

**"CHAPTER 291E
USE OF INTOXICANTS WHILE OPERATING A VEHICLE**

Part I. General Provisions

Section

- 291E-1 Definitions
- 291E-2 Medical services
- 291E-3 Evidence of intoxication
- 291E-4 Convictions and acts prior to January 1, 2002
- 291E-5 Ignition interlock user affordability
- 291E-6 Ignition interlock devices; certification
- 291E-7 Trauma system surcharge

Part II. Testing and Implied Consent

- 291E-11 Implied consent of operator of vehicle to submit to testing to determine alcohol concentration and drug content
- 291E-12 Persons qualified to take blood specimen
- 291E-13 Additional tests
- 291E-14 Consent of person incapable of refusal not withdrawn
- 291E-15 Refusal to submit to breath, blood, or urine test; subject to administrative revocation proceedings
- 291E-16 Repealed
- 291E-17 Other evidence not excluded
- 291E-18 Test results to be collected
- 291E-19 Authorization to establish intoxicant control roadblock programs
- 291E-20 Minimum standards for roadblock procedures
- 291E-21 Applicable scope of part; mandatory testing in the event of a collision resulting in injury or death
- 291E-22 Presence of drugs or metabolic products; admissibility

Part III. Administrative Revocation Process

- 291E-31 Notice of administrative revocation; effect
- 291E-32 Criminal prosecution
- 291E-33 Probable cause determination; issuance of notice of administrative revocation; procedures
- 291E-34 Notice of administrative revocation; contents
- 291E-35 Immediate restoration of license
- 291E-36 Documents required to be submitted for administrative review; sworn statements
- 291E-37 Administrative review; procedures; decision
- 291E-38 Administrative hearing; procedure; decision
- 291E-39 Fees and costs
- 291E-40 Judicial review; procedure
- 291E-41 Effective date, conditions, and period of

- administrative revocation; criteria
- 291E-42 Notice to other states
- 291E-43 Administrative procedure act
- 291E-44 Repealed
- 291E-44.5 Ignition interlock permits; driving for employment
- 291E-45 Eligibility for relicensing and reregistration of motor vehicle
- 291E-45.5 Repeat intoxicated driver after December 31, 2010; eligibility to obtain motor vehicle registration and number plates
- 291E-46 Computation of time
- 291E-47 Failure to surrender number plates
- 291E-48 Special motor vehicle registration
- 291E-49 Transferring title to, or ownership interest in, vehicle prohibited; exceptions
- 291E-50 Notice to the department of land and natural resources of suspensions and revocations of operating privileges

Part IV. Prohibited Conduct

- 291E-61 Operating a vehicle under the influence of an intoxicant
- 291E-61.5 Habitually operating a vehicle under the influence of an intoxicant
- 291E-61.6 Petition for ignition interlock instruction permit and ignition interlock permit; eligibility; requirements
- 291E-62 Operating a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant; penalties
- 291E-63 Records of suspensions and revocations of operating privileges to be maintained
- 291E-64 Operating a vehicle after consuming a measurable amount of alcohol; persons under the age of twenty-one
- 291E-65 Refusal to submit to testing for measurable amount of alcohol; district court hearing; sanctions; appeals; admissibility
- 291E-66 Circumvention of, or tampering with, an ignition interlock device by a person who has been restricted to operating a vehicle equipped with an ignition interlock device; penalties
- 291E-67 Assisting or abetting the circumvention of, or tampering with, an ignition interlock device; penalties
- 291E-68 Repealed

Case Notes

The completion of certain administrative driver's license revocation office forms by defendant and subsequent transmittal of the forms by a civilian police officer for the Navy to the office did not violate the Posse Comitatus Act as (1) the enforcement of Hawaii state law against military personnel on a military base does not infringe on civil authority, and (2) a primary purpose for the completion and transmittal was established; thus, suspension of defendant's license affirmed. 110 H. 172, 130 P.3d 1037.

"PART I. GENERAL PROVISIONS

§291E-1 Definitions. As used in this chapter, unless the context otherwise requires:

"Administrative revocation" means termination of the respondent's license, and the privilege to operate a vessel underway on or in the waters of the State pursuant to part III, but does not include any revocation imposed under section 291E-61 or 291E-61.5.

"Alcohol" means ethanol or any substance containing ethanol.

"Alcohol concentration" means either grams of alcohol per one hundred milliliters or cubic centimeters of blood or grams of alcohol per two hundred ten liters of breath.

"Alcohol enforcement contact" means:

- (1) Any administrative revocation ordered pursuant to part III;
- (2) Any administrative revocation ordered pursuant to part XIV of chapter 286, as that part was in effect on or before December 31, 2001;
- (3) Any suspension or revocation of any license or any suspension or revocation of a privilege to operate a vessel underway imposed by this or any other state or federal jurisdiction for refusing to submit to a test for alcohol concentration;
- (4) Any conviction in this State for operating or being in physical control of a vehicle while having an unlawful alcohol concentration or while under the influence of alcohol; or
- (5) Any conviction in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having an unlawful alcohol concentration or while under the influence of alcohol.

"Certified substance abuse counselor" means any person certified by the department of health pursuant to section 321-193(10), or any other substance abuse specialist or medical practitioner the director of health may appoint to carry out the functions of a certified substance abuse counselor under this chapter.

"Director" means the administrative director of the courts or any other person within the judiciary appointed by the director to conduct administrative reviews or hearings or carry out other functions relating to administrative revocation under part III.

"Drug" means any controlled substance, as defined and enumerated in schedules I through IV of chapter 329, or its metabolites.

"Drug enforcement contact" means:

- (1) Any administrative revocation ordered pursuant to part III;
- (2) Any administrative revocation ordered pursuant to part XIV of chapter 286, as that part was in effect on or before December 31, 2001;
- (3) Any suspension or revocation of license or any suspension or revocation of a privilege to operate a vessel underway imposed by this or any other state or federal jurisdiction for refusing to submit to a test for drug content in the person's blood or urine;
- (4) Any conviction in this State for operating or being in physical control of a vehicle while having an unlawful drug content in the blood or urine or while under the influence of drugs; or
- (5) Any conviction in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having an unlawful drug content in the blood or urine or while under the influence of drugs.

"Household member" means:

- (1) Persons who reside in the same dwelling unit as the respondent; or
- (2) Persons under twenty-one years of age who are related to the respondent by marriage, blood, or adoption, regardless of whether they reside in the same dwelling unit with the respondent.

"Ignition interlock device" means a breath alcohol ignition interlock device that is certified pursuant to section 291E-6 and rules adopted thereunder that, when affixed to the ignition system of a motor vehicle, prevents the vehicle from being started without first testing, and thereafter from being operated without periodically retesting, a deep-lung breath

sample of the person required to use the device that indicates the person's alcohol concentration is less than .02.

"Impair" means to weaken, to lessen in power, to diminish, to damage, or to make worse by diminishing in some material respect or otherwise affecting in an injurious manner.

"Intoxicant" means alcohol or any drug, as defined in this section.

"Law enforcement officer" means any public servant, whether employed by the State, a county, or by the United States, vested by law with a duty to maintain public order or to make arrests for offenses or to enforce the criminal laws, and includes a conservation and resources enforcement officer as specified in section 199-3.

"License" means any driver's license or any other license or permit to operate a motor vehicle issued under, or granted by, the laws of this State and includes:

- (1) Any learner's permit or instruction permit;
- (2) The privilege of any person to operate a motor vehicle, regardless of whether the person holds a valid license;
- (3) Any nonresident's operating privilege; and
- (4) The eligibility, including future eligibility, of any person to apply for a license or privilege to operate a motor vehicle.

"Measurable amount of alcohol" means a test result equal to or greater than .02 but less than .08 grams of alcohol per one hundred milliliters or cubic centimeters of blood or equal to or greater than .02 but less than .08 grams of alcohol per two hundred ten liters of breath.

"Moped" has the same meaning as in section 291C-1.

"Motor vehicle" has the same meaning as in section 291C-1, except that it specifically includes a moped.

"Nonresident's operating privilege" means the privilege conferred by law upon a nonresident to operate a vehicle in this State.

"Notice of administrative revocation" or "notice" means the written notice issued to the respondent pursuant to section 291E-33.

"Number plates" refer to the number plates or special number plates, which are commonly known as license plates, that are issued under sections 249-9, 249-9.1, 249-9.2, and 249-9.3 and that are required to be attached on a motor vehicle pursuant to sections 249-1 to 249-13.

"Operate" means to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway or to navigate or otherwise use or assume physical control of a vessel underway on or in the waters of the State.

"Operator" means a person who drives or assumes actual physical control of a vehicle or a person who operates, navigates, or who has an essential role in the operation of a vessel underway.

"Preliminary alcohol screening device" means a device designed to detect and verify the presence of alcohol or provide an estimated value of alcohol concentration.

"Privilege" refers to the authority to operate a vessel underway on or in the waters of the State.

"Public way, street, road, or highway" includes:

- (1) The entire width, including berm or shoulder, of every road, alley, street, way, right of way, lane, trail, highway, or bridge;
- (2) A parking lot, when any part thereof is open for use by the public or to which the public is invited for entertainment or business purposes;
- (3) Any bicycle lane, bicycle path, bicycle route, bikeway, controlled-access highway, laned roadway, roadway, or street, as defined in section 291C-1; or
- (4) Any public highway, as defined in section 264-1.

"Qualified household member" means a household member of the respondent who has a license that has not expired or been suspended or revoked.

"Repeat intoxicated driver" means a person who previously:

- (1) Has been convicted, during the five years preceding the date of arrest, of one or more violations under:
 - (A) Section 291E-61 or 291E-61.5, as a result of having consumed alcohol; or
 - (B) Section 291-4 or 291-4.4, as those sections were in effect on or before December 31, 2001;
- (2) Has been convicted, during the ten years preceding the date of arrest, of three or more violations under:
 - (A) Section 291E-61 or 291E-61.5, as a result of having consumed alcohol; or
 - (B) Section 291-4 or 291-4.4, as those sections were in effect on or before December 31, 2001; or
- (3) Has had one prior alcohol enforcement contact or drug enforcement contact during the five years preceding the date of arrest, two prior alcohol enforcement contacts or drug enforcement contact during the five years preceding the date of arrest, or three or more prior alcohol enforcement contacts or drug enforcement contact during the ten years preceding the date of arrest.

"Respondent" means a person to whom a notice of administrative revocation has been issued following an arrest for a violation of section 291E-61 or 291E-61.5 or following the

collection of a blood or urine sample from the person, pursuant to section 291E-21, because there was probable cause to believe that the person has violated section 291E-61 or 291E-61.5.

"State" means: any state or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; the United States Virgin Islands; American Samoa; Guam; any province or territory of the Dominion of Canada; and the Commonwealth of the Northern Mariana Islands, except when the word, in context, clearly refers to the State of Hawaii.

"Substance" and "substance abuse" have the same meanings as provided in section 321-191.

"Temporary permit" means that portion of the notice of administrative revocation that, when completed by a law enforcement officer, permits the respondent to operate a vehicle for thirty days in the case of an alcohol related offense and forty-four days in the case of a drug related offense or until such time as the director may establish under part III.

"Under the influence" means that a person:

- (1) Is under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
- (2) Is under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
- (3) Has .08 or more grams of alcohol per two hundred ten liters of the person's breath; or
- (4) Has .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of the person's blood.

"Underway" means that a vessel is not at anchor, made fast to the shore, or aground.

"Valid license" means a license that:

- (1) Is issued by an authorized licensing official in any state;
- (2) Authorizes an individual to operate a motor vehicle on public streets, roads, or highways; and
- (3) Has not expired or been revoked, suspended, or canceled.

"Vehicle" includes a:

- (1) Motor vehicle;
- (2) Moped; and
- (3) Vessel.

"Vessel" means all description of watercraft that are used or are capable of being used as a means of transportation on or in the water.

"Waters of the State" means any waters within the jurisdiction of the State, the marginal seas adjacent to the State, and the high seas when navigated as part of a journey or ride to or from the shore of the State. [L 2000, c 189, pt of §23; am L 2001, c 157, §10; am L 2004, c 90, §2; am L 2006, c 201, §1; am L 2007, c 198, §1; am L 2008, c 171, §4; am L 2009, c 88, §13; am L 2010, c 166, §5; am L 2012, c 327, §7; am L 2016, c 231, §59]

Case Notes

Honolulu police department form 396B prohibiting operation of "a vehicle" in the event of license revocation did adequately put defendant on notice that the term "vehicle" includes mopeds and vessels, as the term "vehicle" is a term of ordinary usage and broad enough to inform a person of ordinary intelligence that it would include a means of ground transportation such as a moped. 108 H. 78, 117 P.3d 109.

Although the oral charge tracked the language of §291E-61, where the charge failed to allege that defendant was driving defendant's vehicle upon a public way, street, road, or highway at the time of the offense, the charge was deficient, as the term "operate" as defined in this section did not comport with its commonly understood definition, required the conduct to take place "upon a public way, street, road, or highway", and was neither "unmistakable" nor "readily comprehensible to persons of common understanding". 121 H. 383, 219 P.3d 1170 (2009).

This section establishes an attendant circumstance of the offense of operating a vehicle under the influence of an intoxicant (OVUII), i.e., that the defendant's conduct occur "upon a public way, street, road, or highway"; the definition of "operate" in this section refers generally to the conduct of "operating" a vehicle under the influence as described in the title of §291E-61, whether the conduct consists of driving the vehicle or otherwise assuming actual physical control of it; thus, the operation of a vehicle on a public way, street, road, or highway is an attendant circumstance of the offense of OVUII and therefore an element of the offense. 121 H. 383, 219 P.3d 1170 (2009).

" **[§291E-2] Medical services.** The several county and state government physicians shall, or any other qualified person may, make whatever tests and analyses as may be requested of them by any law enforcement officer in connection with the determination of whether a person is or was under the influence of an intoxicant or has consumed a measurable amount of alcohol for any purpose under this chapter. [L 2000, c 189, pt of §23]

" **§291E-3 Evidence of intoxication.** (a) In any criminal prosecution for a violation of section 291E-61 or 291E-61.5 or in any proceeding under part III:

- (1) .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of the person's blood;
- (2) .08 or more grams of alcohol per two hundred ten liters of the person's breath; or
- (3) The presence of one or more drugs in an amount sufficient to impair the person's ability to operate a vehicle in a careful and prudent manner,

within three hours after the time of the alleged violation as shown by chemical analysis or other approved analytical techniques of the person's blood, breath, or urine shall be competent evidence that the person was under the influence of an intoxicant at the time of the alleged violation.

