

55-10-402. Penalty for violations of § 55-10-401 – Alternative facilities for incarceration – Public service work – Monitoring – Inpatient alcohol and drug treatment;

(a)

(1)

(A) Any person violating § 55-10-401, shall, upon conviction for the **first offense**, be sentenced to serve in the county jail or workhouse **not less than forty-eight (48) consecutive hours** nor more than eleven (11) months and twenty-nine (29) days.

(B) Any person violating § 55-10-401, upon conviction for the first offense with a **blood alcohol concentration of twenty-hundredths of one percent (0.20%) or more**, shall serve a minimum of **seven (7) consecutive** days rather than forty-eight (48) hours.

(2)

(A) Any person violating § 55-10-401, shall, upon conviction for **second offense**, be sentenced to serve in the county jail or workhouse **not less than forty-five (45) consecutive days** nor more than eleven (11) months and twenty-nine (29) days.

(B) After sentencing the person to a period of confinement pursuant to subdivision (a)(2)(A), as a **condition of probation**, the **judge may order** the person to participate in a **substance abuse treatment program**, which includes any aftercare recommended by the treatment program, licensed or certified by the department of mental health and substance abuse services, which includes a certified drug court or DUI court, if the person first:

(i) Completes a clinical substance abuse assessment conducted pursuant to subsection (h); and

(ii) **Serves at least twenty-five (25) days of the period of incarceration imposed in the county jail or workhouse.**

(3)

(A) Any person violating § 55-10-401, shall, upon conviction for **third offense**, be sentenced to serve in the county jail or workhouse **not less than one hundred twenty (120) consecutive days** nor more than eleven (11) months and twenty-nine (29) days.

(B) **After** sentencing the person to a period of confinement pursuant to subdivision (a)(3)(A), as a **condition of probation** the **judge may order** the person to participate in a substance abuse **treatment** program, which includes any aftercare recommended by the treatment program, licensed or certified by the department of mental health and substance abuse services, which includes a certified drug court or DUI court, if the person first:

(i) Completes a clinical substance abuse assessment conducted pursuant to subsection (h); and

(ii) Serves at least sixty-five (65) days of the period of incarceration imposed in the county jail or workhouse.

(4) Any person violating § 55-10-401, upon conviction for a **fourth offense**, shall be sentenced as a **felon** to serve **not less than one hundred fifty (150) consecutive days** nor more than the maximum punishment authorized for the appropriate range of a **Class E felony**.

(5)

(A) Any person violating § 55-10-401, upon conviction for a **fifth offense**, shall be sentenced as a Class D felon and shall be sentenced to serve not less than the minimum sentence of imprisonment established in subdivision (a)(4) for a fourth offender, and not more than the maximum punishment authorized for the appropriate range of a **Class D felony**. This subdivision (a)(5) applies if the person:

(i) Has at least four (4) previous convictions for violations of § 55-10-401, or any other applicable prior conviction as described in § 55-10-405(c);

(ii) Commits a fifth violation of § 55-10-401; and

(iii) Commits the fifth violation on or after July 1, 2019.

(B) In addition to the required term of imprisonment for a fifth offense, all of the collateral consequences of a violation of § 55-10-401, including a fine, forfeiture, driver license suspension or revocation, interlock, transdermal, and other monitoring devices, substance abuse assessments, in-patient or out-patient treatment, drug court or DUI court, and conditions of probation shall also apply to a fifth offender.

(6)

(A) A sixth or subsequent conviction for violating § 55-10-401, or any other applicable prior conviction as described in § 55-10-405(c), is a Class C felony and any person sentenced under this subdivision (a)(6) shall be sentenced to serve no less than the minimum sentence of imprisonment established in subdivision (a)(4) for a fourth offender, and not more than the maximum punishment authorized for the appropriate range of a Class C felony. For this subdivision (a)(6) to be applicable, the person shall:

(i) Have at least five (5) previous convictions for violations of § 55-10-401, or any other applicable prior conviction as described in § 55-10-405(c);

(ii) Commit a sixth or subsequent violation of § 55-10-401; and

(iii) Commit the sixth or subsequent violation on or after July 1, 2016.

