

# VIRGINIA ACTS OF ASSEMBLY -- 2004 RECONVENED SESSION

## CHAPTER 1013

*An Act to amend and reenact §§ 18.2-267, 18.2-268.2 through 18.2-268.5, 18.2-268.8, 18.2-268.9, 18.2-268.10 and 18.2-272 of the Code of Virginia, relating to driving on a suspended license after consuming alcohol.*

[S 329]

Approved April 21, 2004

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 18.2-267, 18.2-268.2 through 18.2-268.5, 18.2-268.8, 18.2-268.9, 18.2-268.10 and 18.2-272 of the Code of Virginia are amended and reenacted as follows:**

§ 18.2-267. Preliminary analysis of breath to determine alcoholic content of blood.

A. Any person who is suspected of a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272 shall be entitled, if such equipment is available, to have his breath analyzed to determine the probable alcoholic content of his blood. The person shall also be entitled, upon request, to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. His breath may be analyzed by any police officer of the Commonwealth, or of any county, city or town, or by any member of a sheriff's department in the normal discharge of his duties.

B. The Department of Criminal Justice Services, Division of Forensic Science, shall determine the proper method and equipment to be used in analyzing breath samples taken pursuant to this section and shall advise the respective police and sheriff's departments of the same.

C. Any person who has been stopped by a police officer of the Commonwealth, or of any county, city or town, or by any member of a sheriff's department and is suspected by such officer to be guilty of a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272, shall have the right to refuse to permit his breath to be so analyzed, and his failure to permit such analysis shall not be evidence in any prosecution under §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272.

D. Whenever the breath sample analysis indicates that alcohol is present in the person's blood, the officer may charge the person with a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272, or a similar ordinance of the county, city or town where the arrest is made. The person so charged shall then be subject to the provisions of §§ 18.2-268.1 through 18.2-268.12, or of a similar ordinance of a county, city or town.

E. The results of the breath analysis shall not be admitted into evidence in any prosecution under §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272, the purpose of this section being to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated the provisions of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272.

F. Police officers or members of any sheriff's department shall, upon stopping any person suspected of having violated the provisions of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272, advise the person of his rights under the provisions of this section.

G. Nothing in this section shall be construed as limiting the provisions of §§ 18.2-268.1 through 18.2-268.12.

§ 18.2-268.2. Implied consent to post-arrest chemical test to determine drug or alcohol content of blood.

A. Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway, as defined in § 46.2-100, in this 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 alcohol, drug, or both alcohol and drug content of his blood, if he is arrested for violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272 or of a similar ordinance within three hours of the alleged offense.

B. Any person so arrested for a violation of *clause (i) or (ii) of* § 18.2-266 ~~(i) or (ii)~~ or both, ~~or~~ § 18.2-266.1 *or* § 18.2-272 or of a similar ordinance shall submit to a breath test. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to administration of the test, be advised by the person administering the test that he has the right to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. If the equipment automatically produces a written printout of the breath test result, the printout, or a copy, shall be given to the accused.

C. A person, after having been arrested for a violation of *clause (iii) or (iv) of* § 18.2-266 ~~(iii) or (iv)~~ or § 18.2-266.1 *or* § 18.2-272 or of a similar ordinance, may be required to submit to a blood test to determine the drug or both drug and alcohol content of his blood. When a person, after having been arrested for a violation of § 18.2-266 (i) or (ii) or both, submits to a breath test in accordance with subsection B of this section or refuses to take or is incapable of taking such a breath test, he may be

required to submit to tests to determine the drug or both drug and alcohol content of his blood if the law-enforcement officer has reasonable cause to believe the person was driving under the influence of any drug or combination of drugs, or the combined influence of alcohol and drugs.

§ 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, *18.2-266.1* or ~~§ 18.2-266.1~~ § 18.2-272 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.

§ 18.2-268.5. Qualifications and liability of persons authorized to take blood sample; procedure for taking samples.

For purposes of this article, only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a circuit court acting upon the recommendation of a licensed physician, using soap and water, polyvinylpyrrolidone iodine or benzalkonium chloride to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining its alcohol or drug or both alcohol and drug content. It is a Class 3 misdemeanor to reuse single-use-only needles or syringes. No civil liability shall attach to any person authorized to withdraw blood as a result of the act of withdrawing blood as provided in this section from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures. However, the person shall not be relieved from liability for negligence in the withdrawing of any blood sample.

