

INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION

ADVISORY OPINION

At Issue

Whether the determination of “a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol” under Rule 2.105(a)(3) is based total number of DUI convictions in the supervised individual’s lifetime, or how the sentencing court classifies the DUI for sentencing purposes

Requesting State: Pennsylvania

Issued By:

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At Issue

Whether the determination of “a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol” under Rule 2.105(a)(3) is based on:

1. the total number of DUI convictions in the supervised individual’s lifetime, or
2. how the sentencing court classifies the DUI for sentencing purposes

Issued by: Don Blackburn, Executive Director and Richard L. Masters, Legal Counsel

Background

Pursuant to Commission Rule 6.101 (c) The Commonwealth of Pennsylvania has requested assistance in the interpretation of Rule 2.105 (a)(3), specifically the determination of what constitutes “a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol.” As Pennsylvania phrases the question:

> *Is it simply the total number of convictions for DUI in a lifetime or is it the manner in which the DUI was sentenced that determines a second or subsequent DUI offense for the purpose of Rule 2.105? If the sentence imposed by a court for a DUI specifically indicates that the DUI is being treated as a first offense for sentencing purposes, should that case be considered a first offense for compact purposes and thus not eligible for transfer under Rule 2.105?*
>
> *In order for states to make uniform decisions regarding the transfer and acceptance of DUI cases, it would be helpful to have clarification on this issue through an Advisory Opinion from the Commission.*

Applicable Rules and Statutes

Rule 2.105: Misdemeanants:

> (a) A misdemeanor supervised individual whose sentence includes 1 year or more of supervision shall be eligible for transfer, provided that all other criteria for transfer, as specified in Rule 3.101, have been satisfied; and the instant offense includes one or more of the following—

1. an offense in which a person has incurred direct or threatened physical or psychological harm;
2. an offense that involves the use or possession of a firearm;
3. a 2nd or subsequent misdemeanor conviction of driving while impaired by drugs or alcohol;
4. a sexual offense that requires the supervised individual to register as a sex offender in the sending state.

Analysis

Commission Rule 2.105 defines the types of misdemeanor offenses for which a convicted supervised individual "shall be eligible for transfer under the Compact. Rule 2.105 (a) (3) specifies one of those types of offenses as: "a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol;" Several states have statutory provisions under which a Judge can sentence a current DUI as a first offense when there has been a specified period of time between the instant DUI offense and prior DUI convictions. Rule 2.105 (a) (3) provides no such discretion but unequivocally provides that if the "instant offense includes . . . a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol" that such a supervised individual "shall be eligible for transfer." The rule provides no exceptions to applicability based on either the time period between the first and subsequent offense(s) or the jurisdiction in which the convictions occurred. Because the Compact has been granted Congressional consent, its provisions as well as its authorized rules are equivalent to and have the effect of federal law. See *Cuyler v. Adams, 449 U.S. 433 (1981*); T*exas v. New Mexico, 482 U.S. 124 (1987)*. Thus, both the compact and rules are enforceable on the states under both the Supremacy Clause and the Contract Clause of the federal Constitution and take precedence over conflicting statutes, executive actions or judicial orders. See *WMATA v. One Parcel of Land, 706 F.2d 1312 (4th Cir. 1983)*, also *Doe v. Ward, 124 F. Supp.2d 900 (W.D. Penn. 2000*). See also *Interstate Commission for Adult Offender Supervision v. Tennessee Board of Probation and Parole, et al. (U.S. Dist. Ct. E. D. KY. 2005)*. Thus, even if the sentencing court considers the DUI conviction to be a "first offense" for "sentencing purposes," the provisions of Rule 2.105 (a)(3) prevail and any supervised individual who has in actuality been previously convicted of a DUI misdemeanor offense shall be eligible for transfer under the Compact based on the plain meaning of this rule.

Conclusion

Under Rule 2.105(a)(3), eligibility is determined by the actual number of DUI convictions, not by how the sentencing court classifies the offense. A supervised individual with any prior DUI misdemeanor conviction qualifies as having "a second or subsequent offense" and is therefore eligible for transfer under the Compact, regardless of how the court designates the offense for

sentencing purposes.