(b) In any criminal prosecution for a violation of section 291E-61 or 291E-61.5, the amount of alcohol found in the defendant's blood or breath within three hours after the time of the alleged violation as shown by chemical analysis or other approved analytical techniques of the defendant's blood or breath shall be competent evidence concerning whether the defendant was under the influence of an intoxicant at the time of the alleged violation and shall give rise to the following presumptions:

- (1) If there were .05 or less grams of alcohol per one hundred milliliters or cubic centimeters of defendant's blood or .05 or less grams of alcohol per two hundred ten liters of defendant's breath, it shall be presumed that the defendant was not under the influence of alcohol at the time of the alleged violation; and
- (2) If there were in excess of .05 grams of alcohol per one hundred milliliters or cubic centimeters of defendant's blood or .05 grams of alcohol per two hundred ten liters of defendant's breath, but less than .08 grams of alcohol per one hundred milliliters or cubic centimeters of defendant's blood or .08 grams of alcohol per two hundred ten liters of defendant's breath, that fact may be considered with other competent evidence in determining whether the defendant was under the influence of alcohol at the time of the alleged violation, but shall not of itself give rise to any presumption.

(c) Nothing in this section shall be construed as limiting the introduction, in any criminal proceeding for a violation

under section 291E-61 or 291E-61.5 or in any proceeding under part III, of relevant evidence of a person's alcohol concentration or drug content obtained more than three hours after an alleged violation; provided that the evidence is offered in compliance with the Hawaii rules of evidence. [L 2000, c 189, pt of §23; am L 2004, c 90, §3; am L 2007, c 198, §2; am L 2010, c 166, §6]

Case Notes

Where a plain reading of this section indicates that the phrase "any proceeding under part III" refers to administrative license revocations, trial court erred in upholding hearing officer's ruling that subsection (c) applies only to criminal prosecutions and has no application to administrative driver's license revocation office cases. 109 H. 220, 124 P.3d 965.

" **§291E-4 Convictions and acts prior to January 1, 2002.**

(a) Any:

- (1) Conviction for an offense under section 200-81, 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001;
- (2) Conviction in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having either an unlawful alcohol concentration or an unlawful drug content in the blood or urine or while under the influence of an intoxicant; or
- (3) Adjudication of a minor for a law violation that, if committed by an adult, would constitute a violation of section 200-81, 291-4, 291-4.4, 291-4.5, or 291-7 as those sections were in effect on December 31, 2001;

shall be counted as a prior offense for purposes of section 291E-41, 291E-61, or 291E-61.5.

(b) Any conviction of an offense under section 291-4, 291-4.4, 291-4.5, or 291-7 as those sections were in effect on December 31, 2001, shall be counted for purposes of imposing sentence for a violation under section 291E-62. [L 2000, c 189, pt of §23; am L 2003, c 71, §2; am L 2004, c 90, §4]

" **§291E-5 Ignition interlock user affordability.** The director of transportation shall contract with the selected ignition interlock vendor to provide partial financial relief for the installation and the periodic calibration charges to offenders who apply for such assistance and who are recipients, at the time of license revocation or suspension, of either food stamps under the Supplemental Nutrition Assistance Program, or

free services under the Older Americans Act or Developmentally Disabled Assistance and Bill of Rights Act. [L 2008, c 171, pt of §2; am L 2009, c 88, §§2, 13, 17(2); am L 2010, c 166, §7]

" **§291E-6 Ignition interlock devices; certification.** (a) The director of transportation shall establish and administer a statewide program relating to certification and monitoring of ignition interlock devices installed pursuant to chapter 291E and shall select a single vendor to install and maintain them.

(b) The program shall include standards and procedures for the certification of ignition interlock devices installed pursuant to chapter 291E. At a minimum, the standards shall require that the devices:

- (1) Be certified by an independent laboratory to meet or exceed the guidelines published by the National Highway Traffic Safety Administration;
- (2) Operate using an alcohol-specific sensor technology;
- (3) Employ a digital camera by which a photograph of the person using the device can be incorporated into the electronic record generated by each use of the device;
- (4) Require a rolling retest by which the driver must, within a specified period of time or distance driven after starting the vehicle, be retested and found to have an alcohol concentration of less than .02, with a margin of error of .01; and
- (5) Generate a record of vehicle usage, including dates and times driven.

(c) The program shall include standards and procedures for the certification of the vendor selected to install and maintain ignition interlock devices pursuant to chapter 291E. At a minimum, the standards shall require that the vendor:

- (1) Install only an ignition interlock device that is certified pursuant to this section;
- (2) Offer or contract for ignition interlock device installation and maintenance statewide;
- (3) Train drivers who are required to install an ignition interlock device, pursuant to chapter 291E, in how to use the device;
- (4) Schedule the driver for all necessary readings and maintenance of the device; and
- (5) Provide periodic reports regarding the use of each ignition interlock device installed pursuant to chapter 291E, including incidents of test failure, attempts to circumvent the device, and dates, times, and distances the vehicle was driven.

(d) The vendor selected for installation and maintenance of ignition interlock devices pursuant to chapter 291E shall be

audited annually by the director of transportation pursuant to this section and the rules adopted thereunder. The director of transportation may require the vendor to pay for all or part of the costs incurred in conducting the audit.

(e) The director of transportation shall adopt rules pursuant to chapter 91 necessary for the purposes of this section. [L 2008, c 171, pt of §2; am L 2009, c 88, §§3, 13, 17(2); am L 2010, c 4, §3 and c 166, §8; am L 2012, c 327, §8]

" **§291E-7 Trauma system surcharge.** (a) In addition to any other civil penalties ordered by the court, a person who violates any offense under this part may be ordered to pay a trauma system surcharge, provided that:

- (1) The maximum of which may be \$10 if the violator is not already required to pay a trauma system surcharge pursuant to the violation of the offense;
- (2) The maximum of which may be \$25 if the violation is an offense under section 291E-61(a)(1), 291E-61(a)(3), or 291E-61(a)(4);
- (3) The maximum of which may be \$50 if the violation is an offense under section 291E-61(a)(2) or 291E-61.5 or if the offense under section 291E-61(a)(3) or 291E-61(a)(4) is a second or subsequent offense that occurred within five years of the first offense.

(b) The surcharge shall not be ordered when the court determines that the defendant is unable to pay the surcharge.

(c) The person shall pay the surcharge to the clerk of the court. The surcharge shall be deposited with the state director of finance who shall transmit the surcharge to the trauma system special fund pursuant to section 321-22.5. [L 2008, c 231, §3; am L 2010, c 166, §9]

"PART II. TESTING AND IMPLIED CONSENT

Law Journals and Reviews

Expert and Opinion Testimony of Law Enforcement Officers Regarding Identification of Drug Impaired Drivers. 23 UH L. Rev. 151.

§291E-11 Implied consent of operator of vehicle to submit to testing to determine alcohol concentration and drug content.

(a) Any person who operates a vehicle upon a public way, street, road, or highway or on or in the waters of the State shall be deemed to have given consent, subject to this part, to a test or tests approved by the director of health of the person's breath, blood, or urine for the purpose of determining

alcohol concentration or drug content of the person's breath, blood, or urine, as applicable.

(b) The test or tests shall be administered at the request of a law enforcement officer having probable cause to believe the person operating a vehicle upon a public way, street, road, or highway or on or in the waters of the State is under the influence of an intoxicant or is under the age of twenty-one and has consumed a measurable amount of alcohol, only after:

- (1) A lawful arrest; and
- (2) The person has been informed by a law enforcement officer that the person may refuse to submit to testing under this chapter.

(c) If there is probable cause to believe that a person is in violation of section 291E-64, as a result of being under the age of twenty-one and having consumed a measurable amount of alcohol, or section 291E-61 or 291E-61.5, as a result of having consumed alcohol, then the person shall elect to take a breath or blood test, or both, for the purpose of determining the alcohol concentration.

(d) If there is probable cause to believe that a person is in violation of section 291E-61 or 291E-61.5, as a result of having consumed any drug, then the person shall elect to take a blood or urine test, or both, for the purpose of determining the drug content. Drug content shall be measured by the presence of any drug or its metabolic products, or both.

(e) A person who chooses to submit to a breath test under subsection (c) also may be requested to submit to a blood or urine test, if the law enforcement officer has probable cause to believe that the person was operating a vehicle while under the influence of any drug under section 291E-61 or 291E-61.5 and the officer has probable cause to believe that a blood or urine test will reveal evidence of the person being under the influence of any drug. The law enforcement officer shall state in the officer's report the facts upon which that belief is based. The person shall elect to take a blood or urine test, or both, for the purpose of determining the person's drug content. Results of a blood or urine test conducted to determine drug content also shall be admissible for the purpose of determining the person's alcohol concentration. Submission to testing for drugs under subsection (d) or this subsection shall not be a substitute for alcohol tests requested under subsection (c).

(f) The use of a preliminary alcohol screening device by a law enforcement officer shall not replace a breath, blood, or urine test required under this section. The analysis from the use of a preliminary alcohol screening device shall only be used in determining probable cause for the arrest.

(g) Any person tested pursuant to this section who is convicted or has the person's license or privilege suspended or revoked pursuant to this chapter may be ordered to reimburse the county for the cost of any blood or urine tests, or both, conducted pursuant to this section. If reimbursement is so ordered, the court or the director, as applicable, shall order the person to make restitution in a lump sum, or in a series of prorated installments, to the police department or other agency incurring the expense of the blood or urine test, or both. [L 2000, c 189, pt of §23; am L 2001, c 157, §11; am L 2002, c 113, §1; am L 2004, c 90, §5; am L 2006, c 64, §1]

Case Notes

Where defendant was lawfully arrested and then "accurately informed of his or her statutory right to consent or refuse, as well as the consequences of such consent or refusal", trial court erred in granting defendant's motion to exclude evidence of defendant's breath alcohol test result. 113 H. 363 (App.), 152 P.3d 535.

" **§291E-12 Persons qualified to take blood specimen.** No person, other than a physician, physician assistant, registered nurse, or phlebotomist deemed qualified by the director of a clinical laboratory that is licensed by the State, or person licensed in a clinical laboratory occupation under section 321-13, may withdraw blood for the purpose of determining the alcohol concentration or drug content therein. This limitation shall not apply to the taking of a breath or urine specimen. [L 2000, c 189, pt of §23; am L 2009, c 151, §6]

" **§291E-13 Additional tests.** The person tested may choose any physician, physician assistant, registered nurse, or person licensed in a clinical laboratory occupation under section 321-13 to withdraw blood and also may choose any qualified person to administer a test or tests in addition to any administered at the direction of a law enforcement officer. The result of the test or tests may be used as provided in section 291E-3. The failure or inability to obtain an additional test by a person shall not preclude the admission of the test or tests administered at the direction of a law enforcement officer. Upon the request of the person who is tested, full information concerning the test or tests administered shall be made available to that person. [L 2000, c 189, pt of §23; am L 2009, c 151, §7]

" **[\$291E-14] Consent of person incapable of refusal not withdrawn.** The consent of a person deemed to have given the person's consent pursuant to section 291E-11 shall not be withdrawn by reason of the person's being dead, unconscious, or in any other condition that renders the person incapable of consenting to examination, and the test may be given. In such event, a test of the person's blood or urine shall be administered. [L 2000, c 189, pt of §23]

" **§291E-15 Refusal to submit to breath, blood, or urine test; subject to administrative revocation proceedings.** If a person under arrest refuses to submit to a breath, blood, or urine test, none shall be given, except as provided in section 291E-21. Upon the law enforcement officer's determination that the person under arrest has refused to submit to a breath, blood, or urine test, if applicable, then a law enforcement officer shall:

- (1) Inform the person under arrest of the sanctions under section 291E-41 or 291E-65; and
- (2) Ask the person if the person still refuses to submit to a breath, blood, or urine test, thereby subjecting the person to the procedures and sanctions under part III or section 291E-65, as applicable;

provided that if the law enforcement officer fails to comply with paragraphs (1) and (2), the person shall not be subject to the refusal sanctions under part III or IV. [L 2000, c 189, pt of §23; am L 2006, c 64, §2; am L 2009, c 88, §§4, 17(1); am L 2010, c 166, §10; am L 2016, c 17, §1]

" **§291E-16 REPEALED.** L 2009, c 88, §§10, 17(1).

" **[\$291E-17] Other evidence not excluded.** This part shall not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of an intoxicant or was operating a vehicle while under the age of twenty-one and after consuming a measurable amount of alcohol. [L 2000, c 189, pt of §23]

" **[\$291E-18] Test results to be collected.** The results of any test for intoxicants made upon any person, including any person who has been fatally injured in a traffic collision or the operator of a vehicle involved in a collision that resulted in another person's death, shall be sent to the state director of transportation, who shall compile the data without revealing the identity of any individual tested. This data shall be available only to the state and county highway safety councils

and to other agencies the director of transportation deems necessary and advisable. [L 2000, c 189, pt of §23]

" **[\$291E-19] Authorization to establish intoxicant control roadblock programs.** The police departments of the respective counties may establish and implement intoxicant control roadblock programs in accordance with the minimum standards and guidelines provided in section 291E-20. The chief of police in any county establishing an intoxicant control roadblock program pursuant to this section shall specify the procedures to be followed in carrying out the program in rules adopted under chapter 91; provided that the procedures shall be in conformity with and not more intrusive than the standards and guidelines described in section 291E-20. In the case of internal police standards that do not fall within the definition of "rule" under section 91-1(4), failure to comply scrupulously with such internal police procedures shall not invalidate a roadblock that otherwise meets the minimum statutory criteria provided in section 291E-20. [L 2000, c 189, pt of §23]

Law Journals and Reviews

Drunk, Driving, and Untouchable: The Implications of State v. Heapy on Reasonable Suspicion in Hawai'i. 31 UH L. Rev. 607 (2009).

Case Notes

Section 291E-20 does not authorize law enforcement officers conducting sobriety checkpoints to pursue and detain drivers of motor vehicles appearing to avoid the sobriety checkpoints in a lawful manner; permitting officers to do so was beyond the lawful scope of the statutory procedures and, therefore, more intrusive than the standards and guidelines described in §291E-20 and violative of this section. 113 H. 283, 151 P.3d 764.

- " **[\$291E-20] Minimum standards for roadblock procedures.**
- (a) Every intoxicant control roadblock program shall:
 - (1) Require that all vehicles approaching roadblocks be stopped or that certain vehicles be stopped by selecting vehicles in a specified numerical sequence or pattern;
 - (2) Require that roadblocks be located at fixed locations for a maximum three-hour period;
 - (3) Provide for the following minimum safety precautions at every roadblock:
 - (A) Proper illumination;

- (B) Off-road or otherwise safe and secure holding areas for vehicles involved in any roadblock stop;
 - (C) Uniformed law enforcement officers carrying proper identification;
 - (D) Adequate advance warning of the fact and purpose of the roadblocks, either by sign posts, flares, or other alternative methods;
 - (E) Termination of roadblocks at the discretion of the law enforcement officer in charge where traffic congestion would otherwise result; and
- (4) Provide for a sufficient quantity and visibility of uniformed officers and official vehicles to ensure speedy compliance with the purpose of the roadblocks and to move traffic with a minimum of inconvenience.
- (b) Nothing in this section shall prohibit the establishment of procedures to make roadblock programs less intrusive than required by the minimum standards provided in this section. [L 2000, c 189, pt of §23]

Law Journals and Reviews

Drunk, Driving, and Untouchable: The Implications of State v. Heapy on Reasonable Suspicion in Hawai'i. 31 UH L. Rev. 607 (2009).

