OH & KY DUI

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Ohio OVI

- ORC 4511.19 - No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

  - The person is under the influence of alcohol, a drug of abuse, or a combination of them.
  - The person has a prohibited concentration of alcohol in their blood (.08-whole blood/.096-serum or plasma), breath (.08), or urine (.11).
  - The person has a prohibited concentration of specific drugs in their blood or urine.
Kentucky DUI

- KRS 189A.010 - A person shall not operate or be in physical control of a motor vehicle anywhere in this state:
  
  (a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle;

  (b) While under the influence of alcohol;

  (c) While under the influence of any other substance or combination of substances which impairs one's driving ability;
(d) While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;

(e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or

(f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle, if the person is under the age of twenty-one (21).
Breath Test Differences

**Ohio**
- .08 is the per se legal limit
- Test must be taken within 3-hours of operation
- Breath test results need to be challenged in a MTS

**Kentucky**
- .08 is the per se legal limit
- Test must be taken within 2-hours of operation
- Breath test results can be challenge in MTS, but state must also lay foundation at trial
Breath Test Differences

**Ohio**
- Single test on I-5000 and BAC-Datamaster, dual test on I-8000
- Machines are owned by individual police depts.

**Kentucky**
- Single Test on I-5000, but cal checked every test
- Machines are owned by Commonwealth
Breath Test Differences

Ohio
20-minute observation period

From the time of arrest?
- yeah, that’s fine

From the time of the stop
- yeah, that’s fine

While they’re behind the officer?
- yeah, that’s fine

By a non-certified officer?
- yeah, that’s fine
Breath Test Differences

**Kentucky**
20-minute observation period

**From the time of arrest?**
-nope, has to be at the machine

**While they’re behind the officer?**
-nope, needs to be ‘personal observation’

**By a non-certified officer?**
-nope, has to be by a certified operator
Breath Test Differences

CALIBRATION CHECK

Ohio
- Every 192 hrs.
- By senior operator

Kentucky
- Machine connected to a simulator, cal check every test
- No specific time for full check, but done 1x month
- By state tech
Independent Testing

**Ohio**
- No right to an independent test

**Kentucky**
- Right to independent test
- Officer’s failure to provide will subject test to suppression.
- Officer’s inability to provide will not. Reasonableness standard.
Kentucky Breath Test Ticket

-Called a BA
-Results are referred to as a “13” or a “22”
-Can see the KSP logo - this was from a Campbell County case
-Breath test machines are generally at the jail, not the PD
Ohio Breath Test Ticket

- Not called a BA
- Results are referred to as a .136 or .224
- Machines owned by PD
- Breath test machines are generally at the PD, not the jail
Ohio Breath Test Ticket

- Not called a BA
- Results are referred to as a .136 or .224
- Machines owned by PD
- Breath test machines are generally at the PD, not the jail
Kentucky Detention
KRS 189A.110

-Any person who is arrested for a violation of KRS 189A.010 and who, upon blood alcohol testing, shows a blood alcohol reading above .15 percent shall be detained in custody at least four (4) hours following his arrest.
Blood & Urine Test Differences

- After an arrestee takes a breath test the officer will offer them a blood test
- Kentucky has no per se urine limit for alcohol or drugs
- Kentucky has no per se limit for drugs…it’s any amount
Blood & Urine Test Differences

✦ A person shall not operate or be in physical control of a motor vehicle anywhere in this state:

✦ While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
Blood & Urine Test Differences

The substances applicable to a prosecution under subsection (1)(d) of this section are:

(a) Any Schedule I controlled substance except marijuana;
(b) Alprazolam;
(c) Amphetamine;
(d) Buprenorphine;
(e) Butalbital;
(f) Carisoprodol;
(g) Cocaine;
(h) Diazepam;
(i) Hydrocodone;
(j) Meprobamate;
(k) Methadone;
(l) Methamphetamine;
(m) Oxycodone;
(n) Promethazine;
(o) Propoxyphene; and
(p) Zolpidem.
Blood & Urine Test Differences

✤ HOWEVER:

✤ (a) Except as provided in paragraph (b) of this subsection, the fact that any person charged with violation of subsection (1) of this section is legally entitled to use any substance, including alcohol, shall not constitute a defense against any charge of violation of subsection (1) of this section.

