

HIGHWAY TO JUSTICE

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EMPOWERING JUDGES AND KEEPING THE ROADS SAFE

*By Judge Gayle Williams-Byers
South Euclid Municipal Court
South Euclid, Ohio*

In June 2018, a truck plowed into a Jeep Wrangler stopped in traffic on Interstate 84 in Idaho, killing the truck driver and three Idaho airmen who were in the Jeep. A newspaper account later revealed that the truck driver had been convicted of more than 20 driving-related violations in four states before the crash and additional offenses in other states.

The obvious question was, why was a driver with so many convictions still on the road and in possession of a commercial driver's license? One likely reason, though it was not part of the record, relates to an all-too-common traffic court practice called "masking." Masking relates to plea bargains struck by commercial driver's license or CDL holders who are in danger of accruing driving violations including driving under the influence that could result in the automatic suspension of their licenses and commercial driving privileges.¹ When drivers are cited, whether in their personal or professional vehicles, they often seek to plead guilty to different, non-moving or reduced infractions, agree to attend driver's education courses or seek to participate in diversion or deferred prosecution programs.

Prosecutors and judges are often sympathetic to the drivers' argument that the loss of the CDL will take away their means of earning a living and supporting their family. But preserving a driver's license in this way effectively—and illegally—masks the true record of dangerous driving.

The Federal Commercial Motor Vehicle Safety Act was enacted to prevent the concealment of unsafe driving records and to establish uniform sanctions for certain unsafe driving practices by holders of a commercial driver's license. Under the Federal regulations that were promulgated under the Act, all out-of-State traffic convictions involving a CDL holder, regardless of whether the violation occurred in a commercial or private vehicle, must be reported to the licensee's licensing state. Under 49 CFR § 384.226, a State is prohibited from masking, deferring imposition of a judgment of conviction, or allowing an individual to enter a diversion program that would prevent a conviction from appearing on the commercial driver's license record. Under this regulation,

a "conviction" would include an unvacated adjudication of guilt or forfeiture of bail, a court-accepted guilty plea, or payment of a fine or court cost.

In order to promote compliance with the Federal Commercial Motor Vehicle Safety Act and its regulations, the Motor Carrier Safety Improvement Act of 1999 requires the withholding of certain Federal funds from States found to be non-compliant with the Federal regulations regarding masking. Additionally, the Federal government has the authority to also prohibit non-compliant States from issuing CDLs.

More attention, however, has been focused on commercial drivers and how the Courts handle their traffic violations. For nearly 20 years, for example, The National Judicial College, has been educating judges about masking and other highway safety regulations. In the past two years, more than 300 judges have tuned in to the College's live national webcasts on the subject or to webcasts customized for each of the 50 states. In 2016 and 2017, 447 judges attended in-person courses presented in seven states.

And the efforts appear to be finally paying off. In Florida, for example, judges report that it was commonplace to withhold convictions in almost all commercial operators' cases, such as speeding, careless driving and improper lane changes. Romana Lavalas, a senior attorney for the National Traffic Law Center of the National District Attorneys Association, says though that awareness of masking is clearly on the rise in courthouses, and "if judges are doing what they're supposed to do, the right drivers will get disqualified."

When asked, many State Court judges have said they were unaware of the concept of "masking" as well as its impact on road safety and noncompliance with federal law. I've had the opportunity to teach NJC courses on commercial driver's license issues around the country, and have found that many, "if not all" of the judges I've taught were unaware that masking was a violation of federal law. For example, a justice of the peace from Delaware, who attended one of the NJC programs commented:

continued, page 2

Editor's Note

Highway to Justice is a publication of the American Bar Association (ABA) and the National Highway Traffic Safety Administration (NHTSA). The views expressed in *Highway to Justice* are those of the author(s) only and not necessarily those of the ABA, the NHTSA, or the government agencies, courts, universities or law firms with whom the members are affiliated.

We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*.

To submit an article, please send it to the editor, Hon. Neil E. Axel at neilaxel49@gmail.com with a copy to the staff liaison, Cheronne.Mayes@americanbar.org. Please contact Ms. Mayes for editorial guidelines.

The deadline for submission of articles for the Winter issue is November 27.

EMPOWERING JUDGES AND KEEPING THE ROADS SAFE continued from 1

"I had no idea that these plea agreements effectively violated the law until I took the course. I now take a much closer look at the record of violations."

The National Judicial College is continuing its year-round program of State-specific webcasts and in-State seated courses designed to provide judges with opportunities to understand CDL issues, including masking, with presentations scheduled through September 2020. For more information regarding a program in your State, go to www.judges.org, or call The National Judicial College.

1. For example, commercial drivers may be disqualified from operating a commercial vehicle for 60 - 120 days for speeding excessively, reckless driving, following a vehicle too closely, and 1- 3 years for operating a vehicle under the influence of alcohol or drugs. In some instances, a commercial driver may be disqualified for life from operating a commercial vehicle for a subsequent conviction for operating under the influence.

VIRGINIA'S DRIVEN TO PROTECT INITIATIVE—A PUBLIC-PRIVATE PARTNERSHIP TO ENHANCE PUBLIC SAFETY ON OUR HIGHWAYS

*By Judge Gordon A. Wilkins
Virginia State Judicial Outreach Liaison
Northern Neck, Virginia*

Each year, drunk driving kills approximately 10,000 people and costs the country more than \$190 billion. Although the number of traffic fatalities caused by drivers under the influence had decreased in past years, it appears that number is now leveling off and still remains a significant public safety problem. If any other set of circumstances cost the same amount in lives and assets, there would be a clamor that "something must be done". Consider, for example, the public response if we were to experience one commercial airline crash each week for a year. The resulting number of fatalities would equal the number killed on our highways due to drunk driving.

In recent years, the automotive industry has made great strides in developing non-operator controlled technological innovations, most of them having to do with the safety of the vehicle. Auto manufacturers have developed cars that are safer because of their construction—introducing popular automatic safety features like blind spot detection and automatic braking. Most of the new capabilities of these vehicles become engaged after the vehicle is started and is in operation. Now the Automotive Coalition for Traffic Safety (ACTS) representing the world's leading automakers, in partnership with the federal government, is developing a new safety technology to help prevent alcohol-impaired driving. This technology is currently in its testing phase and is known as the Driver Alcohol Detection System for Safety (DADSS). ACTS has partnered with the Virginia Department of Motor Vehicles to form the Driven to Protect Initiative. This public-private partnership is the first to deploy in-vehicle alcohol detection sensors that will determine when a driver is impaired and therefore unsafe to operate the vehicle.

DADSS is a system designed to detect whether a person who attempts to start and drive a vehicle is under the influence of alcohol, or, in other words, has a blood alcohol concentration of 0.08% or greater. If it is determined that he/she does, the vehicle will start, but will not move. DADSS is approaching the measurement problem in two ways. The first is based upon

continued, page 3