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SENATE BILL NO. 592

Offered January 25, 1994

A BILL to amend and reenact §§ 46.2-351.1, 46.2-352 through 46.2-358, 46.2-360 and 46.2-361 of the Code of Virginia, relating generally to the Habitual Offender Act; administrative.

Patron—Norment

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 46.2-351.1, 46.2-352 through 46.2-358, 46.2-360 and 46.2-361 of the Code of Virginia are amended and reenacted as follows:

§ 46.2-351.1. Intervention required for certain offenders; fee; penalty; notice.

A. Upon receiving notification of any alcohol-related or drug-related conviction entered on or after January 1, 1994, which will result in the offender's being subject to ~~adjudication determination~~ as an habitual offender if convicted of one additional offense, the Commissioner shall notify the person that he shall report to an alcohol safety action program within sixty days of the date of such notice for intervention. Intervention shall be in accordance with § 18.2-271.1. The program shall provide the Commissioner with information of compliance.

B. Upon receiving notification of any conviction which is not alcohol or drug related entered on or after January 1, 1994, which will result in the offender's being subject to ~~adjudication determination~~ as an habitual offender if convicted of one additional offense, the Commissioner shall notify the person that he shall attend a driver intervention interview within sixty days of the date of the notice. The interview shall be conducted by a representative of the Department, to be designated by the Commissioner. The representative shall review with the person attending the interview the habitual offender laws and explain the consequences of future offenses and may refer the person to any driver improvement program approved by the Commissioner. A fee of thirty dollars shall be paid for attendance at a driver intervention interview.

C. The Commissioner shall suspend the driving privilege of any person who fails to report for intervention within the sixty-day period. The suspension shall continue until such time as the person reports.

D. Notice to report for intervention shall be sent by the Department by certified mail, return receipt requested, to the driver at the last known address supplied by the driver and on file with the Department.

E. Failure of the offender to attend as required or failure of the Department to notify the offender upon the second qualifying offense shall not be used to prohibit ~~adjudication determination~~ as an habitual offender upon receipt of the third qualifying offense.

§ 46.2-352. Commissioner to determine when person qualifies as habitual offender; when court may refuse to satisfy the Commissioner's determination under § 46.2-355; transcript or abstract as evidence.

A. The Commissioner shall ~~certify~~*determine*, from the Department's records, ~~substantially in the manner provided for in § 46.2-215, three transcripts or abstracts of those conviction documents which bring that~~ a person named therein ~~within~~ *qualifies under* the definition of an habitual offender, as defined in § 46.2-351, ~~to the attorney for the Commonwealth of the political subdivision in which the person resides according to the records of the Department or the attorney for the Commonwealth of the City of Richmond if the person is not a resident of the Commonwealth. The Commissioner shall revoke the person's driver's license for the period of time defined in § 46.2-356. The Commissioner shall immediately notify the person of the revocation by certified mail, return receipt requested, and in the same letter shall notify the person of his right to a hearing on the revocation as provided in subsection~~

B. After ~~certification determination~~ of any person as an habitual offender, the Department shall not thereafter issue a new or duplicate driver's license to any such person until (i) a ~~show cause proceeding~~ *has been held under § 46.2-354 and a notice of dismissal reversal of the revocation* has been received by the Department from the clerk of court as ~~provided in § 46.2-355~~ or (ii) an order of license restoration has been received by the Department as otherwise provided in this article. Any license issued in contravention of this provision shall be invalid.

~~In any proceeding under § 46.2-354, the~~ B. If the person denies that he is an habitual offender, he may file, with the criminal court of the city, county, or town in which the person resides, or with the Circuit Court of the City of Richmond if the person is not a resident of the Commonwealth, a petition for a hearing and determination by the court that the person is not an habitual offender. Jurisdiction also is in the court of record to which venue may be changed. The clerk of the court in which the

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60 *petition is filed shall forward a copy of the petition to the Commissioner. The court may refuse to enter*
61 *any order as provided in § 46.2-355 if such certification the determination by the Commissioner was*
62 *made more than five years after the date of the most recent of the convictions which bring the person*
63 *within the definition of habitual offender and the person would be otherwise eligible for restoration of*
64 *his privilege under § 46.2-360. The transcript or abstract may be admitted as evidence as provided in*
65 *§ 46.2-215. The transcript or abstract as provided for in § 46.2-353 shall be prima facie evidence that*
66 *the person named therein was duly convicted, or held not innocent in the case of a juvenile, by the*
67 *court wherein the conviction or holding was made, of each offense shown by the transcript or abstract.*
68 *If the person denies any of the facts as stated therein, he shall have the burden of proving that the fact*
69 *is untrue.*

70 § 46.2-353. Commissioner to certify copy of conviction record; attorney for the Commonwealth or
71 Attorney General to represent Commissioner.

