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H.237

Introduced by Representatives Potter of Clarendon, Bissonnette of Winooski,
Brennan of Colchester, Browning of Arlington, LaLonde of
South Burlington, O’Sullivan of Burlington, and Viens of
Newport City

Referred to Committee on

Date:

Subject: Driving under the influence; saliva testing

Statement of purpose of bill as introduced: This bill proposes to allow law
enforcement to use saliva testing on operators of motor vehicles reasonably
suspected to be drug-impaired.

An act relating to saliva testing

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 23 V.S.A. § 1200 is amended to read:

§ 1200. DEFINITIONS

As used in this subchapter:

* * *

(3) “Evidentiary test” means a breath, saliva, or blood test ~~which that~~
indicates the person’s alcohol concentration or the presence of other drug and
~~which that~~ is intended to be introduced as evidence.

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Sec. 2. 23 V.S.A. § 1201 is amended to read:

§ 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF
INTOXICATING LIQUOR OR OTHER SUBSTANCE; CRIMINAL
REFUSAL; ENHANCED PENALTY FOR BAC OF 0.16 OR MORE

(a) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway:

(1) when the person's alcohol concentration is:

(A) 0.08 or more; or

(B) 0.02 or more if the person is operating a school bus as defined in subdivision 4(34) of this title; or

(C) 0.04 or more if the person is operating a commercial motor vehicle as defined in subdivision 4103(4) of this title; or

(D) 0.05 or more and the person has any detectable amount of delta-9 tetrahydrocannabinol in the person's blood; or

(2) when the person is under the influence of intoxicating liquor; or

(3) when the person is under the influence of any other drug or under the combined influence of alcohol and any other drug; ~~or~~

~~(4) when the person's alcohol concentration is 0.04 or more if the person is operating a commercial motor vehicle as defined in subdivision 4103(4) of this title.~~

1 (b) A person who has previously been convicted of a violation of this
2 section shall not operate, attempt to operate, or be in actual physical control of
3 any vehicle on a highway and refuse a law enforcement officer's reasonable
4 request under the circumstances for an evidentiary test ~~where~~ if the officer had
5 reasonable grounds to believe the person was in violation of subsection (a) of
6 this section.

7 (c) A person shall not operate, attempt to operate, or be in actual physical
8 control of any vehicle on a highway and be involved in an accident or collision
9 resulting in serious bodily injury or death to another and refuse a law
10 enforcement officer's reasonable request under the circumstances for an
11 evidentiary test ~~where~~ if the officer has reasonable grounds to believe the
12 person has any amount of alcohol or drugs in the system.

13 * * *

14 Sec. 3. 23 V.S.A. § 1202 is amended to read:

15 § 1202. CONSENT TO TAKING OF TESTS TO DETERMINE BLOOD

16 ALCOHOL CONTENT OR DRUG IMPAIRMENT

17 (a)~~(1)~~ Implied consent.

18 (1) Breath test. Every person who operates, attempts to operate, or is in
19 actual physical control of any vehicle on a highway in this State is deemed to
20 have given consent to an evidentiary test of that person's breath for the purpose
21 of determining the person's alcohol concentration or the presence of other drug

1 in the blood. The test shall be administered at the direction of a law
2 enforcement officer.

3 (2)(A) Blood test. If A person is deemed to have given consent to the
4 taking of an evidentiary sample of blood if:

5 (i) breath testing equipment is not reasonably available; or ~~if~~

6 (ii) the law enforcement officer has ~~reason~~ reasonable grounds to
7 believe that the person;

8 (I) is unable to give a sufficient sample of breath for testing; or
9 ~~if the law enforcement officer has reasonable grounds to believe that the~~
10 ~~person~~

11 (II) is under the influence of a drug other than alcohol; or

12 (III) ~~the person is deemed to have given consent to the taking~~
13 ~~of an evidentiary sample of blood~~ is under the influence of alcohol and a drug.

14 (B) If in the officer's opinion the person is incapable of decision or
15 unconscious or dead, it is deemed that the person's consent is given and a
16 sample of blood shall be taken.

