

Virginia DUI/DWI
Frequently Asked Questions
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WHEN RESULTS MATTER

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General

Is there a difference between the terms DUI and DWI in Virginia?

No. The term DUI generally refers to driving under the influence, and the term DWI generally refers to driving while intoxicated. Although some states draw a distinction between the terms and make one a less serious offense, Virginia does not. Virginia's DUI / DWI law covers them both and even uses both terms in the statute. The statute is titled "Driving...While Intoxicated, etc." and the substantive text of the law reads thou shall not "drive....while under the influence...." In Virginia, there is no difference between the terms DUI and DWI: they are interchangeable.

Can you explain Virginia's DUI / DWI law?

Of course I can, but it would be a very lengthy and complex discussion. In a nutshell, Virginia DUI / DWI law can be separated into two categories: (1) cases involving impairment of the driver and (2) cases which have nothing to do with impairment of the driver.

Virginia DUI / DWI cases involving impairment of the driver:

These cases are sometimes referred to as "common law" DUI cases. Virginia DUI law makes it illegal to:

- ◆ Drive while under the influence of alcohol.
- ◆ Drive while under the influence of drugs to a degree that it impairs your ability to operate a motor vehicle safely.

NOTE: Successful prosecution of these cases does not require any proof of the amount of alcohol or drugs in the driver's body. This is the law under which DUI / DWI offenses are prosecuted when there is no breath or blood test to rely upon.

Virginia DUI / DWI cases which have nothing to do with impairment of the driver:

These cases are sometimes referred to as "per se" cases because the proof of the violation is a measurement. Virginia DUI law makes it illegal to:

- ◆ Drive with a prohibited amount of alcohol in your system.
- ◆ Drive with a prohibited amount of specific drugs in your system.

NOTE: Successful prosecution of these cases does not require any proof that the driver was impaired by alcohol or drugs. The violation is simply driving with the prohibited amount of alcohol or drugs in your body.

What are the legal limits for alcohol DUI / DWI cases and drug DUI / DWI cases in Virginia?

Virginia DUI / DWI cases involving alcohol: Virginia DUI / DWI laws prohibit driving with a blood alcohol content or breath alcohol content of:

- ◆ 0.08 g per 210 liters of breath
- ◆ 0.02 g per 210 liters of breath if you are under 21 years of age

Virginia DUI / DWI cases involving drugs: Virginia DUI / DWI laws prohibit driving with the following amounts of the specified drugs in your body:

- ◆ 0.02 milligrams of cocaine per liter of blood
- ◆ 0.10 milligrams methamphetamine per liter of blood
- ◆ 0.01 milligrams of phencyclidine per liter of blood
- ◆ 0.10 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood

I blew less than 0.08 on the Preliminary Breath Test, so why was I arrested for a Virginia DUI / DWI?

The officer must have thought there was enough other evidence to suggest you were impaired by alcohol and/or drugs. Remember, in Virginia it is illegal to drive if you are impaired, even if your blood alcohol concentration (BAC) is less than 0.08.

My breath or blood test result was above 0.08, so why should I hire a lawyer? Aren't I just going to be found guilty anyway?

Not necessarily. The truth is that there is simply no way to know, especially at this early stage, whether you will eventually be found guilty of DUI / DWI. In addition to the fact that to even recognize and understand the issues which may be presented in a DUI / DWI case, a lawyer needs to have at least a working knowledge not only of the substantive law in Virginia, but also scientific principles regarding the absorption, distribution and elimination of alcohol in the human body, the fundamental principles of breath testing, the operational theories of various breath testing machines, the numerous possible causes for error,

and the relationship between blood alcohol content and breath alcohol content. Laws in Virginia concerning the admissibility of evidence in a DUI / DWI case are written and interpreted in a way which facilitates easy prosecution, and the obligation of the Commonwealth to provide information about their case to the accused through the discovery process is woefully lacking in Virginia when compared to other states. All of this makes effectively representing someone accused of DUI / DWI in Virginia a difficult and complex endeavor.

As I explain to all of my clients, the odds are against you, the playing field is not level and you may eventually be found guilty of a DUI / DWI. However, one thing is certain: 100 % of people who plead guilty to a DUI / DWI in Virginia are found guilty. You can not win if you do not try. It seems so obvious, but every person who has had a DUI / DWI trial in Virginia and was found *not guilty*, entered a *not guilty* plea and forced the Commonwealth to have to prove the case beyond a reasonable doubt. It is simply impossible to know what the outcome of a case will be. I have successfully represented clients all across Virginia, and have received *not guilty* verdicts in cases with BAC results as high as 0.29.

