

VIRGINIA ACTS OF ASSEMBLY -- 2005 SESSION

CHAPTER 616

An Act to amend and reenact §§ 18.2-266, 18.2-268.2, 18.2-268.10, 18.2-269, 29.1-738, 29.1-738.2, 29.1-738.3, 46.2-341.24, 46.2-341.26:2, 46.2-341.26:10, and 46.2-341.27, of the Code of Virginia relating to driving under the influence of certain drugs; penalty.

[H 1896]

Approved March 23, 2005

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-266, 18.2-268.2, 18.2-268.10, 18.2-269, 29.1-738, 29.1-738.2, 29.1-738.3, 46.2-341.24, 46.2-341.26:2, 46.2-341.26:10, and 46.2-341.27 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc.

It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, ~~or~~ (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, *or (v) while such person has a blood concentration of any of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood.* A charge alleging a violation of this section shall support a conviction under clauses (i), (ii), (iii), ~~or~~ (iv), *or (v).*

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

§ 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, 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 or both, § 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), *or (v)* of § 18.2-266 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.

§ 18.2-268.10. 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, 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, *except in a prosecution under clause (v) of § 18.2-266*, 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.

§ 18.2-269. Presumptions from alcohol or drug content of blood.

A. In any prosecution for a violation of § 18.2-36.1 or *clause (ii), (iii) or (iv) of § 18.2-266* ~~(ii)~~, or any similar ordinance, the amount of alcohol *or drugs* in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the accused's blood or breath to determine the alcohol *or drug* content of his blood in accordance with the provisions of §§ 18.2-268.1 through 18.2-268.12 shall give rise to the following rebuttable presumptions:

(1) If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood or 0.05 grams or less per 210 liters of the accused's breath, it shall be presumed that the accused was not under the influence of alcohol intoxicants at the time of the alleged offense;

(2) If there was at that time in excess of 0.05 percent but less than 0.08 percent by weight by volume of alcohol in the accused's blood or 0.05 grams but less than 0.08 grams per 210 liters of the accused's breath, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcohol intoxicants at the time of the alleged offense, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused; ~~or~~

(3) If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused's blood or 0.08 grams or more per 210 liters of the accused's breath, it shall be presumed that the accused was under the influence of alcohol intoxicants at the time of the alleged offense; *or*

(4) *If there was at that time an amount of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood, it shall be presumed that the accused was under the influence of drugs at the time of the alleged offense to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely.*

B. The provisions of this section shall not apply to and shall not affect any prosecution for a violation of § 46.2-341.24.

§ 29.1-738. Operating boat or manipulating water skis, etc., in reckless manner or while intoxicated, etc.

A. No person shall operate any motorboat or vessel, or manipulate any skis, surfboard, or similar device, or engage in any spearfishing while skin diving or scuba diving in a reckless manner so as to endanger the life, limb, or property of any person.

B. No person shall operate any watercraft, as defined in § 29.1-712, or motorboat which is underway (i) while such person has a blood alcohol concentration at or greater than the blood alcohol concentration at which it is unlawful to drive or operate a motor vehicle as provided in § 18.2-266 as indicated by a chemical test administered in accordance with § 29.1-738.2, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to operate the watercraft or motorboat safely, ~~or~~ (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to operate the watercraft or motorboat safely, *or (v) while such person has a blood concentration of any of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood.*

C. For purposes of this article, the word "operate" shall include being in actual physical control of a watercraft or motorboat and "underway" shall mean that a vessel is not at anchor, or made fast to the shore, or aground.

Any person who violates any provision of this section shall be guilty of a Class 1 misdemeanor.

§ 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

alcohol, drug, or both alcohol and drug content of his blood, if such person is arrested for operating a watercraft or motorboat which is underway in violation of subsection B of § 29.1-738, § 29.1-738.02, or of a similar ordinance of any county, city or town, within two hours of the alleged offense. Any person so arrested for a violation of clause (i) or (ii), or both, of subsection B of § 29.1-738, § 29.1-738.02, or of a similar ordinance, shall submit to a breath test. If the breath test is not available, 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 such equipment automatically produces a written printout of the breath test result, this written printout, or a copy thereof, shall be given to the accused in each case.

B. Any person, after having been arrested for a violation of clause (iii), ~~or~~ (iv), *or* (v) of subsection B of § 29.1-738, § 29.1-738.02, 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 clause (i) or (ii), or both, of subsection B of § 29.1-738, submits to a breath test, in accordance with subsection A 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 operating a watercraft or motorboat under the influence of any drug or combination of drugs, or the combined influence of alcohol and drugs.