17 (3) Saliva test. If the law enforcement officer has reasonable grounds to
18 believe that the person is under the influence of a drug other than alcohol, the
19 person is deemed to have given consent to the taking of an evidentiary sample
20 of saliva. Any saliva test administered under this section shall be used only for

1 the limited purpose of detecting the presence of a drug in the person's body,
2 and shall not be used to extract DNA information.

3 (4) Evidentiary test. The evidentiary test shall be required of a person
4 when a law enforcement officer has reasonable grounds to believe that the
5 person was operating, attempting to operate, or in actual physical control of a
6 vehicle in violation of section 1201 of this title.

7 ~~(4)~~(5) Fatal collision or incident resulting in serious bodily injury. The
8 evidentiary test shall also be required if the person is the surviving operator of
9 a motor vehicle involved in a fatal incident or collision or an incident or
10 collision resulting in serious bodily injury, and the law enforcement officer has
11 reasonable grounds to believe that the person has any amount of alcohol or
12 other drug in his or her system.

13 * * *

14 Sec. 4. 23 V.S.A. § 1203 is amended to read:

15 § 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND

16 VIDEOTAPE

17 (a) A breath test shall be administered only by a person who has been
18 certified by the Vermont Criminal Justice Training Council to operate the
19 breath testing equipment being employed. In any proceeding under this
20 subchapter, a person's testimony that he or she is certified to operate the breath
21 testing equipment employed shall be prima facie evidence of that fact.

1 (b) Only a physician, licensed nurse, medical technician, physician
2 assistant, medical technologist, or laboratory assistant acting at the request of a
3 law enforcement officer may withdraw blood for the purpose of determining
4 the presence of alcohol or other drug. This limitation does not apply to the
5 taking of a breath or saliva sample.

6 (c) When a breath test which is intended to be introduced in evidence is
7 taken with a crimper device, or when blood is withdrawn at an officer's
8 request, a sufficient amount of breath, or blood, as the case may be, shall be
9 taken to enable the person to have made an independent analysis of the sample,
10 and shall be held for at least 45 days from the date the sample was taken. At
11 any time during that period, the person may direct that the sample be sent to an
12 independent laboratory of the person's choosing for an independent analysis.
13 The Department of Public Safety shall adopt rules providing for the security of
14 the sample. At no time shall the defendant or any agent of the defendant have
15 access to the sample. A preserved sample of breath shall not be required when
16 an infrared breath-testing instrument is used. A person tested with an infrared
17 breath-testing instrument shall have the option of having a second infrared test
18 administered immediately after receiving the results of the first test.

19 (d) In the case of a breath test administered using an infrared ~~breath-testing~~
20 breath-testing instrument, the test shall be analyzed in compliance with rules
21 adopted by the Department of Public Safety. The analyses shall be retained by

1 the State. A sample is adequate if the infrared ~~breath testing~~ breath-testing
2 instrument analyzes the sample and does not indicate the sample is deficient.
3 ~~Analysis~~ An analysis of the person's breath, saliva, or blood which is available
4 to that person for independent analysis shall be considered valid when
5 performed according to methods approved by the Department of Public Safety.
6 The analysis performed by the State shall be considered valid when performed
7 according to a method or methods selected by the Department of Public Safety.
8 The Department of Public Safety shall use ~~rule-making~~ rulemaking procedures
9 to select its method or methods. Failure of a person to provide an adequate
10 breath or saliva sample constitutes a refusal.

11 (e) [Repealed.]

12 (f) When a law enforcement officer has reason to believe that a person may
13 be violating or has violated section 1201 of this title, the officer may request
14 the person to provide a sample of breath or saliva for a preliminary screening
15 test using a device approved by the Commissioner of Public Safety for this
16 purpose. The person shall not have the right to consult an attorney prior to
17 submitting to this preliminary ~~breath alcohol~~ screening ~~test~~. The results of this
18 preliminary screening ~~test~~ may be used for the purpose of deciding whether an
19 arrest should be made and whether to request an evidentiary test and shall not
20 be used in any court proceeding except on those issues. Following the

1 screening ~~test~~, additional tests may be required of the operator pursuant to the
2 provisions of section 1202 of this title.