Case Notes

This section does not authorize law enforcement officers conducting sobriety checkpoints to pursue and detain drivers of motor vehicles appearing to avoid the sobriety checkpoints in a lawful manner; permitting officers to do so was beyond the lawful scope of the statutory procedures and, therefore, more intrusive than the standards and guidelines described in this section and violative of §291E-19. 113 H. 283, 151 P.3d 764.

" **§291E-21 Applicable scope of part; mandatory testing in the event of a collision resulting in injury or death.** (a) Nothing in this part shall be construed to prevent a law enforcement officer from obtaining a sample of breath, blood, or urine, from the operator of any vehicle involved in a collision resulting in injury to or the death of any person, as evidence that the operator was under the influence of an intoxicant.

(b) If a health care provider who is providing medical care, in a health care facility, to any person involved in a vehicle collision:

- (1) Becomes aware, as a result of any blood or urine test performed in the course of medical treatment, that:
 - (A) The alcohol concentration in the person's blood meets or exceeds the amount specified in section 291E-61(a)(4) or 291E-61.5(a)(2)(D); or
 - (B) The person's blood or urine contains one or more drugs that are capable of impairing a person's ability to operate a vehicle in a careful and prudent manner; and

(2) Has a reasonable belief that the person was the operator of a vehicle involved in the collision, the health care provider shall notify, as soon as reasonably possible, any law enforcement officer present at the health care facility to investigate the collision. If no law enforcement officer is present, the health care provider shall notify the county police department in the county where the collision occurred. If the health care provider is aware of any blood or urine test result, as provided in paragraph (1), but lacks information to form a reasonable belief as to the identity of the operator involved in a vehicle collision, as provided in paragraph (2), then the health care provider shall give notice to a law enforcement officer present or to the county police department, as applicable, for each person involved in a vehicle collision whose alcohol concentration in the person's blood meets or exceeds the amount specified in section 291E-61(a)(4) or 291E-61.5(a)(2)(D) or whose blood or urine contains one or more drugs. The notice by the health care provider shall consist of the name of the person being treated, the blood alcohol concentration or drug content disclosed by the test, and the date and time of the administration of the test. This notice shall be deemed to satisfy the intoxication element necessary to establish the probable cause requirement set forth in subsection (c).

(c) In the event of a collision resulting in injury or death and if a law enforcement officer has probable cause to believe that a person involved in the collision has committed a violation of section 707-702.5, 707-703, 707-704, 707-705, 707-706, 291E-61, 291E-61.5, or 291E-64, the law enforcement officer shall request that a sample of blood or urine be recovered from the vehicle operator or any other person suspected of committing a violation of section 707-702.5, 707-703, 707-704, 707-705, 707-706, 291E-61, 291E-61.5, or 291E-64. If the person involved in the collision is not injured or refuses to be treated for any injury, the law enforcement officer may offer the person a breath test in lieu of a blood or urine test. If the person declines to perform a breath test, the law enforcement officer shall request a blood or urine sample pursuant to subsection

(d). The act of declining to perform a breath test under this section shall not be treated as a refusal under chapter 291E and shall not relieve the declining person from the requirement of providing a blood or urine sample under this section.

(d) The law enforcement officer shall make the request under subsection (c) to the hospital or medical facility treating the person from whom the blood or urine is to be recovered. If the person is not injured or refuses to be treated for any injury, the law enforcement officer shall make the request of a blood or urine sample under subsection (c) to a person authorized under section 291E-12; provided that a law enforcement officer may transport that person to another police facility or a hospital or medical facility that is capable of conducting a breath, blood, or urine test. Upon the request of the law enforcement officer that blood or urine be recovered pursuant to this section, and except where the person to perform the withdrawal of a blood sample or to obtain a urine sample or the responsible attending personnel at the hospital or medical facility determines in good faith that recovering or attempting to recover blood or urine from the person presents an imminent threat to the health of the medical personnel or others, the person authorized under section 291E-12 shall:

- (1) Recover the sample in compliance with section 321-161; and
- (2) Provide the law enforcement officer with the blood or urine sample requested.

(e) Any person complying with this section shall be exempt from liability pursuant to section 663-1.9 as a result of compliance.

(f) As used in this section, unless the context otherwise requires:

"Health care facility" includes any program, institution, place, building, or agency, or portion thereof, private or public, whether organized for profit or not, that is used, operated, or designed to provide medical diagnosis, treatment, or rehabilitative or preventive care to any person. The term includes health care facilities that are commonly referred to as hospitals, outpatient clinics, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, and others providing similarly organized services regardless of nomenclature.

"Health care provider" means a person who is licensed, certified, or otherwise authorized or permitted by law to administer health care in the ordinary course of business or practice of a profession. [L 2000, c 189, pt of §23; am L 2001, c 157, §12; am L 2003, c 72, §1; am L 2004, c 90, §6]

Case Notes

Due process rights not violated by administrative driver's license revocation hearing procedure where defendant was afforded a hearing where witnesses were called and defendant was represented by counsel, and hearing office advised counsel of the procedure that hearing officer was going to follow. 108 H. 31, 116 P.3d 673.

Where there was insufficient evidence to conclude that defendant was involved in a "collision", as is necessary for a police officer to obtain a blood sample from defendant without defendant's consent, the requirements of subsection (c) were not met; thus, the blood draw was improper and should have been suppressed. 114 H. 406, 163 P.3d 1143 (2007).

" **[\$291E-22] Presence of drugs or metabolic products; admissibility.** Any results reflecting the presence of drugs or metabolic products obtained from a blood or urine specimen obtained under this part shall not be admissible in any proceeding brought under chapter 329 or 712. [L 2000, c 189, pt of §23]

"PART III. ADMINISTRATIVE REVOCATION PROCESS

Rules of Court

See Hawaii Court Records Rules.

Case Notes

Administrative revocation (AR) of petitioner's driver's license reversed where hearing officer erred in considering the unsworn statements of the stopping officer that were included in the sworn police report of the arresting officer in determining that the police had reasonable suspicion to stop petitioner's car. The statutory scheme reveals the legislature's intent that sworn statements be submitted by police and other government officers playing crucial roles in the AR process and the importance the legislature placed on sworn statements by the officers as a means of ensuring the reliability of their statements and evidence used in the AR process. 130 H. 74 (App.), 305 P.3d 490 (2013).

Due process rights not violated by administrative driver's license revocation hearing procedure where defendant was afforded a hearing where witnesses were called and defendant was represented by counsel, and hearing office advised counsel of

the procedure that hearing officer was going to follow. 108 H. 31, 116 P.3d 673.

§291E-31 Notice of administrative revocation; effect. As used in this part, the notice of administrative revocation:

- (1) Establishes that the respondent's license and privilege to operate a vehicle in the State or on or in the waters of the State shall be terminated:
 - (A) Thirty days after the date the notice of administrative revocation is issued in the case of an alcohol related offense;
 - (B) Forty-four days after the date the notice of administrative revocation is issued in the case of a drug related offense; or
 - (C) Such later date as is established by the director under section 291E-38, if the director administratively revokes the respondent's license and privilege;
- (2) Establishes the date on which administrative revocation proceedings against the respondent were initiated;
- (3) Serves as a temporary permit, if applicable, to operate a vehicle as provided in section 291E-33; and
- (4) Notifies the respondent that the respondent shall obtain an ignition interlock permit and keep an ignition interlock device installed and operating in any vehicle the respondent operates during the revocation period if the respondent had a valid license at the time of the arrest. [L 2000, c 189, pt of §23; am L 2001, c 157, §13; am L 2006, c 201, §2; am L 2010, c 166, §11; am L 2012, c 327, §9]

Case Notes

The administrative director of the courts (director) may not, in an administrative hearing filed pursuant to §291E-38, consider an offense occurring after the notice of administrative revocation has been issued under this section, as a basis for increasing an administrative revocation period already determined on administrative review by the director under §§291E-37 and 291E-41. 108 H. 350, 120 P.3d 249.

" **§291E-32 Criminal prosecution.** (a) Criminal prosecution under section 291E-61 or 291E-61.5 may be commenced concurrently with administrative revocation proceedings under this part; provided that documentary and testimonial evidence provided by the respondent during the administrative proceeding shall not be

admissible against the respondent in any proceeding under section 291E-61 or 291E-61.5 arising out of the same occurrence.

(b) When a person's license and privilege to operate a vehicle is revoked under this part and the person also is convicted of an offense under section 291E-61 or 291E-61.5 arising out of the same occurrence, the total period of revocation imposed in the two proceedings shall not exceed the longer period of revocation imposed in either proceeding. If the person is convicted under section 291E-61 or 291E-61.5 prior to completion of administrative proceedings, the person shall surrender the temporary permit issued under this part at the time of entry of a plea of guilty or no contest, entry of a verdict of guilty, or of sentencing, whichever occurs first. [L 2000, c 189, pt of §23; am L 2004, c 90, §7]

" **§291E-33 Probable cause determination; issuance of notice of administrative revocation; procedures.** (a) Whenever a person is arrested for a violation of section 291E-61 or 291E-61.5 on a determination by the arresting law enforcement officer that:

- (1) There was reasonable suspicion to stop the vehicle or the vehicle was stopped at an intoxicant control roadblock established and operated in compliance with sections 291E-19 and 291E-20; and
- (2) There was probable cause to believe that the person was operating the vehicle while under the influence of an intoxicant;

the law enforcement officer shall take possession of any license held by the person and request the person to take a test for alcohol concentration, in the case of an alcohol related offense, or a test for drug content in the blood or urine, in the case of a drug related offense. The law enforcement officer shall inform the person that, in the case of an alcohol related offense, the person shall elect to take a breath test, a blood test, or both, pursuant to section 291E-11, but that the person may refuse to submit to testing under this chapter. In the case of a drug related offense, the person shall elect to take a blood test, a urine test, or both, pursuant to section 291E-11, after being informed that the person may refuse to submit to testing under this chapter.

(b) When applicable under section 291E-15, the law enforcement officer also shall:

- (1) Inform the person of the sanctions under section 291E-41, including the sanction for refusing to take a breath, blood, or urine test, if applicable; and
- (2) Ask the person if the person still refuses to submit to a breath, blood, or urine test, upon the law

enforcement officer's determination that, after the person has been informed by a law enforcement officer that the person may refuse to submit to testing, the person under arrest has refused to submit to a breath, blood, or urine test.

(c) After taking action pursuant to subsections (a) and (b), as applicable, the law enforcement officer shall complete and issue to the person a notice of administrative revocation and shall indicate thereon whether the notice shall serve as a temporary permit. The notice shall serve as a temporary permit, unless, at the time of arrest: the person was unlicensed; the person's license or privilege to operate a vehicle was revoked or suspended; or the person had no license in the person's possession.

(d) Whenever a law enforcement officer determines that, as the result of a blood or urine test performed pursuant to section 291E-21, there is probable cause to believe that a person being treated in a hospital or medical facility has violated section 291E-61 or 291E-61.5, the law enforcement officer immediately shall take possession of any license held by the person and shall complete and issue to the person a notice of administrative revocation and indicate thereon whether the notice shall serve as a temporary permit. The notice shall serve as a temporary permit unless, at the time the notice was issued: the person was unlicensed; the person's license or privilege to operate a vehicle was revoked or suspended; or the person had no license in the person's possession. [L 2000, c 189, pt of §23; am L 2001, c 157, §14; am L 2002, c 113, §2; am L 2004, c 90, §8; am L 2006, c 64, §3 and c 201, §3; am L 2010, c 166, §12; am L 2012, c 327, §10]

Case Notes

Where hearing officer refused to admit intoxilyzer results, this was an adequate safeguard in the situation where the police failed to adequately notify the defendant of the implied consent law. 108 H. 31, 116 P.3d 673.

" **§291E-34 Notice of administrative revocation; contents.**

(a) The notice of administrative revocation shall provide, at a minimum and in clear language, the following general information relating to administrative revocation:

- (1) The statutory authority for administrative revocation;
- (2) An explanation of the distinction between administrative revocation and a suspension or revocation imposed under section 291E-61 or 291E-61.5; and

(3) That criminal charges filed pursuant to section 291E-61 or 291E-61.5 may be prosecuted concurrently with the administrative action.

(b) The notice, when completed by the law enforcement officer and issued to the respondent, shall contain at a minimum the following information relating to the incident that gives rise to the issuance of the notice of administrative revocation:

- (1) Information identifying the respondent;
- (2) The specific violation for which the respondent was arrested;
- (3) The date issued and the date the administrative revocation is scheduled to go into effect;
- (4) The expiration date of the temporary permit; and
- (5) That the issuance of the notice of administrative revocation will be administratively reviewed.

(c) The notice shall provide, at a minimum, the following information relating to the administrative review:

- (1) That the review is automatic;
- (2) That the respondent, within three days of the issuance of the notice of administrative revocation in the case of an alcohol related offense and within seventeen days of the issuance of the notice of administrative revocation in the case of a drug related offense, may submit written information demonstrating why the respondent's license and privilege to operate a vehicle should not be administratively revoked;
- (3) The address or location where the respondent may submit the information;
- (4) That the respondent is not entitled to be present or represented at the administrative review; and
- (5) That the administrative review decision shall be mailed to the respondent:
 - (A) No later than eight days after the date of the issuance of the notice of administrative revocation in the case of an alcohol related offense; and
 - (B) No later than twenty-two days after the date of the issuance of the notice of administrative revocation in the case of a drug related offense.

(d) The notice shall state that, if the respondent's license and privilege to operate a vehicle is not administratively revoked after the review, the respondent's license shall be returned, unless a subsequent alcohol or drug enforcement contact has occurred, along with a certified statement that the administrative revocation proceedings have been terminated.

(e) The notice shall state that, if the respondent's license and privilege to operate a vehicle is administratively revoked after the review, a decision shall be mailed to the respondent, or to the parent or guardian of the respondent if the respondent is under the age of eighteen, that shall contain, at a minimum, the following information:

- (1) The reasons why the respondent's license and privilege to operate a vehicle is administratively revoked;
- (2) That the respondent may request the director, within six days of the date the decision is mailed, to schedule an administrative hearing to review the administrative revocation;
- (3) That, if the respondent's request for an administrative hearing is received by the director within six days of the date the decision was mailed, the hearing shall be scheduled to commence:
 - (A) No later than twenty-five days after the date of the issuance of the notice of administrative revocation in the case of an alcohol related offense; and
 - (B) No later than thirty-nine days after the date of the issuance of the notice of administrative revocation in the case of a drug related offense;
- (4) The procedure to request an administrative hearing;
- (5) That failure to request an administrative hearing within the time provided shall cause the administrative revocation to take effect for the period and under the conditions established by the director in the decision;
- (6) That the respondent may regain the right to a hearing by requesting the director, within sixty days after the issuance of the notice of administrative revocation, to schedule a hearing;
- (7) That the director shall schedule the hearing to commence no later than thirty days after a request under paragraph (6) is received, but that, except as provided in section 291E-38(j), the temporary permit shall not be extended if the respondent fails to request an administrative hearing within the initial six-day period provided for that purpose;
- (8) That failure to attend the hearing shall cause the administrative revocation to take effect for the period and under the conditions indicated;
- (9) The duration of the administrative revocation and other conditions that may be imposed, including: referral to the driver's education program for an

assessment of the respondent's substance abuse or dependence and the need for treatment; and

- (10) That the respondent shall obtain an ignition interlock permit in order to operate a vehicle during the revocation period if the respondent had a valid license at the time of the arrest.

