

		<b>DIRECTIVE</b>	
		<b>6.35</b>	
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## **Driving While Under the Influence of Alcohol/Drugs**

**Directive: 6.35**

Officers will be guided by the following procedures regarding driving under the influence of alcohol/drug cases. Essentially, the process involves three separate areas of responsibility. Each of these areas of responsibility is outlined below:

### **A. Arrest Officers**

1. When an officer encounters a person who is suspected of driving while under the influence of alcohol/drugs, the officer should begin making mental notes about the suspect's condition. The officer should take particular note of any unusual actions on the part of the suspect, to include fumbling for license and registration, repetition and/or slurred statements, and discernible coordination difficulties.
2. As the officer is observing the suspect, the officer should try to detect the odor of alcohol on the suspect's breath. If the officer is satisfied that the suspect's breath smells of alcohol, and that the suspect has displayed some other signs of alcohol affecting his ability to drive, the officer should administer the Standardized field Sobriety Tests as set forth by NHTSA (National Highway Traffic Safety Administration).

If the suspect does have some physical infirmity which would preclude the administration of physical coordination tests, the officer should attempt to administer the alternate test as outlined in the Standardized Field Sobriety Tests. (i.e. finger dexterity test, reciting the alphabet, starting at a specific letter and ending at a specific letter, usually E to R, or counting backwards from a specific number and ending at a specific number, such as 87 to 69).

**NOTE:** If the suspect is later arrested and refuses a chemical test, the officer will have to rely on his observations and the results of these coordination tests.

- 3. Standardized Field Sobriety Tests should be conducted on a level surface taking in to factor that safety of the subject, and effects on the tests.

If a PBT (portable breath tester) is available the officer should administer it to the subject to confirm his suspicions.

At this point, the officer should have sufficient probable cause to make an arrest for driving under the influence.

- 4. **Once the suspect is placed under arrest**, the officer will advise the defendant of his Miranda Warnings prior to the asking of any questions, including those on the back of the Implied Consent/Probable Cause form. The officer will notify the Communications Center that he/she is bringing a defendant to Central.

If the arresting officer is not a qualified operator, the officer should request a qualified operator through the Communications Center but only after ascertaining that the subject will in fact submit to a test. An operator is not to be requested while the subject is still enroute to central from the stop scene, thus eliminating the certified operator from wasting a minimum of twenty (20) minutes while the instrument is getting ready.

The disposition of the defendant's vehicle should follow the guidelines outlined in Directive 6.34, "TOWING, SEIZURE, AND RELEASE OF VEHICLES."

- 5. Once a defendant is brought to Central, the arresting officer will request that the defendant submit to the Intoxilyzer test. This should be done in the Intoxilyzer room.

[REDACTED]

- 6. If the defendant refuses to submit to the **breath test**, and the officer is not drawing blood, the officer will complete the remainder of the questions on "Implied Consent and Probable Cause" form, and have the defendant sign the form. If the defendant refuses to sign the form, the officer will enter the word "REFUSED" on the defendant signature line. This portion of the Implied

Consent/Probable Cause form will only be completed after there is an initial refusal to submit to a chemical test.

The Implied Consent form is located in LEISS under the Impaired Driving Report section. If it is a refusal the officer will print the refusal form from this section and have the defendant sign it.

7. If the defendant refuses to submit to the Intoxilyzer test, the officer will complete the IDR (impaired driving report) in LEISS.
8. Officers shall use and make a written record of reasonable efforts to contact parents of juvenile defendants before subjecting the defendant to Intoxilyzer testing. Although parental consent to Intoxilyzer testing is not required, an attempt to contact parents is required by Family Court. Officers should remain cognizant of the (4) four hour time limit for the administration of a chemical test. Once a reasonable effort has been made, the officer should proceed per departmental procedure regarding administration of a chemical test.
9. When the defendant refuses the breath test, the arresting officer will print the Implied Consent form from the IDR section of LEISS. The officer will complete the back section or page 2. The front will be signed by the officer's supervisor or by the traffic sergeant. The original will be mailed to the Department of Motor Vehicles by the officer assigned in SOD Traffic Division.
10. When the defendant refuses to submit to the breath test, the arresting officer will assure that the Intoxilyzer instrument is turned off and that the proper information concerning the defendant is recorded in the Intoxilyzer log book.
11. If the defendant consents to take the Intoxilyzer test, same will then be administered.
  - a. Due to a recent Superior Court decision, officers should make sure that prior to a breath test, the defendant remove any and all foreign objects from their mouths (i.e., false teeth). In addition, officers must wait the prescribed twenty-minute waiting period after the object(s) is removed from the mouth.