(B) In addition to the required term of imprisonment for a sixth or subsequent offense, all of the collateral consequences of a violation of § 55-10-401, including a fine, forfeiture, driver license suspension or revocation, interlock, transdermal, and other monitoring devices, substance abuse assessments, in-patient or out-patient treatment, drug court or DUI court, and conditions of probation shall also apply to a sixth or subsequent offender.

(b)

(1) If a person is convicted of a violation of § 55-10-401, and at the time of the offense, the person was accompanied by a **child under eighteen (18) years of age**, the person's sentence **shall be enhanced** by a **mandatory minimum period of incarceration of thirty (30) days**. The incarceration enhancement shall be served **in addition** to any period of incarceration received for the violation of § 55-10-401.

(2) Notwithstanding subsection (a), if, at the time of the offense, the person was accompanied by a **child under eighteen (18) years of age**, and the **child suffers serious bodily** injury as the proximate result of the violation of § 55-10-401, the person commits a **Class D felony** and shall be punished as provided in § 39-13-106, for vehicular assault.

(3) Notwithstanding subsection (a), if, at the time of the offense, the person was accompanied by a child under eighteen (18) years of age, and the **child is killed** as the proximate result of the violation of § 55-10-401, the person commits a **Class B felony** and shall be punished as provided in § 39-13-213(b)(2), for vehicular homicide involving intoxication.

(c) Subdivisions (b)(1)-(3) constitute an enhanced sentence, not a new offense.

(d)

(1) After service of at least the minimum sentence day for day, the judge has the discretion to require an individual convicted of a violation of § 55-10-401 to **remove litter** from the state highway system, public playgrounds, public parks or other appropriate locations for any prescribed period or to work in a recycling center or other appropriate location for any prescribed period of time in lieu of or in addition to any of the penalties otherwise provided in this section; provided, that any person sentenced to remove litter from the state highway system, public playgrounds, public parks or other appropriate locations or to work in a recycling center shall be allowed to do so at a time other than the person's regular hours of employment.

(2)

(A) The court **may order** any person convicted of a violation of § 55-10-401 to be subject to monitoring using one (1) or more of the following:

- (i) **Transdermal monitoring** device or other alternative alcohol or drug monitoring device;
- (ii) **Electronic monitoring** with **random alcohol or drug testing**;
- (iii) **Global positioning monitoring system**, as defined in § 40-11-152. If the court determines that the person is indigent, the court shall order the person to pay any portion of the costs of such a system for which the person has the ability to pay, as determined by the court. Any portion of the costs of such a system that the person is unable to pay shall come from the electronic monitoring indigency fund established pursuant to § 55-10-419, subject to the availability of funds; or
- (iv) **Any other monitoring device** the court believes necessary to ensure the person complies with the conditions of probation and, if applicable, the results of the clinical substance abuse assessment.

(B) If the court orders a person to be subject to monitoring as provided in subdivision (d)(2)(A), the court, the department of correction, or any other agency, department, program, group, private entity, or association that is responsible for the supervision of such person shall:

- (i) Require periodic reporting by the person for verification of the proper operation of the monitoring device;
- (ii) Require the person to have the **device monitored for proper use and accuracy** by an entity approved by the supervising entity at least **every thirty (30) days**, or more frequently as the circumstances may require; and
- (iii) Immediately notify the court of any of the person's violations of this subdivision (d)(2), which

shall be considered a violation of the conditions of probation.

(e) All persons sentenced under this part shall, in addition to service of at least the minimum sentence, be required to serve the difference between the time actually served and the maximum sentence on probation.

(f)

(1) An offender sentenced to a period of incarceration for a violation of § 55-10-401, shall be required to commence service of the sentence within thirty (30) days of conviction or, if space is not immediately available in the appropriate municipal or county jail or workhouse within such time, as soon as such space is available. The sheriff or chief administrative officer of a local jail or workhouse may use alternative facilities for the incarceration of an offender convicted of a violation of § 55-10-401.

