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SENATE BILL NO. 384

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 2, 2004)

(Patron Prior to Substitute—Senator Norment)

(Patrons Prior to Substitute—Senators Norment, Rerras [SB 443] and Mims [SBs 488, 489 and 491])

*A BILL to amend and reenact §§ 18.2-270, 18.2-271, 19.2-294.1, 46.2-391 and 46.2-391.2 of the Code of Virginia, relating to punishment on charge of third DUI; joint prosecution of DUI and reckless driving; consecutive sentences and administrative license suspension.***Be it enacted by the General Assembly of Virginia:****1. That §§ 18.2-270, 18.2-271, 19.2-294.1, 46.2-391 and 46.2-391.2 of the Code of Virginia are amended and reenacted as follows:**

§ 18.2-270. Penalty for driving while intoxicated; subsequent offense; prior conviction.

A. Except as otherwise provided herein, any person violating any provision of § 18.2-266 shall be guilty of a Class 1 misdemeanor. If the person's blood alcohol level as indicated by the chemical test administered as provided in this article was at least ~~0.20~~ 0.15, but not more than ~~0.25~~ 0.20, he shall be confined in jail for an additional mandatory, minimum period of five days or, if the level was more than ~~0.25~~ 0.20, for an additional mandatory, minimum period of 10 days. The additional mandatory, minimum period of confinement shall not be suspended by the court. In addition, such person shall be fined a mandatory, minimum fine of \$250, which shall not be suspended by the court.

B. 1. Any person convicted of a second offense committed within less than five years after a first offense under § 18.2-266 shall upon conviction of the second offense be punished by a mandatory, minimum fine of \$500, which shall not be suspended by the court, and by confinement in jail for not less than one month nor more than one year. Five days of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court.

2. Any person convicted of a second offense committed within a period of five to ~~ten~~ 10 years of a first offense under § 18.2-266 shall upon conviction of the second offense be punished by a mandatory, minimum fine of \$500, which shall not be suspended by the court, and by confinement in jail for not less than one month.

3. Upon conviction of a second offense within 10 years of a first offense, if the person's blood alcohol level as indicated by the chemical test administered as provided in this article was at least ~~0.20~~ 0.15, but not more than ~~0.25~~ 0.20, he shall be confined in jail for an additional ~~minimum~~, mandatory *minimum* period of 10 days or, if the level was more than ~~0.25~~ 0.20, for an additional mandatory, minimum period of 20 days. The additional mandatory, minimum period of confinement shall not be suspended by the court. In addition, such person shall be fined a mandatory, minimum fine of \$500, which shall not be suspended by the court.

C. Any person convicted of three or more offenses of § 18.2-266 ~~committed within a 10-year period~~ shall ~~upon conviction of the third offense~~ be guilty of a Class 6 felony, and the sentence shall include a mandatory, minimum sentence of confinement for ~~40~~ 30 days that shall not be subject to suspension by the court. In addition, such person shall be fined a mandatory, minimum fine of \$1,000, which shall not be suspended by the court. ~~Any~~ *The sentence of any person convicted of a third offense under § 18.2-266 committed within a five years of an offense under § 18.2-266 shall upon conviction of the third offense be guilty of a Class 6 felony, and the sentence -year period shall include a mandatory, minimum sentence of confinement for 30 days of 60 days that shall not be subject to suspension by the court. In addition, such person shall be fined a mandatory, minimum fine of \$1,000, which shall not be suspended by the court. The punishment of any person convicted of a fourth or subsequent offense under § 18.2-266 committed within a 10-year period shall, upon conviction, include a mandatory, minimum term of imprisonment of one year, none of which may be suspended in whole or in part. In addition, such person shall be fined a mandatory, minimum fine of \$1,000, which shall not be suspended by the court. Unless otherwise modified by the court, the defendant shall remain on probation and under the terms of any suspended sentence for the same period as his operator's license was suspended, not to exceed three years.*

D. In addition to the penalty otherwise authorized by this section or § 16.1-278.9, any person convicted of a violation of § 18.2-266 committed while transporting a person 17 years of age or younger shall be (i) fined an additional minimum of \$500 and not more than \$1000 and (ii) sentenced to a mandatory, minimum period of confinement of five days.