Once the breath sample is given, the defendant will be removed from in front of the Intoxilyzer instrument.

**NOTE:** If the defendant passes the breath test, but his condition indicates the presence of drugs, the arresting officer will administer a blood test. If the defendant is not injured and is at central, Omega will be contacted and the blood drawn at central.

12. After the breath test is completed, the arresting officer will complete two copies of the "Implied Consent and Probable Cause" form. The officer should complete the front side of this form only, addressing the area of probable cause. Once the form is completed, it will be processed as described in paragraph 8.
13. State of Delaware, Title 21, Paragraph 4177, sets a B.A.C. of **.08** percent or higher as the point at which one is considered to be driving under the influence of alcoholic beverages.

Samples for chemical analysis must be taken within four (4) hours of the alleged offense. If the defendant has a **.08** percent or higher B.A.C. reading, the arresting officer has no discretion. The defendant will be issued a uniform traffic summons for the charge of driving under the influence.

Additionally, the arresting officer will complete the proper departmental report form(s): Arrest Report, Accident Report, and IDR from LEISS. Depending on the charges will dictate which report the officer is to complete (refer to Chapter 4 to determine which report to use).

14. The arresting officer will take possession of the defendant's Delaware operator's license and will mail this license to the Motor Vehicle Division (see Section A-16). Out of state drivers license are not to be seized for any reason, however, a temporary license form is still issued.
15. The arresting officer will issue a temporary license form to the defendant. These sequentially numbered forms are maintained in the House Sergeant's office. Any officer needing said form will obtain same from the house sergeant, complete the log book for same, and obtain the supervisor's signature. These forms will be typed, or printed legibly.
  - a. A temporary operator's license will be issued to all defendants charged with the offense of driving under the influence, or when he is charged with another crime having as an element of the crime the charge of driving under the influence. This will account for the offenses of vehicular assault or vehicular homicide.
    - (1) Driving a motor vehicle under the influence of an alcoholic beverage, or drugs (21-4177) is an element of vehicular homicide 1st degree (11-630A); of vehicular homicide 2nd degree (11-63); of vehicular Assault 1st degree (11-629); and of vehicular assault 2nd degree (11-628).
    - (2) In order for the Division of Motor Vehicles to properly and accurately record the charge on the subject's driving record, it will be necessary for the investigating/arresting officer(s) to complete Form 529 (see sample at the end of this Directive) and secure the subject's driver's

license.

- (3) The investigating/arresting officer(s) will also complete the necessary "Uniform Traffic Complaint and Summons" and have the document signed and sealed by the **JP Court #20**, which then makes the summons a warrant. The summons will also guarantee that the Division of Motor Vehicles receives proper notification to charge the subject's driving record. If the officer uses E-Ticket, the officer does not need to have the summons signed and sealed at JP # 20.
- (4) If the investigating/arresting officer does not charge the subject at the "scene" of the accident (see 6.16 (5) D), **it will be necessary for them to complete the JP Court #20 Warrant.**
  - a. Exhibit A - Charge Sheet
  - b. Warrant Application
  - c. Exhibit B - Affidavit of Probable Cause

16. If the defendant:

- a. Does not have a Delaware operator's license in his possession;
- b. Has an out-of-state operator's license;
- c. Was driving during a period of suspension/ revocation;
- d. Was driving on an emergency operator's permit;

The arresting officer will sign the bottom of the temporary license form, and check the block "No Temporary License Issued" and the reason for this action. **NOTE:** Even though the block "No temporary license issued" has been checked, the defendant still receives a copy of this form. **They still have not been given the privilege of driving.**

Distribution of the permit form will be as follows:

Original (top/white copy) to defendant  
Copy 2 (blue copy) to be mailed to DMV  
Copy 3 (yellow copy) to be attached to a copy of the report for records division

17. A supply of pre-addressed envelopes has been made available in the Intoxilyzer room. The arresting officer will insert the following completed documents into one of these envelopes and place it in the traffic summons box in the House Sergeant's Office:

- a. Defendant's operator's license, if available;  
**but not an out of state license;**
- b. Copy 2 (blue copy) of the temporary license form

18. On the front of the "Uniform Traffic Summons," the arresting officer should indicate whether or not the defendant is eligible to enter the First Offenders Program (or on E-ticket, check the appropriate boxes). The officer will make this determination by considering the following:
- a. Did the defendant have a B.A.C. of 0.15 percent or greater?
  - b. Was the defendant involved in a motor vehicle traffic accident that resulted in injury to anyone other than the defendant?
  - c. At the time of arrest, was the defendant operating a motor vehicle in violation of Title 21, Section 2756; that is, driving during a period of suspension or revocation?
  - d. At the time of arrest, had the defendant been charged with three or more moving violations during the two years prior to this arrest, or convicted of DUI during the five years prior to this arrest?

