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HOUSE BILL NO. 614

Offered January 14, 2004

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A BILL to amend and reenact §§ 18.2-268.2 through 18.2-268.5, 18.2-268.8, 18.2-268.9 and 18.2-268.10 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-266.2, relating to driving motor vehicle, engine, etc., while having a Schedule I or Schedule II drug in bloodstream.

Patrons—Carrico and Albo

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-268.2 through 18.2-268.5, 18.2-268.8, 18.2-268.9 and 18.2-268.10 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 18.2-266.2 as follows:

§ 18.2-266.2. Driving motor vehicle, engine, etc., while having Schedule I or Schedule II drug in blood.

A. It shall be unlawful for any person to drive or operate any motor vehicle, engine or train while such person has in his blood any detectable amount of a Schedule I drug or its metabolites or Schedule II drug or its metabolites, not prescribed by a physician, as defined in § 54.1-3446 or § 54.1-3448.

For the purposes of this section, the term "motor vehicle" includes mopeds while operated on the public highways of this Commonwealth.

B. A violation of this section is a Class 1 misdemeanor. In addition, a violation of this section shall be punishable by forfeiture of such person's license to operate a motor vehicle, engine or train for a period of 12 months from the date of conviction. Any person convicted of a violation of this section shall be eligible to attend an alcohol safety action program under the provisions of § 18.2-271.1 and may, in the discretion of the court, be issued a restricted license during the term of license suspension.

§ 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 § 18.2-266.2 or of a similar ordinance within three hours of the alleged offense.

B. Any person so arrested for a violation of § 18.2-266 (i) or (ii) or both, or § 18.2-266.1 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 § 18.2-266 (iii) or (iv) or § 18.2-266.1 or § 18.2-266.2 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 or § 18.2-266.1 or § 18.2-266.2 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

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59 highways of this Commonwealth, refuses to permit blood or breath or both blood and breath samples to
60 be taken for such tests, the arresting officer shall take the person before a committing magistrate. If the
61 person is unable to be taken before a magistrate because the person is taken to a medical facility for
62 treatment or evaluation of his medical condition, the arresting officer at a medical facility, in the
63 presence of a witness other than a law-enforcement officer, shall again advise the person, at the medical
64 facility, of the law requiring blood or breath samples to be taken and the penalty for refusal. If he again
65 so refuses after having been further advised by the magistrate or by the arresting officer at a medical
66 facility (i) of the law requiring blood or breath samples to be taken, (ii) that a finding of unreasonable
67 refusal to consent may be admitted as evidence at a criminal trial, and (iii) the penalty for refusal, and
68 so declares again his refusal in writing upon a form provided by the Supreme Court, or refuses or fails
69 to so declare in writing and such fact is certified as prescribed below, then no blood or breath samples
70 shall be taken even though he may later request them.

71 B. The form shall contain a brief statement of the law requiring the taking of blood or breath
72 samples, that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal
73 trial, and the penalty for refusal, a declaration of refusal, and lines for the signature of the person from
74 whom the blood or breath sample is sought, the date, and the signature of a witness to the signing. If
75 the person refuses or fails to execute the declaration, the magistrate or arresting officer at a medical
76 facility shall certify such fact and that the magistrate or arresting officer at a medical facility advised the
77 person that a refusal to permit a blood or breath sample to be taken, if found to be unreasonable,
78 constitutes grounds for revocation of the person's privilege to operate a motor vehicle on the highways
79 of this Commonwealth. The magistrate shall promptly issue a warrant or summons charging the person
80 with a violation of subsection A. The warrant or summons shall be executed in the same manner as
81 criminal warrants or summonses. If the person has been taken to a medical facility for treatment or
82 evaluation of his medical condition, the arresting officer at a medical facility may issue, on the premises
83 of the medical facility, a summons for a violation of subsection A in lieu of securing a warrant.

84 C. Venue for the trial of the warrant or summons shall lie in the court of the county or city in which
85 the offense of driving under the influence of intoxicants is to be tried. The executed declaration of
86 refusal or the certificate of the magistrate or arresting officer at a medical facility, as the case may be,
87 shall be attached to the warrant or summons from the arresting officer and shall be forwarded by the
88 magistrate or by the arresting officer to the aforementioned court.

89 D. When the court receives the declaration or certificate and the warrant or summons charging
90 refusal, the court shall fix a date for the trial of the warrant or summons, at such time as the court
91 designates.

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

97 § 18.2-268.4. Appeal and trial; sanctions for refusal.

98 The procedure for appeal and trial shall be the same as provided by law for misdemeanors; if
99 requested by either party on appeal to the circuit court, trial by jury shall be as provided in Article 4
100 (§ 19.2-260 et seq.) of Chapter 15 of Title 19.2, and the Commonwealth shall be required to prove its
101 case beyond a reasonable doubt.

