

Mark Your Calendars

Drive Sober or Get Pulled Over

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August 19—September 5

National Association of Prosecutor Coordinators

Winter Meeting
December 5—8, 2011
The Greenbrier
White Sulphur Springs, WV

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Between the Lines

“Unmasking CDL Convictions”

by Kristen Shea*

What constitutes ‘masking’ of a commercial driver’s license (CDL) violation? This question, or some variation, remains one of the most frequently submitted commercial motor vehicle (CMV) related requests for technical assistance received by the National Traffic Law Center (NTLC). The answer to this question has primarily been found in state statutes or Federal regulations. As more courts struggle with this question, case law is being created to help guide prosecutors and judges through the prosecution and adjudication of CDL violations.

Masking Defined

The Federal Motor Carrier Safety Administration (FMCSA) promulgates safety regulations in Title 49 of the Code of Federal Regulations (CFR). Some of these regulations address how state and local courts and licensing authorities should handle CDL related cases. The term ‘masking’ comes from 49 CFR 384.226 (2010). This regulation prohibits “the state” from resolving a CDL violation so as to “*mask, defer imposition of judgment, or allow an individual to enter into a diversion program*” if doing so would “*prevent a CDL driver’s conviction*” from appearing on his driving record. The violations for which masking is prohibited include “any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation).” The FMCSA has established a broad definition for conviction in 49 CFR 383.5 (2010). That definition encompasses, as expected, any unvacated adjudication of guilt or violation “in a court of original jurisdiction or by an authorized administrative tribunal.” It also includes any “*unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law, an unvacated forfeiture of bail or collateral deposited to secure the person’s appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.*”

Reporting Violations

The Federal Motor Carrier Safety Regulations, found in the CFR, not only determine which violations must be reported, but also establish a timeframe for how swiftly those convictions must be conveyed. For instance, a state which convicts an out-of-state CDL holder for violating a law related to motor vehicle control must convey that conviction, according to 49 CFR 384.209 (2010), to the state that issued that driver’s license. Information regarding the conviction must be conveyed within 10 days. This rule applies to traffic offenses occurring both in CMVs and in non-commercial vehicles. Also, this rule applies if the driver has committed an offense in a CMV and *should have held* a CDL in order to be driving that CMV legally.

Title 49, Part 384 of the Code of Federal Regulations establishes general standards for state compliance with federal commercial motor vehicle licensing regulations. The standards include requirements that each state adopt appropriate testing and fitness screening programs for CDL applicants¹ and that each state impose license-based sanctions for traffic violations and unsafe driving consistent with the federally established penalties for major and serious traffic violations². Driving under the influence is specifically addressed within Part 384.

In 49 CFR 383.51 (2010), the regulations provide lists of violations and the period of disqualification that must be imposed for each offense. Any CDL holder convicted under any state impaired driving or implied consent law must be disqualified for one year for the first offense and life for the second of subsequent such offense. These regulations sometimes result in tougher standards for CDL holders than for drivers without CDL privileges. The treatment of alcohol impaired driving is one example of this. While 49 CFR 384.203 (2010) does not require states to impose special criminal sanctions on CDL holders, it does require that any driver determined to be driving a CMV with a blood

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alcohol concentration of .04% or higher be disqualified CDL from eligibility for no less than one year.

CDLIS

Federal reporting regulations are intended to curtail a dangerous practice by CDL holder of obtaining and keeping CDLs from multiple states. This would allow drivers to present one license to law enforcement. That license would accumulate points and reflect any dangerous driving behaviors for which the driver had been ticketed. A driver would then have at least one more CDL from a different state. That license would be presented to any perspective employer. The 'clean' license would not reflect any violations for which the driver had been cited. Eventually, a Federal regulation, 49 CFR 383.21 (2010), prohibited drivers from holding more than one state's CDL at a time. The Commercial Driver's License Information System (CDLIS) was established to create a pointer system available to each state.³ If one state sought a driver history for a CDL applicant, CDLIS would point that state to any prior licenses held by the applicant so that those other issuing states could be contacted for eligibility related data. The viability of CDLIS is dependant on the completeness and accuracy of the information it receives.