If any of these criteria are met, the arresting officer will indicate that the defendant is ineligible for the First Offenders Program. If none of these criteria are met, then the officer will indicate that the defendant is eligible for the program.

19. The arresting officer should make an attempt to have the defendant released to a responsible person's custody. This responsible person must be at least (18) years of age and as best that can be determined, not under the influence of intoxicating alcoholic beverages and/or drugs. This person must be specifically advised that the defendant is not to be permitted to drive a motor vehicle until they have sobered sufficiently. Officers can employ a "burn-off" rate of .015% per hour to estimate the number of hours before a defendant will be completely sober.

If the defendant cannot contact someone to pick him up, then he should be booked. There are a number of other circumstances that may lead to the defendant being booked rather than released, such as:

- a. Defendant cannot properly identify him or herself.
  - b. Defendant is from out of state, unless someone can respond within a reasonable amount of time at the discretion of the arresting officer.
  - c. Defendant's condition is such that the person who is taking custody of him will not be able to stop him from driving a vehicle again.
20. If an arrestee consents to take the chemical test and has a **B.A.C of less than .05** percent, provable drug involvement aside, he should be released and not charged with driving under the influence. When the reading is .06 percent B.A.C. to .07 percent B.A.C., the arresting officer may still exercise his discretion and consider other competent evidence, i.e., erratic driving, observations of coordination, admissions, etc., to determine whether there is a provable case, and the officer can express an unqualified opinion that the arrestee was unfit to drive.

If the arrestee consents to take a chemical test and has a BAC of .049% or less, probable drug involvement aside, he/she should not be charged with DUI, but consideration should be given to placing a charge relative to whatever violation initially led to the stop. Depending on the charge(s) placed, if any, a decision would then be made as to the defendant being released. When the BAC is .050% to .07%, the arresting officer may still exercise their discretion and consider other competent evidence. Naturally, this exercise of discretion does not limit the officer in charging the arrestee with other moving traffic violations such as careless driving; disregarding a red light, etc., if these can be proven. If the defendant is operating a commercial vehicle and has a BAC of .04 percent or more he will be charged with DUI, 21/4177.

Depending on whatever course of action the officer chooses, they will be required to submit the appropriate report form detailing their actions and the reason(s) for same.

21. It is the arresting officer's choice, **not the defendant's**, as to which test will be administered. Therefore, if the defendant refuses the Intoxilyzer test, after being advised of the Implied Consent Law, but states he would submit to a blood or urine test, this is to be considered a refusal and refusal forms will be submitted.

Defendants are not entitled to speak with an attorney relative to their making a decision as to whether or not they will submit to an Intoxilyzer, or other chemical test. Miranda Warnings are not applicable to this decision, as same is covered within the Implied Consent provisions of the Delaware Motor Vehicle Code.

22. If a defendant is unconscious, or is otherwise in a condition rendering him incapable of refusal, the defendant will be taken to the Wilmington Hospital, where a specimen of blood will be taken by a doctor/nurse/technician.

The blood will be drawn under the provision of the Implied Consent Law. The procedure for the taking of blood samples is outlined under Directive 6.36.

**NOTE:** When the case reaches trial, the officer, if requested by the prosecutor prior to appearing in court, will ensure that the original calibration certificates are available. These are normally located in a binder maintained in the Traffic Unit. An additional binder of calibration certificates is also maintained in the Records Division; however, these are to be utilized only as a last resort in the event that both of the other certificates are misplaced, or otherwise unavailable.

## **B. Qualified Intoxilyzer Operator**

1. The arresting officer will sign and complete the Implied Consent form and ensure that the immediate supervisor, and if necessary the defendant, if he/she has

refused to submit to chemical testing.

2. It is imperative that when handling the Intoxilyzer instrument and administering the Intoxilyzer test, the utmost care be given in preventing damage to this delicate instrument.
3. The operator holds the responsibility to complete the check list. The arresting officer will record the proper information in the Intoxilyzer log book. Additionally, the arresting officer will complete the area on the Impaired Driving Report form that deals with the test results and the defendant's ability to drive.
4. At any time during the use of the Intoxilyzer instrument the operator detects any problems with the instrument; he will complete a Departmental Information report completely explaining the problem. If the machine still has any problems and won't work properly and a sample of the defendant's breath cannot be obtained, the operator will notify the House Sergeant and the House Sergeant will determine if the machine should be taken out of service and one of the spare machines placed in service in place of the old machine.

