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HOUSE BILL NO. 2794

Offered January 18, 2019

A BILL to amend and reenact §§ 18.2-268.3 and 46.2-391.2 of the Code of Virginia, relating to refusal of tests; restricted license.

Patrons—Lindsey, Kory and Plum; Senator: Boysko

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-268.3 and 46.2-391.2 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-268.3. Refusal of tests; penalties; procedures.

A. It is unlawful for a person who is arrested for a violation of § 18.2-266 or 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance to unreasonably refuse to have samples of his breath taken for chemical tests to determine the alcohol content of his blood as required by § 18.2-268.2, and any person who so unreasonably refuses is guilty of a violation of this subsection, which is punishable as follows:

1. A first violation is a civil offense. For a first offense, the court shall suspend the defendant's privilege to drive for a period of one year. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

2. If a person is found to have violated this subsection and within 10 years prior to the date of the refusal he was found guilty of any of the following: a violation of this section, a violation of § 18.2-266, or a violation of any offense listed in subsection E of § 18.2-270 arising out of separate occurrences or incidents, he is guilty of a Class 1 misdemeanor. A conviction under this subdivision shall of itself operate to deprive the person of the privilege to drive for a period of three years from the date of the judgment of conviction. This revocation period is in addition to the suspension period provided under § 46.2-391.2.

B. It is unlawful for a person who is arrested for a violation of § 18.2-266 or 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance to unreasonably refuse to have samples of his blood taken for chemical tests to determine the alcohol or drug content of his blood as required by § 18.2-268.2 and any person who so unreasonably refuses is guilty of a violation of this subsection, which is a civil offense and is punishable as follows:

1. For a first offense, the court shall suspend the defendant's privilege to drive for a period of one year. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

2. If a person is found to have violated this subsection and within 10 years prior to the date of the refusal he was found guilty of any of the following: a violation of this section, a violation of § 18.2-266, or a violation of any offense listed in subsection E of § 18.2-270 arising out of separate occurrences or incidents, such violation shall of itself operate to deprive the person of the privilege to drive for a period of three years from the date of the judgment. This revocation period is in addition to the suspension period provided under § 46.2-391.2.

C. When a person is arrested for a violation of § 18.2-51.4, 18.2-266, or 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance and such person refuses to permit blood or breath or both blood and breath samples to be taken for testing as required by § 18.2-268.2, the arresting officer shall advise the person, from a form provided by the Office of the Executive Secretary of the Supreme Court (i) that a person who operates a motor vehicle upon a highway in the 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) that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial, (iii) that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of the Commonwealth, (iv) of the civil penalties for unreasonable refusal to have blood or breath or both blood and breath samples taken, and (v) of the criminal penalty for unreasonable refusal to have breath samples taken within 10 years of a prior conviction for driving while intoxicated or unreasonable refusal, which is a Class 1 misdemeanor. The form from which the arresting officer shall advise the person arrested shall contain a brief statement of the law requiring the taking of blood or breath samples, a statement that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial, and the penalties for refusal. The Office of the Executive Secretary of the Supreme Court shall make the form available on the Internet and the form shall be considered an official publication of the Commonwealth for the purposes of § 8.01-388.

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59 D. The arresting officer shall, under oath before the magistrate, execute the form and certify (i) that
60 the defendant has refused to permit blood or breath or both blood and breath samples to be taken for
61 testing; (ii) that the officer has read the portion of the form described in subsection C to the arrested
62 person; (iii) that the arrested person, after having had the portion of the form described in subsection C
63 read to him, has refused to permit such sample or samples to be taken; and (iv) how many, if any,
64 violations of this section, § 18.2-266, or any offense described in subsection E of § 18.2-270 the arrested
65 person has been convicted of within the last 10 years. Such sworn certification shall constitute probable
66 cause for the magistrate to issue a warrant or summons charging the person with unreasonable refusal.
67 The magistrate shall attach the executed and sworn advisement form to the warrant or summons. The
68 warrant or summons for a first offense under subsection A or any offense under subsection B shall be
69 executed in the same manner as a criminal warrant or summons. If the person arrested has been taken to
70 a medical facility for treatment or evaluation of his medical condition, the arresting officer may read the
71 advisement form to the person at the medical facility, and issue, on the premises of the medical facility,
72 a summons for a violation of this section in lieu of securing a warrant or summons from the magistrate.
73 The magistrate or arresting officer, as the case may be, shall forward the executed advisement form and
74 warrant or summons to the appropriate court.

