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HOUSE BILL NO. 2384

Offered January 16, 2023

A *BILL to amend and reenact §§ 4.1-1302, 18.2-266, 18.2-267, 18.2-269, 29.1-738, 29.1-738.1, 46.2-341.24, 46.2-341.25, and 46.2-341.27 of the Code of Virginia, relating to marijuana; search and seizure; driving or operating a motor vehicle, etc., while intoxicated; marijuana presumption; saliva drug screening.*

Patron—Adams, L.R.

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 4.1-1302, 18.2-266, 18.2-267, 18.2-269, 29.1-738, 29.1-738.1, 46.2-341.24, 46.2-341.25, and 46.2-341.27 of the Code of Virginia are amended and reenacted as follows:

§ 4.1-1302. Search without warrant; odor of marijuana.

A. No law-enforcement officer, as defined in § 9.1-101, may lawfully stop, search, or seize any person, place, or thing and no search warrant may be issued solely on the basis of the odor of marijuana and no evidence discovered or obtained pursuant to a violation of this subsection, including evidence discovered or obtained with the person's consent, shall be admissible in any trial, hearing, or other proceeding.

B. The provisions of subsection A shall not apply in any airport as defined in § 5.1-1 or if the violation occurs in a commercial motor vehicle as defined in § 46.2-341.4.

C. *The provisions of subsection A shall not apply to any suspected violation of § 4.1-1110, 5.1-13, 18.2-36.1, 18.2-36.2, 18.2-51.4, 18.2-51.5, or 18.2-266, subsection B of § 29.1-738, or § 46.2-341.24.*

§ 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, (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, *or (e) 0.003 milligrams of delta-9-tetrahydrocannabinol per liter of blood.* A charge alleging a violation of this section shall support a conviction under ~~clauses~~ *clause* (i), (ii), (iii), (iv), or (v).

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

§ 18.2-267. Preliminary analysis of breath to determine alcoholic content of blood; preliminary analysis of saliva to screen for the presence of drugs in the saliva.

A. Any person who is suspected of a violation of *clause (i), (ii), or (iv) of § 18.2-266, § 18.2-266.1, subsection B of § 18.2-272, or a similar ordinance* shall be entitled, if such equipment is available, to have his breath analyzed to determine the probable alcoholic content of his blood. The person shall also 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. His breath may be analyzed by any police officer of the Commonwealth, or of any county, city, or town, or by any member of a sheriff's department in the normal discharge of his duties.

Al. Any person who is suspected of a violation of clause (iii), (iv), or (v) of § 18.2-266 or a similar ordinance shall be entitled, if such equipment is available, to have his saliva analyzed to screen for the presence of drugs in the saliva. The person shall also be entitled, upon request, to observe the process of analysis and to see the results of the analysis on the equipment used to perform the saliva analysis. His saliva may be analyzed by any police officer of the Commonwealth, or of any county, city, or town, or by any member of a sheriff's department in the normal discharge of his duties.

B. The Department of Forensic Science shall determine the proper method and equipment to be used in analyzing breath *or saliva* samples taken pursuant to this section and shall advise the respective police and sheriff's departments of the same.

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59 C. Any person who has been stopped by a police officer of the Commonwealth, or of any county,
60 city or town, or by any member of a sheriff's department and is suspected by such officer to be guilty
61 of an offense listed in subsection A *or* A1, shall have the right to refuse to permit his breath *and* saliva
62 to be so analyzed, and his failure to permit such analysis shall not be evidence in any prosecution for an
63 offense listed in subsection A *or* A1.

64 D. Whenever the breath sample analysis indicates that alcohol is present in the person's blood *or the*
65 *saliva sample analysis indicates that drugs are present in the person's saliva*, the officer may charge the
66 person with a violation of an offense listed in subsection A *or* A1. The person so charged shall then be
67 subject to the provisions of §§ 18.2-268.1 through 18.2-268.12, or of a similar ordinance. *Nothing in this*
68 *section shall prohibit a law-enforcement officer from making a lawful arrest if the officer has probable*
69 *cause for such arrest based on other competent evidence.*

70 E. The results of the breath *or* saliva analysis shall not be admitted into evidence in any prosecution
71 for an offense listed in subsection A *or* A1, the purpose of this section being to permit a preliminary
72 analysis of the alcoholic content of the blood *or of the presence of drugs in the saliva* of a person
73 suspected of having committed an offense listed in subsection A *or* A1.