A copy of this report will be placed in the Traffic Unit ticket box to ensure that this information is brought to the attention of the technical supervisor.

5. When the test is completed, the operator who administered the test will carefully remove and discard the mouthpiece. All supplies, such as mouthpieces, forms, and log books are kept in the Intoxilyzer room. All operators will ensure that they are kept in their proper locations.
6. Care must be used to prevent the spread of oral infection between prisoners and between officer and prisoner. By carefully opening the plastic package in which the mouthpiece is stored, only the package itself need be handled during insertion and removal of the mouthpiece. The actual mouthpiece should never be touched by the operator. The operator should wash his hands at the conclusion of the test.

### **C. Blood Samples at Hospitals**

1. All Delaware Hospitals, in all counties, are in a position to assist law enforcement officers in obtaining blood samples alcohol and/or drug testing from drivers arrested for D.U.I. and Vehicular Assault and Vehicular Homicide where police have probable cause to believe alcohol and/or drug impairment was an essential element of the offense.
2. In order for the hospital to document the request for police assistance, the hospital may present the attached form which should be completed and signed by the officer at the time of his request for the hospital's assistance. It goes without saying that should emergency room personnel be busy tending to patients, patients requiring treatment obviously have priority over the taking of samples for testing.

3. Hospital personnel are not expected to physically restrain or assist in the restraining of an arrestee if they object to the taking of the sample for testing. The use of force is the sole responsibility of the police. If the individual to be tested is extremely violent and there is a danger that injury may result from the taking of a sample, the physician or hospital staff has the right to so indicate and not take the sample.
4. If the defendant/prisoner is not injured or already at the hospital on other matters, the [REDACTED]. The officer will call the pager number and leave a number for the phlebotomist to contact the officer. This is for after hours. If it is during working hours, Omega will be contacted directly and the phlebotomist advised where to respond. If the officer is at the [REDACTED] and needs blood drawn and hospital staff refuses to draw blood due to the defendant not giving consent, the officer can have Omega respond to the [REDACTED] and draw blood. If the defendant is being treated for other injuries and the hospital had already drawn blood for the defendant then the officer can subpoena the hospital records for the BAC from the hospital.

**D. Intoxilyzer Officer**

1. The Intoxilyzer Maintenance Officer, assigned to SOD/Traffic Division will be responsible for transporting the department's Intoxilyzer to the location where the State Chemist will be doing calibrations and any minor adjustments needed on the machines. This will be done on a regular basis as over seen by the State Chemist.
2. The Intoxilyzer Officer will ensure that the instruments are calibrated every thirty (30) days by employing the assistance of the Medical Examiner's Office or the office of the State chemist.
3. The Intoxilyzer Officer will ensure that the log book is maintained properly. Additional responsibilities for log book maintenance are outlined in Directive 3.2, Section D.
4. The Intoxilyzer Officer will ensure that all necessary supplies are replaced and that an ample amount is available in the Intoxilyzer room.
5. The Intoxilyzer Officer will periodically inspect the Intoxilyzer room to ensure that it is clean.

**NOTE:** For additional information on the Intoxilyzer Officer's duties, see Directive 3.2 (D)

**E. Driving Under the Influence and "Actual Physical Control"**

According to the Attorney General's Office, there have been recent problems with

prosecution charging "Driving Under the Influence" when the defendant was not operating or driving the vehicle at the time of the initial stop by the officer.

It is recommended that officers not take arrest action on occasions when they discover an individual who has apparently not driven the vehicle at all (asleep in a parking lot), or on occasions when the individual has voluntarily chosen to stop and rest due to his condition.

#### **F. Motor Vehicle Homicide and Assault Legislation**

**Vehicular Assault in the 2nd Degree** is a Class B misdemeanor, and it is to be used when a person's criminally negligent driving causes serious physical injury to another person, or when a person's negligent driving causes physical injury to another person if the driver is under the influence of alcohol or drugs at the time of the incident.

**Vehicular Assault in the 1st Degree** is a Class A misdemeanor, and it should be used when a person's criminally negligent driving, while under the influence of alcohol or drugs, results in serious physical injury to another person.