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

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

E. If the court or jury finds the defendant guilty of unreasonably refusing to permit a blood or breath sample to be taken, the court shall order such person not to operate a watercraft or motorboat which is underway for a period of ~~twelve~~ 12 months for a first offense and for ~~twenty-four~~ 24 months for a second or subsequent offense of refusal within five years of the first or other such refusal. However, if the defendant pleads guilty to a violation of subsection B of § 29.1-738, the court may dismiss the refusal warrant.

§ 29.1-738.3. Presumptions from alcohol or drug content.

In any prosecution for operating a watercraft or motorboat which is underway in violation of clause (ii), (iii) or (iv) of subsection B of § 29.1-738, or of a similar ordinance of any county, city or town, the amount of alcohol *or drugs* in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the accused's blood or breath to determine the ~~alcoholic~~ *alcohol* *or drug* content of his blood in accordance with the provisions of § 29.1-738.2 shall give rise to the rebuttable presumptions of subdivisions (1) through ~~(3)~~ (4) of subsection A of § 18.2-269.

§ 46.2-341.24. Driving a commercial motor vehicle while intoxicated, etc.

A. It shall be unlawful for any person to drive or operate any commercial motor vehicle (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams per 210 liters of breath as indicated by a chemical test administered as provided in this article; (ii) while such person is under the influence of alcohol; (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any commercial motor vehicle safely; ~~or~~ (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any commercial motor vehicle safely; *or* (v) *while such person has a blood concentration of any of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of*

methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood.

B. It shall be unlawful and a lesser included offense of an offense under provision (i), (ii), or (iv) of subsection A of this section for a person to drive or operate a commercial motor vehicle while such person has a blood alcohol concentration of 0.04 percent or more by weight by volume or 0.04 grams or more per 210 liters of breath as indicated by a chemical test administered in accordance with the provisions of this article.

§ 46.2-341.26:2. Implied consent to post-arrest chemical test to determine alcohol or drug content of blood of commercial driver.

A. Any person, whether licensed by Virginia or not, who operates a commercial motor vehicle upon a highway as defined in § 46.2-100 in 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 alcohol, drug or both alcohol and drug content of his blood, if he is arrested for violation of § 46.2-341.24 or § 46.2-341.31 within two hours of the alleged offense.

B. Such person shall be required to have a breath sample taken and shall 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. If the equipment automatically produces a written printout of the breath test result, the printout or a copy shall be given to the suspect. If a breath test is not available, then a blood test shall be required.

C. The person may be required to submit to blood tests to determine the drug content of his blood if he has been arrested pursuant to provision (iii), ~~or~~ (iv), *or* (v) of subsection A of § 46.2-341.24, or if he has taken the breath test required pursuant to subsection B and 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.

D. If the certificate of analysis referred to in § 46.2-341.26:9 indicates the presence of alcohol in the suspect's blood, the suspect shall be taken before a magistrate to determine whether the magistrate should issue an out-of-service order prohibiting the suspect from driving any commercial motor vehicle for a ~~twenty-four~~ 24-hour period. If the magistrate finds that there is probable cause to believe that the suspect was driving a commercial motor vehicle with any measurable amount of alcohol in his blood, the magistrate shall issue an out-of-service order prohibiting the suspect from driving any commercial motor vehicle for a period of ~~twenty-four~~ 24 hours. The magistrate shall forward a copy of the out-of-service order to the Department within seven days after issuing the order. The order shall be in addition to any other action or sanction permitted or required by law to be taken against or imposed upon the suspect.

§ 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 *except in a prosecution under clause (v) of § 46.2-341.24*, 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.

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.

§ 46.2-341.27. Presumptions from alcohol and drug content of blood.

In any prosecution for a violation of provision (ii), (iii) *or* (iv) of subsection A of § 46.2-341.24, the amount of alcohol *or drugs* in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the suspect's blood or breath to determine the ~~alcoholic alcohol or~~ *alcohol or drug* content of his blood in accordance with the provisions of §§ 46.2-341.26:1 through 46.2-341.26:11 shall give rise to the following rebuttable ~~presumption~~ *presumptions*:

A. If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused's blood or 0.08 grams or more per 210 liters of the accused's breath, it shall be presumed that the accused was under the influence of alcoholic intoxicants.

B. If there was at that time less than 0.08 percent by weight by volume of alcohol in the accused's blood or 0.08 grams or more per 210 liters of the accused's breath, such fact shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such fact may be considered with other competent evidence in determining the guilt or innocence of the accused.

C. *If there was at that time an amount of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood, it shall be presumed that the accused was under the influence of drugs to a degree which impairs his ability to drive or operate any commercial motor vehicle safely.*

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.