E. For the purpose of this section, an adult conviction of any person, or finding of guilty in the case of a juvenile, under the following shall be considered a ~~prior~~ conviction *under § 18.2-266*: (i) the provisions of § 18.2-36.1 or the substantially similar laws of any other state or of the United States, (ii)

60 the provisions of §§ 18.2-51.4, 18.2-266, former § 18.1-54 (formerly § 18-75), the ordinance of any
61 county, city or town in this Commonwealth or the laws of any other state or of the United States
62 substantially similar to the provisions of §§ 18.2-51.4, and or § 18.2-266 through 18.2-269, or (iii) the
63 provisions of subsection A of § 46.2-341.24 or the substantially similar laws of any other state or of the
64 United States.

65 § 18.2-271. Forfeiture of driver's license for driving while intoxicated.

66 A. Except as provided in § 18.2-271.1, the judgment of conviction if for a first offense under
67 § 18.2-266 or for a similar offense under any county, city, or town ordinance, or for a first offense
68 under subsection A of § 46.2-341.24, shall of itself operate to deprive the person so convicted of the
69 privilege to drive or operate any motor vehicle, engine or train in the Commonwealth for a period of
70 one year from the date of such judgment. This suspension period shall be in addition to the suspension
71 period provided under § 46.2-391.2.

72 B. If a person (i) is tried on a process alleging a second offense of violating § 18.2-266 or subsection
73 A of § 46.2-341.24, or any substantially similar local ordinance, or law of any other jurisdiction, within
74 ten years of a first offense for which the person was convicted, or found guilty in the case of a juvenile,
75 under § 18.2-266 or subsection A of § 46.2-341.24 or any valid local ordinance or any law of any other
76 jurisdiction substantially similar to § 18.2-266 or subsection A of § 46.2-341.24 and (ii) is convicted
77 thereof, such conviction shall of itself operate to deprive the person so convicted of the privilege to
78 drive or operate any motor vehicle, engine or train in the Commonwealth for a period of three years
79 from the date of the judgment of conviction and such person shall have his license revoked as provided
80 in subsection A of § 46.2-391. The court trying such case shall order the surrender of the person's
81 driver's license, to be disposed of in accordance with § 46.2-398, and shall notify such person that his
82 license has been revoked for a period of three years and that the penalty for violating that revocation is
83 as set out in § 46.2-391. This suspension period shall be in addition to the suspension period provided
84 under § 46.2-391.2. Any period of license suspension or revocation imposed pursuant to this section, in
85 any case, shall run consecutively with any period of suspension for failure to permit a blood or breath
86 sample to be taken as required by §§ 18.2-268.1 through 18.2-268.12 or §§ 46.2-341.26:1 through
87 46.2-341.26:11.

88 C. If a person (i) is tried on a process alleging a third or subsequent offense of violating § 18.2-266
89 or subsection A of § 46.2-341.24, or any substantially similar local ordinance, or law of any other
90 jurisdiction, within ten years of two other offenses for which the person was convicted, or found not
91 innocent in the case of a juvenile, under § 18.2-266 or subsection A of § 46.2-341.24 or any valid local
92 ordinance or any law of any other jurisdiction substantially similar to § 18.2-266 or subsection A of
93 § 46.2-341.24 and (ii) is convicted thereof, such conviction shall of itself operate to deprive the person
94 so convicted of the privilege to drive or operate any motor vehicle, engine or train in the
95 Commonwealth and such person shall not be eligible for participation in a program pursuant to
96 § 18.2-271.1 and shall, upon such conviction, have his license revoked as provided in subsection B of
97 § 46.2-391. The court trying such case shall order the surrender of the person's driver's license, to be
98 disposed of in accordance with § 46.2-398, and shall notify such person that his license has been
99 revoked indefinitely and that the penalty for violating that revocation is as set out in § 46.2-391.

100 D. Notwithstanding any other provision of this section, the period of license revocation or suspension
101 shall not begin to expire until the person convicted has surrendered his license to the court or to the
102 Department of Motor Vehicles.

103 E. The provisions of this section shall not apply to, and shall have no effect upon, any
104 disqualification from operating a commercial motor vehicle imposed under the provisions of the
105 Commercial Driver's License Act (§ 46.2-341.1 et seq.).

106 § 19.2-294.1. Dismissal of charge of reckless driving upon conviction of charge of driving while
107 intoxicated.

108 Whenever any person is charged with a violation of § 18.2-51.4 or § 18.2-266 or any similar
109 ordinances of any county, city, or town and reckless driving growing is also charged with reckless
110 driving, in violation of any provision of Article 7 (§ 46.2-852 et seq.) of Chapter 8 of Title 46.2, or any
111 similar ordinance of any county, city or town, with both charges arising out of the same act or acts and
112 is convicted of one of these charges, tried simultaneously on both charges, the court shall dismiss the
113 remaining reckless driving charge if the defendant is found guilty of the charge of driving under the
114 influence.

