**DUI #1 EPISODE NOTES**

**(The Relevant Law)**

**Wade: Hello folks, and welcome to another episode of “The Good Judge-ment Podcast. I’m Wade Padgett**

*Tain: And I’m Tain Kell. The happily retired former judge.*

**Wade: Today we are going to have a guest third wheel to help us present this series on DUI law. Judge Ben Studdard retired last year as a judge of the State Court of Henry County.**

*Tain: After two decades on the bench, Judge Studdard retired but he has always been considered one of the real guru’s on Georgia criminal law, specifically on DUI law. With that limited intro, we welcome Judge Studdard to the Good Judge-Ment Podcast. Tell everyone a little about your background, Judge.*

***Ben: \_\_\_\_\_\_ (your call)***

**Wade: As our loyal listener (haha) knows, we occasionally can cajole an expert to help us navigate different topics we decide to take up. There has been a request or two for us to address DUI cases and some of the recent changes to Georgia law in this area. This is the first episode in a multi-episode series on DUI law. Let’s jump right in.**

*Tain: Before taking this plunge, I have a confession to make. During my time on the bench, I do not recall handling a DUI case that was not otherwise related to felony charges. Therefore, throughout this series, I am going to be asking as many questions as I am going to give deep insights into the relevant law.*

**Wade: We are going to begin this journey through DUI law with an obvious statement – a person charged with DUI is facing a criminal charge. While that may be a painfully obvious point, I think it is helpful to remember that Georgia’s Constitution and laws and the US Constitution do not have separate sections based upon the relative seriousness of the potential penalty.**

1. O.C.G.A. § 40-6-391 makes it illegal for a person to drive while under the influence of alcohol or drugs. There are several different ways that the state can prove that a driver was under the influence of alcohol on the date in question. The statute makes the following acts illegal:

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| ¶ | TYPE OF DUI |
| (a)(1) | “less safe” |
| (a)(2) | “drugs, less safe” |
| (a)(3) | “inhalants-less safe” |
| (a)(4) | “less safe” combined of alcohol, drugs, inhalants |
| (a)(5) | “per se” (BAC .08 grams or more) |
| (a)(6) | “per se” drugs/marijuana |

1. It is a misnomer to refer to a “legal limit” of alcohol. Media reports and other outlets often refer to .08 as the “legal limit.” That is simply wrong for a couple of reasons:
   1. You can be charged with DUI without any specific level of intoxication being proven;
      1. Of course, that has to be true. Otherwise, the driver could simply refuse any testing and always avoid being charged because the officer does not have the exact BAC (BAC=Blood Alcohol Content)
   2. These limits only apply to DUI cases – they do not apply to “walking around” doing other illegal acts;
      1. And there are different “legal limits” applicable within DUI cases based upon the age of the driver and/or the type of vehicle being driven
   3. There is no legal limit associated with certain drugs in a DUI case.
2. Throughout this series, you will hear us discuss a “less safe” DUI charge as opposed to a “per se” DUI charge.
   1. Let’s define those terms
3. **LESS SAFE:** § 40-6-391(a)(1) is commonly referred to as the “less safe” DUI charge. The State is only required to prove that the defendant’s level of intoxication was such that he/she was a less safe driver and there is no requirement that the State prove that the defendant actually committed a less safe act to prove the defendant guilty under (a)(1).[[1]](#endnote-1)
4. **PER SE:** also illegal for any driver to drive “or be in actual physical control of a moving vehicle” with a BAC of .08 or more or to do so while under the influence of any marijuana or any controlled substance. This type of DUI prosecution is frequently referred to as a “per se” DUI charge. It is important to note that proof that the driver was a less safe driver is not required for per se DUI charges.
   1. That level of BAC is different for a per se charge of DUI if the driver is driving a commercial vehicle (.04) or is under the age of 21 (.02).

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| ¶ | TYPE OF DRIVER | BAC FOR PER SE |
| (a) | OVER AGE 21 | .08 |
| (i) | DRIVING COMMERCIAL VEHICLE | .04 |
| (k) | UNDER AGE 21 | .02 |