(f) The notice shall provide, at a minimum, the following information relating to administrative hearings:

- (1) That the respondent shall have six days from the date the administrative review decision was mailed to request that an administrative hearing be scheduled;
- (2) That a request for an administrative hearing and payment of a \$30 fee, unless waived pursuant to section 291E-39, shall entitle the respondent to review and copy, prior to the hearing, all documents that were considered at the administrative review, including the arrest report and the sworn statements;
- (3) That the respondent may be represented by an attorney, submit evidence, give testimony, and present and cross-examine witnesses;
- (4) That, in cases where the respondent is under the age of eighteen, a parent or guardian must be present; and
- (5) That a written decision shall be mailed no later than five days after completion of the hearing.

(g) The notice shall state that, if the administrative revocation is reversed after the hearing, the respondent's license shall be returned, along with a certified statement that the administrative revocation proceedings have been terminated.

(h) The notice shall state that, if the administrative revocation is sustained at the hearing, a written decision shall be mailed to the respondent, or to the parent or guardian of the respondent if the respondent is under the age of eighteen, that shall contain, at a minimum, the following information:

- (1) The effective date of the administrative revocation;
- (2) The duration of the administrative revocation;
- (3) Other conditions that may be imposed by law, including the use of an ignition interlock device; and
- (4) The right to obtain judicial review.

(i) The notice shall state that failure of the respondent, or of the parent or guardian of the respondent if the respondent is under the age of eighteen, to attend a scheduled hearing shall cause the administrative revocation to take effect as provided in the administrative review decision. [L 2000, c 189, pt of §23; am L 2001, c 157, §15; am L 2004, c 90, §9; am L 2006, c 64, §4; am L 2008, c 171, §5; am L 2009, c 88, §13] [L 2000, c 189, pt of §23; am L 2001, c 157, §15; am L 2004, c 90,

§9; am L 2006, c 64, §4; am L 2008, c 171, §5; am L 2009, c 88, §13; am L 2010, c 166, §13; am L 2012, c 327, §11]

Case Notes

As Honolulu police department form 396B explains the essential difference between the civil nature of the revocation proceeding and the penal characteristics of the criminal proceeding, the various consequences that flow from each, and the interrelationship between the two with respect to driving privileges, the form satisfies the directive of subsection (a)(2) that "general information" about the "distinction" between the two be explained. 108 H. 78, 117 P.3d 109.

Honolulu police department form 396B need not notify drivers that the police must establish reasonable suspicion to stop and probable cause to believe a driver is under the influence of an intoxicant in an administrative license revocation hearing, in the absence of a statutory directive to that effect. 108 H. 78, 117 P.3d 109.

" **§291E-35 Immediate restoration of license.** (a) In cases involving an alcohol related offense, if a test conducted in accordance with part II and section 321-161 and the rules adopted thereunder shows that a respondent had an alcohol concentration less than .08, the director or the arresting law enforcement agency immediately shall return the respondent's license along with a certified statement that administrative revocation proceedings have been terminated with prejudice.

(b) In cases involving a drug related offense, if a test conducted in accordance with part II and section 321-161 and the rules adopted thereunder fails to show the presence, in the respondent's blood or urine, of any drug that is capable of impairing the respondent's ability to operate a vehicle in a careful and prudent manner, the director or the arresting law enforcement agency immediately shall return the respondent's license along with a certified statement that administrative revocation proceedings have been terminated with prejudice. [L 2000, c 189, pt of §23; am L 2001, c 157, §16; am L 2012, c 327, §12]

" **§291E-36 Documents required to be submitted for administrative review; sworn statements.** (a) Whenever a respondent has been arrested for a violation of section 291E-61 or 291E-61.5 and submits to a test that establishes: the respondent's alcohol concentration was .08 or more; the presence, in the respondent's blood or urine, of any drug that is capable of impairing the respondent's ability to operate a

vehicle in a careful and prudent manner; or whenever a respondent has been involved in a collision resulting in injury or death and a blood or urine test performed pursuant to section 291E-21 establishes that the respondent's alcohol concentration was .08 or more or establishes the presence in the respondent's blood or urine of any drug that is capable of impairing the respondent's ability to operate a vehicle in a careful and prudent manner, the following shall be forwarded immediately to the director:

- (1) A copy of the arrest report or the report of the law enforcement officer who issued the notice of administrative revocation to the person involved in a collision resulting in injury or death and the sworn statement of the arresting law enforcement officer or the officer who issued the notice of administrative revocation, stating facts that establish that:
 - (A) There was reasonable suspicion to stop the vehicle, the vehicle was stopped at an intoxicant control roadblock established and operated in compliance with sections 291E-19 and 291E-20, or the respondent was tested pursuant to section 291E-21;
 - (B) There was probable cause to believe that the respondent had been operating the vehicle while under the influence of an intoxicant; and
 - (C) The respondent agreed to be tested or the person was tested pursuant to section 291E-21;
- (2) In a case involving an alcohol related offense, the sworn statement of the person responsible for maintenance of the testing equipment, stating facts that establish that, pursuant to section 321-161 and rules adopted thereunder:
 - (A) The equipment used to conduct the test was approved for use as an alcohol testing device in this State;
 - (B) The person had been trained and at the time the test was conducted was certified and capable of maintaining the testing equipment; and
 - (C) The testing equipment used had been properly maintained and was in good working condition when the test was conducted;
- (3) In a case involving an alcohol related offense, the sworn statement of the person who conducted the test, stating facts that establish that, pursuant to section 321-161 and rules adopted thereunder:

- (A) The person was trained and at the time the test was conducted was certified and capable of operating the testing equipment;
 - (B) The person followed the procedures established for conducting the test;
 - (C) The equipment used to conduct the test functioned in accordance with operating procedures and indicated that the respondent's alcohol concentration was at, or above, the prohibited level; and
 - (D) The person whose breath or blood was tested is the respondent;
- (4) In a case involving a drug related offense, the sworn statement of the person responsible for maintenance of the testing equipment, stating facts that establish that, pursuant to section 321-161 and rules adopted thereunder:
- (A) The equipment used to conduct the test was approved for use in drug testing;
 - (B) The person conducting the test had been trained and, at the time of the test, was certified and capable of maintaining the testing equipment; and
 - (C) The testing equipment used had been properly maintained and was in good working condition when the test was conducted;
- (5) In a case involving a drug related offense, the sworn statement of the person who conducted the test, stating facts that establish that, pursuant to section 321-161 and rules adopted thereunder:
- (A) At the time the test was conducted, the person was trained and capable of operating the testing equipment;
 - (B) The person followed the procedures established for conducting the test;
 - (C) The equipment used to conduct the test functioned in accordance with operating procedures and indicated the presence of one or more drugs or their metabolites in the respondent's blood or urine; and
 - (D) The person whose blood or urine was tested is the respondent;
- (6) A copy of the notice of administrative revocation issued by the law enforcement officer to the respondent;
- (7) Any license taken into possession by the law enforcement officer; and

(8) A listing of any prior alcohol or drug enforcement contacts involving the respondent.

(b) Whenever a respondent has been arrested for a violation of section 291E-61 or 291E-61.5 and refuses to submit to a test to determine alcohol concentration or drug content in the blood or urine, the following shall be forwarded immediately to the director:

(1) A copy of the arrest report and the sworn statement of the arresting law enforcement officer, stating facts that establish that:

(A) There was reasonable suspicion to stop the vehicle or the vehicle was stopped at an intoxicant control roadblock established and operated in compliance with sections 291E-19 and 291E-20;

(B) There was probable cause to believe that the respondent had been operating the vehicle while under the influence of an intoxicant;

(C) The respondent was informed of:

(i) The sanctions of section 291E-41;

(ii) The possibility that criminal charges may be filed; and

(iii) The probable consequences of refusing to be tested for alcohol concentration or drug content in the blood or urine; and

(D) The respondent refused to be tested;

(2) A copy of the notice of administrative revocation issued to the respondent;

(3) Any license taken into possession; and

(4) A listing of all alcohol and drug enforcement contacts involving the respondent. [L 2000, c 189, pt of §23; am L 2001, c 157, §17; am L 2002, c 113, §3; am L 2004, c 90, §10; am L 2006, c 64, §5; am L 2012, c 327, §13]

" **§291E-37 Administrative review; procedures; decision.** (a) The director automatically shall review the issuance of a notice of administrative revocation and shall issue a written decision administratively revoking the license and privilege to operate a vehicle or rescinding the notice of administrative revocation. The written review decision shall be mailed to the respondent, or to the parent or guardian of the respondent if the respondent is under the age of eighteen, no later than:

(1) Eight days after the date the notice was issued in a case involving an alcohol related offense; or

(2) Twenty-two days after the date the notice was issued in a case involving a drug related offense.

(b) The respondent shall have the opportunity to demonstrate in writing why the respondent's license and privilege to operate a vehicle should not be administratively revoked and, within three days of receiving the notice of administrative revocation, as provided in section 291E-33, shall submit any written information, either by mail or in person, to the director's office or to any office or address designated by the director for that purpose.

(c) In conducting the administrative review, the director shall consider:

- (1) Any sworn or unsworn written statement or other written evidence provided by the respondent;
- (2) The breath, blood, or urine test results, if any; and
- (3) The sworn statement of any law enforcement officer or other person or other evidence or information required by section 291E-36.

(d) The director shall administratively revoke the respondent's license and privilege to operate a vehicle if the director determines that:

- (1) There existed reasonable suspicion to stop the vehicle, the vehicle was stopped at an intoxicant control roadblock established and operated in compliance with sections 291E-19 and 291E-20, or the person was tested pursuant to section 291E-21;
- (2) There existed probable cause to believe that the respondent operated the vehicle while under the influence of an intoxicant; and
- (3) The evidence proves by a preponderance that:
 - (A) The respondent operated the vehicle while under the influence of an intoxicant; or
 - (B) The respondent operated the vehicle and refused to submit to a breath, blood, or urine test after being informed:
 - (i) That the person may refuse to submit to testing in compliance with section 291E-11; and
 - (ii) Of the sanctions of this part and then asked if the person still refuses to submit to a breath, blood, or urine test, in compliance with the requirements of section 291E-15.

(e) If the evidence does not support administrative revocation, the director shall rescind the notice of administrative revocation and return the respondent's license along with a certified statement that administrative revocation proceedings have been terminated.

(f) If the director administratively revokes the respondent's license and privilege to operate a vehicle, the

director shall mail a written review decision to the respondent, or to the parent or guardian of the respondent if the respondent is under the age of eighteen. The written review decision shall:

- (1) State the reasons for the administrative revocation;
- (2) Indicate that the respondent has six days from the date the decision is mailed to request an administrative hearing to review the director's decision;
- (3) Explain the procedure by which to request an administrative hearing;
- (4) Be accompanied by a form, postage prepaid, that the respondent may fill out and mail in order to request an administrative hearing;
- (5) Inform the respondent of the right to review and copy all documents considered at the review, including the arrest report and the sworn statements of law enforcement officers or other persons, prior to the hearing; and
- (6) State that the respondent may be represented by counsel at the hearing, submit evidence, give testimony, and present and cross-examine witnesses, including the arresting law enforcement officer.

(g) Failure of the respondent to request a hearing within the time provided in section 291E-38(a) shall cause the administrative revocation to take effect for the period and under the conditions provided in the administrative review decision issued by the director under this section. The respondent may regain the right to an administrative hearing by requesting the director, within sixty days of the issuance of the notice of administrative revocation as provided in section 291E-33, to schedule an administrative hearing. The administrative hearing shall be scheduled to commence no later than thirty days after the request is received by the director. The administrative review decision issued by the director under this section shall explain clearly the consequences of failure to request an administrative hearing and the procedure by which the respondent may regain the right to a hearing. [L 2000, c 189, pt of §23; am L 2001, c 157, §18; am L 2006, c 64, §6; am L 2012, c 327, §14]

Case Notes

The administrative director of the courts (director) may not, in an administrative hearing filed pursuant to §291E-38, consider an offense occurring after the §291E-31 notice of administrative revocation has been issued, as a basis for

increasing an administrative revocation period already determined on administrative review by the director under §291E-41 and this section. 108 H. 350, 120 P.3d 249.

" **§291E-38 Administrative hearing; procedure; decision.** (a)

If the director administratively revokes the respondent's license and privilege to operate a vehicle after the administrative review, the respondent may request an administrative hearing to review the decision within six days of the date the administrative review decision is mailed. If the request for hearing is received by the director within six days of the date the decision is mailed, the hearing shall be scheduled to commence no later than:

- (1) Twenty-five days from the date the notice of administrative revocation was issued in a case involving an alcohol related offense; or
- (2) Thirty-nine days from the date the notice of administrative revocation was issued in a case involving a drug related offense.

The director may continue the hearing only as provided in subsection (j).

(b) The hearing shall be held at a place designated by the director, as close to the location where the notice of administrative revocation was issued as practical.

(c) The respondent may be represented by counsel and, if the respondent is under the age of eighteen, must be accompanied by a parent or guardian.

(d) The director shall conduct the hearing and have authority to:

- (1) Administer oaths and affirmations;
- (2) Examine witnesses and take testimony;
- (3) Receive and determine the relevance of evidence;
- (4) Issue subpoenas;
- (5) Regulate the course and conduct of the hearing;
- (6) Impose up to the maximum license revocation period as specified under section 291E-41(b)(4); and
- (7) Make a final ruling.

(e) The director shall affirm the administrative revocation only if the director determines that:

- (1) There existed reasonable suspicion to stop the vehicle, the vehicle was stopped at an intoxicant control roadblock established and operated in compliance with sections 291E-19 and 291E-20, or the person was tested pursuant to section 291E-21;
- (2) There existed probable cause to believe that the respondent operated the vehicle while under the influence of an intoxicant; and

- (3) The evidence proves by a preponderance that:
- (A) The respondent operated the vehicle while under the influence of an intoxicant; or
 - (B) The respondent operated the vehicle and refused to submit to a breath, blood, or urine test after being informed:
 - (i) That the person may refuse to submit to testing in compliance with section 291E-11; and
 - (ii) Of the sanctions of this part and then asked if the person still refuses to submit to a breath, blood, or urine test in compliance with the requirements of section 291E-15.