After the creation of the one-CDL-per-driver rule, a driver hoping to keep his license clean despite poor driving focused on convincing law enforcement, prosecutors or judges to divert, dismiss or simply defer any violation. CDL holders appealed to the sympathies of the court to avoid any potentially disqualifying offense being placed on their driving history. This technique would potentially remain effective regardless of how many times a driver was cited. This was particularly true with long-haul drivers. In each new state or county a court was presented with a clean record and no evidence that the driver had previously been sanctioned. Without proof that a driver had received prior citations, courts felt comfortable allowing CDL holders to participate in programs that involved traffic school, automatic charge reduction or conviction deferral, ultimately resulting in record devoid of any evidence that the driver had ever been cited for a potentially disqualifying offense. This cycle could be repeated over and over with little or no consequence to the worst drivers and no benefit to the drivers who were doing their best to obey traffic regulations. The Federal anti-masking regulation was created to help break this cycle and to make sure prosecutors, courts and state licensing authorities were able to review a driver's complete and accurate driving history.

Avoiding Masking

As states more consistently impose CDL sanctions, drivers sometimes seek loopholes in the law in an effort to avoid imposition of the mandated penalties. One technique involves the driver willingly surrendering a CDL prior to appearing in court on a violation. Because, at the time of sentencing, the driver is no longer technically a CDL holder, a court may decide to allow a driver to participate in traffic school or some other deferral program that will result in no conviction appearing on the driver's record. This practice can and is being challenged. In a 2010 California Court of Appeals decision, the Court found that traffic or trial courts

allowing this type of disposition subverted the original intent of the masking prohibition. The Court stated that it was possible for drivers to surrender their licenses prior to sentencing only to reacquire those licenses after participation in a deferral program that allowed them to avoid disqualification and maintain records free of traffic convictions. Given the Court's belief that "the worst of the worst" would be the ones most likely or highly motivated to cheat" it determined that this type of "gaming of the system" could not be permitted by traffic courts.⁴

Anti-masking legislation applies to violations committed in CMVs and in non-commercial or personal vehicles. A CDL holder may attempt to combat this by making an appeal based on 'fairness', arguing that the way a person drives his private vehicle is unrelated to the professional operation of a CMV. A Nashville, Tennessee judge faced just such an argument when a CDL holder receipted a speeding ticket while operating his personal vehicle. Citing the driver's clean driving record and the impact a conviction would have on the driver's CDL, the Court found that the driver had been speeding but allowed him to attend traffic school in lieu of a conviction of record. The appeal of the judge's decision cited both 49 CFR 384.226 (2010) and similar state statutory language found in T.C.A. 55-10-301. The Tennessee Court of Appeals held that the judge's action had constituted masking and reversed the original judgment stating "(a)pparently the Trial Court was influenced by the fact that defendant was driving a personal vehicle at the time of the violation, but the state and federal law make clear that this is of no consequence." The costs of the appeal were assessed to the driver.⁵

Recent Case Law

In another recent Tennessee Court of Appeals decision, the Court determined that the United States Department of Transportation's imposition of mandated CDL offense sentencing guidelines did not improperly limit the State's sentencing discretion.⁶ The decision specifically addressed the anti-masking language of 49 CFR 384.226 (2010) saying that "by discouraging state authorities from taking measures to lessen the impact a driving conviction has upon the status of a defendant's commercial driver's (sic) licenses the FMCSA sought to prevent dangerous drivers from maintaining commercial driver's license and thereby improve the safety of our nation's highways." Using that same reasoning, the Court decided that "insofar as the disputed regulation ... increases the transparency of a CDL holder's driving record" the prohibition on masking was a "valid exercise of Congress's power under the Commerce Clause."⁷

One limitation of the masking prohibition is that it only applies to unvacated convictions. A Pennsylvania appellate decision determined that a driver whom the court permitted to withdraw his originally agreed upon plea to impaired driving would no longer be subject to the mandatory year-long CDL disqualification.⁸ The state Department of Transportation argued unsuccessfully that the disqualification should stand. Essentially, the Court's determination that the entire plea had been nullified by the withdrawal meant that the violation was not covered by Pennsylvania's anti-masking statute. This is a fairly narrow exception. Prosecutors should also be aware that many valid and unvacated convictions relevant to CDL status go unreported. Drug trafficking, including sales, manufacture or distribution, in any motor vehicle carries a lifetime disqualification. In fact, using any vehicle, commercial or non-commercial, to commit a felony will subject the CDL holder to a period of mandatory disqualification pursuant to 49 CFR 383.51

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(2010). This rule is applicable to traffic related offenses such as vehicular manslaughter as well as other offenses such as an aggravated assault or kidnapping. To avoid the possibility of inadvertent masking, courts and prosecutors should routinely check to see if an offender holds a CDL.