115 § 46.2-391. Revocation of license for multiple convictions of driving while intoxicated; exception;
116 petition for restoration of privilege.

117 A. The Commissioner shall forthwith revoke and not thereafter reissue for three years the driver's
118 license of any person on receiving a record of the conviction of any person who (i) is adjudged to be a
119 second offender in violation of the provisions of subsection A of § 46.2-341.24 (driving a commercial
120 motor vehicle under the influence of drugs or intoxicants), or § 18.2-266 (driving under the influence of
121 drugs or intoxicants), if the subsequent violation occurred within ten 10 years from the prior violation, or

(ii) is convicted of any two or more offenses of § 18.2-272 (driving while the driver's license has been forfeited for a conviction under § 18.2-266) if the second or subsequent violation occurred within ~~ten~~ 10 years of the prior offense. However, if the Commissioner has received a copy of a court order authorizing issuance of a restricted license as provided in subsection E of § 18.2-271.1, he shall proceed as provided in the order of the court. For the purposes of this subsection, an offense in violation of a valid local ordinance, or law of any other jurisdiction, which ordinance or law is substantially similar to any provision of Virginia law herein shall be considered an offense in violation of such provision of Virginia law. Additionally, in no event shall the Commissioner reinstate the driver's license of any person convicted of a violation of § 18.2-266, or of a substantially similar valid local ordinance or law of another jurisdiction, until receipt of notification that such person has successfully completed an alcohol safety action program if such person was required by court order to do so unless the requirement for completion of the program has been waived by the court for good cause shown.

B. The Commissioner shall forthwith revoke and not thereafter reissue the driver's license of any person after receiving a record of the conviction of any person (i) convicted of a violation of § 18.2-36.1 or § 18.2-51.4 or (ii) adjudged to be a third *or subsequent* offender ~~within a period of ten years~~ in violation of the provisions of subsection A of § 46.2-341.24 or § 18.2-266, or a substantially similar ordinance or law of any other jurisdiction.

C. Any person who has had his driver's license revoked in accordance with subsection B of this section may petition the circuit court of his residence, or, if a nonresident of Virginia, any circuit court:

1. For restoration of his privilege to drive a motor vehicle in the Commonwealth after the expiration of five years from the date of his last conviction. On such petition, and for good cause shown, the court may, in its discretion, restore to the person the privilege to drive a motor vehicle in the Commonwealth on condition that such person install an ignition interlock system in accordance with § 18.2-270.1 on all motor vehicles, as defined in § 46.2-100, owned by or registered to him, in whole or in part, for a period of at least six months, and upon whatever other conditions the court may prescribe, subject to the provisions of law relating to issuance of driver's licenses, if the court is satisfied from the evidence presented that: (i) at the time of his previous convictions, the petitioner was addicted to or psychologically dependent on the use of alcohol or other drugs; (ii) at the time of the hearing on the petition, he is no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and (iii) the defendant does not constitute a threat to the safety and welfare of himself or others with regard to the driving of a motor vehicle. However, prior to acting on the petition, the court shall order that an evaluation of the person, to include an assessment of his degree of alcohol abuse and the appropriate treatment therefor, if any, be conducted by a Virginia Alcohol Safety Action Program and recommendations therefrom be submitted to the court. The court may, in lieu of restoring the person's privilege to drive, authorize the issuance of a restricted license for a period not to exceed five years in accordance with the provisions of § 18.2-270.1 and subsection E of § 18.2-271.1. The court shall notify the Virginia Alcohol Safety Action Program which shall during the term of the restricted license monitor the person's compliance with the terms of the restrictions imposed by the court. Any violation of the restrictions shall be reported to the court, and the court may then modify the restrictions or revoke the license.