(f) The respondent's prior alcohol and drug enforcement contacts shall be entered into evidence.

(g) The sworn statements provided in section 291E-36 shall be admitted into evidence. The director shall consider the sworn statements in the absence of the law enforcement officer or other person. Upon written notice to the director, no later than five days prior to the hearing, that the respondent wishes to examine a law enforcement officer or other person who made a sworn statement, the director shall issue a subpoena for the officer or other person to appear at the hearing. Personal service upon the law enforcement officer or other person who made a sworn statement shall be made no later than forty-eight hours prior to the hearing time. If the officer or other person cannot appear, the officer or other person at the discretion of the director, may testify by telephone.

(h) The hearing shall be recorded in a manner to be determined by the director.

(i) The director's decision shall be rendered in writing and mailed to the respondent, or to the parent or guardian of the respondent if the respondent is under the age of eighteen, no later than five days after the hearing is concluded. If the decision is to reverse the administrative revocation, the director shall return the respondent's license, along with a certified statement that administrative revocation proceedings have been terminated. If the decision sustains the administrative revocation, the director shall mail to the respondent a written decision indicating the duration of the administrative revocation and any other conditions or restrictions as may be imposed pursuant to section 291E-41.

(j) For good cause shown, the director may grant a continuance either of the commencement of the hearing or of a hearing that has already commenced. If a continuance is granted at the request of the director, the director shall extend the validity of the temporary permit, unless otherwise prohibited,

for a period not to exceed the period of the continuance. If a continuance is granted at the request of the respondent, the director shall not extend the validity of the temporary permit. For purposes of this section, a continuance means a delay in the commencement of the hearing or an interruption of a hearing that has commenced, other than for recesses during the day or at the end of the day or week. The absence from the hearing of a law enforcement officer or other person, upon whom personal service of a subpoena has been made as set forth in subsection (g), constitutes good cause for a continuance.

(k) The director may grant a special motor vehicle registration, pursuant to section 291E-48, to a qualified household member or a co-owner of any motor vehicle upon determination that:

- (1) The person is completely dependent on the motor vehicle for the necessities of life; and
- (2) At the time of the application for a special motor vehicle registration, the respondent does not have a valid ignition interlock permit.

The special motor vehicle registration shall not be valid for use by the respondent.

(1) If the respondent fails to appear at the hearing, or if a respondent under the age of eighteen fails to appear with a parent or guardian, administrative revocation shall take effect for the period and under the conditions established by the director in the administrative review decision issued by the director under section 291E-37. [L 2000, c 189, pt of §23; am L 2001, c 157, §19; am L 2002, c 113, §§4 to 6; am L 2006, c 64, §7 and c 201, §4; am L 2010, c 166, §14; am L 2012, c 327, §15]

Case Notes

Inasmuch as the administrative driver's license revocation office hearings are quasi-judicial in nature, due process requires that the hearings be public. 104 H. 483, 92 P.3d 993.

Due process rights not violated by administrative driver's license revocation hearing procedure where defendant was afforded a hearing where witnesses were called and defendant was represented by counsel, and hearing office advised counsel of the procedure that hearing officer was going to follow. 108 H. 31, 116 P.3d 673.

The administrative director of the courts (director) may not, in an administrative hearing filed pursuant to this section, consider an offense occurring after the §291E-31 notice of administrative revocation has been issued, as a basis for increasing an administrative revocation period already

determined on administrative review by the director under §§291E-37 and 291E-41. 108 H. 350, 120 P.3d 249.

Where effect of administrative driver's license revocation office's default decision under this section was to deprive petitioner of driver's license, a constitutionally protected property interest, the risk of erroneous deprivation of this interest through the procedures the office used was great, and outweighed the government's interest, including the function of the office and the fiscal and administrative burdens that any additional or substitute procedural requirement would entail, procedural due process right denied. 110 H. 407, 133 P.3d 1199.

" **§291E-39 Fees and costs.** The director may assess and collect a \$30 fee from the respondent to cover the costs of processing the respondent's request for an administrative hearing. These costs include but shall not be limited to: the cost of photocopying documents; conditional license permits, temporary permits, and relicensing forms; interpreter services; and other similar costs; provided that the costs of issuing subpoenas for witnesses, including mileage fees, shall be borne by the party requesting the subpoena. The director may waive the fee in the case of an indigent respondent, upon an appropriate inquiry into the financial circumstances of the respondent seeking the waiver and an affidavit or a certificate signed by the respondent demonstrating the respondent's financial inability to pay the fee. [L 2000, c 189, pt of §23; am L 2001, c 157, §20; am L 2003, c 31, §1; am L 2012, c 327, §16]

" **[§291E-40] Judicial review; procedure.** (a) If the director sustains the administrative revocation after an administrative hearing, the respondent, or parent or guardian of a respondent under the age of eighteen, may file a petition for judicial review within thirty days after the administrative hearing decision is mailed. The petition shall be filed with the clerk of the district court in the district in which the incident occurred and shall be accompanied by the required filing fee for civil actions. The filing of the petition shall not operate as a stay of the administrative revocation, nor shall the court stay the administrative revocation pending the outcome of the judicial review. The petition shall be appropriately captioned. The petition shall state with specificity the grounds upon which the petitioner seeks reversal of the administrative revocation.

(b) The court shall schedule the judicial review as quickly as practicable, and the review shall be on the record of the administrative hearing without taking of additional

testimony or evidence. If the petitioner fails to appear without just cause or, in the case of a petitioner under the age of eighteen, the petitioner fails to appear with a parent or guardian, the court shall affirm the administrative revocation.

(c) The sole issues before the court shall be whether the director:

- (1) Exceeded constitutional or statutory authority;
- (2) Erroneously interpreted the law;
- (3) Acted in an arbitrary or capricious manner;
- (4) Committed an abuse of discretion; or
- (5) Made a determination that was unsupported by the evidence in the record.

(d) The court shall not remand the matter back to the director for further proceedings consistent with its order. [L 2000, c 189, pt of §23]

Case Notes

As reference to the "court" in subsection (a) is to the district court, the supreme court is not precluded from remanding a case back to the administrative driver's license revocation office. 110 H. 407, 133 P.3d 1199.

" **§291E-41 Effective date, conditions, and period of administrative revocation; criteria.** (a) Unless an administrative revocation is reversed or the temporary permit is extended by the director, administrative revocation shall become effective on the day specified in the notice of administrative revocation. Except as provided in section 291E-44.5, no license and privilege to operate a vehicle shall be restored under any circumstances during the administrative revocation period. Upon completion of the administrative revocation period, the respondent may reapply and be reissued a license pursuant to section 291E-45.

(b) Except as provided in paragraph (5) and in section 291E-44.5, the respondent shall keep an ignition interlock device installed and operating in any vehicle the respondent operates during the revocation period. Except as provided in section 291E-5, installation and maintenance of the ignition interlock device shall be at the respondent's expense. The periods of administrative revocation, with respect to a license and privilege to operate a vehicle, that shall be imposed under this part are as follows:

- (1) A one year revocation of license and privilege to operate a vehicle, if the respondent's record shows no prior alcohol enforcement contact or drug enforcement

- contact during the five years preceding the date the notice of administrative revocation was issued;
- (2) An eighteen month revocation of license and privilege to operate a vehicle, if the respondent's record shows one prior alcohol enforcement contact or drug enforcement contact during the five years preceding the date the notice of administrative revocation was issued;
 - (3) A two-year revocation of license and privilege to operate a vehicle, if the respondent's record shows two prior alcohol enforcement contacts or drug enforcement contacts during the five years preceding the date the notice of administrative revocation was issued;
 - (4) A minimum of five years up to a maximum of ten years revocation of license and privilege to operate a vehicle, if the respondent's record shows three or more prior alcohol enforcement contacts or drug enforcement contacts during the ten years preceding the date the notice of administrative revocation was issued;
 - (5) For respondents under the age of eighteen years who were arrested for a violation of section 291E-61 or 291E-61.5, revocation of license and privilege to operate a vehicle for the appropriate revocation period provided in paragraphs (1) to (4) or in subsection (c); provided that the respondent shall be prohibited from driving during the period preceding the respondent's eighteenth birthday and shall thereafter be subject to the ignition interlock requirement of this subsection for the balance of the revocation period; or
 - (6) For respondents, other than those excepted pursuant to section 291E-44.5(c), who do not install an ignition interlock device in any vehicle the respondent operates during the revocation period, revocation of license and privilege to operate a vehicle for the period of revocation provided in paragraphs (1) to (5) or in subsection (c); provided that:
 - (A) The respondent shall be absolutely prohibited from driving during the revocation period and subject to the penalties provided by section 291E-62 if the respondent drives during the revocation period; and
 - (B) The director shall not issue an ignition interlock permit to the respondent pursuant to section 291E-44.5;

provided that when more than one administrative revocation, suspension, or conviction arises out of the same arrest, it shall be counted as only one prior alcohol enforcement contact or drug enforcement contact, whichever revocation, suspension, or conviction occurs later.

(c) If a respondent has refused to be tested after being informed:

- (1) That the person may refuse to submit to testing in compliance with section 291E-11; and
- (2) Of the sanctions of this part and then asked if the person still refuses to submit to a breath, blood, or urine test, in compliance with the requirements of section 291E-15,

the revocation imposed under subsection (b)(1), (2), (3), or (4) shall be for a period of two years, three years, four years, or ten years, respectively.

(d) Whenever a license and privilege to operate a vehicle is administratively revoked under this part, the respondent shall be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the respondent's substance abuse or dependence and the need for treatment. The counselor shall submit a report with recommendations to the director. If the counselor's assessment establishes that the extent of the respondent's substance abuse or dependence warrants treatment, the director shall so order. All costs for assessment and treatment shall be paid by the respondent.

(e) Alcohol and drug enforcement contacts that occurred prior to January 1, 2002, shall be counted in determining the administrative revocation period.

(f) The requirement to provide proof of financial responsibility pursuant to section 287-20 shall not be based upon a revocation under subsection (b)(1). [L 2000, c 189, pt of §23; am L 2001, c 157, §21; am L 2002, c 113, §7; am L 2004, c 90, §11; am L 2006, c 64, §8 and c 201, §5; am L 2007, c 198, §3; am L 2008, c 171, §6; am L 2009, c 88, §§5, 13, 17(2); am L 2010, c 166, §15; am L 2012, c 327, §17]

Case Notes

Where implied consent form disclosed that defendant would be referred for substance abuse assessment and would be held responsible for the costs of that assessment and treatment, officer read the entire form to defendant, informed defendant of the consequences of refusing to take either the blood or breath test, defendant agreed to take the breath test and initialed each paragraph of the form, defendant was adequately informed of

the consequences of consenting to or refusing the test and of the requirements of subsection (f) that defendant complete any substance abuse treatment as recommended by a counselor. 114 H. 396 (App.), 163 P.3d 199 (2007).

" **§291E-42 Notice to other states.** When a nonresident's driving and boating privileges, and motor vehicle registration if applicable, are administratively revoked under this part, the director shall:

- (1) Notify, in writing, the officials in charge of traffic control, boating control, or public safety in the nonresident's home state, and in any other state in which the nonresident has driving and boating privileges, licenses, or any motor vehicles registered if applicable, of the action taken in this State; and
- (2) Return to the appropriate issuing authority in the other states any license, and any motor vehicle registration and number plates if applicable, seized under section 291E-33. [L 2000, c 189, pt of §23; am L 2001, c 157, §22]

" **[§291E-43] Administrative procedure act.** Neither the administrative review nor the administrative hearing provided under this part shall be subject to the contested case requirements of chapter 91. The availability of administrative review of an order of administrative revocation shall have no effect upon the availability of judicial review under this part. [L 2000, c 189, pt of §23]

" **§291E-44 REPEALED.** L 2009, c 88, §§11, 17(2).

" **§291E-44.5 Ignition interlock permits; driving for employment.** (a) Except as provided in subsection (b), upon proof that the respondent has installed an ignition interlock device in any vehicle the respondent operates and obtained motor vehicle insurance or self-insurance that complies with the requirements of section 431:10C-104 or 431:10C-105, the director shall issue an ignition interlock permit that will allow the respondent to drive a vehicle equipped with an ignition interlock device during the revocation period.

(b) Except as provided in sections 286-118.5 and 291E-61.6, the director shall not issue an ignition interlock permit to:

- (1) A respondent whose license is expired, suspended, or revoked as a result of action other than the instant revocation;

- (2) A respondent who does not hold a valid license at the time of arrest for the violation of section 291E-61;
- (3) A respondent who holds a license that is a learner's permit or instruction permit; or
- (4) A respondent who holds either a category 4 license under section 286-102(b) or a commercial driver's license under section 286-239(a) unless the ignition interlock permit is restricted to a category 1, 2, or 3 license under section 286-102(b).

(c) Except as provided in subsection (b), the director may issue a separate permit authorizing a respondent to operate a vehicle owned by the respondent's employer during the period of revocation without installation of an ignition interlock device if the respondent is gainfully employed in a position that requires driving and the respondent will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device.

(d) A request made pursuant to subsection (c) shall be accompanied by:

- (1) A sworn statement from the respondent containing facts establishing that the respondent currently is employed in a position that requires driving and that the respondent will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device; and
- (2) A sworn statement from the respondent's employer establishing that the employer will, in fact, discharge the respondent if the respondent is prohibited from driving a vehicle not equipped with an ignition interlock device and identifying the specific vehicle or vehicles and hours of the day the respondent will drive, not to exceed twelve hours per day, for purposes of employment.

(e) A permit issued pursuant to subsection (c) shall include restrictions allowing the respondent to drive:

- (1) Only during specified hours of employment, not to exceed twelve hours per day, and only for activities solely within the scope of the employment;
- (2) Only the vehicles specified; and
- (3) Only if the permit is kept in the respondent's possession while operating the employer's vehicle.

In addition, the director may impose other appropriate restrictions. [L 2008, c 171, §3; am L 2009, c 88, §13; am L 2010, c 166, §16; am L 2012, c 327, §18; am L 2014, c 72, §6]

" **§291E-45 Eligibility for relicensing and reregistration of motor vehicle.** (a) To be eligible for relicensing or renewing

the privilege to operate a vessel after a period of administrative revocation has expired, the person shall:

- (1) Submit proof to the director of compliance with all conditions imposed by the director;
- (2) Obtain a certified statement from the director indicating eligibility for relicensing and for renewing the privilege to operate a vessel;
- (3) Present the certified statement to the appropriate licensing official or to the department of land and natural resources, as applicable; and
- (4) Successfully complete each requirement, including payment of all applicable fees, for:
 - (A) Obtaining a new license in this State, pursuant to chapter 286; or
 - (B) Renewing the privilege to operate a vessel, as may be provided in chapter 200 or rules adopted by the department of land and natural resources pursuant to section 200-24.