75 E. A defendant who is found guilty of a first offense and whose license is suspended pursuant to
76 subsection B 1 may petition the court 30 days after the date of conviction for a restricted license and
77 the court may, for good cause shown, provide that the defendant is issued a restricted license during the
78 remaining period of suspension, or any portion thereof, for any of the purposes set forth in subsection E
79 of § 18.2-271.1. If the court grants such petition and issues the defendant a restricted license, the court
80 shall order (i) that restoration of the defendant's license to drive be conditioned upon the installation of
81 an ignition interlock system on each motor vehicle, as defined in § 46.2-100, owned by or registered to
82 the person, in whole or in part, for a period of time not to exceed the period of license suspension and
83 restriction and (ii) that, as a condition of probation or otherwise, the defendant enter into and
84 successfully complete an alcohol safety action program in the judicial district in which such charge is
85 brought or in any other judicial district upon such terms and conditions as the court may set forth.
86 However, upon motion of a person convicted of any such offense following an assessment of the person
87 conducted by an alcohol safety action program, the court, for good cause, may decline to order
88 participation in such a program if the assessment conducted by the alcohol safety action program
89 indicates that intervention is not appropriate for such person. In no event shall such persons be
90 permitted to enter any such program that is not certified as meeting minimum standards and criteria
91 established by the Commission on the Virginia Alcohol Safety Action Program (VASAP) pursuant to this
92 section and to § 18.2-271.2. The court shall require the person entering such program under the
93 provisions of this section to pay a fee of no less than \$250 but no more than \$300. A reasonable
94 portion of such fee, as may be determined by the Commission on VASAP, but not to exceed 10 percent,
95 shall be forwarded monthly to be deposited with the State Treasurer for expenditure by the Commission
96 on VASAP, and the balance shall be held in a separate fund for local administration of driver alcohol
97 rehabilitation programs. Upon a positive finding that the defendant is indigent, the court may reduce or
98 waive the fee. In addition to the costs of the proceeding, fees as may reasonably be required of
99 defendants referred for intervention under any such program may be charged. Notwithstanding the
100 provisions of § 46.2-411, the fee charged pursuant to § 46.2-411 for reinstatement of the driver's license
101 of any person whose privilege or license has been suspended or revoked pursuant to this section shall
102 be \$105. Forty dollars of such reinstatement fee shall be retained by the Department of Motor Vehicles
103 as provided in § 46.2-411, \$40 shall be transferred to the Commission on VASAP, and \$25 shall be
104 transferred to the Commonwealth Neurotrauma Initiative Trust Fund. The provisions of subsections E
105 and F of § 18.2-271.1 shall apply to this subsection *mutatis mutandis*, except as herein provided.

106 **§ 46.2-391.2. Administrative suspension of license or privilege to operate a motor vehicle.**

107 A. If a breath test is taken pursuant to § 18.2-268.2 or any similar ordinance or § 46.2-341.26:2 and
108 (i) the results show a blood alcohol content of 0.08 percent or more by weight by volume or 0.08 grams
109 or more per 210 liters of breath, or (ii) the results, for persons under 21 years of age, show a blood
110 alcohol concentration of 0.02 percent or more by weight by volume or 0.02 grams or more per 210
111 liters of breath or (iii) the person refuses to submit to the breath or blood test in violation of
112 § 18.2-268.3 or any similar ordinance or § 46.2-341.26:3, and upon issuance of a petition or summons,
113 or upon issuance of a warrant by the magistrate, for a violation of § 18.2-51.4, 18.2-266, or 18.2-266.1,
114 or any similar ordinance, or § 46.2-341.24 or upon the issuance of a warrant or summons by the
115 magistrate or by the arresting officer at a medical facility for a violation of § 18.2-268.3, or any similar
116 ordinance, or § 46.2-341.26:3, the person's license shall be suspended immediately or in the case of (a)
117 an unlicensed person, (b) a person whose license is otherwise suspended or revoked, or (c) a person
118 whose driver's license is from a jurisdiction other than the Commonwealth, such person's privilege to
119 operate a motor vehicle in the Commonwealth shall be suspended immediately. The period of
120 suspension of the person's license or privilege to drive shall be seven days, unless the petition, summons

