

Section V.D.

PRE-TRIAL PRACTICE SECTION V. D.

DWI ENHANCEMENT-PROVING PRIORS

The following information is summarized for quick review. Please consult the relevant statute or case(s) in their entirety before relying on its applicability in any given case.

1. REQUISITE PROOF OF PRIOR CONVICTION

A. A.C.A. ? 16-90-204 provides that evidence of a former conviction may be evidenced by a duly certified copy of the record of said conviction ... of any court record. A photocopy of a docket sheet certified by the court clerk as being an accurate record of the proceedings has been deemed sufficient.

Peters v. State, 286 Ark. 421,692 S.W.2d 243 (1985)

King v. State, 304 Ark. 592, 804 S.W.2d 360 (1991)

Kilmans v. State, 259 Ark. 301, 534 S.W.2d 202, cert. denied 429 U.S.846, 97 S. Ct. 128, 50 L.Ed.2d 117 (1976)

Thomas v. State, 303 Ark. 210, 795 S.W.2d 917 (1990)

Porter v. State, 281 Ark. 277,553 S.W.2d 723 (1984)

Willford v. State, 284 Ark. 449, 683, S.W.2d 228 (1985)

Bryant v. State, 16 Ark. App. 45, 696 S.W.2d 773 (1985)

B. PROOF OF PRIOR MISDEMEANOR CONVICTIONS

Same as current

C. PROOF OF PRIOR FELONY CONVICTIONS

A.C.A. ? 5-4-504 provides that a previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty. The following are per se sufficient by a statute:

1. A certified copy of the record of a previous conviction or finding of guilty by a court of record;
2. A certificate of the warden or other chief officer or a penal institution of this state or of another jurisdiction containing the name and fingerprints of the defendant as they appear in the records of his office;
3. A certificate of the chief custodian of the records of the United States Department of Justice containing the name and fingerprints of the defendant as they appear in the records of his office.
4. Additionally, a prior conviction cannot be used collaterally to impose enhanced punishment unless the misdemeanor was represented by counsel or validly waived counsel.

King v. State, 283 Ark. 592, 804 S.W.2d 360 (1991) The usual "record" from a municipal court is the docket sheet

Lovell v. State, 283 Ark. 425, 678 S.W.2d 318 (1984) Waiver of counsel may not be presumed from a silent record.

Southern v. State, 284 Ark. 572, 683 S.W.2d 933 (1985)

Hegier v. State, 286 Ark. 215, 691 S.W.2d 129 (1985)

Peters v. State, 286 Ark. 421, 692 S.W.2d 243 (1985)

Miller v. State, 19 Ark. App. 36, 715 S.W.2d 855 (1986) Judge's handwritten notations setting forth waiver of counsel is sufficient evidence.

Williford v. State, 284 Ark. 449, 683 S.W.2d 228 (1985) Certified copy of a document showing representation by counsel is sufficient proof.

II. PRIOR CONVICTIONS IN ANOTHER STATE

A. A.C.A. ? 16-90-203 provides that prior convictions in another state are admissible as evidence of a prior offense provided the previous offense would have constituted an offense under Arkansas law if the crime had been committed in Arkansas.

Polk v. State, 252 Ark. 320, 478 S.W.2d 738 (1972)

Roach v. State, 255 Ark. 773, 503 S.W.2d 467 (1973)

B. PRIOR MISDEMEANOR CONVICTIONS

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C. PRIOR FELONY CONVICTIONS

A.C.A. ? 5-4-503 provides that a conviction or finding of guilt of an offense in another jurisdiction shall constitute a previous conviction or finding of guilt of a felony if a sentence of death or imprisonment for a term in excess of one (1) year was authorized under the laws of the other jurisdiction.

McGirt v. State, 289 Ark.7, 798 S.W.2d 620 (1986)

III. PROOF OF IDENTIFICATION OF DEFENDANT

The fact that the Defendant has a common name or was referred to in his prior conviction by another given name does not render the proof of the prior conviction defective.

Ferguson v. State, 249 Ark. 138, 458 S.W.2d 383 (1970)

Leggins v. State, 271 Ark. 616, 609 S.W.2d 76 (1980)

In Leggins, the Court recognized the doctrine of "idem sonans," a rule of criminal procedure which ignores spelling differences in names if the pronunciation is practically the same, See Leggins v. State, Id.

IV. WHEN PRIOR MUST BE ALLEGED

A prior DWI should be alleged in the criminal information. This effectively puts the defendant on notice as to the state's intention to enhance. Often, a prior conviction is not discovered until after a citation is given or an information is filed.

Should a subsequent conviction be discovered, as practical matter, an amended information should be filed to reflect the additional offense, i.e., DWI-I would be amended to DWI-II.

Where the elements of the misdemeanor offense, as amended, remains the same, the defendant is not prejudiced by the state's actions in the same, the defendant is not prejudiced by the state's action in amending the information from DWI-I or II to DWI-II or III. Note, however, that a DWI-III amended to a DWI-IV would change the nature of the offense from a misdemeanor to a felony, and such could be held to prejudice the defendant.

Wilson v. State, 286 Ark. 430, 692 S.W.2d 620 (1985)

State v. Brown, 283 Ark. 304, 675 S.W.2d 822 (1984)

V. EXISTENCE OF PRIORS IS A FACT QUESTION

The existence of a prior conviction(s) is a fact question properly left to the jury (if tried before a jury).

Peters v. State, 286 Ark. 421, 692 S.W.2d 243 (1985)

VI. BIFURCATED TRIAL REQUIRED IN JURY TRIAL

A.C.A. ? 16-90-205 provides that: (1) the jury shall first hear all of the evidence pertaining to the current charge against the defendant and shall retire to reach its verdict as to this charge based only upon the evidence. However, nothing in this subdivision shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his own defense; (2) If the defendant is found guilty, the same jury shall sit again and hear evidence of the defendant's prior conviction or convictions. However, the defendant shall have the right to deny the existence of any prior convictions and to offer evidence in support of this denial; (3) The jury shall again retire, and if it is found that one (1) or more prior convictions exist, or if the defendant admits the previous conviction or convictions, then the prior conviction or convictions shall be considered in fixing punishment for the current offense for which the defendant has been convicted.

Peters v. State, 286 Ark. 421, 692 S.W.2d 243 (1985)