102 If the court or jury finds the defendant guilty as charged in the warrant or summons issued pursuant
103 to § 18.2-268.3, the court shall suspend the defendant's privilege to drive for a period of one year. This
104 suspension period is in addition to the suspension period provided under § 46.2-391.2. However, if the
105 defendant pleads guilty to a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 or § 18.2-266.2 or of a similar
106 ordinance, the court may dismiss the warrant or summons.

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

112 § 18.2-268.5. Qualifications and liability of persons authorized to take blood sample; procedure for
113 taking samples.

114 For purposes of this article, only a physician, registered professional nurse, graduate laboratory
115 technician or a technician or nurse designated by order of a circuit court acting upon the
116 recommendation of a licensed physician, using soap and water, polyvinylpyrrolidone iodine or
117 benzalkonium chloride to cleanse the part of the body from which the blood is taken and using
118 instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the
119 accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the
120 purpose of determining its alcohol or drug or both alcohol and drug content. It is a Class 3

121 misdemeanor to reuse single-use-only needles or syringes. No civil liability shall attach to any person
 122 authorized to withdraw blood as a result of the act of withdrawing blood as provided in this section
 123 from any person submitting thereto, provided the blood was withdrawn according to recognized medical
 124 procedures. However, the person shall not be relieved from liability for negligence in the withdrawing of
 125 any blood sample.

126 No person arrested for a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-266.2, or a similar
 127 ordinance shall be required to execute in favor of any person or corporation a waiver or release of
 128 liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of
 129 blood as provided for in this section.

130 § 18.2-268.8. Fees.

131 Payment for withdrawing blood shall not exceed \$25, which shall be paid out of the appropriation
 132 for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for a
 133 violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-266.2 or of a similar ordinance, or is placed under
 134 the purview of a probational, educational, or rehabilitational program as set forth in § 18.2-271.1, the
 135 amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal
 136 case and shall be paid into the general fund of the state treasury.

137 If the person whose blood sample was withdrawn is subsequently convicted for violation of §§
 138 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-266.2 or a similar ordinance, a fee of \$25 for testing the first blood
 139 sample by the Division shall be taxed as part of the costs of the criminal case and shall be paid into the
 140 general fund of the state treasury.

141 § 18.2-268.9. Assurance of breath-test validity; use of test results as evidence.

142 To be capable of being considered valid as evidence in a prosecution under §§ 18.2-266, 18.2-266.1,
 143 *or* § 18.2-266.2 or a similar ordinance, chemical analysis of a person's breath shall be performed by an
 144 individual possessing a valid license to conduct such tests, with a type of equipment and in accordance
 145 with methods approved by the Department of Criminal Justice Services, Division of Forensic Science.
 146 The Division shall test the accuracy of the breath-testing equipment at least once every six months.

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

151 Any individual conducting a breath test under the provisions of § 18.2-268.2 shall issue a certificate
 152 which will indicate that the test was conducted in accordance with the Division's specifications, the
 153 equipment on which the breath test was conducted has been tested within the past six months and has
 154 been found to be accurate, the name of the accused, that prior to administration of the test the accused
 155 was advised of his right to observe the process and see the blood alcohol reading on the equipment used
 156 to perform the breath test, the date and time the sample was taken from the accused, the sample's
 157 alcohol content, and the name of the person who examined the sample. This certificate, when attested by
 158 the individual conducting the breath test, shall be admissible in any court in any criminal or civil
 159 proceeding as evidence of the facts therein stated and of the results of such analysis. Any such
 160 certificate of analysis purporting to be signed by a person authorized by the Division shall be admissible
 161 in evidence without proof of seal or signature of the person whose name is signed to it. A copy of the
 162 certificate shall be promptly delivered to the accused.

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

166 § 18.2-268.10. Evidence of violation of § 18.2-266 or § 18.2-266.1.

167 A. In any trial for a violation of §§ 18.2-266 ~~or~~ §, 18.2-266.1 *or* § 18.2-266.2 or a similar ordinance,
 168 the admission of the blood or breath test results shall not limit the introduction of any other relevant
 169 evidence bearing upon any question at issue before the court, and the court shall, regardless of the result
 170 of any blood or breath tests, consider other relevant admissible evidence of the condition of the accused.
 171 If the test results indicate the presence of any drug other than alcohol, the test results shall be admissible
 172 only if other competent evidence has been presented to relate the presence of the drug or drugs to the
 173 impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely.

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

179 C. Evidence of a finding against the defendant under § 18.2-268.3 for his unreasonable refusal to
 180 permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood shall
 181 be admissible into evidence, upon the motion of the Commonwealth or the defendant, for the sole

182 purpose of explaining the absence at trial of a chemical test of such sample. When admitted pursuant to
183 this subsection such evidence shall not be considered evidence of the accused's guilt.
184 D. The court or jury trying the case involving a violation of clause (ii), (iii) or (iv) of § 18.2-266 or
185 § 18.2-266.1 *or* § 18.2-266.2 shall determine the innocence or guilt of the defendant from all the
186 evidence concerning his condition at the time of the alleged offense.