

1 H.459

2 Introduced by Representatives Potter of Clarendon, Bancroft of Westford,
3 Brennan of Colchester, Browning of Arlington, Canfield of Fair
4 Haven, Forguites of Springfield, Helm of Fair Haven, LaLonde
5 of South Burlington, Quimby of Concord, and Savage of
6 Swanton

7 Referred to Committee on

8 Date:

9 Subject: Driving under the influence; saliva testing

10 Statement of purpose of bill as introduced: This bill proposes to allow law
11 enforcement to administer preliminary and evidentiary saliva testing on
12 operators of motor vehicles to determine drug-impairment.

13 An act relating to saliva testing

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

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

16 § 1200. DEFINITIONS

17 As used in this subchapter:

18 * * *

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

2 § 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF

3 ALCOHOL OR OTHER SUBSTANCE; CRIMINAL REFUSAL;

4 ENHANCED PENALTY FOR BAC OF 0.16 OR MORE

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

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

8 (A) 0.08 or more; or

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

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

13 (2) when the person is under the influence of alcohol; or

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

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

19 (b) A person who has previously been convicted of a violation of this
20 section shall not operate, attempt to operate, or be in actual physical control of
21 any vehicle on a highway and refuse a law enforcement officer's reasonable

1 request under the circumstances for an evidentiary test where the officer had
2 reasonable grounds to believe the person was in violation of subsection (a) of
3 this section.

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

10 * * *

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

12 § 1202. CONSENT TO TAKING OF TESTS TO DETERMINE BLOOD
13 ALCOHOL CONTENT OR PRESENCE OF OTHER DRUG

14 (a)(1) Implied consent. Every person who operates, attempts to operate, or
15 is in actual physical control of any vehicle on a highway in this State is deemed
16 to have ~~given consent~~ consented to an evidentiary test of that person's breath
17 and to an evidentiary test of that person's saliva, and to comply with all
18 nontestimonial aspects of a drug recognition expert examination for the
19 purpose of determining if the person is impaired by alcohol or any other drug
20 and the person's alcohol concentration or the presence of other drug in the

1 ~~blood~~ person's body. ~~The test~~ These tests shall be administered at the direction
2 of a law enforcement officer.

3 (2) Blood test. If breath testing equipment is not reasonably available or
4 if the officer has reason to believe that the person is unable to give a sufficient
5 sample of breath or saliva for testing or if the law enforcement officer has
6 reasonable grounds to believe that the person is under the influence of a drug
7 other than alcohol, the person is deemed to have given consent to the taking of
8 an evidentiary sample of blood. If in the officer's opinion the person is
9 incapable of decision or unconscious or dead, it is deemed that the person's
10 consent is given and a sample of blood shall be taken. A blood test sought
11 pursuant to this subdivision (2) shall be obtained pursuant to subsection (f) of
12 this section.

13 (3) Saliva test. If the law enforcement officer has reasonable grounds to
14 believe that the person is under the influence of a drug other than alcohol, or
15 under the combined influence of alcohol and a drug, the person is deemed to
16 have given consent to the taking of an evidentiary sample of saliva. Any saliva
17 test administered under this section shall be used only for the limited purpose
18 of detecting the presence of a drug in the person's body, and shall not be used
19 to extract DNA information.

20 (4) Evidentiary test. The evidentiary test shall be required of a person
21 when a law enforcement officer has reasonable grounds to believe that the

1 person was operating, attempting to operate, or in actual physical control of a
2 vehicle in violation of section 1201 of this title.

3 ~~(4)~~(5) Fatal collision or incident resulting in serious bodily injury. The
4 evidentiary test shall also be required if the person is the surviving operator of
5 a motor vehicle involved in a fatal incident or collision or an incident or
6 collision resulting in serious bodily injury and the law enforcement officer has
7 reasonable grounds to believe that the person has any amount of alcohol or
8 other drug in his or her system.

9 (b) A refusal to take a breath or saliva test or to comply with all
10 nontestimonial aspects of a drug recognition expert examination may be
11 introduced as evidence in a criminal proceeding.

12 * * *

13 (f) If a blood test is sought from a person pursuant to subdivision (a)(2) of
14 this section, or if a person who has been involved in an accident or collision
15 resulting in serious bodily injury or death to another refuses an evidentiary test,
16 a law enforcement officer may apply for a search warrant pursuant to Rule 41
17 of the Vermont Rules of Criminal Procedure to obtain a sample of blood for an
18 evidentiary test. If a blood sample is obtained by search warrant, the fact of
19 the refusal may still be introduced in evidence, in addition to the results of the
20 evidentiary test. Once a law enforcement official begins the application
21 process for a search warrant, the law enforcement official is not obligated to

1 discontinue the process even if the person later agrees to provide an
2 evidentiary ~~breath~~ sample. The limitation created by Rule 41(g) of the
3 Vermont Rules of Criminal Procedure regarding blood specimens shall not
4 apply to search warrants authorized by this section.

5 (g) The Defender General shall provide statewide 24-hour coverage seven
6 days a week to assure that adequate legal services are available to persons
7 entitled to consult an attorney under this section.

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

9 § 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND

10 VIDEOTAPE

11 (a) A breath test shall be administered only by a person who has been
12 certified by the Vermont Criminal Justice Training Council to operate the
13 breath testing equipment being employed. In any proceeding under this
14 subchapter, a person's testimony that he or she is certified to operate the breath
15 testing equipment employed shall be prima facie evidence of that fact. A
16 saliva test may be administered only by a person who has been trained to
17 collect a sample of saliva through a training approved by the Vermont
18 Criminal Justice Training Council. In any proceeding under this subchapter, a
19 person's testimony that he or she is trained to collect a sample of saliva shall
20 be prima facie evidence of that fact.

