



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

March 26, 1998

The Honorable Thomas M. Goff
Tom Green County Attorney
112 West Beauregard
San Angelo, Texas 76903

Letter Opinion No. 98-027

Re: Whether a person under the age of twenty-one (21) may be prosecuted for the offense of driving while intoxicated (RQ-1028)

Dear Mr. Goff:

You have requested our opinion regarding whether a person under the age of twenty-one may be prosecuted for the offense of driving while intoxicated under section 49.04 of the Penal Code. That statute provides: "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place."

"Intoxicated" is defined as:

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or

(B) having an alcohol concentration of 0.10 or more.

Penal Code § 49.01.

Your question is prompted by the recent enactment of section 106.041 of the Alcoholic Beverage Code, which creates a new offense of "driving under the influence of alcohol by a minor." It provides, in relevant part:

(a) A minor commits an offense if the minor operates a motor vehicle in a public place while having any detectable amount of alcohol in the minor's system.

(b) Except as provided by Subsection (c), an offense under this section is a Class C misdemeanor.

....

(g) An offense under this section is not a lesser included offense under Section 49.04, Penal Code.

You thus ask whether a minor who is "intoxicated" under section 49.04 of the Penal Code may continue to be prosecuted under that provision, or whether he may be prosecuted only under the terms of section 106.041 of the Alcoholic Beverage Code.

Section 106.041 is part of a comprehensive bill enacted by the Seventy-fifth Legislature, in part to comport with the requirements of the National Highway Designation Act of 1995 that mandates that all states adopt a "zero tolerance" standard for alcohol-related traffic offenses involving minors. See Bill Analysis, Senate Criminal Justice Comm. Report, S.B. 35, 75th Leg. (1997). The bill analysis states its intent to "create a *separate* offense for driving under the influence of alcohol by a minor." *Id.* (emphasis added). Section 106.041 is, in some respects, broader than section 49.04 of the Penal Code. It provides that a minor commits an offense whenever he operates a motor vehicle "while having *any detectable amount* of alcohol" in his bloodstream. (Emphasis added.) No intoxication need be alleged or proved in order to demonstrate a violation of section 106.041. A first offense conviction under section 106.041 is a class C misdemeanor.

On the other hand, section 49.04 is in most particulars the broader statute. It requires a showing of actual "intoxication," defined in section 49.01 as *either* as having in the blood "an alcohol concentration of 0.10 or more," *or* as "not having the normal use of mental or physical faculties" by virtue of the introduction into the body of one of various substances. Thus, a person may violate section 49.04 by means other than alcohol consumption, but a person violates that provision only if he is actually "intoxicated." A first offense conviction under section 49.04 is a class B misdemeanor, "with a minimum term of confinement of 72 hours." Furthermore, section 106.041 specifically declares that "an offense" thereunder "is not a lesser included offense under Section 49.04." Alco. Bev. Code § 106.041(g). Finally, we believe it would be anomalous for the legislature, in a recently-enacted statute addressing its concern that "Texas leads the nation in the number of alcohol-related traffic fatalities among the nation's youths," to have *reduced* the penalty for driving while intoxicated for persons under the age of twenty-one. Bill Analysis, Senate Criminal Justice Committee Report, S.B. 35, 75th Leg. (1997). We conclude that, notwithstanding the enactment of section 106.041 of the Alcoholic Beverage Code, a person under the age of twenty-one may be prosecuted for the offense of driving while intoxicated under section 49.04 of the Penal Code.

S U M M A R Y

Notwithstanding the enactment of section 106.041, Alcoholic Beverage Code, a person under the age of twenty-one may be prosecuted for the offense of driving while intoxicated under section 49.04 of the Penal Code.

Yours very truly,



Rick Gilpin
Deputy Chair
Opinion Committee