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HOUSE BILL NO. 2579

Offered January 10, 2001

Prefiled January 10, 2001

A BILL to amend and reenact §§ 18.2-268.3, 29.1-738.2 and 46.2-391.2 of the Code of Virginia, relating to refusal of blood alcohol test.

Patrons—McDonnell, Albo, Drake, Nixon, Suit and Tata; Senator: Wagner

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

That §§ 18.2-268.3, 29.1-738.2 and 46.2-391.2 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 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, and 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 the person is unable to be taken before a magistrate because the person is taken to a medical facility for treatment or evaluation of his medical condition, the arresting officer, in the presence of a witness, shall again advise the person, at the medical facility, of the law requiring blood or breath samples to be taken and the penalty for refusal.* If he again so refuses after having been further advised by the magistrate *or arresting officer* of the law requiring blood or breath samples to be taken and 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 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 *or arresting officer* shall certify such fact and that the magistrate *or arresting officer* 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 *or summonses*. *If the person has been taken to a medical facility for treatment or evaluation of his medical condition, the arresting officer may issue, on the premises of a medical facility, a summons for a violation of § 18.2-268.2 in lieu of securing a warrant.*

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 *or arresting officer*, as the case may be, shall be attached to the warrant *or summons from the arresting officer* and shall be forwarded by the magistrate *or arresting officer* 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 *or arresting officer* 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.

§ 29.1-738.2. Consent to blood or breath test.

A. Any person who operates a watercraft or motorboat which is underway upon waters of the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the

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59 alcohol, drug, or both alcohol and drug content of his blood, if such person is arrested for operating a
60 watercraft or motorboat which is underway in violation of subsection B of § 29.1-738, § 29.1-738.02, or
61 of a similar ordinance of any county, city or town, within two hours of the alleged offense. Any person
62 so arrested for a violation of clause (i) or (ii), or both, of subsection B of § 29.1-738, § 29.1-738.02, or
63 of a similar ordinance, shall submit to a breath test. If the breath test is not available, or the person is
64 physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to
65 administration of the test, be advised by the person administering the test that he has the right to
66 observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform
67 the breath test. If such equipment automatically produces a written printout of the breath test result, this
68 written printout, or a copy thereof, shall be given to the accused in each case.

69 B. Any person, after having been arrested for a violation of clause (iii) or (iv) of subsection B of
70 § 29.1-738, § 29.1-738.02, or of a similar ordinance, may be required to submit to a blood test to
71 determine the drug or both drug and alcohol content of his blood. When a person, after having been
72 arrested for a violation of clause (i) or (ii), or both, of subsection B of § 29.1-738, submits to a breath
73 test, in accordance with subsection A of this section, or refuses to take or is incapable of taking such a
74 breath test, he may be required to submit to tests to determine the drug or both drug and alcohol content
75 of his blood if the law-enforcement officer has reasonable cause to believe the person was operating a
76 watercraft or motorboat under the influence of any drug or combination of drugs, or the combined
77 influence of alcohol and drugs.

78 C. If a person, after being arrested for a violation of subsection B of § 29.1-738, § 29.1-738.02, or of
79 a similar ordinance of any county, city or town and after having been advised by the arresting officer
80 that a person who operates a watercraft or motorboat which is underway upon the waters of the
81 Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have a
82 sample of his blood and breath taken for a chemical test to determine the alcohol or drug content of his
83 blood, and that the unreasonable refusal to do so constitutes grounds for a court to order him not to
84 operate a watercraft or motorboat which is underway upon the waters of the Commonwealth, then
85 refuses to permit the taking of a sample of his blood or breath or both blood and breath samples for
86 such tests, the arresting officer shall take the person arrested before a committing magistrate. *If the*
87 *person is unable to be taken before a magistrate because the person is taken to a medical facility for*
88 *treatment or evaluation of his medical condition, the arresting officer, in the presence of a witness, shall*
89 *again advise the person, at the medical facility, of the law requiring blood or breath samples to be*
90 *taken and the penalty for refusal.* If he again so refuses after having been further advised by such
91 magistrate or arresting officer of the law requiring a blood or breath sample to be taken and the penalty
92 for refusal, and so declares again his refusal in writing upon a form provided by the Supreme Court of
93 Virginia, or refuses or fails to so declare in writing and such fact is certified as prescribed in
94 § 18.2-268.3, then no blood or breath sample shall be taken even though he may thereafter request same.

95 D. When any person is arrested for operating a watercraft or motorboat which is underway in
96 violation of subsection B of § 29.1-738 or § 29.1-738.02, the procedures and requirements of
97 §§ 18.2-268.1 through 18.2-268.11 shall apply, mutatis mutandis, to this section.