**I can't believe I've been arrested for a DUI / DWI offense in Virginia.
Does this make me a bad person?**

Of course not. Unlike most crimes, DUI / DWI is an offense that many people commit by accident. After all, it is essentially impossible to know what your BAC is at any given time, and alcohol impairs your ability to judge just how impaired you are. Generally speaking, people are more impaired than they realize which is why so many of my clients say "I felt fine. I didn't feel drunk at all." The lesson to be learned from this unfortunate incident is that if you drink and then drive, you are always taking a risk.

Administrative License Suspension

Why did they suspend my license when I haven't been convicted of anything yet?

In Virginia, everyone arrested for DUI / DWI will have the ability to drive in Virginia suspended automatically if there was a breath test result of 0.08 or more, a breath test result of 0.02 or more if they are under 21 years of age, or if they also were charged with Unreasonable Refusal to Submit to a Breath / Blood Test (Refusal). The automatic administrative suspension is triggered by the arrest for a DUI / DWI in Virginia coupled with a qualifying breath test or a charge of Refusal. If you are eventually convicted of DUI / DWI and / or Refusal in Virginia there will be an additional suspension of your ability to drive in Virginia.

I was arrested for DUI / DWI and/or Refusal in Virginia, but I don't have a Virginia license. Will an administrative license suspension be imposed?

Yes. If your license was issued by a state other than Virginia and you are arrested for drunk driving and / or Refusal in Virginia, your ability / permission / privilege to drive in Virginia will still be suspended.

How long is my license / privilege to drive in Virginia administratively suspended now that I've been arrested for a DUI / DWI and/or Refusal in Virginia?

The length of the administrative license suspension triggered by an arrest for DUI / DWI and / or Refusal in Virginia depends on whether it is for a first offense, second offense or third, etc. offense, as set forth below.

- ◆ 1st offense.....7 days
- ◆ 2nd offense in 10 years.....60 days or until trial
- ◆ 3rd, 4th , etc. offense in 10 years.....until trial

I need to drive to keep my job. Do the DUI / DWI laws in Virginia allow me to get permission from the court or from DMV to drive to and from work during the administrative license suspension?

No. Virginia DUI / DWI law does not allow the court or the DMV to grant permission to drive for work, or for any other reason, during the administrative license suspension. During the administrative license suspension period, you may not drive at any time, for any reason, and if you are caught driving during this time you will likely be arrested and taken to jail.

But I really need to drive. Is there any thing I can do to get my license back quicker or do I just have to wait until Virginia's administrative license suspension is over?

Although your ability to drive in Virginia is automatically suspended after an arrest for DUI / DWI and / or Refusal, Virginia law does allow you to bring the matter before the appropriate court and challenge administrative license suspension. Of course, this needs to be done while the suspension is still in effect and in order to be successful you must prove one of the following by a preponderance of the evidence:

- ◆ the arresting officer did not have probable cause for the arrest
- ◆ there was not probable cause for the issuance of the warrant/petition

If the administrative license suspension challenge is successful your license to drive will be reinstated immediately, or the length of the suspension will be shortened, as appropriate. If the administrative license suspension challenge is not successful, the suspension remains in effect and you are prohibited from driving at any time and for any reason until the suspension has expired.

Arraignment

I've been told I have to appear in court for an arraignment. What should I expect at the arraignment?

In Virginia, the term “arraignment” is generally used to refer to the first appearance before the Court. If you are held in jail, the arraignment should happen the following morning, and if you are released from custody (either after posting a bond or on your own recognizance) it typically happens a few days later. Substantively, the arraignment is a brief administrative hearing at which the Court will do the following:

- ◆ inform you of the charge against you and make sure you understand it
- ◆ inform you of your right to be represented by an attorney
- ◆ inquire whether you plan to hire a lawyer, ask the court to appoint a lawyer or represent yourself
- ◆ inform you of your next court date

Can a lawyer handle this for me in Virginia or will I actually be required to appear in court for the arraignment?