121 or warrant issued charges the person with a second or subsequent offense. If the person is charged with
122 a second offense the suspension shall be for 60 days. If not already expired, the period of suspension
123 shall expire on the day and time of trial of the offense charged on the petition, summons or warrant,
124 except that it shall not so expire during the first seven days of the suspension. If the person is charged
125 with a third or subsequent offense, the suspension shall be until the day and time of trial of the offense
126 charged on the petition, summons or warrant.

127 A law-enforcement officer, acting on behalf of the Commonwealth, shall serve a notice of suspension
128 personally on the arrested person. When notice is served, the arresting officer shall promptly take
129 possession of any driver's license held by the person and issued by the Commonwealth and shall
130 promptly deliver it to the magistrate. Any driver's license taken into possession under this section shall
131 be forwarded promptly by the magistrate to the clerk of the general district court or, as appropriate, the
132 court with jurisdiction over juveniles of the jurisdiction in which the arrest was made together with any
133 petition, summons or warrant, the results of the breath test, if any, and the report required by subsection
134 B. A copy of the notice of suspension shall be forwarded forthwith to both (1) the general district court
135 or, as appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was
136 made and (2) the Commissioner. Transmission of this information may be made by electronic means.

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

141 B. Promptly after arrest and service of the notice of suspension, the arresting officer shall forward to
142 the magistrate a sworn report of the arrest that shall include (i) information which adequately identifies
143 the person arrested and (ii) a statement setting forth the arresting officer's grounds for belief that the
144 person violated § 18.2-51.4, 18.2-266, or 18.2-266.1, or a similar ordinance, or § 46.2-341.24 or refused
145 to submit to a breath or blood test in violation of § 18.2-268.3 or a similar ordinance or §
146 46.2-341.26:3. The report required by this subsection shall be submitted on forms supplied by the
147 Supreme Court.

148 C. Any person whose license or privilege to operate a motor vehicle has been suspended under
149 subsection A may, during the period of the suspension, request the general district court or, as
150 appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was made to
151 review that suspension. The court shall review the suspension within the same time period as the court
152 hears an appeal from an order denying bail or fixing terms of bail or terms of recognizance, giving this
153 matter precedence over all other matters on its docket. If the person proves to the court by a
154 preponderance of the evidence that the arresting officer did not have probable cause for the arrest, that
155 the magistrate did not have probable cause to issue the warrant, or that there was not probable cause for
156 issuance of the petition, the court shall rescind the suspension, or that portion of it that exceeds seven
157 days if there was not probable cause to charge a second offense or 60 days if there was not probable
158 cause to charge a third or subsequent offense, and the clerk of the court shall forthwith, or at the
159 expiration of the reduced suspension time, (i) return the suspended license, if any, to the person unless
160 the license has been otherwise suspended or revoked, (ii) deliver to the person a notice that the
161 suspension under § 46.2-391.2 has been rescinded or reduced, and (iii) forward to the Commissioner a
162 copy of the notice that the suspension under § 46.2-391.2 has been rescinded or reduced. Otherwise, the
163 court shall affirm the suspension. If the person requesting the review fails to appear without just cause,
164 his right to review shall be waived.

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

168 D. If a person whose license or privilege to operate a motor vehicle is suspended under subsection A
169 is convicted under § 18.2-36.1, 18.2-51.4, 18.2-266, ~~or~~ 18.2-266.1, *or subsection B 1 of § 18.2-268.3* or
170 any similar ordinance, or § 46.2-341.24 during the suspension imposed by subsection A, and if the court
171 decides to issue the person a restricted permit under subsection E of § 18.2-271.1 *or subsection E of*
172 *§ 18.2-268.3*, such restricted permit shall not be issued to the person before the expiration of the first
173 seven days of the suspension imposed under subsection A.