**Vehicular Homicide in the 2nd Degree** basically is the equivalent of Criminally Negligent Homicide, which has been the charge in the past. However, the statute specifically outlines two (2) circumstances under which a person is guilty of vehicular homicide in the 2nd degree. Those circumstances are when the person's criminally negligent driving results in death to another person and secondly, when the driver is negligent and also under the influence of alcohol or drugs. Vehicular homicide in the 2nd degree is a Class E felony.

**Vehicular Homicide in the 1st Degree** is a Class D felony and is defined as occurring when the driver's criminally negligent operation of a vehicle, while under the influence of alcohol or drugs, causes the death of another person.

It is also important to note that Section 1242 of Title 11 was amended so as to provide that hospitals and hospital personnel have civil immunity when withdrawing blood at the request of a police officer. We have had incidents in the past where hospitals have refused to comply with the request to draw blood and this statute should clear up that problem.

#### **G. Personal Injury Motor Vehicle Accidents**

Notice has been received from the Attorney General's Office that the different police agencies are experiencing problems with the application of the vehicular assault statutes. Apparent inconsistencies are surfacing, primarily during the investigation of "personal injury" accidents where driving under the influence is involved and innocent victims are hospitalized for substantial periods of time.

In recent cases which have come to the attention of the Attorney General's Office where

accidents were the direct result of driving under the influence, the responsible party was cited for that offense only and no attempt was made to use the vehicular assault statutes when innocent parties were injured.

These statutes were created to eliminate confusion and inconsistent results in prosecution. As an example, prior to the drafting of these statutes, if a victim of an accident by a drunken driver died, the defendant was charged with a felony (Criminally Negligent Homicide) which carried a lesser penalty than one that would have been charged if the victim had lived (Assault I or Assault II).

The vehicular assault statutes were adopted to eliminate the problems in prosecuting such cases.

So that we may properly utilize these laws and facilitate a favorable prosecution, as well as a standardization of efforts by all agencies, the Attorney General's office suggests the following guidelines:

First, where there is evidence of driving under the influence in an accident involving personal injury, there should be a charge of vehicular assault.

This is not to say that if a victim complains of a headache or other minor injury the charge would be required, but certainly if an innocent victim needs to be transported to a hospital for treatment, the vehicular assault charge would be appropriate.

The second guideline suggested involves the jurisdiction of these cases. Provisions of the vehicular assault statutes do not grant exclusive jurisdiction to the Superior Court.

Although there is no jurisdiction for these charges in the magistrate courts, they are classified as misdemeanors, giving the Court of Common Pleas jurisdiction.

When the only difference between a serious vehicular assault and a vehicular homicide is the death of an innocent party, complex issues may exist in the area of evidence presentation. This can be minimized by the Attorney General's Office reviewing the case and assigning a deputy to examine and prepare the evidence for trial.

This cannot be adequately accomplished in the lower courts. Therefore, it is now the policy of the Attorney General's Office that all agencies treat a charge of vehicular assault as if it were a felony charge, requiring a scheduled intake and grand jury presentation for Superior Court. In this way, the proper amount of attention can be given to these cases and consistent decisions can be made as to how these cases should be handled.

#### **H. D.U.I. Cases in New Castle County Jurisdiction**

When a member of this department affects a D.U.I. arrest in New Castle County jurisdiction and a blood sample is drawn for evidentiary purposes, the blood drawn will still be submitted through normal department procedures. The arresting officer will

ensure that the transporting officer and the state chemist are added to the witness list so that J.P. Courts can subpoena the doctor and properly direct all witness lists. Compliance to this procedure will avoid the unnecessary dismissal of D.U.I. cases in J.P. Courts.

## **I. D.U.I. Arrest**

1. A D.U.I. arrest will result with one of the following report forms being completed:
  - a. If the suspect is arrested for D.U.I., and the vehicle is not towed and the suspect is ultimately released to a responsible person, the incident will be reported on an Impaired Driving Report only.
  - b. If the suspect is arrested and the vehicle is towed, but the suspect is ultimately released to a responsible person, the incident will be reported on an Impaired Driving Report and an automated tow slip through LEISS generated.
  - c. In both of the preceding circumstances, if the suspect is unable, or unwilling to be released, an arrest report will be submitted in addition to the Crime or Vehicle report. This arrest report will be an added report listed under the original case number.
  - d. If the suspect is arrested as a result of an accident, the incident will be reported on an accident report with the same criterion applicable as to whether or not an added arrest report is submitted.
2. If the arrest of a suspect results from the observation or detection of an officer who is not ultimately the arresting officer, that "initial" officer will, without exception, submit a supplement report detailing the observations that led to their suspicion that the suspect was Driving Under the Influence. This report will be an added report using the original case number.