

VIRGINIA ACTS OF ASSEMBLY -- 2001 SESSION

CHAPTER 654

An Act to amend and reenact §§ 18.2-268.3, 18.2-268.10, 46.2-341.26:3 and 46.2-341.26:10 of the Code of Virginia, relating to driving while intoxicated; refusal of tests as evidence.

[H 924]

Approved March 25, 2001

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-268.3, 18.2-268.10, 46.2-341.26:3 and 46.2-341.26:10 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-268.3. Refusal of tests; procedures.

A. If a person, after having been arrested for a violation of §§ 18.2-51.4, 18.2-266 or § 18.2-266.1 or of a similar ordinance and after having been advised by the arresting officer that (i) a person who operates a motor vehicle upon a public highway in this Commonwealth is deemed thereby, as a condition of such operation, to have consented to have samples of his blood and breath taken for chemical tests to determine the alcohol or drug content of his blood, (ii) *a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial*, and (iii) that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this Commonwealth, refuses to permit blood or breath or both blood and breath samples to be taken for such tests, the arresting officer shall take the person before a committing magistrate. If he again so refuses after having been further advised by the magistrate (i) of the law requiring blood or breath samples to be taken, (ii) *that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial*, and (iii) the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Supreme Court, or refuses or fails to so declare in writing and such fact is certified as prescribed below, then no blood or breath samples shall be taken even though he may later request them.

B. The form shall contain a brief statement of the law requiring the taking of blood or breath samples, *that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial*, and the penalty for refusal, a declaration of refusal, and lines for the signature of the person from whom the blood or breath sample is sought, the date, and the signature of a witness to the signing. If the person refuses or fails to execute the declaration, the magistrate shall certify such fact and that the magistrate advised the person that a refusal to permit a blood or breath sample to be taken, if found to be unreasonable, constitutes grounds for revocation of the person's privilege to operate a motor vehicle on the highways of this Commonwealth. The magistrate shall promptly issue a warrant or summons charging the person with a violation of § 18.2-268.2. The warrant or summons shall be executed in the same manner as criminal warrants.

C. Venue for the trial of the warrant or summons shall lie in the court of the county or city in which the offense of driving under the influence of intoxicants is to be tried. The executed declaration of refusal or the certificate of the magistrate, as the case may be, shall be attached to the warrant and shall be forwarded by the magistrate to the aforementioned court.

D. When the court receives the declaration or certificate and the warrant or summons charging refusal, the court shall fix a date for the trial of the warrant or summons, at such time as the court designates ~~but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.~~

E. The declaration of refusal or certificate of the magistrate shall be prima facie evidence that the defendant refused to allow a blood or breath sample to be taken to determine the alcohol or drug content of his blood. However, this shall not prohibit the defendant from introducing on his behalf evidence of the basis for his refusal. The court shall determine the reasonableness of such refusal.

§ 18.2-268.10. Evidence of violation of § 18.2-266 or § 18.2-266.1.

A. In any trial for a violation of § 18.2-266 or § 18.2-266.1 or a similar ordinance, the admission of the blood or breath test results shall not limit the introduction of any other relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of any blood or breath tests, consider other relevant admissible evidence of the condition of the accused. If the test results indicate the presence of any drug other than alcohol, the test results shall be admissible only if other competent evidence has been presented to relate the presence of the drug or drugs to the impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely.

B. The failure of an accused to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal *or pursuant to subsection C*; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal *or pursuant to subsection C*.

C. Evidence of a finding against the defendant under § 18.2-268.3 for his unreasonable refusal to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood shall be admissible into evidence, upon the motion of the Commonwealth or the defendant, for the sole purpose of explaining the absence at trial of a chemical test of such sample. When admitted pursuant to this subsection such evidence shall not be considered evidence of the accused's guilt.

D. The court or jury trying the case involving a violation of clause (ii), (iii) or (iv) of § 18.2-266 or § 18.2-266.1 shall determine the innocence or guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

§ 46.2-341.26:3. Refusal of tests; issuance of out-of-service orders; disqualification.

