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## HOUSE BILL NO. 1420

Offered January 22, 1996

A *BILL to amend and reenact §§ 18.2-268.2, 18.2-268.3, 18.2-268.6 and 18.2-268.7 of the Code of Virginia, relating to driving under the influence; implied consent; refusal; transmission of blood test results.*

Patrons—Mims, Davies, Kilgore, McClure, McDonnell and Scott

Referred to Committee for Courts of Justice

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

**1. That §§ 18.2-268.2, 18.2-268.3, 18.2-268.6 and 18.2-268.7 of the Code of Virginia are amended and reenacted as follows:**

§ 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 of a similar ordinance within two hours of the alleged offense.

B. 1. *In any case where (i) a law-enforcement officer has probable cause to suspect that a motor vehicle accident which resulted in the death or serious bodily injury of any person was caused by a person's operation of a motor vehicle in violation of § 18.2-266 or § 18.2-266.1 and (ii) that person's apparent physical or mental condition renders impractical his arrest or his consent or refusal to take a chemical test, and such person has been transported to a medical facility, such person, whether licensed by Virginia or not, shall be deemed to have consented to have samples of blood taken, upon request of the law-enforcement officer, for a chemical test to determine the alcohol or drug content of his blood. The sample taken upon request of the law-enforcement officer shall be taken by persons authorized by this article and in conformance with procedures specified therein. However, in no event shall a blood sample be taken if, in the opinion of the attending physician, this procedure would be harmful to the person deemed to have consented.*

2. 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 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 *subdivision 2 of 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 § 18.2-266 or § 18.2-266.1 or of a similar ordinance and after having been advised by the arresting officer that 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, and 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 Commonwealth, 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 he~~Any person whose blood sample was taken pursuant to § 18.2-268.2 shall be advised, as soon as is practical but in no event later than the time of his arrest for a violation of § 18.2-266, of his implied consent and the penalties for unreasonable refusal to consent as provided in this subsection. If he refuses to consent to

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60 *allow the sample previously taken to be tested, the arresting officer shall take him before a committing*  
61 *magistrate.*

62 *If any person brought before the magistrate as provided herein again so refuses after having been*  
63 *further advised by the magistrate of the law requiring blood or breath samples to be taken and the*  
64 *penalty for refusal, and so declares again his refusal in writing upon a form provided by the Supreme*  
65 *Court, or refuses or fails to so declare in writing and such fact is certified as prescribed below, then no*  
66 *blood or breath samples shall be taken, or be used in any proceeding if previously taken under*  
67 *§ 18.2-268.2, even though he may later request them.*

68 B. The form shall contain a brief statement of the law requiring the taking of blood or breath  
69 samples and the penalty for refusal, a declaration of refusal, and lines for the signature of the person  
70 from whom the blood or breath sample is sought, the date, and the signature of a witness to the signing.  
71 If the person refuses or fails to execute the declaration, the magistrate shall certify such fact and that the  
72 magistrate advised the person that a refusal to permit a blood or breath sample to be taken, if found to  
73 be unreasonable, constitutes grounds for revocation of the person's privilege to operate a motor vehicle  
74 on the highways of this Commonwealth. The magistrate shall promptly issue a warrant or summons  
75 charging the person with a violation of § 18.2-268.2. The warrant or summons shall be executed in the  
76 same manner as criminal warrants.

77 C. Venue for the trial of the warrant or summons shall lie in the court of the county or city in which  
78 the offense of driving under the influence of intoxicants is to be tried. The executed declaration of  
79 refusal or the certificate of the magistrate, as the case may be, shall be attached to the warrant and shall  
80 be forwarded by the magistrate to the aforementioned court.

81 D. When the court receives the declaration or certificate and the warrant or summons charging  
82 refusal, the court shall fix a date for the trial of the warrant or summons, at such time as the court  
83 designates but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.

84 E. The declaration of refusal or certificate of the magistrate shall be prima facie evidence that the  
85 defendant refused to allow a blood or breath sample to be taken to determine the alcohol or drug  
86 content of his blood. However, this shall not prohibit the defendant from introducing on his behalf  
87 evidence of the basis for his refusal. The court shall determine the reasonableness of such refusal.

88 § 18.2-268.6. Transmission of blood samples.