98 E. If the court or jury finds the defendant guilty of unreasonably refusing to permit a blood or breath
99 sample to be taken, the court shall order such person not to operate a watercraft or motorboat which is
100 underway for a period of twelve months for a first offense and for twenty-four months for a second or
101 subsequent offense of refusal within five years of the first or other such refusal. However, if the
102 defendant pleads guilty to a violation of subsection B of § 29.1-738, the court may dismiss the refusal
103 warrant.

104 § 46.2-391.2. Administrative suspension of license or privilege to operate a motor vehicle.

105 A. If a breath test is taken pursuant to § 18.2-268.2 or any similar ordinance of any county, city or
106 town and the results show a blood alcohol content of 0.08 percent or more by weight by volume or 0.08
107 grams or more per 210 liters of breath, or the person refuses to submit to the breath test in violation of
108 § 18.2-268.3 or any similar local ordinance, and upon issuance of a petition or summons, or upon
109 issuance of a warrant by the magistrate, for a violation of §§ 18.2-51.4, or 18.2-266, or any similar
110 local ordinance, or upon the issuance of a warrant or summons by the magistrate or arresting officer
111 for a violation of § 18.2-268.3, or any similar local ordinance, the person's license shall be suspended
112 immediately for seven days or in the case of (i) an unlicensed person, (ii) a person whose license is
113 otherwise suspended or revoked, or (iii) a person whose driver's license is from a jurisdiction other than
114 the Commonwealth, such person's privilege to operate a motor vehicle in the Commonwealth shall be
115 suspended immediately for seven days.

116 A law-enforcement officer, acting on behalf of the Commonwealth, shall serve a notice of suspension
117 personally on the arrested person. When notice is served, the arresting officer shall promptly take
118 possession of any driver's license held by the person and issued by the Commonwealth and shall
119 promptly deliver it to the magistrate. Any driver's license taken into possession under this section shall
120 be forwarded promptly by the magistrate to the clerk of the general district court or, as appropriate, the

121 court with jurisdiction over juveniles of the jurisdiction in which the arrest was made together with any
122 petition, summons or warrant, the results of the breath test, if any, and the report required by subsection
123 B. A copy of the notice of suspension shall be forwarded forthwith to both (i) the general district court
124 or, as appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was
125 made and (ii) the Commissioner. Transmission of this information may be made by electronic means.

126 The clerk shall promptly return the suspended license to the person at the expiration of the seven-day
127 suspension. Whenever a suspended license is to be returned under this section or § 46.2-391.4, the
128 person may elect to have the license returned in person at the clerk's office or by mail to the address on
129 the person's license or to such other address as he may request.

130 B. Promptly after arrest and service of the notice of suspension, the arresting officer shall forward to
131 the magistrate a sworn report of the arrest that shall include (i) information which adequately identifies
132 the person arrested and (ii) a statement setting forth the arresting officer's grounds for belief that the
133 person violated § 18.2-51.4 or § 18.2-266 or a similar local ordinance or refused to submit to a breath
134 test in violation of § 18.2-268.3 or a similar local ordinance. The report required by this subsection shall
135 be submitted on forms supplied by the Supreme Court.

136 C. Any person whose license or privilege to operate a motor vehicle has been suspended under
137 subsection A may, during the period of the suspension, request the general district court or, as
138 appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was made to
139 review that suspension. The court shall review the suspension within the same time period as the court
140 hears an appeal from an order denying bail or fixing terms of bail or terms of recognizance, giving this
141 matter precedence over all other matters on its docket. If the person proves to the court by a
142 preponderance of the evidence that the arresting officer did not have probable cause for the arrest, that
143 the magistrate did not have probable cause to issue the warrant, or that there was not probable cause for
144 issuance of the petition, the court shall rescind the suspension, and the clerk of the court shall forthwith
145 (i) return the suspended license, if any, to the person unless the license has been otherwise suspended or
146 revoked, (ii) deliver to the person a notice that the suspension under § 46.2-391.2 has been rescinded,
147 and (iii) forward to the Commissioner a copy of the notice that the suspension under § 46.2-391.2 has
148 been rescinded. Otherwise, the court shall affirm the suspension. If the person requesting the review fails
149 to appear without just cause, his right to review shall be waived.

150 The court's findings are without prejudice to the person contesting the suspension or to any other
151 potential party as to any proceedings, civil or criminal, and shall not be evidence in any proceedings,
152 civil or criminal.

153 D. If a person whose license or privilege to operate a motor vehicle is suspended under subsection A
154 is convicted under § 18.2-51.4 or § 18.2-266 or any similar local ordinance during the seven-day
155 suspension imposed by subsection A, and if the court decides to issue the person a restricted permit
156 under subsection E of § 18.2-271.1, such restricted permit shall not be issued to the person before the
157 expiration of the seven-day suspension imposed under subsection A.