(b) To be eligible for reregistration of a motor vehicle, if applicable, after a period of administrative revocation has expired, the person shall:

- (1) Submit proof to the director of compliance with all conditions imposed by the director;
- (2) Obtain a certified statement from the director indicating eligibility for registration of a motor vehicle;
- (3) Present the certified statement to the director of the appropriate county agency; and
- (4) Successfully complete each requirement, as provided in chapter 286, for obtaining a new certificate of registration for a motor vehicle in this State, including payment of all applicable fees. [L 2000, c 189, pt of §23; am L 2001, c 157, §24; am L 2010, c 166, §17]

" **[§291E-45.5] Repeat intoxicated driver after December 31, 2010; eligibility to obtain motor vehicle registration and number plates.** Any repeat intoxicated driver arrested for a violation of section 291E-61 or 291E-61.5 after December 31, 2010, may request that the director remove any stopper imposed on the motor vehicle registration files pursuant to part III of chapter 291E. Upon request, the director shall remove the stopper as soon as practicable. [L 2012, c 327, §3]

" **§291E-46 Computation of time.** The time in which any act provided in this part is to be done is computed by excluding the first day and including the last, unless the last day is a

Saturday, Sunday, or state holiday, and then it also is excluded; provided that if the last day for the mailing of decisions under sections 291E-37(a) and 291E-38(i) is a federal holiday, it also is excluded. [L 2000, c 189, pt of §23; am L 2012, c 327, §19]

" **[§291E-47] Failure to surrender number plates.** Any person who has had the person's motor vehicle registration revoked pursuant to this part and subsequently fails to comply with an order to surrender all motor vehicle number plates issued to the person, pursuant to chapter 249, shall be guilty of a misdemeanor. [L 2001, c 157, pt of §3]

" **§291E-48 Special motor vehicle registration.** (a) Anytime after the effective date of revocation or after the administrative hearing decision is mailed pursuant to section 291E-38(i), a qualified household member or co-owner of a motor vehicle with a respondent who has had a motor vehicle registration revoked under this part may submit a sworn statement to the director requesting a special motor vehicle registration. The director may grant the request upon determining that the following conditions have been met:

- (1) The applicant is a household member of the respondent's or a co-owner of the vehicle;
- (2) The applicant has a license that has not expired or been suspended or revoked;
- (3) The applicant is completely dependent on the motor vehicle for the necessities of life;
- (4) The director finds that the applicant will take reasonable precautions to ensure that the respondent will not drive the vehicle; and
- (5) The respondent does not have a valid ignition interlock permit.

A person to whom a special motor vehicle registration has been granted shall apply to the director of the appropriate county agency for special series number plates, as provided in section 249-9.4.

(b) The director shall revoke the special motor vehicle registration if any one of the conditions set forth in the application no longer exist.

(c) The applicant shall be under an affirmative duty to report to the director any changes in the conditions to the special motor vehicle registration.

(d) The director shall adopt rules, pursuant to chapter 91, necessary to carry out the purposes of this section. [L 2001, c 157, pt of §3; am L 2010, c 166, §18; am L 2012, c 327, §20]

" **[\$291E-49] Transferring title to, or ownership interest in, vehicle prohibited; exceptions.** (a) A registered owner shall not sell or transfer title to, or ownership interest in, a motor vehicle during the time period the motor vehicle's registration has been ordered revoked and number plates surrendered or during the time the motor vehicle bears the special series number plates pursuant to section 249-9.4, unless the registered owner applies to the administrative director of the courts, or the administrative director's appointee pursuant to section 291E-1, for consent to transfer title to the motor vehicle. If the director is satisfied that:

- (1) The proposed sale is in good faith and for valid consideration;
- (2) The registered owner will be deprived of the custody and control of the motor vehicle; and
- (3) The sale is not for the purpose of circumventing this part,

the director may consent to the sale or transfer. If the director consents, the director shall issue a certified copy of the written consent to the registered owner and forward a copy to the appropriate county director of finance.

(b) The county director of finance, upon proper application and the presentation to the director of finance of a certified copy of the director's written consent to the sale or transfer of a motor vehicle, shall transfer the certificate of title and ownership to the new owner pursuant to chapter 286 and shall issue new number plates to the new registered owner pursuant to chapter 249.

(c) Notwithstanding subsections (a) and (b), if the title to the motor vehicle is transferred by foreclosure of a chattel mortgage, cancellation of a conditional sales contract, a sale upon execution, or decree or order of a court of competent jurisdiction, after the motor vehicle registration has been revoked under this part, the county director of finance shall transfer the certificate of title and ownership to the new owner pursuant to chapter 286 and shall issue new number plates to the new registered owner pursuant to chapter 249. [L 2001, c 157, pt of §3]

" **[\$291E-50] Notice to the department of land and natural resources of suspensions and revocations of operating privileges.** The director shall notify the department of land and natural resources of all persons adjudicated of violations under this part and the period of suspension or revocation of operator privileges ordered by the director under this part. [L 2001, c 157, pt of §3]

"PART IV. PROHIBITED CONDUCT

Revision Note

Sections 291E-61 to 291E-65 renumbered pursuant to §23G-15(1).

- §291E-61 Operating a vehicle under the influence of an intoxicant.** (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
- (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
 - (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
 - (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
 - (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.
- (b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced without possibility of probation or suspension of sentence as follows:
- (1) For the first offense, or any offense not preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):
 - (A) A fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court;
 - (B) One-year revocation of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;
 - (C) Any one or more of the following:
 - (i) Seventy-two hours of community service work;
 - (ii) Not less than forty-eight hours and not more than five days of imprisonment; or
 - (iii) A fine of not less than \$150 but not more than \$1,000;
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund; and

- (E) A surcharge, if the court so orders, of up to \$25 to be deposited into the trauma system special fund;
- (2) For an offense that occurs within five years of a prior conviction for an offense under this section or section 291E-4(a):
 - (A) Revocation for not less than eighteen months nor more than two years of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;
 - (B) Either one of the following:
 - (i) Not less than two hundred forty hours of community service work; or
 - (ii) Not less than five days but not more than thirty days of imprisonment, of which at least forty-eight hours shall be served consecutively;
 - (C) A fine of not less than \$500 but not more than \$1,500;
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund; and
 - (E) A surcharge of up to \$50 if the court so orders, to be deposited into the trauma system special fund;
 - (3) For an offense that occurs within five years of two prior convictions for offenses under this section or section 291E-4(a):
 - (A) A fine of not less than \$500 but not more than \$2,500;
 - (B) Revocation for two years of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;
 - (C) Not less than ten days but not more than thirty days imprisonment, of which at least forty-eight hours shall be served consecutively;
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund; and
 - (E) A surcharge of up to \$50 if the court so orders, to be deposited into the trauma system special fund;
 - (4) In addition to a sentence imposed under paragraphs (1) through (3), any person eighteen years of age or older who is convicted under this section and who operated a

vehicle with a passenger, in or on the vehicle, who was younger than fifteen years of age, shall be sentenced to an additional mandatory fine of \$500 and an additional mandatory term of imprisonment of forty-eight hours; provided that the total term of imprisonment for a person convicted under this paragraph shall not exceed the maximum term of imprisonment provided in paragraph (1), (2), or (3), as applicable. Notwithstanding paragraphs (1) and (2), the revocation period for a person sentenced under this paragraph shall be not less than two years; and

- (5) If the person demonstrates to the court that the person:
 - (A) Does not own or have the use of a vehicle in which the person can install an ignition interlock device during the revocation period; or
 - (B) Is otherwise unable to drive during the revocation period,

the person shall be absolutely prohibited from driving during the period of applicable revocation provided in paragraphs (1) to (4); provided that the court shall not issue an ignition interlock permit pursuant to subsection (i) and the person shall be subject to the penalties provided by section 291E-62 if the person drives during the applicable revocation period.

(c) Except as provided in sections 286-118.5 and 291E-61.6, the court shall not issue an ignition interlock permit to:

- (1) A defendant whose license is expired, suspended, or revoked as a result of action other than the instant offense;
- (2) A defendant who does not hold a valid license at the time of the instant offense;
- (3) A defendant who holds either a category 4 license under section 286-102(b) or a commercial driver's license under section 286-239(a), unless the ignition interlock permit is restricted to a category 1, 2, or 3 license under section 286-102(b); or
- (4) A defendant who holds a license that is a learner's permit or instruction permit.

(d) Except as provided in subsection (c), the court may issue a separate permit authorizing a defendant to operate a vehicle owned by the defendant's employer during the period of revocation without installation of an ignition interlock device if the defendant is gainfully employed in a position that requires driving and the defendant will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device.

(e) A request made pursuant to subsection (d) shall be accompanied by:

- (1) A sworn statement from the defendant containing facts establishing that the defendant currently is employed in a position that requires driving and that the defendant will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device; and
- (2) A sworn statement from the defendant's employer establishing that the employer will, in fact, discharge the defendant if the defendant is prohibited from driving a vehicle not equipped with an ignition interlock device and identifying the specific vehicle and hours of the day, not to exceed twelve hours per day, the defendant will drive for purposes of employment.

(f) A permit issued pursuant to subsection (d) shall include restrictions allowing the defendant to drive:

- (1) Only during specified hours of employment, not to exceed twelve hours per day, and only for activities solely within the scope of the employment;
 - (2) Only the vehicle specified; and
 - (3) Only if the permit is kept in the defendant's possession while operating the employer's vehicle.
- (g) Notwithstanding any other law to the contrary, any:
- (1) Conviction under this section, section 291E-4(a), or section 291E-61.5;
 - (2) Conviction in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having either an unlawful alcohol concentration or an unlawful drug content in the blood or urine or while under the influence of an intoxicant or habitually operating a vehicle under the influence of an intoxicant; or
 - (3) Adjudication of a minor for a law violation that, if committed by an adult, would constitute a violation of this section or an offense under section 291E-4(a), or section 291E-61.5,

shall be considered a prior conviction for the purposes of imposing sentence under this section. Any judgment on a verdict or a finding of guilty, a plea of guilty or nolo contendere, or an adjudication, in the case of a minor, that at the time of the offense has not been expunged by pardon, reversed, or set aside shall be deemed a prior conviction under this section. No license and privilege revocation shall be imposed pursuant to this section if the person's license and privilege to operate a

vehicle has previously been administratively revoked pursuant to part III for the same act; provided that, if the administrative revocation is subsequently reversed, the person's license and privilege to operate a vehicle shall be revoked as provided in this section. There shall be no requirement for the installation of an ignition interlock device pursuant to this section if the requirement has previously been imposed pursuant to part III for the same act; provided that, if the requirement is subsequently reversed, a requirement for the installation of an ignition interlock device shall be imposed as provided in this section.

(h) Whenever a court sentences a person pursuant to subsection (b), it also shall require that the offender be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the offender's substance abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's substance abuse or dependence. All costs for assessment and treatment shall be borne by the offender.

(i) Upon proof that the defendant has:

- (1) Installed an ignition interlock device in any vehicle the defendant operates pursuant to subsection (b); and
- (2) Obtained motor vehicle insurance or self-insurance that complies with the requirements under either section 431:10C-104 or section 431:10C-105,

the court shall issue an ignition interlock permit that will allow the defendant to drive a vehicle equipped with an ignition interlock device during the revocation period.

(j) Notwithstanding any other law to the contrary, whenever a court revokes a person's driver's license pursuant to this section, the examiner of drivers shall not grant to the person a new driver's license until the expiration of the period of revocation determined by the court. After the period of revocation is completed, the person may apply for and the examiner of drivers may grant to the person a new driver's license.

(k) Any person sentenced under this section may be ordered to reimburse the county for the cost of any blood or urine tests conducted pursuant to section 291E-11. The court shall order the person to make restitution in a lump sum, or in a series of prorated installments, to the police department or other agency incurring the expense of the blood or urine test. Except as provided in section 291E-5, installation and maintenance of the

ignition interlock device required by subsection (b) shall be at the defendant's own expense.

(1) As used in this section, the term "examiner of drivers" has the same meaning as provided in section 286-2. [L 2000, c 189, pt of §23; am L 2001, c 157, §25; am L 2002, c 160, §11; am L 2003, c 71, §3; am L 2004, c 90, §12; am L 2005, c 33, §1 and c 194, §1; am L 2006, c 201, §7; am L 2007, c 198, §4; am L 2008, c 171, §§8, 16, 20 and c 231, §17; am L 2009, c 11, §17 and c 45, §§1, 2 as superseded by c 88, §§6, 13, 17(2); am L 2010, c 166, §19; am L 2012, c 327, §21; am L 2014, c 72, §7]

Case Notes

As to the description of the offense, this section, which relates to operating a vehicle under the influence of an intoxicant, substantially reenacted §291-4.4, which pertained to the offense of habitually driving under the influence of intoxicating liquor or drugs. 106 H. 480, 107 P.3d 409.

Where indictment charged defendant under §291-4.4, the statute that was in effect at the time of defendant's arrest, there was no ex post facto problem. 106 H. 480, 107 P.3d 409.

Where the five-year time period omitted from the oral charge was a critical part of the subsection (b)(2) attendant circumstance, especially in light of defendant's several prior DUI convictions, the oral charge was defective and defendant's oral motion to dismiss should have been granted. 112 H. 269 (App.), 145 P.3d 812.

Because a prior conviction, as described in subsection (b)(2) (2003), is an elemental attendant circumstance, intrinsic to the offense of operating a vehicle under the influence of an intoxicant, it was necessary that defendant's prior conviction be alleged in the charging instrument and proven at trial as preconditions to defendant's present conviction of operating a vehicle under the influence of an intoxicant for the second time within five years, in violation of subsections (a) and (b)(2) (2003). 114 H. 227, 160 P.3d 703 (2007).

Considerations of due process continue to require that the aggravating factors set forth in subsection (b) - all of which remain "attendant circumstances that are intrinsic to and 'enmeshed' in the hierarchy of offenses that this section as a whole describes" - be alleged in the charging instrument and proven beyond a reasonable doubt at trial. 114 H. 227, 160 P.3d 703 (2007).

The 2003 amendment to this section transformed subsection (b)(1) to (3) into status offenses. 114 H. 227, 160 P.3d 703 (2007).

Where complaint charging defendant with a violation of this section was silent with respect to the attendant circumstance of any prior conviction, complaint was insufficient as a matter of law in charging a violation of subsections (a) and (b)(2) (2003). 114 H. 227, 160 P.3d 703 (2007).

Although prosecution's oral charge failed to adequately set forth the essential elements of the offense described by subsections (a) and (b)(2) (2004), absent the phrase "for your second offense", the prosecution's oral charge set forth the essential elements of the included offense described by subsections (a) and (b)(1) (2004); thus, as record contained sufficient evidence that defendant committed the offense of operating a vehicle under the influence of an intoxicant under subsections (a) and (b)(1) (2004), case remanded for entry of judgment and resentencing under subsections (a) and (b)(1) (2004). 114 H. 411, 163 P.3d 1148 (2007).

