

APPEARANCE TICKETS FOR OWI OFFENSES

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 438 as enacted

Public Act 39 of 2021

Sponsor: Sen. Curtis S. VanderWall

House Committee: [Placed on second reading]

Senate Committee: Judiciary and Public Safety [Discharged]

Complete to 7-30-21

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: Senate Bill 438 amends the Code of Criminal Procedure to exempt operating while intoxicated (OWI) offenses from the requirement to issue an appearance ticket and release a person from custody for certain misdemeanor offenses.

FISCAL IMPACT: Senate Bill 438 would have no significant fiscal impact on the state or on local units of government.

THE APPARENT PROBLEM:

Jail populations have been exploding as of late, and various approaches have been explored for identifying who should be detained in jail after arrest and who can be released on an appearance ticket (which requires a person to appear in court at a set time and date in the near future instead of going to jail while awaiting arraignment or trial). In 2020, a bipartisan package of bills was enacted that adopted numerous recommendations made by the Michigan Joint Task Force on Jail and Pretrial Incarceration.¹ One of the bills in the package, which became 2020 PA 393, took effect April 1, 2021.

Among its provisions, 2020 PA 393 requires police officers to issue an appearance ticket to a person arrested for most misdemeanor offenses and release the person from custody. Certain misdemeanors are excluded, such as those involving domestic violence, the subject of a personal protection order, an assaultive crime, or serious misdemeanors, and those with a maximum penalty of more than one year in jail. Another provision in the new law creates a process by which, if certain conditions are met (including that property or another person could be endangered if the arrested person were released from custody), an officer may take the person before a magistrate and file a complaint, which would allow the officer to take the person into custody.

A recent legal update issued by the Department of State Police explaining the parameters of the new law² has been interpreted by some as meaning that, because the law does not specifically provide an exemption from the mandatory issuance of appearance tickets for persons arrested for a misdemeanor drunk or drugged driving offense, such persons must be released after the appearance ticket is issued. Only if the circumstances of an incident fit the conditions allowing for the person to be taken before a magistrate and a complaint filed could the person be held in jail.

¹ <https://courts.michigan.gov/News-Events/Pages/DataDrivenJusticeSolutions.aspx>

² https://www.michigan.gov/documents/msp/MSP_Legal_Update_No_147_719898_7.pdf

However, some argue that not all drunk and drugged incidents could fit within the listed conditions. For example, an officer may pull a vehicle over for an equipment violation but smell an obvious odor of alcohol or marijuana. Would the conditions for arresting the person and bringing him or her before a magistrate be met in this circumstance if the person failed a preliminary breathalyzer test or roadside drug test but showed no outward signs of impairment?

Legislation has been offered to include an arrest for an operating while intoxicated offense as a misdemeanor offense for which an appearance ticket and release from custody are not required.

THE CONTENT OF THE BILL:

Senate Bill 438 amends the Code of Criminal Procedure to exempt OWI offenses from the requirement to issue an appearance ticket and release a person from custody for certain misdemeanor offenses.

Currently, a police officer is required to issue to and serve upon a person an appearance ticket and release him or her from custody if he or she is arrested without a warrant for a misdemeanor or ordinance violation that has a maximum penalty of one year in jail or a criminal fine, or both, and that is not a serious misdemeanor, assaultive crime, or domestic violence violation involving assault and battery (sections 81 and 81a of the Michigan Penal Code).

The bill adds an *operating while intoxicated offense* to this list of exceptions for which an appearance ticket is not mandatory.

Operating while intoxicated offense means a violation of either of the following:

- Section 625 or 625m of the Michigan Vehicle Code.
- Any of the following substantially corresponding to a violation listed in section 625 or 625m of the Michigan Vehicle Code:
 - A local ordinance.
 - A law of an Indian tribe.
 - A law of another state.
 - A law of the United States.

Section 625 of the Michigan Vehicle Code prohibits operating a motor vehicle while under the influence of alcohol, a controlled substance, other intoxicating substance, or a combination of any of those substances; establishes criteria for offenses such as “operating a vehicle while intoxicated” and “visibly impaired”; prohibits operation of a motor vehicle by a person under 21 years of age with any bodily alcohol content (BAC); prohibits knowingly allowing another person who is under the influence of alcohol or drugs, or both, to operate his or her vehicle; and prohibits operating a vehicle while under the influence of alcohol or drugs, or both, while a person under 16 years of age is present in the vehicle.

Section 625m of the Michigan Vehicle Code prohibits operation of a commercial motor vehicle by a person who has an alcohol content of 0.04 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. (Beginning October 1, 2021, that will rise to 0.04 grams or more but less than 0.10 grams.)

MCL 764.9c

ARGUMENTS:

For:

Proponents of the bill believe that 2020 PA 393, as it relates to drunk and drugged misdemeanor offenses, is confusing and could have public safety implications. It is said, for example, that a person who registers below a 0.08 BAC may show signs of impairment, such as weaving between lanes or slurred speech, while another person may show no signs of impairment yet register a 0.25 BAC on a preliminary breathalyzer test. In the absence of property damage or an accident causing death or injury to another person, however, it is unclear to officers whether either driver can be taken into custody until he or she sobers up or if they must issue an appearance ticket and let the person drive off. Questions of liability have been raised should the driver come to harm or harm someone else.

Although 2020 PA 393 does allow an officer to arrest a person instead of issuing an appearance ticket, the conditions that must be met are untested and may not pass judicial review. The procedure that must be followed, which includes taking the person before a magistrate and additional reporting requirements, is cumbersome and may be difficult for agencies with limited officers to follow.

Senate Bill 438 brings clarity by exempting drunk and drugged driving from the presumption that an appearance ticket must be issued and the person released from custody. Because the bill does not include operating while intoxicated offenses in the list of offenses for which an appearance ticket *could not* be issued, the bill preserves discretion for an officer to issue an appearance ticket if there were no public safety issues.

Against:

There is disagreement as to whether the bill is needed. For example, a person suspected of drunk or drugged driving, regardless of whether property or another person suffered harm, is typically placed under arrest and taken to the station or a medical facility for a blood test, as the results from a preliminary breathalyzer test or roadside drug test are not admissible as evidence in a court proceeding. In that sense, almost all suspected offenders would appear to be subject to arrest.

Response:

The bill clears up confusion as to the procedure a police officer must follow when faced with a person who may be operating a vehicle while under the influence of alcohol or drugs. As described above, the bill still allows an officer to issue an appearance ticket and release the person from custody if the person does not pose a safety threat to self or to others. Since the bill only pertains to drunk and drugged misdemeanor offenses, it does not undermine the intent of the law, which is to reduce unnecessary incarceration, reduce harm to people incarcerated unnecessarily, and reduce the costs to taxpayers of incarcerating people who do not pose a risk to public safety.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.