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E-warrant and saliva testing language for S.54

Sec. A. Rule 41 of the Vermont Rules of Criminal Procedure is amended to read:

* * *

(4) Requesting a Warrant by Reliable Electronic Means.

(A) In General. When a law enforcement officer, an attorney for the state, or other person authorized by law so requests, a judicial officer may issue a warrant based on information communicated by reliable electronic means.

(B) Transmitting and Affirming Affidavits. Upon learning that an applicant is requesting a warrant under Rule 41(d)(4), a judicial officer shall inform the applicant that a signed or unsigned affidavit shall be transmitted electronically to the judicial officer. The warrant affidavit shall be sworn to or affirmed by administration of the oath over the telephone by the judicial officer. The administration of the oath need not be made part of the affidavit or recorded, but the judicial officer shall note on the affidavit that the oath was administered. The determination of probable cause for issuance of the warrant shall be made solely on the contents of the affidavit or affidavits provided.

(C) Warrant by Reliable Electronic Means. If the judicial officer proceeds under this subsection, the following additional procedures apply:

1 (i) Transmission to a Judicial Officer. The applicant shall prepare
2 an original warrant and shall transmit it to the judicial officer by reliable
3 electronic means.

4 (ii) Modification. The judicial officer may modify the original
5 warrant. The judge shall transmit a copy of the modified warrant to the
6 applicant by reliable electronic means.

7 (iii) Signing the Warrant. Upon determining to issue the warrant,
8 the judicial officer shall immediately sign the original warrant with any
9 modifications, enter on its face the exact date and time it is issued, and transmit
10 a copy by reliable electronic means to the applicant.

11 (iv) Filing of the Warrant. The judicial officer shall file with the
12 clerk by an appropriate means the signed original or modified warrant and the
13 affidavit. The clerk shall enter the signed original or modified warrant on the
14 docket when filed.

15 (D) Expedited Affidavit. A law enforcement officer may request a warrant
16 based upon an expedited affidavit communicated by reliable electronic means.
17 This subsection shall apply to warrants requested pursuant to 23 V.S.A.
18 chapter 13, subchapter 13, and warrants requested outside of regular court
19 hours and on weekends. If the judicial officer proceeds under this subsection,
20 the same procedures shall apply as in subsection (C), in addition to the
21 following procedures:

1 (1) An expedited affidavit shall be sworn to under oath or by written
2 statement signed under penalty of perjury, and establish the following grounds
3 for the order:

4 (A) that there is probable cause to believe that an offense has been
5 committed; and

6 (B) that there are reasonable grounds to suspect that the person
7 named or described in the affidavit committed the offense.

8 (2) The judicial officer shall decide whether to grant or deny the
9 application and issue the order solely on the basis of the content of the affidavit
10 or affidavits sworn to before the judicial officer and establishing grounds
11 pursuant to this subdivision (D). If a judicial officer administers an oath via
12 telephone, radio, or similar means of communication and the applicant does no
13 more than attest to the contents of the affidavit that was transmitted
14 electronically, a verbatim recording of the oath is not required.

15 * * *

16 Sec. B. Rule 54 of the Vermont Rules of Criminal Procedure is amended to
17 read:

18 * * *

19 (c) Definitions. Unless specified to the contrary, the following words
20 wherever used in these rules shall have the following meanings:

21 (1) The word "court" or "judge" shall mean

1 (A) With respect to proceedings in the Criminal Division of the
2 Superior Court, any Supreme Court Justice, a Superior Judge assigned to the
3 unit in which the court is sitting, or a member of the Vermont bar acting for
4 that judge.

5 (B) With respect to proceedings in the Civil Division of the Superior
6 Court, a majority of the judges, except that in any matter in which by law or by
7 these rules a Superior Judge is authorized to act alone, the words "court" or
8 "judge" shall mean the assigned judge or a judge acting for that judge, or any
9 Superior Judge authorized to act alone, or a member of the Vermont bar acting
10 for that judge.

11 (2) The term "presiding judge" shall mean a Superior Judge who has
12 been assigned additional administrative responsibilities for the unit of the court
13 by the Administrative Judge, pursuant to 4 V.S.A. § 73 and the administrative
14 authority of the Supreme Court.

15 (3) The term "clerk" shall mean the clerk of the Superior Court for the
16 unit in which the proceedings are pending.

17 (4) The term "defendant's attorney" or any like term shall include a
18 defendant appearing without counsel.

19 (5) The term "judicial officer" shall mean a Superior Judge, ~~or~~ a member
20 of the Vermont bar acting for that Judge; or a Judicial Master.

