

A newsletter by **Taheri & Todoro, P.C.**, devoted to Driving While Intoxicated law in New York State
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Enhanced DWI Charges

Homero, N.Y.L.J., April 14, 1997).

When does DWI become a felony?

Driving While Intoxicated and Driving with Greater than .10% Blood Alcohol Content are usually unclassified misdemeanors. However, Vehicle and Traffic Law section 1193[1](c)(i) makes Driving While Intoxicated and Driving with Greater than .10% Blood Alcohol Content class E felonies if the driver has been convicted of either Driving While Intoxicated, Driving with Greater than .10% Blood Alcohol Content, or Driving While Ability Impaired by Drugs within ten years of his or her most recent arrest. A driver may also face a felony DWI prosecution if he or she has previously been convicted of Vehicular Assault in the First or Second Degree or Vehicular Manslaughter in the First Degree or Second Degree within the past ten years.

What happens if the driver has more than one prior DWI within the past ten years?

If a driver has two or more prior convictions for DWI, Vehicular Assault in the First or Second Degree or Vehicular Manslaughter in the First Degree or Second Degree within the past ten years and is arrested for DWI, he or she will be charged with DWI as a class D felony.

This charge will be enhanced to a class D felony even if both the prior convictions were for misdemeanors. A driver does not have to have been previously convicted of DWI as a class E felony to be charged with DWI as a class D felony (*see People v.*

When does Driving While Ability Impaired by Alcohol become a misdemeanor?

Driving While Ability Impaired by Alcohol is usually a traffic infraction. If a driver has two or more alcohol or drug-related driving convictions under any of the provisions of Vehicle and Traffic Law section 1192 within the past ten years and is arrested for Driving While Ability Impaired by Alcohol, the charge will be enhanced to an unclassified misdemeanor under Vehicle and Traffic Law section 1193[1](a).

Is DWAI as a misdemeanor a lesser included offense of DWI?

It is not uncommon for a driver to be arrested for Driving While Intoxicated, Driving with Greater than .10% Blood Alcohol Content, or both, and subsequently be convicted of Driving While Ability Impaired by Alcohol. When a driver has two prior alcohol or drug-related driving convictions within ten years, and is convicted of the lesser charge of DWAI, there is a question as to whether the accusatory instrument and proof at trial must set forth these convictions for the enhancement to a misdemeanor to apply.

In *People v. Jamison*, 170 Misc.2d 974 (Rochester 1996), the defendant was charged with Driving While Intoxicated and Driving with Greater than .10% Blood Alcohol Content. The jury acquitted the

defendant of both misdemeanors and convicted him of Driving While Ability Impaired by Alcohol. No proof was offered during the trial regarding the driver's two prior DWAI convictions. Instead, the prosecution argued that it should be allowed to introduce these prior convictions at sentencing to enhance the conviction from a violation to a misdemeanor. The court denied the prosecution's motion for enhancement to a misdemeanor after trial. In its analysis, the court noted that misdemeanor DWAI could not be a lesser included offense of DWI because both offenses are unclassified misdemeanors and that misdemeanor DWAI requires proof of two prior offenses within the preceding ten years while DWI does not. As a result, it is possible to commit DWI without committing misdemeanor DWAI at the same time.

While not raising the conviction to a misdemeanor, the court did allow the prosecution to prove one prior Driving While Ability Impaired by Alcohol violation within five years at sentencing for purposes of any potential enhanced sentence (fines, jail term and license suspension) that the driver may receive.

This newsletter does not offer specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. If you have any questions or would like a specific topic covered in the newsletter, please contact Michael S. Taheri, Esq., or Peter J. Todoro, Esq., at Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, telephone no. (716) 633-0374, e-mail: taheri@localnet.com.

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