74 F. Police officers or members of any sheriff's department shall, upon stopping any person suspected
75 of having committed an offense listed in subsection A *or* A1, advise the person of his rights under the
76 provisions of this section.

77 G. Nothing in this section shall be construed as limiting the provisions of §§ 18.2-268.1 through
78 18.2-268.12.

79 **§ 18.2-269. Presumptions from alcohol or drug content of blood.**

80 A. In any prosecution for a violation of § 18.2-36.1 or clause (ii), (iii), or (iv) of § 18.2-266 or any
81 similar ordinance, the amount of alcohol or drugs in the blood of the accused at the time of the alleged
82 offense as indicated by a chemical analysis of a sample of the accused's blood or breath to determine
83 the alcohol or drug content of his blood (i) in accordance with the provisions of §§ 18.2-268.1 through
84 18.2-268.12 or (ii) performed by the Department of Forensic Science in accordance with the provisions
85 of §§ 18.2-268.5, 18.2-268.6, and 18.2-268.7 on the suspect's whole blood drawn pursuant to a search
86 warrant shall give rise to the following rebuttable presumptions:

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

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

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

98 4. If there was at that time an amount of the following substances at a level that is equal to or
99 greater than: (i) 0.02 milligrams of cocaine per liter of blood, (ii) 0.1 milligrams of methamphetamine
100 per liter of blood, (iii) 0.01 milligrams of phencyclidine per liter of blood, ~~or~~ (iv) 0.1 milligrams of
101 3,4-methylenedioxymethamphetamine per liter of blood, *or* (v) 0.003 milligrams of
102 *delta-9-tetrahydrocannabinol per liter of blood*, it shall be presumed that the accused was under the
103 influence of drugs at the time of the alleged offense to a degree which impairs his ability to drive or
104 operate any motor vehicle, engine or train safely.

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

107 **§ 29.1-738. Operating boat or manipulating water skis, etc., in reckless manner or while**
108 **intoxicated, etc.**

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

112 B. No person shall operate any watercraft, as defined in § 29.1-733.2, or motorboat which is
113 underway (i) while such person has a blood alcohol concentration at or greater than the blood alcohol
114 concentration at which it is unlawful to drive or operate a motor vehicle as provided in § 18.2-266 as
115 indicated by a chemical test administered in accordance with § 29.1-738.2, (ii) while such person is
116 under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any
117 other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a
118 degree which impairs his ability to operate the watercraft or motorboat safely, (iv) while such person is
119 under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to
120 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, *or (e) 0.003 milligrams of delta-9-tetrahydrocannabinol per liter of blood.*

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

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

§ 29.1-738.1. Analysis of breath to determine alcohol content of blood; analysis of saliva to screen for the presence of drugs in the saliva.

Any person who is suspected of a violation of *clause (i), (ii), or (iv) of subsection B of § 29.1-738 or § 29.1-738.02* shall be entitled, if such equipment is available, to have a preliminary breath analysis for the purpose of obtaining an analysis of the probable alcohol content of his blood. *Any person who is suspected of a violation of clause (iii), (iv), or (v) of subsection B of § 29.1-738 shall also be entitled, if such equipment is available, to have his saliva analyzed for the purpose of screening for the presence of drugs in the saliva.* The procedures and requirements of § 18.2-267 shall apply, mutatis mutandis.

§ 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; (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, *or (e) 0.003 milligrams of delta-9-tetrahydrocannabinol 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.

§ 46.2-341.25. Preliminary analysis of breath of commercial drivers to determine alcohol content of blood; preliminary analysis of saliva of commercial drivers to screen for the presence of drugs in the saliva.