3 (g) The Office of the Chief Medical Examiner shall report in writing to the
4 Department of Motor Vehicles the death of any person as the result of an
5 accident involving a vehicle and the circumstances of such accident within five
6 days of such death.

7 (h) A Vermont law enforcement officer shall have a right to request a
8 breath, saliva, or blood sample in an adjoining state or country under this
9 section unless prohibited by the law of the other state or country. If the law in
10 an adjoining state or country does not prohibit an officer acting under this
11 section from taking a breath, saliva, or blood sample in its jurisdiction,
12 evidence of such sample shall not be excluded in the courts of this State solely
13 on the basis that the test was taken outside the State.

14 (i) The Commissioner of Public Safety shall adopt emergency rules relating
15 to the operation, maintenance, and use of preliminary drug or alcohol screening
16 devices for use by law enforcement officers in enforcing the provisions of this
17 title. The ~~commissioner~~ Commissioner shall consider relevant standards of the
18 National Highway Traffic Safety Administration in adopting such rules. Any
19 preliminary alcohol screening device authorized for use under this title shall be
20 on the qualified products list of the National Highway Traffic Safety
21 Administration.

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Sec. 5. 23 V.S.A. § 1203a is amended to read:

§ 1203a. INDEPENDENT CHEMICAL TEST; BLOOD TESTS

(a) A person tested has the right at the person's own expense to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of the law enforcement officer under section 1203 of this title. The failure or inability to obtain an additional test or tests by a person shall not preclude the admission in evidence of the test taken at the direction of an enforcement officer unless the additional test was prevented or denied by the enforcement officer.

(b) Arrangements for a blood test shall be made by the person submitting to the evidentiary breath or saliva test, by the person's attorney, or by some other person acting on the person's behalf unless the person is detained in custody after administration of the evidentiary test and upon completion of processing, in which case the law enforcement officer having custody of the person shall make arrangements for administration of the blood test upon demand but at the person's own expense.

* * *

1 Sec. 6. 23 V.S.A. § 1204 is amended to read:

2 § 1204. PERMISSIVE INFERENCES

3 (a) Upon the trial of any civil or criminal action or proceeding arising out
4 of acts alleged to have been committed by a person while operating, attempting
5 to operate, or in actual physical control of a vehicle on a highway, the person's
6 alcohol concentration or alcohol concentration and evidence of delta-9
7 tetrahydrocannabinol shall give rise to the following permissive inferences:

8 (1) If the person's alcohol concentration at that time was less than 0.08,
9 such fact shall not give rise to any presumption or permissive inference that the
10 person was or was not under the influence of intoxicating liquor, but such fact
11 may be considered with other competent evidence in determining whether the
12 person was under the influence of intoxicating liquor.

13 (2) If the person's alcohol concentration at that time was 0.08 or more, it
14 shall be a permissive inference that the person was under the influence of
15 intoxicating liquor in violation of subdivision 1201(a)(2) or (3) of this title.

16 (3) If the person's alcohol concentration at that time was 0.05 or more
17 and the person had any detectable amount of delta-9 tetrahydrocannabinol in
18 the person's blood, it shall be a permissive inference that the person was under
19 the combined influence of alcohol and any other drug in violation of
20 subdivision 1201(a)(3) of this title.

1 (4) If the person's alcohol concentration at any time within two hours of
2 the alleged offense was 0.10 or more, it shall be a permissive inference that the
3 person was under the influence of intoxicating liquor in violation of
4 subdivision 1201(a)(2) or (3) of this title.

5 (b) The foregoing provisions shall not be construed as limiting the
6 introduction of any other competent evidence bearing upon the question
7 whether the person was under the influence of intoxicating liquor, nor shall
8 they be construed as requiring that evidence of the amount of alcohol in the
9 person's blood, breath, urine, or saliva must be presented.

10 Sec. 7. EFFECTIVE DATE

11 This act shall take effect on July 1, 2017.