(2)

(A) As used in this subsection (f), "alternative facilities" include, but are not limited to, vacant schools or office buildings or any other building or structure that would be suitable for housing DUI offenders for short periods of time on an as-needed basis and licensed through the department of mental health and substance abuse services for the state.

(B)

(i) The court may approve a private appropriately licensed substance abuse treatment program as an "alternative facility." If a person is ordered to participate in a court-approved private appropriately licensed substance abuse treatment program, that person shall be responsible for the cost and fees involved with the program, whether it be a prepayment or pay as you go program. The court does not have the authority to order the expenditure of public funds to provide for participation in such a program. However, if a person ordered to participate in such a program is indigent, the court may allow the person, subject to

availability of services, to enter any program that provides the treatment without cost to an individual.

(ii) A local governmental entity is immune from liability for a cause of action or claim for damages arising out of a person's participation in a private appropriately licensed substance abuse treatment program approved by the court as an alternative facility under this subdivision (f)(2)(B).

(3) Nothing in this subsection (f) shall be construed to give an offender a right to serve a sentence for a violation of § 55-10-401, in an alternative facility or within a specified period of time. Failure of a sheriff or chief administrative officer of a jail to require an offender to serve the sentence within a certain period of time or in a certain facility or type of facility shall have no effect upon the validity of the sentence.

(g) Notwithstanding this section to the contrary, in counties with a metropolitan form of government and a population in excess of one hundred thousand (100,000), according to the 1990 federal census or any subsequent federal census, the judge exercising criminal jurisdiction may sentence a person convicted of violating § 55-10-401 for the first time to perform two hundred (200) hours of public service work in a supervised public service program in lieu of the minimum period of confinement required by subsection (a).

(h)

(1) The clinical substance abuse assessment required before a person is ordered to participate in a substance abuse treatment program as a condition of probation pursuant to subdivisions (a)(2) or (a)(3), shall be administered to the person by qualified alcohol and drug abuse treatment personnel, as that term is defined by rules promulgated by the department of mental health and substance abuse services. If the assessment determines the person is in need of substance abuse treatment, the court may, using the assessment to determine the appropriate level of care, order the person referred to an appropriate substance abuse treatment program licensed or certified by the department of

mental health and substance abuse services, including a certified drug court or DUI court.

(2) A person ordered to attend a substance abuse treatment program pursuant to subdivisions (a)(2) or (a)(3) shall receive **sentence reduction credits from** the period of incarceration imposed by the court as follows:

(A) **Day-for-day credit** for the period of time the person spends in a residential treatment program; and

(B) **One (1) day of credit for every nine (9) hours of successfully completed intensive outpatient treatment.**

(3)

(A) Upon the successful completion of the substance abuse treatment program, the program provider shall notify the court of the fact that treatment was successfully completed and the number of days the person spent in residential treatment, or the number of hours spent in intensive outpatient treatment, whichever is applicable. The court shall calculate the sentence reduction credits the person has earned based upon the service provider's report.

(B) If the person ceases to attend the substance abuse treatment program, the service provider shall notify the court of the person's absence within three (3) business days of the date the provider knew or should have known of such absence. If the person fails to successfully complete the program for any other reason, the provider shall notify the court of such failure.

(4) **A person who does not successfully complete the substance abuse treatment program to which the person is ordered is in violation of the person's probation, and the court shall order the person committed to the county jail or workhouse for service of the full period of the mandatory minimum confinement required by law and any portion of confinement in excess of the minimum imposed by the court that the court deems necessary.**

The person shall receive no sentence reduction credits for any time spent in the substance abuse treatment program prior to failure to complete the program.

(5) Upon successful completion of a substance abuse treatment program, the person shall be required to report to the county jail or workhouse to serve the remainder of any mandatory period of confinement required by law and imposed by the court. Failure to do so is a violation of the person's probation.