✤ (b) A laboratory test or tests for a controlled substance shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section upon a finding by the court that the defendant consumed the substance under a valid prescription from a practitioner, as defined in KRS 218A.010, acting in the course of his or her professional practice.
# Blood & Urine Test Differences

## Operation with concentration of controlled substance specified below. RC 4511.19(A)(1)(j)(i)-(x).

<table>
<thead>
<tr>
<th>Controlled Substance</th>
<th>Urine</th>
<th>Whole Blood, Blood Serum or Plasma</th>
<th>Section No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amphetamine</td>
<td>≥ 500 ng</td>
<td>≥ 100 ng</td>
<td>(A)(1)(j)(i)</td>
</tr>
<tr>
<td>Cocaine</td>
<td>≥ 150 ng</td>
<td>≥ 50 ng</td>
<td>(A)(1)(j)(ii)</td>
</tr>
<tr>
<td>Cocaine Metabolite</td>
<td>≥ 150 ng</td>
<td>≥ 50 ng</td>
<td>(A)(1)(j)(iii)</td>
</tr>
<tr>
<td>Heroin</td>
<td>≥ 2000 ng</td>
<td>≥ 50 ng</td>
<td>(A)(1)(j)(iv)</td>
</tr>
<tr>
<td>Heroin Metabolite (6-monoacetyl morphine)</td>
<td>≥ 10 ng</td>
<td>≥ 10 ng</td>
<td>(A)(1)(j)(v)</td>
</tr>
<tr>
<td>L.S.D.</td>
<td>≥ 25 ng</td>
<td>≥ 10 ng</td>
<td>(A)(1)(j)(vi)</td>
</tr>
<tr>
<td>Marihuana</td>
<td>≥ 10 ng</td>
<td>≥ 2 ng</td>
<td>(A)(1)(j)(vii)</td>
</tr>
<tr>
<td>Marihuana Metabolite and under the influence</td>
<td>≥ 15 ng</td>
<td>≥ 5 ng</td>
<td>(A)(1)(j)(viii)(I)</td>
</tr>
<tr>
<td>Marihuana Metabolite</td>
<td>≥ 35 ng</td>
<td>≥ 50 ng</td>
<td>(A)(1)(j)(viii)(II)</td>
</tr>
<tr>
<td>Methamphetamine</td>
<td>≥ 500 ng</td>
<td>≥ 100 ng</td>
<td>(A)(1)(j)(ix)</td>
</tr>
<tr>
<td>Phencyclidine</td>
<td>≥ 25 ng</td>
<td>≥ 10 ng</td>
<td>(A)(1)(j)(x)</td>
</tr>
<tr>
<td>Salvia divinorum and salvinorin A</td>
<td>Pending State Board of Pharmacy rule</td>
<td>Pending State Board of Pharmacy rule</td>
<td>(A)(1)(j)(xi)</td>
</tr>
</tbody>
</table>

...
Initial Appearance

ALS 5-day hearing and Kentucky Arraignment
Ohio’s Arrest, Arraignment, and ALS

- On a first offense, person is usually cited to court
- No requirement that they be held if they have a high BAC
- If they refuse the test or test over, an ALS is imposed at the time of test/refusal
- Arraignment required to occur within 5 business days of arrest
- At arraignment, the defendant may challenge the imposition of the ALS
- At arraignment, limited pre-trial privileges can be requested
Kentucky’s Arrest, Arraignment, and ALS

- On a first offense, person is usually taken to jail
- Requirement that they are held for 4 hrs if BA > .15
- Refusal or test over - they keep their license until arraignment
- At arraignment, the defendant is placed under a pre-trial suspension for a refusal or 2nd offense
- At arraignment, defendant can request a pre-trial suspension hearing
Kentucky’s Arrest, Arraignment, and ALS

- If the person took the test and was over, there is no pretrial suspension on a 1st offense
- The defendant may file a petition for judicial review of the pre-trial suspension
- That review consists of a mini-pc hearing, implied consent, and actual refusal determination
- Hearing must occur within 30-days of demand
Kentucky’s Arrest, Arraignment, and ALS

- If there was a refusal, the person may petition the court for an interlock device. This is new - eff. 7/15, KRS 189A.200(2)

- They may do this only if they waive their right to a judicial review of the suspension.
Prior Offenses

- Prior convictions enhance penalties for future convictions.
- Look back period: 6 years in OH and 5 years in KY.
- OH: Calculates the date from prior conviction to present offense.
- KY: Calculates the date from prior offense to present offense.
Prior Offenses in KY

- Any challenges to a prior conviction in KY must occur at the ‘first opportunity’ or they’re waived

- **THIS IS BIG**: any OVI conviction that came from a NO CONTEST plea cannot be used to enhance the current KY DUI. KRE 410(2)
Prior Offenses in KY

KY sees DUI and Physical Control as one and the same

What does DUI require? Operation.

