

2004 RECONVENED SESSION

REPRINT

CHAPTER 985

An Act to amend and reenact §§ 18.2-268.3 and 18.2-268.4 of the Code of Virginia, relating to refusal of breath or blood test; penalties.

[H 127]

Approved April 21, 2004

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-268.3 and 18.2-268.4 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~~ *the* 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~~ *the* Commonwealth, (iv) *the criminal penalty for unreasonable refusal within 10 years of a prior conviction for driving while intoxicated or unreasonable refusal is a Class 2 misdemeanor, and (v) the criminal penalty for unreasonable refusal within 10 years of any two prior convictions for driving while intoxicated or unreasonable refusal is a Class 1 misdemeanor,* 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 at a medical facility, in the presence of a witness other than a law-enforcement officer, 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 by the arresting officer at a medical facility (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 penalties~~ 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 penalties~~ 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 at a medical facility shall certify such fact and that the magistrate or arresting officer at a medical facility 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~~ *the* Commonwealth. The magistrate shall promptly issue a warrant or summons charging the person with a violation of subsection A. The warrant or summons *for a first offense under this section* 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 at a medical facility may issue, on the premises of the medical facility, a summons for a violation of subsection A 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 at a medical facility, 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 by the 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.

E. The declaration of refusal or certificate of the magistrate or arresting officer at a medical facility 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.

§ 18.2-268.4. Appeal and trial; penalties for refusal.

A. The procedure for appeal and trial *of a first offense of § 18.2-268.3* shall be the same as provided by law for misdemeanors; if requested by either party on appeal to the circuit court, trial by jury shall be as provided in Article 4 (§ 19.2-260 et seq.) of Chapter 15 of Title 19.2, and the Commonwealth shall be required to prove its case beyond a reasonable doubt.

If the court or jury finds the defendant *guilty of a first offense* as charged in the warrant or summons issued pursuant to § 18.2-268.3, the court shall suspend the defendant's privilege to drive for a period of one year.

B. Any person convicted of a violation of § 18.2-268.3 committed within 10 years of a prior offense of § 18.2-266, § 18.2-268.3 or any offense set forth in subsection E of § 18.2-270 arising out of separate occurrences or incidents, as charged in the warrant or summons issued pursuant to § 18.2-268.3, is guilty of a Class 2 misdemeanor and the court shall suspend the defendant's privilege to drive for a period of three years. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

C. Any person convicted of a violation of § 18.2-268.3 committed within 10 years of any combination of two or more offenses of § 18.2-266, § 18.2-268.3 or any offense set forth in subsection E of § 18.2-270 arising out of separate occurrences or incidents, as charged in the warrant or summons issued pursuant to § 18.2-268.3, is guilty of a Class 1 misdemeanor and the court shall suspend the defendant's privilege to drive for a period of three years. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

D. ~~However~~, If the defendant pleads guilty to a violation of § 18.2-266 or § 18.2-266.1 or of a similar ordinance, the court may dismiss the warrant or summons.

The court shall forward the defendant's license to the Commissioner of the Department of Motor Vehicles of Virginia as in other cases of similar nature for suspension of license. ~~However~~, If the defendant appeals his conviction, the court shall return the license to him upon his appeal being perfected; however, the defendant's license shall not be returned during any period of suspension imposed under § 46.2-391.2.