(6) If a person voluntarily attends residential treatment after arrest but before sentencing, the person may receive sentence reduction credits for completion of residential treatment if the person is ordered to treatment by the judge as a condition of probation. However, **before** commencing any court-ordered treatment program, the person must undergo a clinical substance abuse assessment as provided in subdivision (h)(1), serve the mandatory minimum sentence provided in subdivision (a)(2)(B) or (a)(3)(B), and follow the recommendations of the assessment.

(7) If the court orders intensive outpatient treatment, it may also order:

(A) The use of transdermal monitoring devices or other alternative alcohol or drug monitoring devices. If the court determines that the person is indigent, the court shall order the person to pay any portion of the costs of such a device for which the person has the ability to pay, as determined by the court. Any portion of the costs of such a device that the person is unable to pay shall come from the electronic monitoring indigency fund established pursuant to § 55-10-419;

(B) The use of electronic monitoring with random alcohol or drug testing;

(C) The use of a global positioning monitoring system, as defined in § 40-11-152. If the court determines that the person is indigent, the court shall order the person to pay any portion of the costs of such a system for which the person has the ability to pay, as determined by the court. Any portion of the costs of such a system that the person is unable to pay shall come from the electronic monitoring indigency fund established pursuant to § 55-10-419, subject to the availability of funds; or

(D) The use of any other monitoring device the court believes necessary to ensure the person complies with the results of the assessment and the conditions of probation.

(i)

(1) Ordering a person to treatment as a condition of probation pursuant to subdivision (a)(2), (a)(3), and subsection (h) for a second or third violation of § 55-10-401 is **solely within the discretion of the judge** as an available sentencing option. Failure to grant such person such treatment is not appealable, except for abuse of discretion.

(2) Nothing in this section shall be construed as creating a **right** for a person convicted of a second or third violation of § 55-10-401 to receive:

(A) A clinical substance abuse assessment;

(B) Intensive outpatient treatment;

(C) Residential treatment;

(D) Enrollment in a state certified treatment program, including drug court or DUI court; or

(E) Any **sentence reduction** credits for substance abuse treatment that would reduce the period of incarceration imposed by the court other than those earned and retained pursuant to subdivision (h)(2)(A) and (B).

(3)

(A) Nothing in this section authorizing a judge to order any of the options specified in subdivision (i)(2) shall be construed to affect or limit any restrictions a judge may place or is required to place on a person convicted of a second or third violation of § 55-10-401 by other provisions of law, including the use of an ignition interlock device under § 55-10-409.

(B) This section governs those instances in which a person is convicted of a second or third violation of § 55-10-401 and the judge chooses to order the person to participate in a substance abuse treatment program as a condition of probation pursuant to this section. In those instances in which the person is a second or third offender but the judge declines to order treatment

pursuant to this section, **or** in which the person is convicted of a **first or fourth or subsequent violation** of § 55-10-401, § 55-10-410 applies.

(j)

(1) The court is not empowered to order the expenditure of public funds to provide treatment. However, if a person ordered to participate in such a program is indigent, the court may allow the person, subject to availability of services, to enter any program that provides the treatment without cost to an individual. When making a finding as to the indigency of an accused, the court shall take into consideration:

(A) The nature of the program services rendered;

(B) The usual and customary charges for rendering such program services in the community;

(C) The income of the person regardless of source;

(D) The poverty level guidelines compiled and published by the United States department of labor;

(E) The ownership or equity of any real or personal property of the person; and

(F) Any other circumstances presented to the court that are relevant to the issue of indigency.

(2) If a person ordered to participate is not indigent and participates in a program that provides treatment without cost to an individual, that person shall be obligated to pay for treatment in the same manner as provided in § 33-2-1102. If a person ordered to participate, participates in a court approved private treatment program, that person shall be responsible for the cost and fees involved with the program.

(k) If a person commits a **second or third violation** of § 55-10-401 **prior to July 1, 2014**, but the conviction for such offense does not occur until after July 1, 2014, the person shall **elect** to the judge at the time of conviction whether to come within the provisions of chapter 902 of the Public Acts of 2014, or be sentenced in accordance with the law in effect at the time the offense was committed.