A. Any person who is reasonably suspected of a violation of *clause (i), (ii), or (iv) of subsection A of § 46.2-341.24* or of having any alcohol in his blood while driving or operating a commercial motor vehicle may be required by any law-enforcement officer to provide a sample of such person's breath for a preliminary screening to determine the probable alcohol content of his blood. Such person 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. Such breath may be analyzed by any police officer of the Commonwealth, or of any county, city, or town, or by any member of a sheriff's department in the normal discharge of his duties.

A1. Any person who is reasonably suspected of a violation of clause (iii), (iv), or (v) of subsection A of § 46.2-341.24 or of having any drugs in his saliva while driving or operating a commercial motor vehicle may be required by any law-enforcement officer to provide a sample of such person's saliva to be screened for the presence of drugs in the saliva. Such person shall be entitled, upon request, to observe the process of analysis and to see the results of the analysis on the equipment used to perform the saliva analysis. Such saliva may be analyzed by any police officer of the Commonwealth, or of any county, city, or town, or by any member of a sheriff's department in the normal discharge of his duties.

B. The Department of Forensic Science shall determine the proper method and equipment to be used in analyzing breath or saliva samples taken pursuant to this section and shall advise the respective police and sheriff's departments of the same.

C. If the breath sample analysis indicates that there is alcohol present in the person's blood *or if the saliva sample analysis indicates that there are drugs present in the person's saliva*, or if the person refuses to provide a sample of his breath or saliva for a preliminary screening, such person shall then be subject to the provisions of §§ 46.2-341.26:1 through 46.2-341.26:11. *Nothing in this section shall prohibit a law-enforcement officer from making a lawful arrest if the officer has probable cause for*

182 *such arrest based on other competent evidence.*

183 D. The results of a breath analysis conducted pursuant to this section shall not be admitted into
184 evidence in any prosecution under § 46.2-341.24 or 46.2-341.31, but may be used as a basis for
185 charging a person for a violation of the provisions of § 46.2-341.24 or 46.2-341.31. *The results of a*
186 *saliva analysis conducted pursuant to this section shall not be admitted into evidence in any prosecution*
187 *under § 46.2-341.24, but may be used as a basis for charging a person for a violation of the provisions*
188 *of § 46.2-341.24.*

189 E. The law-enforcement officer requiring the preliminary screening test shall advise the person of his
190 obligations under this section and of the provisions of subsection C of this section.

191 **§ 46.2-341.27. Presumptions from alcohol and drug content of blood.**

192 In any prosecution for a violation of clause (ii), (iii), or (iv) of subsection A of § 46.2-341.24, the
193 amount of alcohol or drugs in the blood of the accused at the time of the alleged offense as indicated by
194 a chemical analysis of a sample of the suspect's blood or breath to determine the alcohol or drug content
195 of his blood (i) in accordance with the provisions of §§ 46.2-341.26:1 through 46.2-341.26:11 or (ii)
196 performed by the Department of Forensic Science in accordance with the provisions of §§ 46.2-341.26:5,
197 46.2-341.26:6, and 46.2-341.26:7 on the suspect's whole blood drawn pursuant to a search warrant shall
198 give rise to the following rebuttable presumptions:

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

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

206 C. If there was at that time an amount of the following substances at a level that is equal to or
207 greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine
208 per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, ~~or~~ (d) 0.1 milligrams of
209 3,4-methylenedioxymethamphetamine per liter of blood, *or (e) 0.003 milligrams of*
210 *delta-9-tetrahydrocannabinol per liter of blood*, it shall be presumed that the accused was under the
211 influence of drugs to a degree which impairs his ability to drive or operate any commercial motor
212 vehicle safely.

213 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
214 **commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the**
215 **necessary appropriation cannot be determined for periods of imprisonment in state adult**
216 **correctional facilities; therefore, Chapter 2 of the Acts of Assembly of 2022, Special Session I,**
217 **requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of**
218 **\$50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary**
219 **appropriation cannot be determined for periods of commitment to the custody of the Department**
220 **of Juvenile Justice.**