1. The same constitutional provisions that apply to felonies apply to DUI cases – which are generally misdemeanor offenses (at least the first 3 in a 10 year period are misdemeanors – 4th is a felony)
   1. This is why we made the painfully obvious point in the beginning that DUI cases are criminal cases
2. **BRIEF DISCUSSION OF CONSTITUTIONAL LAW:** A state constitution can grant citizens ***MORE*** rights than are found within the US Constitution but cannot provide any ***FEWER*** rights that are afforded under the US Const. **[[2]](#endnote-2)**
   1. While the Ga. Const. largely tracks the format of the US Const, there are a couple of important distinctions.
   2. The one distinction applicable here is the difference between the 5th Amend. to the US Const (““No person ... shall be compelled in any criminal case to be a witness against himself[.]”)
   3. Ga. Const. Article I, Section I, Paragraph XVI provides, “No person shall be compelled to give testimony tending in any manner to be self-incriminating.”
      1. These seem rather similar but the language has been interpreted to be very different.
3. This provision in the Georgia Constitution has long been held to prevent a criminal defendant from being required to perform ***any act*** that might tend to incriminate the defendant.**[[3]](#endnote-3)** The Fifth Amendment to the U.S. Constitution generally has been held to only prohibit compelled “testimony.” The Ga. Const, has been interpreted to include any act by the defendant as potential “testimony”
   1. In this area, the Georgia Constitution provides greater protections than do the parallel provisions in the U.S. Constitution.
   2. In some famous cases, the Ga. Supreme Court has held that requiring a defendant to put his foot into a plaster mold of a footprint left at the scene of the crime was unconst. under the GA. Const.[[4]](#endnote-4) A defendant cannot be forced to raise his shirt during a trial to show scars on his torso. **[[5]](#endnote-5)**
4. There is a difference between being forced to perform an act versus making yourself available to have evidence extracted from you.
   1. In a famous case, it was held not to be a violation of the Ga. Const. for the defendant to be present to have a bullet extracted from his body.[[6]](#endnote-6)
      1. In reaching that decision, the Supreme Court noted that if defendants could resist presenting themselves to have a “procedure” performed, it would be impossible to have fingerprints, photos, etc. taken during the booking process.
5. **APPLICATION OF THESE PRINCIPLES TO DUI:** We are going to discuss in a later episode some of the recent case law that has applied these principles to DUI cases. For now, it is enough if you understand these concepts:
   1. The Ga. Const. prevents any defendant from being required to perform any act that might incriminate him/her
   2. A defendant can be required to submit to evidence gathering from his/her person (but actually taking the blood sample will probably require a search warrant).
6. **ONE ADDITIONAL LEGAL PRINCIPLE BEFORE WE MOVE ON:** Let’s assume, for a moment, a defendant is charged with armed robbery. The defendant is apprehended and, after reading him his rights under *Miranda*, the officer asks the defendant to make a recorded statement. The defendant refuses and, instead, asks for a lawyer. Would that refusal be admissible at trial?
   1. Obviously not. The jury would assume that his refusal was motivated by his desire to hide something. Regardless of the number of warnings you give the jury, they would not be able to put that aside. A defendant’s exercise of his legal rights cannot be introduced into evidence against him.
   2. NOW, apply that same principle to a DUI arrest. The officer asks the defendant to blow into a machine to get a reading of his level of intoxication. The defendant refuses. The jury cannot be told about that refusal for the same reasons that were applicable to the armed robbery case.[[7]](#endnote-7)
   3. All of these const. issues will be more fully discussed in future episodes within this series.
7. **ELEMENTS OF CRIME OF DUI:** Depending on how the case is charged, (i.e. less safe vs. per se vs. drugs), must prove:
   1. Venue
   2. Defendant was in actual, physical control of a moving ~~motor~~ vehicle (anything with a not on tracks!) **BEN-address this**
      1. To extent less safe for the defendant to drive OR
      2. Under the influence of any drug to extent less safe to drive; OR
      3. Under influence of glue, aerosol or other toxic vapor to extent less safe to drive; OR
      4. Has a BAC of .08 grams or more within 3 hours of driving; OR
      5. Under influence of controlled substance or marijuana
         1. If legally allowed to use the controlled substance or marijuana, must prove defendant “rendered incapable of driving safely”
8. **Penalties for DUI:** (Looking for Ben’s input here!)

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| **DUI (§ 40-6-391)**  (all sentences must contain at least 12 months’ probation with credit for time sentenced to serve in confinement)  Ignition Interlock requirements § 40-5-64.1; Photo fee § 40-6-391(j)(2)  4TH or subsequent offense w/in 10 years is a felony | | | | | |
| **# OFF/10 YEARS** | **JAIL** | **MIN FINE** | **COMM SVC** | **EVALUATION** | **OTHER** |
| **1ST** | **1 DAY**  **(IF BAC .08 OR MORE)** | **$300** | **40 HRS**  **(20 HRS IF UNDER 21 AND BAC UNDER .08)** | **RISK REDUCTION/CLINICAL EVALUATION**  **(EVAL CAN BE WAIVED)** | **LIMITED PERMIT ALLOWED; NO NOLO IF BAC .15 OR MORE** |
| **2ND** | **3 DAYS** | **$600** | **30 DAYS** | **RR/CLINICAL EVAL**  **SUBSTANCE ABUSE TREATMENT** | **IGNITION INTERLOCK MIN 6 MOS; $25 PHOTO FEE; SURRENDER TAGS** |
| **3RD** | **15 DAYS** | **$1,000** | **30 DAYS** | **RR/MULTI OFFENSE TREATMENT** | **IGNITION INTERLOCK; $25 PHOTO FEE; SURRENDER TAGS; SERVE WITH HV NOTICE** |
| **DUI-Child Endangerment** | **Punished per § 16-12-1 (see § 40-6-391(L))** | | | | |