Prosecutors and judges should and do retain the authority to dismiss charges not supported by evidence or invalidated for constitutional or procedural reasons. Without prosecuting and convicting CDL holders guilty of disqualifying offenses, the important regulations intended to protect all drivers are rendered much less effective. Proper reporting of these convictions allows the next prosecutor or court to determine the best course of action for a driver based on his or her actual driving history. It is not just the potential loss of highway funding pursuant to 49 CFR 384.401 (2010) that should motivate states to comply with the anti-masking regulations.⁹ Enforcement of traffic safety laws provides a continuing incentive to CMV drivers who consistently demonstrate good practices. Moreover, the removal of unsafe drivers from our roadways protects commercial and non-commercial drivers alike.

¹49 CFR 384.201

²49 CFR 384.213

³CDLIS was established in 1986, by the U.S. Congress enacted the Commercial Motor Vehicle Safety Act (CMVSA) which aimed to improve the safety of commercial motor vehicle drivers throughout the nation.

⁴People v. Meyer, 112 Cal.Reptr.3d 889, (Cal. Ct. App. 2010).

⁵Tennessee v. Stark, No M2007-00635-COA-R3-CV, 2008 WL 276005, (Tenn. Ct. App. Jan. 31, 2008).

⁶Tennessee v. James, No. M2010-01001-CCA-R3-CD, 2011 WL 303268, (Tenn. Crim. App., Jan. 26, 2011).

⁷Tennessee v. James, No. M2010-01001-CCA-R3-CD, 2011 WL 303268, at *4 (Tenn.Crim.App., Jan. 26, 2011).

⁸Kolva v. Pennsylvania, Department of Transportation, 977 A. 2d. 1248 (Pa. Commw. Ct. 2009).

⁹This section provides for the loss of up to 5% of "Federal-aid highway funds" and up to 10 % for the first and second years of failed compliance respectively.

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Drive Sober or Get Pulled Over

2011 Labor Day Crackdown

August 19—September 5

Nearly 10,000 law enforcement agencies nationwide will join together in support of an intensive crackdown on impaired driving August 19–September 5, known as "Driver Sober or Get Pulled Over."

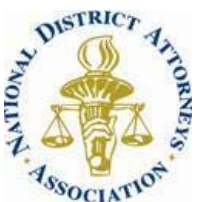


The problem of impaired driving is a serious one. Data from the National Highway Traffic Safety Administration shows the number of alcohol-impaired-driving fatalities in America fell from 2008 to 2009, but the numbers are still too high.

In 2009 alone, 10,839 people died in crashes in which a driver or motorcycle rider was at or above the legal limit, according to the National Highway Traffic Safety Administration. The age group with the highest percentage of alcohol-impaired-driving fatalities in motor vehicle traffic crashes was the 21-to-24 age group.

Law enforcement officers will be aggressively looking for all impaired drivers during the crackdown and will arrest anyone they find driving while impaired — regardless of age, vehicle type or time of day. The message is simple and unwavering: "If we find you driving impaired, we will arrest you. No exceptions."

For more information, visit the High-Visibility Enforcement Campaign Headquarters at www.StopImpairedDriving.org.



The National Traffic Law Center is a program of the National District Attorneys Association. This document was prepared under Cooperative Agreement Number DTNH22-10-R-00360 from the U. S. Department of Transportation National Highway Traffic Safety Administration and Grant Number CD099913NDA AOP from the U.S. Department of Transportation Federal Motor Carrier Safety Administration. Points of view or opinions in this document are those of the authors and do not necessarily represent the official positions or policies of the Department of Transportation or the National District Attorneys Association.