Where prosecution failed to present sufficient foundational evidence for either the REA blood alcohol chemical testing procedure or the Abbott AxSYM testing instrument used to perform defendant's blood alcohol test, prosecution failed to prove beyond a reasonable doubt as required under this section that defendant was operating a vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood; appeals court thus erred in affirming district court's admission into evidence of defendant's test results without a proper foundation. 121 H. 274, 218 P.3d 762 (2009).

Although the oral charge tracked the language of this section, where the charge failed to allege that defendant was driving defendant's vehicle upon a public way, street, road, or highway at the time of the offense, the charge was deficient, as the term "operate" as defined in §291E-1 did not comport with its commonly understood definition, required the conduct to take place "upon a public way, street, road, or highway", and was neither "unmistakable" nor "readily comprehensible to persons of common understanding". 121 H. 383, 219 P.3d 1170 (2009).

Section 291E-1 establishes an attendant circumstance of the offense of operating a vehicle under the influence of an intoxicant (OVUII), i.e., that the defendant's conduct occur "upon a public way, street, road, or highway"; the definition of "operate" in §291E-1 refers generally to the conduct of "operating" a vehicle under the influence as described in the title of this section, whether the conduct consists of driving the vehicle or otherwise assuming actual physical control of it; thus, the operation of a vehicle on a public way, street, road, or highway is an attendant circumstance of the offense of OVUII and therefore an element of the offense. 121 H. 383, 219 P.3d 1170 (2009).

An appellate court's remand for entry of judgment of conviction and resentencing for a lesser-included offense must be based on a jurisdictionally valid lesser-included charge; where defendant's charge under §291E-61.5 did not adequately allege the lesser-included offense of operating a vehicle under the influence of an intoxicant as a first offender under this section because the charge failed to allege an essential element, specifically, the attendant circumstance that defendant operated a vehicle on a public road, way, street, or highway, the appellate court did not err in vacating and remanding circuit court case. 126 H. 475, 273 P.3d 1161 (2012).

A charge of operating a vehicle under the influence of an intoxicant (OVUII) under subsection (a)(1) must allege the requisite mens rea in order to fully define the offense in unmistakable terms readily comprehensible to persons of common understanding, whereas an OVUII charge under subsection (a)(3) is an absolute liability offense for which mens rea need not be alleged or proven. 127 H. 48, 276 P.3d 617 (2012).

As the distinction between general and specific intent has been abandoned, appellate court erred in relying on general intent cases to hold that mens rea may be inferred from the allegations in an operating a vehicle under the influence of an intoxicant charge under subsection (a)(1). 127 H. 48, 276 P.3d 617 (2012).

A prior judgment of acquittal on a subsection (a)(3) method of proof in an operating a vehicle under the influence of an intoxicant trial is "in form only", but it serves as a factual finding that the State has not met its burden of proving breath alcohol content. As such, the collateral estoppel principle embodied in the double jeopardy clause of article I, §10 of the Hawaii constitution and article V of the U.S. Constitution prohibits the State from re-litigating breath alcohol content, whether in a re-prosecution of defendant on the subsection (a)(3) method of proof, or as part of the State's evidence in a subsequent trial on the subsection (a)(1) method of proof. 129 H. 146, 296 P.3d 359 (2013).

Where it was undisputed that the complaint against defendant failed to allege a mens rea and, therefore, was insufficient to charge a violation of subsection (a)(1), on remand, the charge under subsection (a)(1) should be dismissed without prejudice. 131 H. 1, 313 P.3d 690 (2013).

Where the written submission of plea form in which defendant entered a plea of no contest solely to the subsection (a)(1) method of proof, was silent regarding subsection (a)(3), and the hearing transcript revealed some ambiguity as to the State's and district court's understandings of the plea, the court construed the State as having given up its ability to prosecute defendant

under subsection (a)(3) in exchange for defendant's conditional plea under subsection (a)(1); in these circumstances, permitting the State to prosecute defendant under subsection (a)(3) would allow the State to avoid its end of the bargain, and would thereby violate defendant's due process rights. 131 H. 1, 313 P.3d 690 (2013).

The oral charge for operating a vehicle under the influence of an intoxicant was defective because it omitted the requisite state of mind of intentional, knowing, or reckless. 131 H. 215, 317 P.3d 659 (2013).

Complaint was not insufficient for failing to allege a mens rea where complaint alleged all the essential elements of the charged operating a vehicle under the influence of an intoxicant offense and provided the defendant with fair notice of the offense charged; with respect to the violation of subsection (a)(3), the violation is an absolute liability offense that does not require proof of mens rea, and with respect to the violation of subsection (a)(1), mens rea is not an essential element of that violation and could be inferred from the allegations in the complaint. 125 H. 232 (App.), 257 P.3d 245 (2011).

Full retroactive application of the Wheeler rule, i.e., the holding that an operating a vehicle under the influence of an intoxicant (OVUII) charge is deficient if it charges in the language of subsection (a) without specifically alleging the public-road element, to cases on collateral review was not warranted; limited or pipeline retroactive effect was sufficient and appropriate. Moreover, appellant had not shown that the deficiency in the OVUII charge entitled appellant to relief on collateral review. 131 H. 153 (App.), 315 P.3d 779 (2013).

" **§291E-61.5 Habitually operating a vehicle under the influence of an intoxicant.** (a) A person commits the offense of habitually operating a vehicle under the influence of an intoxicant if:

- (1) The person is a habitual operator of a vehicle while under the influence of an intoxicant; and
- (2) The person operates or assumes actual physical control of a vehicle:
 - (A) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
 - (B) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
 - (C) With .08 or more grams of alcohol per two hundred ten liters of breath; or

- (D) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.
- (b) For the purposes of this section:
 - (1) "Convicted three or more times for offenses of operating a vehicle under the influence" means that, at the time of the behavior for which the person is charged under this section, the person had three or more times within ten years of the instant offense:
 - (A) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for a violation of section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5;
 - (B) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for an offense that is comparable to section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5; or
 - (C) An adjudication of a minor for a law or probation violation that, if committed by an adult, would constitute a violation of section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5,that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside prior to the instant offense shall not be deemed prior convictions for the purposes of proving that the person is a habitual operator of a vehicle while under the influence of an intoxicant.
 - (2) "Convicted one or more times for offenses of habitually operating a vehicle under the influence" means that, at the time of the behavior for which the person is charged under this section, the person had one or more times within ten years of the instant offense:
 - (A) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for a violation of this section or section 291-4.4 as that section was in effect on December 31, 2001;
 - (B) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for an offense that is comparable to this section or section 291-4.4 as that section was in effect on December 31, 2001; or

(C) An adjudication of a minor for a law or probation violation that, if committed by an adult, would constitute a violation of this section or section 291-4.4 as that section was in effect on December 31, 2001,

that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside prior to the instant offense shall not be deemed prior convictions for the purposes of proving the person's status as a habitual operator of a vehicle while under the influence of an intoxicant.

- (3) "Habitual operator of a vehicle while under the influence of an intoxicant" means that the person:
- (A) Was convicted three or more times for offenses of operating a vehicle under the influence; or
 - (B) Was convicted one or more times for offenses of habitually operating a vehicle under the influence.

(c) Habitually operating a vehicle while under the influence of an intoxicant is a class C felony.

(d) For a conviction under this section, the sentence shall be either:

- (1) An indeterminate term of imprisonment of five years; or
- (2) A term of probation of five years, with conditions to include:
 - (A) Mandatory revocation of license and privilege to operate a vehicle for a period not less than one year but not more than five years;
 - (B) Not less than ten days imprisonment, of which at least forty-eight hours shall be served consecutively;
 - (C) Referral to a certified substance abuse counselor as provided in section 291E-61(d);
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund; and
 - (E) May be charged a surcharge of up to \$50 to be deposited into the trauma system special fund if the court so orders.

In addition to the foregoing, any vehicle owned and operated by the person committing the offense shall be subject to forfeiture pursuant to chapter 712A, provided that the department of transportation shall provide storage for vehicles forfeited under this subsection.

(e) Whenever a court sentences a person under this section, it shall also require that the offender be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the offender's substance abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's substance abuse or dependence. All costs for assessment and treatment shall be borne by the offender.

(f) Notwithstanding any other law to the contrary, whenever a court revokes a person's driver's license pursuant to this section, the examiner of drivers shall not grant to the person a new driver's license until expiration of the period of revocation determined by the court. After the period of revocation is complete, the person may apply for and the examiner of drivers may grant to the person a new driver's license.

(g) Any person sentenced under this section may be ordered to reimburse the county for the cost of any blood or urine tests conducted pursuant to section 291E-11. The court shall order the person to make restitution in a lump sum, or in a series of prorated installments, to the police department or other agency incurring the expense of the blood or urine test.

(h) As used in this section, the term "examiner of drivers" has the same meaning as provided in section 286-2. [L 2003, c 71, §1; am L 2004, c 90, §13; am L 2005, c 194, §2; am L 2008, c 231, §18; am L 2015, c 11, §1]

Case Notes

An appellate court's remand for entry of judgment of conviction and resentencing for a lesser-included offense must be based on a jurisdictionally valid lesser-included charge; where defendant's charge under this section did not adequately allege the lesser-included offense of operating a vehicle under the influence of an intoxicant as a first offender under §291E-61 because the charge failed to allege an essential element, specifically, the attendant circumstance that defendant operated a vehicle on a public road, way, street, or highway, the appellate court did not err in vacating and remanding circuit court case. 126 H. 475, 273 P.3d 1161 (2012).

Where, under §701-114(1)(a), proof of each element of an offense is required for a conviction, and the term "habitual" or "habitual operator" in the indictment did not convey the narrow definition that the person charged with habitually operating a vehicle under the influence of an intoxicant had to have three

or more convictions within the previous ten years, the phrase "habitual operator" did not provide adequate notice to defendant what the State was required to prove as an element of the offense; thus, defendant's conviction vacated. 128 H. 132 (App.), 284 P.3d 905 (2012).

" **[\$291E-61.6] Petition for ignition interlock instruction permit and ignition interlock permit; eligibility; requirements.**

(a) This section shall apply to the following:

- (1) Any person subject to a lifetime license revocation pursuant to part III, as that part was in effect before January 1, 2011, or part XIV of chapter 286, as that part was in effect before January 1, 2002;
- (2) Any person who was arrested pursuant to section 291E-61 or 291E-61.5 before January 1, 2011, and whose license revocation period has not terminated;
- (3) Except as provided in section 286-118.5, any person whose license was expired, had a learner's permit or instruction permit, or who was otherwise unlicensed at the time of arrest pursuant to section 291E-61 or 291E-61.5; and
- (4) Any person arrested pursuant to section 291E-61 or 291E-61.5 whose driver's license from another state is expired or will expire during the license revocation period and who applies for a permit under this section.

(b) Any person under subsection (a) may file a petition in the district court for permission to apply for an ignition interlock instruction permit that will allow the person to take the driving demonstration portion of the driver's license examination. The petition shall be filed with the clerk of the district court in the district in which the arrest occurred and shall be accompanied by the required filing fee for civil actions. The petition shall include the following:

- (1) A certified court abstract establishing that other than the instant offense, the petitioner has no pending traffic matters, outstanding fines, outstanding court costs, and outstanding restitution;
- (2) A certified statement from the director establishing that the petitioner has complied with all requirements, including payment of applicable fees, undergone substance abuse assessment and treatment, and surrendered motor vehicle registration and vehicle number plates, if applicable; and
- (3) A proposed order.

In determining whether the petitioner may be granted an ignition interlock instruction permit, the district court shall consider

whether the requirements of paragraphs (1) through (3) are met and may also consider any other factors, including but not limited to the petitioner's criminal and traffic record after receiving a lifetime license revocation, and based on the foregoing, the district court shall determine whether an order allowing the petitioner to apply to the director for an ignition interlock instruction permit and requiring the director to remove any stopper placed on the petitioner's motor vehicle registration files pursuant to part III of chapter 291E, as applicable, shall be issued; provided that the petitioner complies with applicable driver licensing requirements under part VI of chapter 286, and proof of financial responsibility under chapter 287. Upon submission of the order to the director, the director shall remove any stopper placed on the person's motor vehicle registration files and issue a certified statement indicating eligibility for an ignition interlock instruction permit.

(c) To apply for an ignition interlock instruction permit, the person shall:

- (1) Present the certified statement of eligibility for ignition interlock instruction permit, as provided in subsection (b), to the examiner of drivers;
- (2) Pass the written portion of the driver's license examination in accordance with section 286-108;
- (3) Install an ignition interlock device on a vehicle to be used for the driving demonstration portion of the driver's license examination; and
- (4) Submit to the director the following:
 - (A) Proof of passing the written portion of the driver's license examination;
 - (B) Proof of installation of the ignition interlock device;
 - (C) Proof of motor vehicle insurance; and
 - (D) Proof of a valid motor vehicle registration.

Upon receipt of proof of the requirements of paragraph (4), the director shall issue an ignition interlock instruction permit that allows the person to drive a category 1, 2, or 3 vehicle under section 286-102(b) that is equipped with an ignition interlock device for the period as provided in section 286-110; provided that a holder of the ignition interlock instruction permit for a category 3 vehicle shall be accompanied by a person who is twenty-one years of age or older and licensed to operate a category 3 vehicle. The licensed person shall occupy a passenger seat beside the permit holder while the category 3 vehicle equipped with an ignition interlock device is being operated. For the purposes of this section, "examiner of

drivers" shall have the same meaning as provided in section 286-2.

(d) Upon showing the ignition interlock instruction permit to the examiner of drivers, an applicant may take the driving demonstration portion of the driver's license examination in accordance with section 286-108. Upon successful completion of the driving demonstration portion of the driver's license examination, an applicant may apply to the director for an ignition interlock permit pursuant to section 291E-44.5. If granted, the ignition interlock permit shall expire as provided in section 286-106 or upon the end of the revocation period, whichever occurs first.

(e) After a minimum period of five years from the issuance of an ignition interlock permit under subsection (d), a person subject to a lifetime license revocation for operating a motor vehicle while under the influence of an intoxicant may file a petition in the district court to reinstate the person's eligibility for license and privilege to operate a vehicle without an ignition interlock device. The petition shall be filed with the clerk of the district court in the district in which the arrest occurred and shall be accompanied by the required filing fee for civil actions. A copy of the petition shall be served on the prosecuting attorney in the county in which the petition is filed. The petition shall include the following:

- (1) A certified court abstract establishing that:
 - (A) The petitioner has no pending traffic matters, outstanding fines, outstanding court costs, and outstanding restitution; and
 - (B) The petitioner has not been convicted of any violation of section 291E-66 during the five-year period immediately preceding the petition;
- (2) A certified statement from the director establishing that the petitioner has complied with all requirements, including payment of applicable fees, undergone substance abuse assessment and treatment, and surrendered motor vehicle registration and vehicle number plates, if applicable;
- (3) A certified statement from the director of transportation establishing that:
 - (A) The petitioner has had an ignition interlock device installed in a vehicle without a cumulative break of more than thirty days during the five years immediately preceding the petition; and
 - (B) The petitioner has not attempted to operate a vehicle with .04 or more grams of alcohol per two

hundred ten liters of breath during the two years immediately preceding the petition;

- (4) A certificate of service demonstrating the place, time, and manner of service of the petition on the prosecuting attorney;
- (5) A certified record from the Hawaii Criminal Justice Information System that shows the petitioner's current criminal history record;
- (6) A statement from the petitioner establishing where the petitioner has resided since the ignition interlock permit was issued;
- (7) A statement from the petitioner as to whether the petitioner has undergone substance abuse assessment and treatment and the outcome of this assessment and treatment; and
- (8) A proposed order.