1. **MERGER:** For those hardcore listeners who adore the topic of Merger as much as we do, Child Endangerment DUI offenses do not merge, but less safe merges into per se DUI.[[8]](#endnote-8)
   1. If a defendant is charged with DUI (less safe), DUI (excessive blood alcohol) and DUI (drugs) all from the same incident, the defendant can only be convicted on one charge of DUI.**[[9]](#endnote-9)**

**Wade: Well let’s recap what we’ve learned today. First, a DUI is a criminal offense – it is a misdemeanor but all of the rules relating to criminal procedure, including the Ga. Const., are applicable.**

*Tain: We promise we are going to get into some the latest case law in future episodes which get into the weeds a bit on these const. and legal issues. I can’t wait!*

***Ben: There are multiple different ways for the prosecution to prove that a defendant is guilty of DUI and all of those provisions are found within O.C.G.A. § 40-6-391. But this offense obviously involves more than merely proving that a person was driving with alcohol on his/her breath.***

**Wade: The penalties for DUI are substantial and are included in our outline that can be found at goodjudgepod.com, together with citations to authority for all of these different points of law we have discussed.**

*Tain: Well, folks, as always, we hope this has been helpful to you in your daily practice. We are going to continue this series on DUI law and it will ultimately include several different episodes. You don’t want to miss any part of this exciting series, so be sure to follow The Good Judge-ment podcast on your favorite platform and “like” us, just for fun!*

**I’m Wade Padgett**

***I’m Ben Studdard***

*And I’m Tain Kell… [insert funny thing about driving a lawnmower while intoxicated]*

1. *Parker v. State*, 249 Ga. App. 530 (2001). [↑](#endnote-ref-1)
2. “State constitutional provisions may, of course, confer greater protections than their federal counterparts, provided that such broader scope is rooted in the language, history, and context of the state provision. In the same way, a state constitution may also offer less rights than federal law, so long as it does not affirmatively violate federal law.” *Olevik v. State*, 302 Ga. 228, n.3 (2017). [↑](#endnote-ref-2)
3. *Day v. State*, 63 Ga. 667 (1879) (defendant cannot be forced to put his foot in a footprint found near the scene of a burglary); *Sheets v. State*, 143 Ga. App. 510 (1977) (at trial, a defendant cannot be forced to raise his shirt before a jury to reveal his scars). However, it is completely legal for a defendant to be required to submit to a draw of his blood and urine to determine whether he had cocaine in his system *pursuant to a search warrant*. *Robinson v. State*, 180 Ga. App. 43, 50 (1986), reversed on other grounds, 256 Ga. 564 (1986). [↑](#endnote-ref-3)
4. *Day v. State*, 63 Ga. 667 (1879). [↑](#endnote-ref-4)
5. *Sheets v. State*, 143 Ga. App. 510 (1977). [↑](#endnote-ref-5)
6. *Creamer v. State*, 229 Ga. 511 (1972). [↑](#endnote-ref-6)
7. *State v. Bradberry*, 357 Ga. App. 60, 62-63 (2020). [↑](#endnote-ref-7)
8. *Partridge v. State*, 266 Ga. App. 305, 306 (2004); *Canelas v. State*, 345 Ga. App. 487 (2018); *Taylor v. State*, 238 Ga. App. 753 (1999), citing *Morgan v. State*, 212 Ga. App. 394, 395 (1994). O.C.G.A. §40-6-391(l) (“A person who violates this Code section while transporting in a motor vehicle a child under the age of 14 years is guilty of the separate offense of endangering a child by driving under the influence of alcohol or drugs. **The offense of endangering a child by driving under the influence of alcohol or drugs shall not be merged with the offense of driving under the influence of alcohol or drugs for the purposes of prosecution and sentencing**. An offender who is convicted of a violation of this subsection shall be punished in accordance with the provisions of subsection (d) of Code Section 16-12-1.”) [↑](#endnote-ref-8)
9. *Partridge v. State*, 266 Ga. App. 305, 306 (2004); *Canelas v. State*, 345 Ga. App. 487 (2018); *Taylor v. State*, 238 Ga. App. 753 (1999), citing *Morgan v. State*, 212 Ga. App. 394, 395 (1994). [↑](#endnote-ref-9)