2. For a restricted license to authorize such person to drive a motor vehicle in the Commonwealth in the course of his employment and to drive a motor vehicle to and from his home to the place of his employment after the expiration of three years from the date of his last conviction. The court may order that a restricted license for such purposes be issued in accordance with the procedures of subsection E of § 18.2-271.1, if the court is satisfied from the evidence presented that (i) at the time of the previous convictions, the petitioner was addicted to or psychologically dependent on the use of alcohol or other drugs; (ii) at the time of the hearing on the petition, he is no longer addicted to or psychologically dependent on the use of alcohol or such other drugs; and (iii) the defendant does not constitute a threat to the safety and welfare of himself and others with regard to the driving of a motor vehicle. The court shall prohibit the person to whom a restricted license is issued from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system during all or any part of the term for which the restricted license is issued, in accordance with the provisions set forth in § 18.2-270.1. However, prior to acting on the petition, the court shall order that an evaluation of the person, to include an assessment of his degree of alcohol abuse and the appropriate treatment therefor, if any, be conducted by a Virginia Alcohol Safety Action Program and recommendations therefrom be submitted to the court. The Virginia Alcohol Safety Action Program shall during the term of the restricted license monitor the person's compliance with the terms of the restrictions imposed by the court. Any violation of the restrictions shall be reported to the court, and the court may then modify the restrictions or revoke the license.

The ignition interlock system installation requirement under subdivisions 1 and 2 of this subsection need only be satisfied once as to any single revocation under subsection B of this section for any person

183 seeking restoration under subdivision 1 following the granting of a restricted license under subdivision 1
184 or 2.

185 D. Any person convicted of driving a motor vehicle or any self-propelled machinery or equipment (i)
186 while his license is revoked pursuant to subsection A or B or (ii) in violation of the terms of a restricted
187 license issued pursuant to subsection C shall, provided such revocation was based on at least one
188 conviction for an offense committed after July 1, 1999, be punished as follows:

189 1. If such driving does not of itself endanger the life, limb, or property of another, such person shall
190 be guilty of a Class 1 misdemeanor punishable by a minimum, mandatory term of confinement in jail
191 for no less than ~~ten~~ 10 days which shall not be suspended except in cases designated in subdivision 2 b
192 (ii) of this subsection.

193 2. a. If such driving (i) of itself endangers the life, limb, or property of another or (ii) takes place
194 while such person is in violation of §§ 18.2-36.1, 18.2-51.4, 18.2-266, subsection A of § 46.2-341.24, or
195 a substantially similar law or ordinance of another jurisdiction, irrespective of whether the driving of
196 itself endangers the life, limb or property of another and the person has been previously convicted of a
197 violation of §§ 18.2-36.1, 18.2-51.4, 18.2-266, subsection A of § 46.2-341.24, or a substantially similar
198 local ordinance, or law of another jurisdiction, such person shall be guilty of a felony punishable by
199 confinement in a state correctional facility for not less than one year nor more than five years or, in the
200 discretion of the jury or the court trying the case without a jury, by confinement in jail for ~~twelve~~ 12
201 months and no portion of such sentence shall be suspended *or run concurrently with any other sentence.*

202 b. However, (i) if the sentence is more than one year in a state correctional facility, any portion of
203 such sentence in excess of one year may be suspended or (ii) in cases wherein such operation is
204 necessitated in situations of apparent extreme emergency ~~which~~ *that* require such operation to save life
205 or limb, said sentence, or any part thereof may be suspended.

206 3. If any such offense of driving is a second or subsequent violation, such person shall be punished
207 as provided in subdivision 2 of this subsection, irrespective of whether the offense, of itself, endangers
208 the life, limb, or property of another.

209 E. Notwithstanding the provisions of subdivisions 2 and 3 of subsection D, following conviction and
210 prior to imposition of sentence with the consent of the defendant, the court may order the defendant to
211 be evaluated for and to participate in the Boot Camp Incarceration Program pursuant to § 19.2-316.1, or
212 the Detention Center Incarceration Program pursuant to § 19.2-316.2, or the Diversion Center
213 Incarceration Program pursuant to § 19.2-316.3.

214 F. Any period of driver's license revocation imposed pursuant to this section shall not begin to expire
215 until the person convicted has surrendered his license to the court or to the Department of Motor
216 Vehicles.

217 G. Nothing in this section shall prohibit a person from operating any farm tractor on the highways
218 when it is necessary to move the tractor from one tract of land used for agricultural purposes to another
219 such tract of land when the distance between the tracts is no more than five miles.

220 H. Any person who operates a motor vehicle or any self-propelled machinery or equipment (i) while
221 his license is revoked pursuant to subsection A or B, or (ii) in violation of the terms of a restricted
222 license issued pursuant to subsection C, where the provisions of subsection D do not apply, shall be
223 guilty of a violation of § 18.2-272.

224 § 46.2-391.2. Administrative suspension of license or privilege to operate a motor vehicle.