1 (b) Only a physician, licensed nurse, medical technician, physician
2 assistant, medical technologist, ~~or~~ laboratory assistant, intermediate or
3 advanced emergency medical technician, or paramedic acting at the request of
4 a law enforcement officer may withdraw blood for the purpose of determining
5 the presence of alcohol or other drug. This limitation does not apply to the
6 taking of a breath or saliva sample. A medical facility or business may not
7 charge more than \$75.00 for services rendered when an individual is brought to
8 a facility for the sole purpose of an evidentiary blood sample or when an
9 emergency medical technician or paramedic draws an evidentiary blood
10 sample.

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

1 with an infrared breath-testing instrument shall have the option of having a
2 second infrared test administered immediately after receiving the results of the
3 first test.

4 (d) In the case of a breath, saliva, or blood test ~~administered using an~~
5 ~~infrared breath testing instrument~~, the test shall be analyzed in compliance with
6 rules adopted by the Department of Public Safety. The analyses shall be
7 retained by the State. A sample is adequate if the infrared ~~breath testing~~
8 breath-testing instrument analyzes the sample and does not indicate the sample
9 is deficient. ~~Analysis~~ An analysis of the person's ~~breath~~ saliva or blood ~~which~~
10 that is available to that person for independent analysis shall be considered
11 valid when performed according to methods approved by the Department of
12 Public Safety. The analysis performed by the State shall be considered valid
13 when performed according to a method or methods selected by the Department
14 of Public Safety. The Department of Public Safety shall use ~~rule-making~~
15 rulemaking procedures to select its method or methods. Failure of a person to
16 provide an adequate breath or saliva sample constitutes a refusal.

17 (e) [Repealed.]

18 (f) When a law enforcement officer has reason to believe that a person may
19 be violating or has violated section 1201 of this title, the officer may request
20 the person to provide a sample of breath or saliva for a preliminary screening
21 test using a device approved by the Commissioner of Public Safety for this

1 purpose. The person shall not have the right to consult an attorney prior to
2 submitting to this preliminary ~~breath alcohol~~ screening test. The results of this
3 preliminary screening or a refusal to submit to a preliminary screening test
4 may be used for the purpose of deciding whether an arrest should be made and
5 whether to request an evidentiary test and shall not be used in any court
6 proceeding except on those issues. Following the screening, ~~test~~ additional
7 tests may be required of the operator pursuant to the provisions of section 1202
8 of this title.

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

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

20 (i) The Commissioner of Public Safety shall adopt emergency rules relating
21 to the operation, maintenance, and use of preliminary alcohol screening

1 devices for use by law enforcement officers in enforcing the provisions of this
2 title. The ~~commissioner~~ Commissioner shall consider relevant standards of the
3 National Highway Traffic Safety Administration in adopting such rules. Any
4 preliminary alcohol screening device authorized for use under this title shall be
5 on the qualified products list of the National Highway Traffic Safety
6 Administration.

7 * * *

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

9 * * *

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

17 * * *

18 (d) The physician, licensed nurse, medical technician, phlebotomist,
19 physician assistant, medical technologist, or laboratory assistant drawing a
20 sample of blood shall use a sample collection kit provided by the Department
21 of Public Safety or another type of collection kit. The sample shall be

1 identified as to donor, date, and time, sealed and mailed to the Department of
2 Public Safety where it shall be held for a period of at least 45 days from the
3 date the sample was taken. At any time during that period, the person may
4 direct that the sample be sent to an independent laboratory of the person's
5 choosing for an independent analysis. The Department of Public Safety may
6 recover its costs of supplies, handling, and storage.

7 * * *

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

9 § 1204. PERMISSIVE INFERENCES; ADMISSIBILITY

10 (a) Upon the trial of any civil or criminal action or proceeding arising out
11 of acts alleged to have been committed by a person while operating, attempting
12 to operate, or in actual physical control of a vehicle on a highway, the person's
13 alcohol concentration shall give rise to the following permissive inferences:

14 (1) If the person's alcohol concentration at that time was less than 0.08,
15 such fact shall not give rise to any presumption or permissive inference that the
16 person was or was not under the influence of alcohol, but such fact may be
17 considered with other competent evidence in determining whether the person
18 was under the influence of alcohol.

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

1 (3) 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 alcohol in violation of subdivision
4 1201(a)(2) or (3) of this title.

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

11 (c) Upon the trial of any civil or criminal action or proceeding arising out
12 of acts alleged to have been committed by a person while operating, attempting
13 to operate, or in actual physical control of a vehicle on a highway, the presence
14 or concentration of any drug, combination of drugs, or metabolites of a drug as
15 shown by a chemical test or analysis of the person's blood or saliva may be
16 admissible and deemed relevant to the determination of whether the person
17 was under the influence of a drug or the combined influence of alcohol and a
18 drug.

1 Sec. 7. 23 V.S.A. § 1220b is amended to read:

2 § 1220b. BLOOD AND BREATH ALCOHOL TESTING SPECIAL FUND

3 (a) There is created a Blood and Breath Alcohol Testing Special Fund
4 which shall be a special fund established and managed pursuant to 32 V.S.A.
5 chapter 7, subchapter 5.

6 (b) The Blood and Breath Alcohol Testing Special Fund shall consist of
7 receipts from the surcharges assessed under subsection 1210(i) of this title.

8 (c) The Blood and Breath Alcohol Testing Special Fund shall be used for
9 the implementation and support of the ~~Blood and Breath Alcohol Testing~~
10 ~~Program~~ DUI testing program within the Department of Public Safety.

11 Sec. 8. EFFECTIVE DATE

12 This act shall take effect on July 1, 2019.