

SHORT TITLE: Civil procedure; authorizing admissibility of conviction for DUI, test results and refusal to submit to testing in civil proceeding for recovery of costs and damages resulting from injury, death or damage to property; effective date; emergency.

STATE OF OKLAHOMA

2nd Session of the 44th Legislature (1994)

SENATE BILL NO. 668

By: Long (Lewis)

AS INTRODUCED

An Act relating to evidence in civil actions;

amending 12 O.S. 1991, Sections 2404 and 2803, 47 O.S. 1991, Sections 753, as amended by Section 6, Chapter 238, O.S.L. 1993 and 11-902, as last amended by Section 13, Chapter 276, O.S.L. 1993 (47 O.S. Supp. 1993, Sections 753 and 11-902), which relate to admissibility of character evidence and crimes, hearsay evidence, refusal to submit to certain testing and driving under the influence of alcohol; authorizing admissibility of conviction for DUI, test results and refusal to submit to testing in civil proceeding for recovery of costs and damages resulting from injury, death or damage to property; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 12 O.S. 1991, Section 2404, is amended to read as follows:

Section 2404. A. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

1. Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same;

2. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; ~~or~~

3. Evidence of the character of a witness, as provided in Sections 2607, 2608 and 2609 of this Code; or

4. Evidence of a conviction under Section 11-902 of Title 47 of the Oklahoma Statutes, evidence of a test result and evidence of refusal to submit to testing as provided in Sections 752 and 753 of Title 47 of the Oklahoma Statutes, offered in a civil proceeding for recovery of costs and damages for injury or death to any victim or victims and for loss or damage to property of a victim when such injury, death, loss or damage resulted from the same incident upon which the conviction, test result or refusal to be tested is based.

B. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

SECTION 2. AMENDATORY 12 O.S. 1991, Section 2803, is amended to read as follows:

Section 2803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

1. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter;

2. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

3. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan,

motive, design, mental feeling, pain and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will;

4. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment;

5. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. The memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party;

6. Any form of memorandum, report, record or data compilation of acts, events, conditions, opinions or diagnosis, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit;

7. Evidence that a matter is not included in the memoranda reports, records or data compilations, in any form, kept in accordance with the provisions of paragraph 6 of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data

compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

8. To the extent not otherwise provided in this paragraph, records, reports, statements or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual finding resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

- a. investigative reports by police and other law enforcement personnel,
- b. investigative reports prepared by or for a government, a public office or agency when offered by it in a case in which it is a party,
- c. factual findings offered by the government in criminal cases,
- d. factual findings resulting from special investigation of a particular complaint, case or incident, or
- e. any matter as to which the sources of information or other circumstances indicate lack of trustworthiness;

9. Records or data of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law;

10. To prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 902 of this Code, or testimony, that diligent search failed to disclose the record, report, statement or data compilation or entry;

11. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage or other similar facts of personal or family history contained in a regularly kept record of a religious organization;

12. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

13. Statements of fact concerning personal or family history including those contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones;

14. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office;

15. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

16. Statements in a document which is at least twenty (20) years old and whose authenticity is established;

17. Market quotations, tabulations, lists, directories or other published compilations generally used and relied upon by the public or by persons in particular occupations;

18. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits;

19. Reputation among members of his family by blood, adoption or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of his personal or family history;

20. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which located;

21. Reputation of a person's character among his associates or in the community;

22. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. Evidence of a felony or misdemeanor conviction under the provisions of Section 11-902 of Title 47 of the Oklahoma Statutes, pleas of nolo contendere to charges under the provisions of 11-902 of Title 47 of the Oklahoma Statutes, evidence of a test result and evidence of refusal to submit to testing as provided in Sections 752 and 753 of Title 47 of the Oklahoma Statutes shall be admissible in a civil proceeding for recovery of

costs and damages for injury or death to any victim or victims and for any loss or damage to property of any victim when such injury, death, loss or damage resulted from the same incident upon which the conviction is based. The pendency of an appeal may be shown but does not affect admissibility;

23. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation; or

24. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

- a. the statement is offered as evidence of a material fact,
- b. the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and
- c. the general purposes of this Code and the interests of justice will best be served by admission of the statement into evidence.

A statement shall not be admitted under this exception unless its proponent makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

SECTION 3. AMENDATORY 47 O.S. 1991, Section 753, as amended by Section 6, Chapter 238, O.S.L. 1993 (47 O.S. Supp. 1993, Section 753), is amended to read as follows:

Section 753. If a conscious person under arrest refuses to submit to testing of his or her blood or breath for the purpose of determining the alcohol concentration thereof, or to a test of his or her blood, saliva or urine for the purpose of determining the

concentration of any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance, none shall be given, unless the investigating officer has probable cause to believe that the person under arrest, while intoxicated, has operated his motor vehicle in such a manner as to have caused the death or serious physical injury of any other person or persons. In such event, such test otherwise authorized by law may be made in the same manner as if a search warrant had been issued for such test or tests. The sample shall be taken in a medically acceptable manner at a hospital or other suitable health care facility. The Commissioner of Public Safety, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public roads, highways, streets, turnpikes or other public place of this state while under the influence of alcohol, any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance and that the person had refused to submit to the test or tests, shall revoke his or her license to drive and any nonresident operating privilege for a period as provided by Section 6-205.1 of this title. If the person is a resident or a nonresident without a license or permit to operate a motor vehicle in this state, the Commissioner of Public Safety shall deny to the person the issuance of a license or permit for a period as provided by Section 6-205.1 of this title subject to a review as provided in Section 754 of this title. The revocation or denial shall become effective thirty (30) days after the arrested person is given written notice thereof by the arresting officer or by the Department as provided in Section 754 of this title. Evidence of refusal to submit to testing shall be admissible in civil actions.

