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New decision on calculation of DUI offenses has unexpected consequences



By David Shrager and Lyle Dresbold

The criminal bar has been scrambling since May 30, when the Pennsylvania Supreme Court decided the case of *Commonwealth v. Shiflett*, reshaping how DUI offenses are calculated and evoking disparate reactions from elected District Attorneys throughout the Commonwealth.

The minimum and maximum penalties for DUI are determined based on the Blood Alcohol Content (BAC) of the defendant and the number of prior DUI offenses during a ten-year lookback period. In addition to prior convictions, the statute includes in the definition of prior offenses, any previous admission into the Accelerated Rehabilitative Disposition (ARD) program.

ARD is a program that, in the sole discretion of the district attorney, is typically offered to defendants who are facing a first DUI and who have no previous criminal history. ARD is not a conviction, it is a diversionary program wherein the charges are held in abeyance while the defendant completes requirements such as probation, community service, safe driving classes, and a license suspension. Successful completion of the program results in a dismissal and potential expungement of the charges. In contrast, a conviction for a first DUI is an ungraded misdemeanor with a maximum penalty of six months incarceration.

In *Shiflett*, the Court determined that acceptance of ARD may no longer be used at sentencing to increase the penalty of a subsequent DUI. Their reasoning is based on the United States Supreme Court cases of *Apprendi* and *Alleyne*. In those cases, the High Court ruled that any *fact* which increases the maximum possible penalty, or the mandatory minimum penalty, must be an element of the crime, submitted to the jury, and proven beyond a reasonable doubt. The only exception to this rule is proof of a prior conviction. Our Supreme Court held that acceptance of ARD is a *fact* for the purposes of *Apprendi* and *Alleyne* and that it does not fall into the prior conviction exception because it is different from a conviction and does not have the same procedural safeguards. As there is no mechanism to add as an element of the offense and submit to the jury the question of prior ARD admission, the Court held that enforcement of that section of the enhancement statute is unconstitutional.

The immediate consequence of *Shiflett* is that defendants who previously completed ARD for DUI and are now facing new DUI charges will not have their prior ARD used against them to

increase the penalties. Many defendants in this situation have been continuing their cases in hopes that this ruling would benefit them. In some cases, a defendant's exposure is significantly decreased.

This is not the first time the criminal bar has faced this issue. In 2021 the Superior Court decided the case of *Commonwealth v. Chichkin*. *Chichkin* raised the same issues as *Shiflett* and was decided in the same way. For a year, defendants who were charged with a new DUI after having completed ARD received the benefit of lower minimum and maximum penalties. Some prosecuting agencies attempted to circumvent *Chichkin* by insisting on a waiver or stipulation which could be used in subsequent prosecutions to increase penalties. Before the waivers could be challenged, the Superior Court reversed itself in *Commonwealth v. Moroz*, restoring the pre-*Chichkin* status quo allowing ARD to be used as a prior offense.

The Allegheny County District Attorney has not responded to *Shiflett* by announcing any significant changes to the way it handles ARD. The same cannot be said for other prosecuting agencies throughout the Commonwealth. In many counties the District Attorney will no longer offer ARD to defendants whose BAC is above .159, who have any drugs in their system including medical marijuana or other prescription drugs, or who refuse chemical testing of blood or breath. A few counties have stopped offering ARD for DUI altogether.

Some prosecutors will admit that their hardline stances are intended as an attempt to force the legislature to restore the status quo. Already there is a bill making its way through committee with the support of the Pennsylvania District Attorneys Association that they believe would cure the issue by making prior ARD acceptance an element of the offense. Other legislative options include taking some of the discretion to offer ARD away from the individual prosecutor in favor of a more uniform system. All of the options being debated have drawbacks and will inevitably invite future challenges.

ARD is intended to give defendants with no prior record the opportunity to dispose of their criminal charges without doing permanent damage to their criminal record. Although the *Shiflett* decision benefits repeat offenders, the reaction by some prosecutors will harm first time offenders. Eventually the legislature may act, until then practitioners will have to continue to navigate a landscape that is different in every county and continues to change every day. ■

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