It depends. Many Virginia courts do not require the accused to appear for the arraignment, as long as an attorney has been hired and the lawyer takes the necessary steps to excuse the accused from having to appear. Some courts require the lawyer to actually appear in court on behalf of the client, while other courts simply require the lawyer to formally inform the court that they will be representing the accused. In any event, as the accused the best course of action is to assume that you must appear in court for the arraignment unless you hire a lawyer and have been assured by the lawyer that your appearance is not necessary.

Miranda Warnings

On TV, whenever someone gets arrested, the police always read the person their rights, but I was never read my rights. Is this important? Will it result in my case being dismissed?

You are right – more often than not when someone is arrested on tv, the cop automatically starts to “read the person his/her rights” - telling the arrested person about the right to remain silent, how anything said can be used against him/her later, about the right to have an attorney present during questioning, etc. However, police officers are not required to give these Miranda warnings immediately upon arresting someone, and the failure of the police to do so does not result in a case being dismissed. Simply stated, the rule to remember is that if you were interrogated by the police, after being taken into custody, and you were not given these Miranda warnings, your statements can not be used against you. Although the majority of incriminating statements in a Virginia DUI / DWI case come before the suspect is taken into custody, there are many situations where this issue still arises in the defense of drunk driving cases.

Breath Alcohol Testing

Why do Virginia DUI / DWI laws deal with the amount of alcohol in my breath anyway? Isn't the amount of alcohol in my blood what is important?

Great question! It's common knowledge that alcohol and drugs will impair your ability to safely drive a motor vehicle, and drunk driving laws are intended to address that risk. And yes, lawmakers only care the amount of alcohol in your blood (not on your breath) because impairment is caused when the alcohol reaches the brain, and the way alcohol reaches the brain is in the blood.

It's really not possible (and certainly not practical) to directly measure the amount of alcohol in the brain, so we have to find another way to try and figure out how much alcohol may be in the brain. The best way to do this is to measure the amount of alcohol in the blood since it is blood that carries alcohol to the brain. The traditional drawing of blood and sending it to the lab for testing is possible, but it is both time-consuming and costly, and lawmakers would obviously prefer a quicker less expensive method of determining blood alcohol content. Enter breath alcohol testing.

Breath alcohol testing is based on the premise that there is a known, constant ratio between the amount of alcohol in your blood and the amount of alcohol in your breath - so if we can accurately measure the amount of alcohol in a person's breath we can calculate the amount of alcohol in that person's blood. Interestingly, breath alcohol testing is not only easy to administer and incredibly quick, but also dirt cheap in comparison to blood testing.

Is it true that there is a known constant ratio between the amount of alcohol in breath and the amount of alcohol in blood?

No. Although this is an interesting idea and a convenient premise, it is a premise which is simply fictitious. The ratio between the amount of alcohol in one's blood and the amount of alcohol in one's breath is not a known constant. In fact, values in scientific literature range from about 1300:1 to 2700:1. Of course, in order to write a computer program to do the necessary calculations, a particular ratio had to be chosen and incorporated into the program which runs the machine. The ratio used in Virginia and the US is 2100:1 - meaning our machines are programmed to believe there is the same quantity of alcohol in 2100 parts of breath as 1

part of blood. Interestingly, the ratio used in Virginia and the US is different than the ratio used in other countries.

After I was arrested for drunk driving in Virginia and while I was waiting to take the breath test they told me not to burp or belch. I thought they meant to not burp or belch out loud, so when I did I kept it quiet. Why did they tell me not to burp or belch and does it matter that I did?

Remember that breath testing for alcohol rests on the premise that there is a known ratio between the amount of alcohol in your blood and the amount of alcohol in your breath – so the machine is attempting to measure the amount of alcohol in the breath coming from your lungs. If you have alcohol in your stomach, the amount of alcohol in the air in your stomach is significantly higher than the amount of alcohol in your lungs. Burping and belching can falsely elevate breath test results by contaminating your breath sample with liquids and gases from your stomach. Simply stated, the breath machine may have measured alcohol from your stomach rather than from your lungs.

Mandatory & Maximum Punishments

I'm scared to death. If things don't go well and I end up being found guilty of a DUI / DWI in Virginia, am I going to go to jail?

Maybe. If you are eventually convicted of a DUI / DWI in Virginia, you may or may not be sentenced to serve time in a local jail or a state prison - it just depends on the specific facts and circumstances of your particular case. Some DUI / DWI offenses in Virginia have mandatory jail/prison sentences, while others do not. In addition, many DUI / DWI cases involve aggravated facts and circumstances that are so bad that you could end up being incarcerated by a judge or jury - even though Virginia DUI / DWI law doesn't require it.