No person arrested for a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272, or a similar ordinance shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for in this section.

§ 18.2-268.8. Fees.

Payment for withdrawing blood shall not exceed \$25, which shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272 or of a similar ordinance, or is placed under the purview of a probational, educational, or rehabilitational program as set forth in § 18.2-271.1, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

If the person whose blood sample was withdrawn is subsequently convicted for violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-272 or a similar ordinance, a fee of \$25 for testing the first blood sample by the Division shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

§ 18.2-268.9. Assurance of breath-test validity; use of test results as evidence.

To be capable of being considered valid as evidence in a prosecution under §§ 18.2-266, 18.2-266.1 *or* § 18.2-272, or a similar ordinance, chemical analysis of a person's breath shall be performed by an individual possessing a valid license to conduct such tests, with a type of equipment and in accordance with methods approved by the Department of Criminal Justice Services, Division of Forensic Science. The Division shall test the accuracy of the breath-testing equipment at least once every six months.

The Division shall establish a training program for all individuals who are to administer the breath tests. Upon a person's successful completion of the training program, the Division may license him to conduct breath-test analyses. Such license shall identify the specific types of breath test equipment upon which the individual has successfully completed training.

Any individual conducting a breath test under the provisions of § 18.2-268.2 shall issue a certificate which will indicate that the test was conducted in accordance with the Division's specifications, the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate, the name of the accused, that prior to administration of the test the accused was advised of his right to observe the process and see the blood alcohol reading on the equipment used to perform the breath test, the date and time the sample was taken from the accused, the sample's alcohol content, and the name of the person who examined the sample. This certificate, when attested by the individual conducting the breath test, shall be admissible in any court in any criminal or civil

proceeding as evidence of the facts therein stated and of the results of such analysis. Any such certificate of analysis purporting to be signed by a person authorized by the Division shall be admissible in evidence without proof of seal or signature of the person whose name is signed to it. A copy of the certificate shall be promptly delivered to the accused.

The officer making the arrest, or anyone with him at the time of the arrest, or anyone participating in the arrest of the accused, if otherwise qualified to conduct such test as provided by this section, may make the breath test or analyze the results.

§ 18.2-268.10. Evidence of violation of §§ 18.2-266, 18.2-266.1 or § 18.2-272.

A. In any trial for a violation of §§ 18.2-266 or § 18.2-266.1 or § 18.2-272 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 or § 18.2-272 shall determine the innocence or guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

§ 18.2-272. Driving after forfeiture of license.

~~If any person so convicted shall, during the time for which he is deprived of his right so to do, drive or operate any motor vehicle, engine or train in this Commonwealth, he shall be guilty of a Class 1 misdemeanor.~~ A. Any person who drives or operates any motor vehicle, engine or train in the Commonwealth during the time for which he was deprived of the right to do so (i) upon conviction of a violation of § 18.2-268.3 or of an offense set forth in subsection E of § 18.2-270, (ii) by § 18.2-271 or § 46.2-391.2, (iii) after his license has been revoked pursuant to § 46.2-389 or § 46.2-391, or (iv) in violation of the terms of a restricted license issued pursuant to subsection E of § 18.2-271.1, is guilty of a Class 1 misdemeanor, except as otherwise provided in § 46.2-391, and is subject to administrative revocation of his driver's license pursuant to §§ 46.2-389 and 46.2-391.

Nothing in this section or §§ 18.2-266, 18.2-270 or § 18.2-271, shall be construed as conflicting with or repealing any ordinance or resolution of any city, town or county which restricts still further the right of such persons to drive or operate any such vehicle or conveyance.

B. *Regardless of compliance with any other restrictions on his privilege to drive or operate a motor vehicle, it shall be a violation of this section for any person whose privilege to drive or operate a motor vehicle has been restricted, suspended or revoked by application of the provisions of the Code set forth in subsection A to do so while he has a blood alcohol content of 0.02 percent or more.*

*Any person suspected of a violation of this subsection shall be entitled to a preliminary breath test in accordance with the provisions of § 18.2-267, shall be deemed to have given his implied consent to have samples of his blood, breath or both taken for analysis pursuant to the provisions of § 18.2-268.2, and, when charged with a violation of this subsection, shall be subject to the provisions of §§ 18.2-268.1 through 18.2-268.12.*