the effect of precluding implied consent under very broad circumstances. AG indicates that under current law, a person is deemed to have given consent in two situations: (1) when the person operates a motor vehicle and a law enforcement officer has reasonable grounds to believe that the person was driving while under the influence (reading current Section 66-8-107(A) and (B) together); and (2) when a person has been arrested for an offense arising out of the acts alleged to have been committed while the person was driving under the influence. By striking "or" in addition to striking "as determined by a law enforcement officer," the bill provides that implied consent has been given only in the second situation above. That is, **implied consent would be given only after a person is arrested for another offense.** (e.g. vehicular homicide allegedly committed while driving under the influence)

The bill's provisions have the potential to effectively eliminate the utility of sobriety checkpoints, barring law enforcement officers from determining drug or alcohol content of a suspect's blood unless the suspect has been arrested for another offense. Therefore, the bill, as drafted, is

likely to result in fewer chemical tests being administered in cases where officers have reasonable grounds to suspect DWI as well as an increase in arrests for reckless driving, vehicular homicide and other offenses.

The AG notes that if the Legislature's intent is to preclude implied consent when a person is sitting in a parked vehicle when the engine is not running, the language should be clarified. AG suggests restricting the definition of "operates" so that one is not "operating" a vehicle when one is inside a parked motor vehicle with the engine off rather than making the proposed amendment to Section 66-8-107(A) and adding Subsection C.

FISCAL IMPLICATIONS

The AG notes that the bill is likely to prompt an increase in the appellate DWI caseload, as the new provisions will have to be interpreted.

AODA indicates that while the number of DWI arrests and criminal prosecutions will likely decrease due to the fact that a significant number of cases will no longer be subject to DWI laws, there will likely be an increase in civil cases arising from additional crashes, and the state may be required to spend additional money to increase staffing in the courts to accommodate a rise in civil litigation. Additionally, because a significant number of offenders presently arrested, prosecuted and convicted of DWI will no longer be charged or convicted, revenue from fines imposed as part of criminal sentencing will be reduced. Some state costs may also be reduced due to a decrease in license revocation hearings.

Taxation and Revenue Department (TRD) estimates that the bill will likely have a small impact on penalty assessments for DWI.

The Corrections Department (CD) notes that the bill may result in a minor cost reduction to the Department as it will likely result in a decrease of one to five DWI convictions each year. Additionally, CD notes the bill may slightly decrease the administrative burden of prison and probation/parole personnel since it may result in approximately 1-5 fewer DWI convictions each year.

OTHER SUBSTANTIVE ISSUES

PDD references several cases in which the Supreme Court has held that a defendant was guilty of DWI when in a parked motor vehicle with the engine off:

PDD notes that it is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state. Section 66-8-102 (A). A "driver" is defined as . . . every person who drives or is in actual physical control of a motor vehicle. . . upon a highway . . . or who operates or is in actual physical control of an off-highway motor vehicle. NMSA 1978, § 66-1-4.4(K) (1999). In State v. Johnson, 2001-NMSC-001, 15 P.3d 1233, the defendant was passed out or asleep in the driver's seat of the vehicle, in the parking lot of a store, with the keys to the vehicle in his pocket. The Supreme Court held that he was DWI because "an inference can be drawn that the defendant, while intoxicated, placed himself in the driver's seat of the vehicle. An inference can be drawn that the defendant was capable, at any time, of using the keys to start the vehicle and cause it to move."

PDD notes the Court has also held that a person is DWI if he is intoxicated and asleep in his car even if the car is on private property. In State v. Johnson, 2001-NMSC-001, 15 P.3d 1233 the court found the defendant guilty of DWI when another passenger in the car placed blocks under wheels rendering it inoperable.

The State Highway and Transportation Department (SHTD) indicates that the provisions of the bill conflict with case law stating that the motion of a motor vehicle is not a necessary element of a DWI offense. SHTD notes that State v. Johnson states that the policy underlying the DWI statute serves to “prevent individuals from driving or exercising actual physical control over a vehicle when they, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle the vehicle with safety both to themselves and the public.”

AODA notes that under existing New Mexico case law (Boone and related cases) an intoxicated “driver” may avoid a DWI charge if he/she is simply use a vehicle for shelter, but not in physical control of the vehicle. (For example, the “driver” is sleeping in the back seat of a vehicle that is not running and is parked in an appropriate location.)

JCF/prr:njw