A. If a person arrested for a violation of § 46.2-341.24 or § 46.2-341.31, after having been advised by a law-enforcement officer (i) that a person who operates a commercial motor vehicle on a public highway in the Commonwealth is deemed thereby, as a condition of such operation, to have consented to have samples of his blood or breath taken for chemical tests to determine the alcohol or drug content of his blood, (ii) *that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial*, and (iii) that the unreasonable refusal to do so constitutes grounds for the issuance of an out-of-service order and for the disqualification of such person from operating a commercial motor vehicle, then refuses to permit blood or breath samples to be taken for such tests, the law-enforcement officer shall take the person before a magistrate. If he again refuses after having been further advised by the magistrate (i) of the law requiring blood or breath samples to be taken, (ii) *that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial*, and (iii) the sanctions for refusal, and declares again his refusal in writing on a form provided by the Supreme Court, or refuses or fails to so declare in writing and such fact is certified as prescribed below, then no blood or breath samples shall be taken even though he may later request them.

B. The form shall contain a brief statement of the law requiring the taking of blood or breath samples, *that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial*, and the sanctions for refusal; a declaration of refusal; and lines for the signature of the person from whom the blood or breath sample is sought, the date, and the signature of a witness to the signing. If the person refuses or fails to execute the declaration, the magistrate shall certify such fact and that the magistrate advised the person that a refusal to permit a blood or breath sample to be taken, if found to be unreasonable, constitutes grounds for immediate issuance of an out-of-service order prohibiting him from driving a commercial vehicle for a period of twenty-four hours, and for the disqualification of such person from operating a commercial motor vehicle.

C. If the magistrate finds that there was probable cause to believe the refusal was unreasonable, he shall immediately issue an out-of-service order prohibiting the person from operating a commercial motor vehicle for a period of twenty-four hours and shall issue a warrant or summons charging such person with a violation of § 46.2-341.26:2. The warrant or summons shall be executed in the same manner as criminal warrants. Venue for the trial of the warrant or summons shall lie in the court of the county or city in which the criminal offense is to be tried.

D. The executed declaration of refusal or the certificate of the magistrate, as the case may be, shall be attached to the warrant and shall be forwarded by the magistrate to the court.

E. When the court receives the declaration or certificate together with the warrant or summons charging refusal, the court shall fix a date for the trial of the warrant or summons, at such time as the court designates ~~but subsequent to the defendant's trial for a violation of § 46.2-341.24 or § 46.2-341.31.~~

F. The declaration of refusal or certificate under § 46.2-341.26:3 shall be prima facie evidence that the defendant refused to allow a blood or breath sample to be taken to determine the alcohol or drug content of his blood. However, this shall not prohibit the defendant from introducing on his behalf evidence of the basis for his refusal. The court shall determine the reasonableness of such refusal.

§ 46.2-341.26:10. Evidence.

A. In any trial for a violation of § 46.2-341.24, admission of the blood or breath test results shall not limit the introduction of any other relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the results of the blood or breath tests, consider other relevant admissible evidence of the condition of the accused. If the test results indicate the presence of any drugs other than alcohol, the test results shall be admissible only if other competent evidence has been presented to relate the presence of the drug or drugs to the impairment of the accused's ability to drive or operate any commercial motor vehicle safely.

B. The failure of an accused to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood is not evidence and shall not be subject to any comment by the Commonwealth at the trial of the case, except in rebuttal *or pursuant to subsection C*; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal *or pursuant to subsection C*.

C. Evidence of a finding against the defendant under § 18.2-268.3 for his unreasonable refusal to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood shall be admissible into evidence, upon the motion of the Commonwealth or the defendant, for the sole purpose of explaining the absence at trial of a chemical test of such sample. When admitted pursuant to

this subsection such evidence shall not be considered evidence of the accused's guilt.

~~B.~~ D. The court or jury trying the case involving a violation of clause (ii), (iii) or (iv) of § 46.2-341.24 shall determine the innocence or guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.