Virginia DUI / DWI offenses involving specific facts and circumstances have mandatory minimum jail/prison sentences. If you are convicted of a DUI / DWI with the following aggravating factors, your jail sentence can be no shorter than listed below, but it can be longer – all the way up to the maximum punishments allowed.

- ◆ breath or blood test results of 0.15 or more.....5 days
- ◆ transporting a passenger 17 years of age or younger..... 5 days
- ◆ 2nd offense within 5 to 10 years.....10 days
- ◆ 2nd offense within 5 years.....20 days
- ◆ 3rd offense within 5 to 10 years.....90 days
- ◆ 3rd offense within 5 years..... 6 months
- ◆ 4th, etc.offense within 10 years.....1 year

How long could I potentially be incarcerated if I am convicted of a DUI / DWI in Virginia?

If you are found guilty of a misdemeanor DUI / DWI offense in Virginia, you may be sentenced to serve up to 12 months in jail. If you are convicted of a felony DUI / DWI offense in Virginia, you may be imprisoned for up to 5 years. If someone was killed as a result of your drunk driving and you are convicted of Involuntary Manslaughter, you may be incarcerated for up to 10 years, and if the facts are so bad that you are found guilty of Aggravated Involuntary Manslaughter the maximum sentence increases to imprisonment for up to 20 years.

Judge Trial vs. Jury Trial

If my Virginia DUI / DWI case goes to trial, will it be decided by a judge or a jury?

It depends on the court in which the case is tried and whether you are charged with a misdemeanor or a felony. The Virginia court system has three different trial courts: Circuit Court, General District Court and Juvenile and Domestic Relations District Court. Under Virginia law, a drunk driving case could be brought to trial in any of the three courts, but jury trials are only available in the Circuit Court. There are no jury trials in either the General District Court or the Juvenile and Domestic Relations District Court in Virginia, so all cases which come to trial in those courts are decided by a judge.

In Virginia, misdemeanor level drunk driving cases with juvenile offenders are typically heard in the Juvenile and Domestic Relations District Court, and misdemeanor level drunk driving cases involving adults are typically heard in the General District Court, so most DUI / DWI cases that go to trial in Virginia are decided by a judge. However, if you are found guilty in either of those courts you have the automatic right to appeal the case to the Circuit Court for a new trial. At this new trial in the Circuit Court you have the right to have a jury trial. All felony DUI / DWI offenses in Virginia are tried in the Circuit Court, so you have the right to have a jury trial.

Why would someone elect to have a jury decide a Virginia DUI / DWI case instead of a judge?

In my experience, when there is a preference for having a jury trial over a judge trial it is because some people believe jurors may be less jaded, and bring more of an open mind to the table than judges who hear case after case day after day. Another potentially attractive aspect of a jury trial is that at the end of a judge trial, only the judge has to be convinced that you are guilty, but at the end of a jury trial, all of the jurors have to agree that you are guilty. If just one juror believes that the case against you has not been proven beyond a reasonable doubt, you can not be found guilty.

Post Conviction License Suspension

If I end up being convicted of drunk driving in Virginia, am I going to lose my license?

Yes, but don't panic yet. Every conviction for a drunk driving offense in Virginia triggers a mandatory suspension of your license. If your license was not issued by Virginia, a conviction for DUI / DWI in Virginia will result in a mandatory suspension of your privilege to drive in Virginia.

How long are we talking? How long will my license (or privilege) to drive in Virginia be suspended following a DUI / DWI conviction?

It depends on whether it is your first DUI / DWI offense, second DUI / DWI offense or third (or more) DUI / DWI offense. A conviction for drunk driving in Virginia results in mandatory suspension of the license (or privilege) to drive in Virginia as set forth below:

- ◆ 1st offense.....12 month suspension
- ◆ 2nd offense in 10 years.....3 year suspension
- ◆ 3rd (or more) offense in 10 years.....indefinite suspension

But I need to be able to drive to keep my job, my house and provide for my family. Can the court at least allow me to drive for work?

Maybe - it depends on whether it is your first DUI / DWI offense, second DUI / DWI offense or third (or more) DUI / DWI offense.