72 *Upon receipt of the copy of the petition received by the clerk of the court pursuant to § 46.2-352, the*
73 *Commissioner shall certify the transcript or abstract of any person whose record brings him within the*
74 *definition of an habitual offender, substantially in the manner provided for in § 46.2-215 to the court*
75 *and to the attorney for the Commonwealth of the city, county, or town in which the person resides or to*
76 *the Attorney General if the person is not a resident of the Commonwealth. The attorney for the*
77 *Commonwealth, on receiving the transcripts or abstracts from the Commissioner provided for in*
78 *§ 46.2-352, shall forthwith file information represent the Commissioner against the person named therein*
79 *in the court of record having jurisdiction of criminal offenses in the county, city, or town in which*
80 *Department of Motor Vehicle records indicate to be the person's latest address. Jurisdiction also is in the*
81 *court of record to which venue may be changed. In the event the person is a nonresident of the*
82 *Commonwealth, the attorney for the Commonwealth of the City of Richmond shall file information*
83 *against the accused person in the Circuit Court of the City of Richmond. The clerk of the Circuit Court*
84 *of the City of Richmond shall be allowed a fee of five dollars for each information petition filed*
85 *against by a nonresident accused designated as an habitual offender. The fee shall be paid out of the*
86 *state treasury from the appropriation for criminal charges on the certificate of the court as provided in*
87 *§ 19.2-334 and shall be taxed against the defendant person challenging the determination of the*
88 *Commissioner as a part of the costs of the proceeding, if the defendant person is found to be an habitual*
89 *offender. In the event the accused is an inmate of a state or local correctional facility, jurisdiction for*
90 *the proceedings shall be in the locality wherein the accused is confined.*

91 Venue of any case may be changed upon motion of either party.

92 § 46.2-354. Hearing by court; scope of hearing; procedure where conviction denied.

93 The court in which an information is filed as provided for in § 46.2-353, shall enter an order, which
94 incorporates the transcript or abstract provided for in § 46.2-352 and is directed to the person named
95 therein, to show cause why he should not be barred from driving a motor vehicle on the highways in
96 the Commonwealth. A copy of the show cause order and the transcript or abstract shall be served on the
97 person named therein in the manner prescribed by § 8.01-296 (1). The person may be served wherever
98 he may be found in the Commonwealth. Service thereof on any nonresident of the Commonwealth may
99 be made on the Secretary of the Commonwealth, who for this purpose shall be the statutory agent of the
100 person. Service shall be made by leaving a copy of the order and the transcript or abstract in the hands
101 of the Secretary or in his office in the City of Richmond, and this service shall be sufficient on the
102 nonresident, provided that notice of the service and a copy of the order and the transcript or abstract are
103 forthwith sent by certified or registered mail, with delivery receipt requested, by the Secretary to the
104 person at his last known address, and an affidavit of compliance herewith by the Secretary or someone
105 designated by him for that purpose and having knowledge of the compliance, shall forthwith be filed
106 with the papers. For this service, a fee of seven dollars, which shall be paid into the general fund of the
107 Commonwealth, shall be taxed against the defendant as a part of the cost of the proceeding, if he is
108 found to be an habitual offender. subsection B of § 46.2-352, shall provide a hearing for the person and
109 shall make the final determination of whether the person is not an habitual offender. The scope of the
110 hearing shall be limited to whether or not the person is the same person named in the record and
111 whether or not the person was convicted of each offense shown by the transcript or abstract.

112 If the person denies he was convicted or held not innocent of any offense necessary for a holding
113 that he is an habitual offender, and if the court cannot, on the evidence available to it, make a
114 determination, the court may certify the decision of the issue to the court in which the conviction or
115 holding of not innocent was made. The court to which the certification is made shall forthwith conduct a
116 hearing to determine the issue and send a certified copy of its final order determining the issue to the
117 court in which the information was filed.

118 § 46.2-355. (Effective January 1, 1994) Determination of court.