225 A. If a breath test is taken pursuant to § 18.2-268.2 or any similar ordinance of any county, city or
226 town and (i) the results show a blood alcohol content of 0.08 percent or more by weight by volume or
227 0.08 grams or more per 210 liters of breath, or (ii) the results, for persons under 21 years of age, show
228 a blood alcohol concentration of 0.02 percent or more by weight by volume or 0.02 grams or more per
229 210 liters of breath or (iii) the person refuses to submit to the breath test in violation of § 18.2-268.3 or
230 any similar local ordinance, and upon issuance of a petition or summons, or upon issuance of a warrant
231 by the magistrate, for a violation of §§ 18.2-51.4, 18.2-266, or § 18.2-266.1, or any substantially similar
232 local ordinance, or upon the issuance of a warrant or summons by the magistrate or by the arresting
233 officer at a medical facility for a violation of § 18.2-268.3, or any similar local ordinance, the person's
234 license shall be suspended immediately for seven days *or in the case of a person who has previously*
235 *been convicted of a violation of §§ 18.2-36.1, 18.2-51.4, 18.2-266, 46.2-341.24 or any similar local*
236 *ordinance, until all appeals are exhausted* or in the case of (i) an unlicensed person, (ii) a person whose
237 license is otherwise suspended or revoked, or (iii) a person whose driver's license is from a jurisdiction
238 other than the Commonwealth, such person's privilege to operate a motor vehicle in the Commonwealth
239 shall be suspended immediately ~~for seven days until all appeals are exhausted.~~

240 A law-enforcement officer, acting on behalf of the Commonwealth, shall serve a notice of suspension
241 personally on the arrested person. When notice is served, the arresting officer shall promptly take
242 possession of any driver's license held by the person and issued by the Commonwealth and shall
243 promptly deliver it to the magistrate. Any driver's license taken into possession under this section shall
244 be forwarded promptly by the magistrate to the clerk of the general district court or, as appropriate, the

court with jurisdiction over juveniles of the jurisdiction in which the arrest was made together with any petition, summons or warrant, the results of the breath test, if any, and the report required by subsection B. A copy of the notice of suspension shall be forwarded forthwith to both (a) the general district court or, as appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was made and (b) the Commissioner. Transmission of this information may be made by electronic means.

The clerk shall promptly return the suspended license to the person at the expiration of the seven-day suspension. Whenever a suspended license is to be returned under this section or § 46.2-391.4, the person may elect to have the license returned in person at the clerk's office or by mail to the address on the person's license or to such other address as he may request.

B. Promptly after arrest and service of the notice of suspension, the arresting officer shall forward to the magistrate a sworn report of the arrest that shall include (i) information which adequately identifies the person arrested and (ii) a statement setting forth the arresting officer's grounds for belief that the person violated §§ 18.2-51.4, 18.2-266, or § 18.2-266.1, or a similar local ordinance or refused to submit to a breath test in violation of § 18.2-268.3 or a similar local ordinance. The report required by this subsection shall be submitted on forms supplied by the Supreme Court.

C. Any person whose license or privilege to operate a motor vehicle has been suspended under subsection A may, during the period of the suspension, request the general district court or, as appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was made to review that suspension. The court shall review the suspension within the same time period as the court hears an appeal from an order denying bail or fixing terms of bail or terms of recognizance, giving this matter precedence over all other matters on its docket. If the person proves to the court by a preponderance of the evidence that the arresting officer did not have probable cause for the arrest, that the magistrate did not have probable cause to issue the warrant, or that there was not probable cause for issuance of the petition, the court shall rescind the suspension, and the clerk of the court shall forthwith (i) return the suspended license, if any, to the person unless the license has been otherwise suspended or revoked, (ii) deliver to the person a notice that the suspension under § 46.2-391.2 has been rescinded, and (iii) forward to the Commissioner a copy of the notice that the suspension under § 46.2-391.2 has been rescinded. Otherwise, the court shall affirm the suspension. If the person requesting the review fails to appear without just cause, his right to review shall be waived.

The court's findings are without prejudice to the person contesting the suspension or to any other potential party as to any proceedings, civil or criminal, and shall not be evidence in any proceedings, civil or criminal.

D. If a person whose license or privilege to operate a motor vehicle is suspended under subsection A is convicted under §§ 18.2-51.4, 18.2-266, or § 18.2-266.1, or any similar local ordinance during the seven-day suspension imposed by subsection A, and if the court decides to issue the person a restricted permit under subsection E of § 18.2-271.1, such restricted permit shall not be issued to the person before the expiration of the seven-day suspension imposed under subsection A.

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 is \$__ for periods of imprisonment in state adult correctional facilities and is \$__ for periods of commitment to the custody of the Department of Juvenile Justice.