89 Adequate portions of the blood samples withdrawn *by consent of the accused or upon request of the*  
90 *law-enforcement officer* pursuant to § 18.2-268.5 shall be placed in vials provided by the Division of  
91 Forensic Science. The vials shall be sealed by the person taking the sample or at his direction. The  
92 person who seals the vial shall complete the prenumbered certificate of blood withdrawal form attached  
93 to the vial by the Division. The completed withdrawal certificate for each vial shall show the name of  
94 ~~the accused person whose blood was taken~~, the name of the person taking the blood sample, the date  
95 and time the blood sample was taken and information identifying the arresting or accompanying officer.  
96 The officer shall initial the completed certificate. The vials shall be divided between two containers  
97 provided by the Division, and the containers shall be sealed to prevent tampering with the vial. The  
98 arresting or accompanying officer shall take possession of the two containers as soon as the vials are  
99 placed in such containers and sealed, and shall promptly transport or mail one of the containers to the  
100 Division. Immediately after taking possession of the second container, the officer shall give to the  
101 *accused or, if the accused is mentally or physically impaired to the extent that he would not understand,*  
102 *to a family member, his legal representative or, if there are none, his attending physician,* a form  
103 provided by the Division which sets forth the procedure to obtain an independent analysis of the blood  
104 in the second container, and a list of the names and addresses of laboratories approved by the Division.  
105 The form shall contain a space for the accused or his counsel to direct the officer possessing the second  
106 container to forward it to an approved laboratory for analysis, if desired. If the accused *or his*  
107 *representative* directs the officer in writing on the form to forward the second container to an approved  
108 laboratory of the accused's choice, the officer shall do so.

109 If the accused does not direct otherwise on the form, the officer having the second container shall  
110 deliver it to the chief police officer. The chief police officer, upon receiving the container, shall retain it  
111 for a period of seventy-two hours *following consent by the accused*, during which time the accused or  
112 his counsel may, in writing, on the form provided hereinabove, direct the chief police officer to mail the  
113 second container to the laboratory the accused has chosen from the approved list.

114 The contents of the second container shall be transmitted, tested and admitted in evidence in the  
115 same manner and in accordance with procedures established for the sample sent to the Division;  
116 however, an analysis of the second blood sample to determine the presence of a drug or drugs shall not  
117 be performed unless an analysis of the first blood sample by the Division has indicated the presence of  
118 such drug or drugs.

119 If the chief police officer having possession of the second container is not directed as herein  
120 provided to mail it within seventy-two hours after ~~receiving the container~~ *the accused consented*, he  
121 shall destroy it.

§ 18.2-268.7. Transmission of blood test results; use as evidence.

Upon receipt of a blood sample forwarded to the Division for analysis pursuant to § 18.2-268.6, the Division shall have it examined for its alcohol or drug or both alcohol and drug content and the Director shall execute a certificate of analysis indicating the name of the ~~accused~~ *person whose blood was taken*; the date, time and by whom the blood sample was received and examined; a statement that the seal on the vial had not been broken or otherwise tampered with; a statement that the container and vial were provided by the Division and that the vial was one to which the completed withdrawal certificate was attached; and a statement of the sample's alcohol or drug or both alcohol and drug content. The Director shall remove the withdrawal certificate from the vial, attach it to the certificate of analysis and state in the certificate of analysis that it was so removed and attached. The certificate of analysis with the withdrawal certificate shall be returned to the clerk of the court in which the charge will be heard. The vial and blood sample shall be destroyed after completion of the analysis. A similar certificate of analysis, with the withdrawal certificate from the independent laboratory which analyzes the second blood sample on behalf of the accused, shall be returned to the clerk of the court in which the charge will be heard. The blood sample shall be destroyed after completion of the analysis by the independent laboratory.

When a blood sample taken in accordance with the provisions of §§ 18.2-268.2 through 18.2-268.6 is forwarded for analysis to the Division, a report of the test results shall be filed in that office. Upon proper identification of the certificate of withdrawal, the certificate of analysis, with the withdrawal certificate attached, shall, when attested by the Director, 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. *However, the results of an analysis of a sample taken pursuant to § 18.2-268.2 shall not be used to establish probable cause to arrest the person whose blood was taken, for any offense.* On motion of the accused, the certificate prepared for the second sample shall be admissible in evidence when attested by the pathologist or by the supervisor of the approved laboratory.

Upon request of the person whose blood was analyzed, the test results shall be made available to him, *except that the results of an analysis of a sample taken pursuant to § 18.2-268.2 shall not be made available to anyone until the Division receives written notice that the person whose blood was taken has been arrested for a violation of § 18.2-268.*

The Director may delegate or assign these duties to an employee of the Division of Forensic Science.