119 If, pursuant to the show cause proceeding hearing as provided for in § 46.2-354, the court finds that
120 the person is not the same person named in the transcript or abstract, or that he is not an habitual
121 offender under this article, the proceeding determination of the Commissioner shall be dismissed, and the

clerk of the court shall file with the Department a notice of the dismissal. If the court finds that the person is the same person named in the transcript or abstract and that the person is an habitual offender, the court shall so find and by appropriate order *affirm the determination of the Commissioner and direct the person not to operate a motor vehicle on the highways in the Commonwealth and to surrender to the court all licenses or permits to drive a motor vehicle on the highways in the Commonwealth for disposal in the manner provided in § 46.2-398. The clerk of the court shall file with the Department a copy of the order which shall become a part of the permanent records of the Department. Unless it appears from the record of the case that the person was present at the hearing in which the court found him to be an habitual offender, the clerk shall cause to be mailed to the person at his last known address appearing in the records of the case a copy of the habitual offender order. Such mailing, by first class mail, shall be deemed adequate notice of affirmation of the habitual offender order, and no other notice shall be required to make the order Commissioner's determination effective if there was appropriate service of process for the show cause proceeding as provided in § 46.2-354. The date upon which the person received the habitual offender determination letter from the Commissioner shall remain the date upon which the person's privilege to drive was revoked.*

§ 46.2-356. Period during which habitual offender not to be licensed to drive motor vehicle.

No license to drive motor vehicles in Virginia shall be issued to an habitual offender, (i) for a period of ten years from the date of the ~~order of the court~~ *notification of the Commissioner to the person*, finding the person to be an habitual offender; and (ii) until the privilege of the person to drive a motor vehicle in the Commonwealth has been restored by an order of a court of record entered in a proceeding as provided in this article.

§ 46.2-357. Operation of motor vehicle or self-propelled machinery or equipment by habitual offender prohibited; penalty; enforcement of section.

A. It shall be unlawful for any person to drive any motor vehicle or self-propelled machinery or equipment on the highways of the Commonwealth while the ~~order of the court~~ *revocation of the person's driving privilege by the Commissioner* prohibiting such operation remains in effect. However, ~~an order~~ *the Commissioner's revocation determination* shall not prohibit the person from operating any farm tractor on the highways when it is necessary to move the tractor from one tract of land used for agricultural purposes to another tract of land used for agricultural purposes, provided that the distance between the said tracts of land is no more than five miles.

B. Any person found to be an habitual offender under this article, who is thereafter convicted of driving a motor vehicle or self-propelled machinery or equipment in the Commonwealth while the ~~order~~ *determination of the Commissioner* prohibiting such driving is in effect, shall be punished as follows:

1. If such driving does not, of itself, endanger the life, limb, or property of another, such person shall be guilty of a misdemeanor punishable by confinement in jail for no more than ninety days and a fine of not more than \$2,500, either or both. However, ten days of any such confinement shall not be suspended except in cases designated in subdivision 2 (ii) of this section.

2. If such driving, of itself, does endanger the life, limb, or property of another, such person shall be guilty of a felony punishable by confinement in the state correctional facility for not less than one year nor more than five years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for twelve months and no portion of such sentence shall be suspended except that (i) if the sentence is more than one year in the state correctional facility, any portion of such sentence in excess of one year may be suspended or (ii) in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended.

3. If the offense of driving while ~~an order of adjudication~~ *a determination* as an habitual offender is in effect is a second or subsequent such offense, such person shall be punished as provided in subdivision 2 of this section, irrespective of whether the offense, of itself, endangers the life, limb, or property of another.

C. For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle or self-propelled machinery or equipment while his license, permit, or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing the charge shall determine whether the person has been ~~held~~ *classified as* an habitual offender by the Commissioner and, by reason of this ~~holding~~ *determination*, is barred from driving a motor vehicle or self-propelled machinery or equipment on the highways in the Commonwealth. If the court determines the accused has been ~~held~~ *determined* to be an habitual offender, it shall certify the case to the court of record of its jurisdiction for trial.

§ 46.2-358. Restoration of privilege of driving motor vehicle; when petition may be brought; terms and conditions.

In any case where the provisions of § 46.2-360 or § 46.2-361 do not apply, five years from the date

183 of any final order of a court entered under this article notification of the revocation determination by the
184 Commissioner finding a person to be an habitual offender and directing him not to drive a motor vehicle
185 in the Commonwealth, the person may petition the court in which he was found to be an habitual
186 offender, or any court of record in Virginia having criminal jurisdiction in the political subdivision in
187 which he then resides, local Alcohol Safety Action Program for restoration of his privilege to drive a
188 motor vehicle in the Commonwealth. On such petition, and for good cause shown, the court may local
189 Alcohol Safety Action Program may recommend to the Commissioner that he, upon a finding that such
190 person does not constitute a threat to the safety and welfare of himself or others with regard to the
191 driving of a motor vehicle, (i) restore to the person the privilege to drive a motor vehicle in the
192 Commonwealth on whatever conditions the court Commissioner may prescribe or (ii) issue an order that
193 the person be issued a restricted license to drive a motor vehicle in the Commonwealth for any of the
194 purposes set forth in and in accordance with the procedures of subsection E of § 18.2-271.1, subject to
195 other provisions of law relating to the issuance of driver's licenses.