Within ten days of service of the petition, the prosecuting attorney may submit a written request for a hearing on the petition. The district court shall set a hearing and the prosecuting attorney shall serve notice of the hearing upon the petitioner at the petitioner's address shown on the petition and in accordance with the applicable court rules pertaining to service of civil process. The prosecuting attorney shall appear at the hearing on the petition and may offer evidence and argument in support of or against the granting of the petition. If the requirements of paragraphs (1) through (8) are met and it appears to the court that the petitioner no longer poses a danger to other persons using streets or highways and is not likely to operate a vehicle under the influence of an intoxicant, the district court shall grant the petition and issue an order declaring the person eligible for relicensing and reregistration, if applicable. In making its decision, the court, in addition to any other evidence, may consider the petitioner's ignition interlock program driving records and history. If the prosecuting attorney fails to submit a timely request for a hearing, and the requirements of paragraphs (1) through (8) are met, the district court shall grant the petition and issue an order declaring the petitioner eligible for relicensing and reregistration, if applicable. If the court denies the petition, the person may file another petition under this subsection no sooner than one year from the date of the court order.

(f) Nothing in this section shall be interpreted to allow repeat intoxicated driving to be treated as a first time offense for purposes of relicensing. [L 2012, c 327, §4]

" **§291E-62 Operating a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant; penalties.** (a) No person whose license and privilege to operate a vehicle have been revoked, suspended, or otherwise restricted pursuant to this section or to part III or section 291E-61 or 291E-61.5, or to part VII or part XIV of chapter 286 or section 200-81, 291-4, 291-4.4, 291-4.5, or 291-7 as those provisions were in effect on December 31, 2001, shall operate or assume actual physical control of any vehicle:

- (1) In violation of any restrictions placed on the person's license;
- (2) While the person's license or privilege to operate a vehicle remains suspended or revoked;
- (3) Without installing an ignition interlock device required by this chapter; or
- (4) With an ignition interlock permit unless the person has the ignition interlock permit and a valid State of Hawaii identification card in the person's immediate possession.

(b) No person who has been issued a notice of administrative revocation that serves as a temporary permit by a law enforcement officer, pursuant to section 291E-33, shall operate or assume actual physical control of any vehicle after the expiration of the temporary permit unless that person has an otherwise valid driver's license. No person charged with violating this section shall be convicted if the person produces in court, or proves from the proper official or other records, that the person was the holder of a valid driver's license at the time of the offense.

(c) Any person convicted of violating this section shall be sentenced as follows without possibility of probation or suspension of sentence:

- (1) For a first offense, or any offense not preceded within a five-year period by conviction for an offense under this section, section 291E-66, or section 291-4.5 as that section was in effect on December 31, 2001:
 - (A) A term of imprisonment of not less than three consecutive days but not more than thirty days;
 - (B) A fine of not less than \$250 but not more than \$1,000;
 - (C) Revocation of license and privilege to operate a vehicle for an additional year; and
 - (D) Loss of the privilege to operate a vehicle equipped with an ignition interlock device, if applicable;

- (2) For an offense that occurs within five years of a prior conviction for an offense under this section, section 291E-66, or section 291-4.5 as that section was in effect on December 31, 2001:
 - (A) Thirty days imprisonment;
 - (B) A \$1,000 fine;
 - (C) Revocation of license and privilege to operate a vehicle for an additional two years; and
 - (D) Loss of the privilege to operate a vehicle equipped with an ignition interlock device, if applicable; and
- (3) For an offense that occurs within five years of two or more prior convictions for offenses under this section, section 291E-66, or section 291-4.5 as that section was in effect on December 31, 2001, or any combination thereof:
 - (A) One year imprisonment;
 - (B) A \$2,000 fine;
 - (C) Permanent revocation of the person's license and privilege to operate a vehicle; and
 - (D) Loss of the privilege to operate a vehicle equipped with an ignition interlock device, if applicable.

(d) The applicable period of revocation in subsection (c) shall commence upon the release of the person from the period of imprisonment imposed pursuant to this section. [L 2000, c 189, pt of §23; am L 2001, c 157, §26; am L 2003, c 71, §4; am L 2004, c 6, §1 and c 90, §14; am L 2008, c 171, §9; am L 2009, c 88, §13; am L 2010, c 166, §20; am L 2015, c 40, §2]

Case Notes

As to the description of the offense, this section, which relates to operating a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant, substantially reenacted §291-4.5, which pertained to driving after license suspended or revoked for driving under the influence of intoxicating liquor. 107 H. 36, 109 P.3d 677.

Prior qualifying convictions for operating a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant, in violation of this section, are an essential offense element that must be alleged in the charging instrument in order to impose the enhanced penalties for repeat offenders under this section. 124 H. 404 (App.), 245 P.3d 477 (2011).

" **§291E-63 Records of suspensions and revocations of operating privileges to be maintained.** The court shall notify the department of land and natural resources of any sanctions imposed for offenses or violations under this part and the period of suspension or revocation of operator privileges ordered by the court under this part. [L 2000, c 189, pt of §23; am L 2001, c 157, §27]

" **§291E-64 Operating a vehicle after consuming a measurable amount of alcohol; persons under the age of twenty-one.** (a) It shall be unlawful for any person under the age of twenty-one years to operate any vehicle with a measurable amount of alcohol. A law enforcement officer may arrest a person under this section when the officer has probable cause to believe the arrested person is under the age of twenty-one and had been operating a vehicle upon a public way, street, road, or highway or on or in the waters of the State with a measurable amount of alcohol.

(b) A person who violates this section shall be sentenced as follows:

(1) For a first violation or any violation not preceded within a five-year period by a prior alcohol enforcement contact:

(A) The court shall impose:

- (i) A requirement that the person and, if the person is under the age of eighteen, the person's parent or guardian attend an alcohol abuse education and counseling program for not more than ten hours; and
- (ii) A one hundred eighty-day prompt suspension of license and privilege to operate a vehicle with absolute prohibition from operating a vehicle during the suspension period, or in the case of a person eighteen years of age or older, the court may impose, in lieu of the one hundred eighty-day prompt suspension of license, a minimum thirty-day prompt suspension of license with absolute prohibition from operating a vehicle and, for the remainder of the one hundred eighty-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in alcohol abuse education and treatment programs; and

(B) In addition, the court may impose any one or more of the following:

- (i) Not more than thirty-six hours of community service work; or
 - (ii) A fine of not less than \$150 but not more than \$500;
- (2) For a violation that occurs within five years of a prior alcohol enforcement contact:
 - (A) The court shall impose prompt suspension of license and privilege to operate a vehicle for a period of one year with absolute prohibition from operating a vehicle during the suspension period; and
 - (B) In addition, the court may impose any of the following:
 - (i) Not more than fifty hours of community service work; or
 - (ii) A fine of not less than \$300 but not more than \$1,000; and
- (3) For a violation that occurs within five years of two prior alcohol enforcement contacts:
 - (A) The court shall impose revocation of license and privilege to operate a vehicle for a period of two years; and
 - (B) In addition, the court may impose any of the following:
 - (i) Not more than one hundred hours of community service work; or
 - (ii) A fine of not less than \$300 but not more than \$1,000.

(c) Notwithstanding any other law to the contrary, any conviction or plea under this section shall be considered a prior alcohol enforcement contact.

(d) Whenever a court sentences a person pursuant to subsection (b)(2) or (3), it also shall require that the person be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the person's alcohol abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the person to obtain appropriate treatment if the counselor's assessment establishes the person's alcohol abuse or dependence. All costs for assessment and treatment shall be borne by the person or by the person's parent or guardian, if the person is under the age of eighteen.

(e) Notwithstanding section 831-3.2 or any other law to the contrary, a person convicted of a first-time violation under subsection (b)(1), who had no prior alcohol enforcement contacts, may apply to the court for an expungement order upon

attaining the age of twenty-one, or thereafter, if the person has fulfilled the terms of the sentence imposed by the court and has had no subsequent alcohol or drug related enforcement contacts.

(f) Notwithstanding any other law to the contrary, whenever a court revokes a person's driver's license pursuant to this section, the examiner of drivers shall not grant to the person an application for a new driver's license for a period to be determined by the court.

(g) Any person sentenced under this section may be ordered to reimburse the county for the cost of any blood tests conducted pursuant to section 291E-11. The court shall order the person to make restitution in a lump sum, or in a series of prorated installments, to the police department or other agency incurring the expense of the blood test.

(h) The requirement to provide proof of financial responsibility pursuant to section 287-20 shall not be based upon a sentence imposed under subsection (b)(1).

(i) Any person who violates this section shall be guilty of a violation.

(j) As used in this section, the terms "driver's license" and "examiner of drivers" have the same meanings as provided in section 286-2. [L 2000, c 189, pt of §23; am L 2001, c 157, §28; am L 2006, c 201, §8; am L 2007, c 198, §5]

" **§291E-65 Refusal to submit to testing for measurable amount of alcohol; district court hearing; sanctions; appeals; admissibility.** (a) If a person under arrest for operating a vehicle after consuming a measurable amount of alcohol, pursuant to section 291E-64, refuses to submit to a breath or blood test, none shall be given, except as provided in section 291E-21, but the arresting law enforcement officer, as soon as practicable, shall submit an affidavit to a district judge of the circuit in which the arrest was made, stating:

- (1) That at the time of the arrest, the arresting officer had probable cause to believe the arrested person was under the age of twenty-one and had been operating a vehicle upon a public way, street, road, or highway or on or in the waters of the State with a measurable amount of alcohol;
- (2) That the arrested person was informed that the person may refuse to submit to a breath or blood test, in compliance with section 291E-11;
- (3) That the person had refused to submit to a breath or blood test;
- (4) That the arrested person was:

- (A) Informed of the sanctions of this section; and then
 - (B) Asked if the person still refuses to submit to a breath or blood test, in compliance with the requirements of section 291E-15; and
- (5) That the arrested person continued to refuse to submit to a breath or blood test.
- (b) Upon receipt of the affidavit, the district judge shall hold a hearing within twenty days. The district judge shall hear and determine:
- (1) Whether the arresting law enforcement officer had probable cause to believe that the person was under the age of twenty-one and had been operating a vehicle upon a public way, street, road, or highway or on or in the waters of the State with a measurable amount of alcohol;
 - (2) Whether the person was lawfully arrested;
 - (3) Whether the person was informed that the person may refuse to submit to a breath or blood test, in compliance with section 291E-11;
 - (4) Whether the person refused to submit to a test of the person's breath or blood;
 - (5) Whether the person was:
 - (A) Informed of the sanctions of this section; and then
 - (B) Asked if the person still refuses to submit to a breath or blood test, in compliance with the requirements of section 291E-15; and
 - (6) Whether the person continued to refuse to submit to a breath or blood test.
- (c) If the district judge finds the statements contained in the affidavit are true, the judge shall suspend the arrested person's license and privilege to operate a vehicle as follows:
- (1) For a first suspension, or any suspension not preceded within a five-year period by a suspension under this section, for a period of twelve months; and
 - (2) For any subsequent suspension under this section, for a period not less than two years and not more than five years.
- (d) An order of a district court issued under this section may be appealed to the supreme court. [L 2000, c 189, pt of §23; am L 2001, c 157, §29; am L 2006, c 64, §9; am L 2009, c 88, §§7, 17(1)]

" **[§291E-66] Circumvention of, or tampering with, an ignition interlock device by a person who has been restricted to operating a vehicle equipped with an ignition interlock device;**

penalties. (a) No person whose driving privileges have been restricted to operating a vehicle equipped with an ignition interlock device shall knowingly:

- (1) Request, solicit, direct, or authorize another person to blow into an ignition interlock device or start a vehicle equipped with the device for the purpose of providing an operable vehicle to a person who has been restricted by law to operating only a vehicle so equipped; or
- (2) Tamper with an ignition interlock device with the intent to render it inaccurate or inoperable.

(b) Any person required under subsection (a) to drive using an ignition interlock device, who violates subsection (a) shall be sentenced without possibility of probation or suspension of sentence as follows:

- (1) For a first offense, or any offense not preceded within a five-year period by conviction under this section or section 291E-62(a)(3):
 - (A) A term of imprisonment of not less than three consecutive days but not more than thirty days;
 - (B) A fine of not less than \$250 but not more than \$1,000; and
 - (C) Loss of the privilege to operate a vehicle equipped with an ignition interlock device;
- (2) For an offense that occurs within five years of a prior conviction for an offense under this section or section 291E-62(a)(3):
 - (A) Thirty days imprisonment;
 - (B) A \$1,000 fine; and
 - (C) Loss of the privilege to operate a vehicle equipped with an ignition interlock device; and
- (3) For an offense that occurs within five years of two or more prior convictions for offenses under this section or section 291E-62(a)(3), or any combination thereof:
 - (A) One year imprisonment;
 - (B) A \$2,000 fine; and
 - (C) Loss of the privilege to operate a vehicle equipped with an ignition interlock device. [L 2010, c 166, pt of §2]

" **[§291E-67] Assisting or abetting the circumvention of, or tampering with, an ignition interlock device; penalties.** (a) No person shall knowingly:

- (1) Blow into or start a vehicle equipped with an ignition interlock device for the purposes of providing an operable vehicle to another person who has been

restricted by law to operating only a vehicle equipped with an ignition interlock device;

- (2) Tamper with an ignition interlock device with the intent to render it inaccurate or inoperable to permit another person, who has been restricted by law to operating only a vehicle equipped with an ignition interlock device, to operate the vehicle; or
- (3) Rent, lease, or lend a vehicle to another person who has been restricted by law to operating only vehicles equipped with an ignition interlock device, when the rented, leased, or loaned vehicle is not equipped with a functioning certified ignition interlock device.

(b) Subsection (a) shall not apply to any act taken for the purpose of safety or mechanical repair of the device; provided that the person who is restricted to operating a vehicle equipped with the interlock device does not operate the vehicle.

- (c) Any person who violates this section shall be:
 - (1) Fined not more than \$1,000 or imprisoned not more than thirty days, or both, for any offense that does not occur within five years of two prior convictions for this offense; and
 - (2) Fined not less than \$500 but not more than \$1,000 or imprisoned not more than one year, or both, if the person has two or more prior convictions for the offense in the preceding five-year period. [L 2010, c 166, pt of §2]

" **§291E-68 REPEALED.** L 2016, c 17, §2.