- ◆ 1st offenses: If this is your first conviction for a DUI / DWI, Virginia courts have the authority to grant restricted driving privileges immediately. However, just because the court has the authority to do so, doesn't mean the court will agree to do so. In many cases where the court could grant restricted driving privileges, the court will refuse to until some time has passed and/or until the court has a report from a substance abuse education and treatment program which discusses the person's level of abuse and dependence on alcohol, likelihood to reoffend, etc.
- ◆ 2nd, 3rd, 4th, etc. offenses: If this is your second, third, fourth, etc. conviction for DUI / DWI within 10 years, Virginia courts do not have the authority to grant restricted driving privileges until

some time has passed. The length of time that you must wait depends on how many times you've been down this road, and it can be as short as 4 months or as long as 3 years, depending on the facts and circumstances of your case.

It is important to note that unless and until you are granted restricted driving privileges, you are not allowed to drive at any time, for any reason, and if you are caught driving during this time you will likely be arrested and taken to jail.

If you and your lawyer are successful in persuading the court to grant you restricted driving privileges after being convicted of a DUI / DWI, Virginia law enables courts to allow driving for a few limited purposes, such as:

- ◆ to get yourself to work
- ◆ to drive during work if your job requires you to do so
- ◆ to get yourself and your children to school
- ◆ to get yourself, your children, your parents and household members to doctors
- ◆ to get your children to day care
- ◆ to get to court ordered visitation with your children
- ◆ to get to alcohol education and treatment programs
- ◆ to appointments with a probation officer
- ◆ to programs required as a condition of probation

Although Virginia law does not require it, most courts in Virginia place arbitrary limitations on the number of hours per day and the number of days per week you will be permitted to drive – and will not allow you to drive around the clock, seven days a week, even for the purposes allowed. So, if you are convicted of a DUI / DWI in Virginia, and you are successful in getting the court to grant you a restricted license, you will only be allowed to drive for a few limited purposes, and only during certain hours.

Is there anything I can do to make it more likely that a Virginia court will grant me a restricted license / privilege to drive after being convicted of a DUI / DWI?

Yes. There are several things you can do to put yourself in the best position for success. First and foremost, do not get in any additional trouble while your case is pending. Enroll in the Virginia Alcohol Safety Action Program (VASAP) as soon as possible after your arrest and ask that they do a Pre-Court Evaluation. Consider attending AA meetings and

abstaining from alcohol use completely. Gather letters from employers, professional colleagues and others who can speak to your level of trustworthiness and responsibility aside from this unfortunate incident. Have written verification of employment and exact addresses to every location you will be requesting permission to drive. And since many courts will not issue a restricted license until the fine and court costs are paid in full, you should come to court prepared to pay the fine and court costs in full.

If my Virginia license is suspended, can I just go to another state and get a license?

Generally speaking, states communicate with one another and honor suspensions imposed by sister states. Therefore, in most cases you will not be able to go to another state and get an unrestricted license if you have been suspended in Virginia as a result of a conviction for a DUI / DWI offense. Even if you are able to obtain a license from another state, as long as your privilege to drive in Virginia remains suspended you will not be allowed to drive in Virginia.

What if I am able to go get an international driver's license, even though I am suspended in Virginia? Will that allow me to drive in Virginia?

No. If you have been convicted of a DUI / DWI offense in Virginia and have had your privilege to drive in Virginia suspended, you are prohibited from driving in Virginia at any time and for any reason unless the court has granted you a restricted license or privilege to do so.

Substance Abuse Education and Treatment

If things don't go well and I end up being convicted of DUI / DWI in Virginia, am I going to have to go to substance abuse treatment classes?

Yes. Everyone convicted of a DUI / DWI in Virginia is ordered to successfully complete substance abuse education and treatment either through the Virginia Alcohol Safety Action Program (VASAP), or through another program which has been approved by VASAP. The amount of education and treatment, and the length of the program required for any particular person, depends on many things such as the facts and circumstances of that person's case; that person's use, abuse and dependence upon alcohol; whether this is a first offense, second offense, third offense, etc.; and any education or treatment which the person may have previously completed.

Those substance abuse education and treatment classes probably cost a bunch of money, and I really don't have time to go to them anyway. What will happen to me if I don't complete VASAP or some other treatment program?

If you are convicted of a DUI / DWI in Virginia, the court will most likely order you to complete substance abuse education and treatment classes through VASAP or another program which VASAP has approved. If you fail to comply with the court's order, several things can happen to you – all of which are bad – including losing your ability to drive, having to pay additional fines and court costs, and even being put in jail.