196 § 46.2-360. Restoration of privilege of operating motor vehicle; restoration of privilege to persons
197 convicted under certain other provisions of Habitual Offender Act.

198 Any person who has been found to be an habitual offender where the adjudication determination was
199 based in part and dependent on a conviction as set out in subdivision 1 b of § 46.2-351, may petition
200 the court in which he was found to be an habitual offender, or the circuit court in the political
201 subdivision in which he then resides, local Alcohol Safety Action Program for a recommendation to the
202 Commissioner:

203 1. For restoration of his privilege to drive a motor vehicle in the Commonwealth after the expiration
204 of five years from the date of the adjudication notice of the determination by the Commissioner was
205 received by the person. On such petition, and recommendation by the local Alcohol Safety Action
206 Program and for good cause shown, the court Commissioner may, in its his discretion, restore to the
207 person the privilege to drive a motor vehicle in the Commonwealth on whatever conditions the court
208 Commissioner may prescribe, subject to other provisions of law relating to the issuance of driver's
209 licenses, if the court Commissioner is satisfied from the evidence presented that: (i) at the time of the
210 previous convictions, the petitioner was addicted to or psychologically dependent on the use of alcohol
211 or other drugs; (ii) at the time of the hearing on the petition, he is no longer addicted to or
212 psychologically dependent on the use of alcohol or such other drug; and (iii) the defendant person does
213 not constitute a threat to the safety and welfare of himself or others with regard to the driving of a
214 motor vehicle.

215 2. For a restricted permit to authorize such person to drive a motor vehicle in the Commonwealth in
216 the course of his employment and to drive a motor vehicle to and from his home to the place of his
217 employment after the expiration of three years from the date of the adjudication habitual offender
218 determination by the Commissioner. The court Commissioner may order that a restricted license for such
219 purposes be issued in accordance with the procedures of subsection E of § 18.2-271.1, if the court
220 Commissioner is satisfied from the evidence presented that (i) at the time of the previous convictions,
221 the petitioner was addicted to or psychologically dependent on the use of alcohol or other drugs, (ii) at
222 the time of the hearing on the petition, he is no longer addicted to or psychologically dependent on the
223 use of alcohol or such other drugs, and (iii) the defendant person does not constitute a threat to the
224 safety and welfare of himself and others with regard to the driving of a motor vehicle.

225 In the computation of the five- and three-year periods under subdivisions 1 and 2 of this section,
226 such person shall be given credit for any period his driver's license was administratively revoked under
227 § 46.2-391 prior to his adjudication the date on which notice of the determination as an habitual
228 offender by the Commissioner was received by the person.

229 § 46.2-361. Restoration of privilege after driving while license revoked or suspended for failure to
230 pay fines or costs or furnish proof of financial responsibility.

231 A. Any person who has been found to be an habitual offender, where the adjudication determination
232 was based in part and dependent on a conviction as set out in subdivision 1 c of § 46.2-351, may, after
233 three years from the date of the adjudication on which notice the determination by the Commissioner
234 was received by the person, petition the court in which he was found to be an habitual offender, or the
235 circuit court in the political subdivision in which he then resides, local Alcohol Safety Action Program for
236 a recommendation to the Commissioner, for restoration of his privilege to drive a motor vehicle in the
237 Commonwealth.

238 B. Any person who has been found to be an habitual offender, where the adjudication determination
239 was based entirely upon convictions as set out in subdivision 1 c of § 46.2-351, may, after payment in
240 full of all outstanding fines, costs and judgments relating to his adjudication, and furnishing proof of
241 financial responsibility, if applicable, petition the court in which he was found to be an habitual
242 offender, or the circuit court in the political subdivision in which he then resides, for restoration of local
243 Alcohol Safety Action Program for a recommendation to the Commissioner that his privilege to drive a
244 motor vehicle in the Commonwealth be restored.

245 C. This section shall apply only where the conviction resulted from a suspension or revocation
246 ordered pursuant to (i) § 46.2-395 for failure to pay fines and costs, (ii) § 46.2-459 for failure to furnish
247 proof of financial responsibility or (iii) § 46.2-417 for failure to satisfy a judgment, provided the
248 judgment has been paid in full prior to the time of filing the petition.

249 D. On any such petition, the ~~court~~ Commissioner, in ~~its~~ *his* discretion, may restore to the person his
250 privilege to drive a motor vehicle, on whatever conditions the ~~court~~ Commissioner may prescribe, if the
251 ~~court~~ Commissioner is satisfied from the evidence presented that the petitioner does not constitute a
252 threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle,
253 and that he has satisfied in full all outstanding court costs, court fines and judgments relating to ~~his~~ *any*
254 *applicable habitual offender* adjudication and furnished proof of financial responsibility, if applicable.