What does physical control require in OH? Being in the driver’s position of a front seat of a vehicle and having possession of the ignition key

THIS IS ALSO BIG: a conviction for an OH physical control can cause an enhancement in a subsequent KY DUI.
Jury Trial

- Ohio has 8 jurors in Municipal Court
- Kentucky has 6 jurors in District Court
- In Ohio we voir dire the venire, pass for cause, then exercise peremptory challenges in succession
- In KY we directly voir dire a venire of 12, pass for cause
- Then the prosecutor and defense each strike 3 jurors - if we each strike a different 3, then we have our jury
- If we strike one or more of the same, then the clerk puts the remaining names in a hat and draws out the first 6, then we have our jury
Post Conviction Suspension

- Ohio driver
- KY DUI, 1st offense suspended 30-120 days
- KY will notify OH
- OH will send notice of suspension to driver
- 21 days from date of mailing of letter, a 6-month suspension begins
Post Conviction Suspension

- Ohio driver

- The ORC provides that the Ohio driver will be suspended for 6-months or the period of suspension given by the foreign court, whichever is less

- By default, they suspend for 6-months

- ORC 4510.17(B)
How to Fix It

Documents needed

- Certified Copy of Driving History Record from KY Transportation Cabinet - 8120 Dream Street in Florence, KY
- Clearance letter from Transportation Cabinet, if available
- Copy of the OH BMV Suspension Notice
How to Fix It

- Appeal Letter Sent to OH BMV
- Include a copy of the KY Driving History Record and, if available, the Clearance Letter
- Never had to have a hearing
How to Fix It

- If the suspension in OH will still be active you can petition for limited privileges
- File in County of Residence
- $126 in Hamilton County
How to Fix It

- Heard in Rm. 236
- Establish need for privileges: work, school, medical
- Must surrender OH license at that time
- Similar to obtaining privileges at OH arraignment
How to Fix It

- Available to download for your use:
  - Sample letter to client
  - Sample of Driving History Record
  - Sample of Clearance Letter
  - Sample letter of appeal to OH BMV

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Post Conviction Suspension

Kentucky Driver

- Ask Judge to put the end date of the OH suspension on the Judgment Entry sheet

- After being informed of the OH conviction:
  - the KY Transportation Cabinet will send a Notice of Suspension to the Client
  - The suspension will begin on the DATE OF CONVICTION, not the date of arrest, even if the OH judge backdates the suspension to the date of arrest.

- Client will be facing KY suspension time equivalent to OH suspension.

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Post Conviction Suspension

Kentucky Driver

For example, if Client is arrested in January 2015 and pleads NO CONTEST in April 2015, his OH 6 month suspension, after being backdated, will terminate in July 2015. However, KY will suspend Client for 6 months, but will begin the suspension in April 2015, meaning the KY suspension will terminate in October 2015. The best way to avoid this scenario is to do the following:

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Post Conviction Suspension

1. Have the sentencing Judge write down the end date of the suspension. Normally, the Judge will write that the suspension will be for 6 months and be backdated to the date of arrest, without putting the end date of the suspension. If the end date of OH suspension is on the Entry, the KY Transportation Cabinet will honor the end date of the suspension and Client’s KY suspension will terminate at the same time as the OH suspension.

2. OH BMV records will not help! The KY Transportation Cabinet will only honor documents coming from the OH courts regarding modifying KY suspensions.

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Post Conviction Suspension

• Client will be eligible for a hardship license in KY after a 30 day hard suspension. The 30 day suspension will be an actual 30 days, beginning from the date of conviction. (No exceptions, even if OH suspension ends prior to 30 days!)
• Client is eligible for hardship license after 30 days. Client does not have to complete 20 hours of Adult Driving Education program to get hardship license.
• Client must pay $40 reinstatement fee in KY and complete a KY alcohol assessment and 20 hours of ADE program (OH assessment will not be accepted!). If KY assessment determines Client only needs to complete 20 hours of ADE program, the OH 3 day DIP program at a state-approved facility may be used to substitute for the 20 hour ADE program.
• In order to get his KY license reinstated, Client must complete ADE program or its equivalent.

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5 Take Aways

- In KY, priors calculate from offense to offense and look back 5 years. In OH they calculate from prior conviction date to current offense date and look back 6 years.
- A conviction that came from a no contest plea cannot be used to enhance a KY DUI.
- KY does not have a physical control that is separate from a DUI. An OH physical control conviction can enhance a KY DUI.

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5 Take Aways

- Ohio will issue a 6-month suspension upon receiving notice of a KY DUI conviction. You can administratively appeal it and have it converted to the length of suspension given by the KY court.

- KY will hand down the suspension given by the OH court but will start the time from the date of conviction unless the OH court journalizes the end date of the suspension.