SECTION 4. AMENDATORY 47 O.S. 1991, Section 11-902, as last amended by Section 13, Chapter 276, O.S.L. 1993 (47 O.S. Supp. 1993, Section 11-902), is amended to read as follows:

Section 11-902. A. It is unlawful and punishable as provided in this section for any person to drive, operate, or be in actual physical control of a motor vehicle within this state who:

1. Has a blood or breath alcohol concentration, as defined in Section 756 of this title, of ten-hundredths (0.10) or more at the time of a test of such person's blood or breath administered within two (2) hours after the arrest of such person;

2. Is under the influence of alcohol;

3. Is under the influence of any other intoxicating substance to a degree which renders such person incapable of safely driving or operating a motor vehicle; or

4. Is under the combined influence of alcohol and any other intoxicating substance to a degree which renders such person incapable of safely driving or operating a motor vehicle.

B. The fact that any person charged with a violation of this section is or has been lawfully entitled to use alcohol or a controlled dangerous substance or any other intoxicating substance shall not constitute a defense against any charge of violating this section.

As used in this title, the term "other intoxicating substance" shall mean any controlled dangerous substance as defined in the Uniform Controlled Dangerous Substances Act, Section 2-101 et seq. of Title 63 of the Oklahoma Statutes, and any other substance, other than alcohol, which is capable of being ingested, inhaled, injected, or absorbed into the human body and is capable of adversely affecting the central nervous system, vision, hearing or other sensory or motor functions.

C. Every person who is convicted of a violation of the provisions of this section shall be deemed guilty of a misdemeanor

for the first offense and shall be punished by imprisonment in jail for not less than ten (10) days nor more than one (1) year, and a fine of not more than One Thousand Dollars (\$1,000.00). Any person who within ten (10) years after a previous conviction of a violation of this section is convicted of a second or subsequent offense pursuant to the provisions of this section or has a prior conviction after October 31, 1984, in a municipal criminal court of record for the violation of a municipal ordinance prohibiting the offense provided for in subsection A of this section and within ten (10) years of such municipal conviction is convicted under the provision of this section shall be deemed guilty of a felony and shall be sentenced to the custody of the Department of Corrections for not less than one (1) year and not to exceed five (5) years, and a fine of not more than Two Thousand Five Hundred Dollars (\$2,500.00).

D. When a person is sentenced to the custody of the Department of Corrections, the person shall be processed through the Lexington Assessment and Reception Center. The Department of Corrections shall classify and assign the person to one or more of the following:

1. The Department of Mental Health and Substance Abuse Services pursuant to paragraph 1 of subsection A of Section ~~13~~ 612 of ~~this act~~ Title 57 of the Oklahoma Statutes;

2. The Electronic Monitoring Program pursuant to Section ~~5~~ 510.9 of ~~this act~~ Title 57 of the Oklahoma Statutes with participation in a substance abuse treatment program and follow-up treatment;

3. A correctional facility operated by the Department of Corrections; or

4. Other alternative to incarceration authorized by law.

E. In the event a felony conviction does not result in the person being sentenced to the custody of the Department of Corrections, the person shall be required to serve not less than ten

(10) days of community service, or to undergo inpatient rehabilitation or treatment in a public or private facility with at least minimum security for a period of not less than forty-eight (48) consecutive hours, notwithstanding the provisions of Sections 991a, 991a-2 and 996.3 of Title 22 of the Oklahoma Statutes.

F. The Department of Mental Health and Substance Abuse Services and the Department of Corrections may certify to the Department of Public Safety that a person has successfully completed a treatment program and is successfully complying with any follow-up treatment required by the Department of Corrections. In such case, the person shall be given credit therefor as fulfillment of all provisions of Section 3-453 of Title 43A of the Oklahoma Statutes and shall be permitted to apply for reinstatement of any suspension, revocation, cancellation or denial order withdrawing his privilege to drive.

G. The Department of Public Safety is hereby authorized to reinstate any suspended or revoked license when the applicant meets the statutory requirements which affect his existing driving privilege.

H. Any person who is found guilty of a violation of the provisions of this section may be referred, prior to sentencing, to an alcoholism evaluation facility designated by the Department of Mental Health and Substance Abuse Services for the purpose of evaluating the receptivity to treatment and prognosis of the person. The court shall order the person to reimburse the facility for the evaluation in an amount not to exceed Seventy-five Dollars (\$75.00). The facility shall, within seventy-two (72) hours, submit a written report to the court for the purpose of assisting the court in its final sentencing determination. If a person is sentenced to the custody of the Department of Corrections and the court has received a written evaluation report pursuant to this subsection, the report shall be furnished to the Department of Corrections with the judgment and sentence.

I. Any person who is found guilty of a violation of the provisions of this section may be required by the court to attend a victims impact panel program, if such a program is offered in the county where the judgment is rendered, and to pay a fee, not less than Five Dollars (\$5.00) nor more than Fifteen Dollars (\$15.00) as set by the governing authority of the program and approved by the court, to the program to offset the cost of participation by the defendant, if in the opinion of the court the defendant has the ability to pay such fee.

J. Evidence of a conviction under the provisions of this section shall be admissible in civil actions for recovery of costs and damages for injury or death to any victim or victims and for loss or damage to property of a victim when such injury, death, loss or damage resulted from the same incident upon which the conviction is based.

SECTION 5. This act shall become effective July 1, 1994.

SECTION 6. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

44-2-1348

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