1 (6) The terms "prosecuting officer," "prosecuting attorney," and any like
2 term shall mean the Attorney General and the Attorney General's deputies or
3 assistants, the state's attorneys and their deputies, town grand jurors, attorneys
4 given authority to prosecute by any municipal charter or ordinance, and special
5 prosecutors authorized by law or appointed by any duly constituted authority.

6 (7) The term "law enforcement officer" shall mean any state police
7 officer, sheriff, deputy sheriff, special deputy sheriff, municipal police officer,
8 or constable, and any other person authorized to make an arrest by the state or
9 a political subdivision of the state, provided the offense is one for which the
10 person is otherwise authorized by law to make an arrest.

11 (8) The word "law" includes statutes and judicial decisions.

12 (9) The term "civil action" means a civil action in the Civil Division of
13 the Superior Court.

14 (10) The word "oath" includes affirmations as provided by law.

15 * * *

16 Sec. C. 4 V.S.A. § 38 is amended to read:

17 § 38. JUDICIAL MASTERS

18 (a) The Administrative Judge may appoint a licensed Vermont lawyer who
19 has been engaged in the practice of law in Vermont for at least the last five
20 years to serve as a Judicial Master. The Judicial Master shall be an employee
21 of the Judiciary and be subject to the Code of Judicial Conduct. A Judicial

1 Master shall not engage in the active practice of law for remuneration while
2 serving in this position. In making this appointment, the Administrative Judge
3 shall apply the criteria and standards for judicial appointments contained in
4 section 601 of this title. The Judicial Master may hear and decide the following
5 matters as designated by the Administrative Judge:

6 (1) In the Criminal Division of the Superior Court;

7 (A) proceedings in treatment court dockets, as approved by the
8 presiding judge, to assure compliance with court orders, including attendance
9 and participation with a treatment plan, imposition of sanctions and incentives,
10 including incarceration in the course of the program and dismissal from the
11 program due to noncompliance; the Master shall not have authority to accept
12 pleas or to impose sentences, to hear motions to suppress, or to dismiss for lack
13 of a prima facie case; and

14 (B) consideration of warrant applications submitted pursuant to Rule
15 41 of the Vermont Rules of Criminal Procedure.

16 * * *

17 Sec. D. REPEAL; EXTENSION

18 (a) 2016 Acts and Resolves No.167, Sec. 2 is amended to read:

19 Sec. 2. REPEAL

20 4 V.S.A. §38 (Judicial Masters) shall be repealed on July 1, ~~2020~~ 2025.

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

1 § 1200. DEFINITIONS

2 As used in this subchapter:

3 * * *

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

7 * * *

8 (11) “Preliminary screening” means a breath or saliva test administered
9 by a law enforcement officer for the purpose of deciding whether an arrest
10 should be made and whether to request an evidentiary test. The results of a
11 preliminary screening shall not be introduced as evidence of impairment in any
12 court proceeding. A preliminary saliva screening result detecting the presence
13 of a drug shall not, by itself, constitute grounds for probable cause for an
14 arrest. A preliminary saliva test shall be sought pursuant to subdivision
15 1202(f)(2) of this title.

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

17 § 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF

18 ALCOHOL OR OTHER SUBSTANCE; CRIMINAL REFUSAL;

19 ENHANCED PENALTY FOR BAC OF 0.16 OR MORE

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

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

2 (A) 0.08 or more; or

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

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

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

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

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

13 (b) A person who has previously been convicted of a violation of this
14 section shall not operate, attempt to operate, or be in actual physical control of
15 any vehicle on a highway and refuse a law enforcement officer's reasonable
16 request under the circumstances for an evidentiary test where the officer had
17 reasonable grounds to believe the person was in violation of subsection (a) of
18 this section.

19 (c) A person shall not operate, attempt to operate, or be in actual physical
20 control of any vehicle on a highway and be involved in an accident or collision
21 resulting in serious bodily injury or death to another and refuse a law

1 enforcement officer's reasonable request under the circumstances for an
2 evidentiary test where the officer has reasonable grounds to believe the person
3 has any amount of alcohol or drugs in ~~the~~ his or her system.

4 * * *

5 Sec. G. 23 V.S.A. § 1202 is amended to read:

6 § 1202. CONSENT TO TAKING OF TESTS TO DETERMINE BLOOD
7 ALCOHOL CONTENT OR PRESENCE OF OTHER DRUG

8 (a)(1) Implied consent. Every person who operates, attempts to operate, or
9 is in actual physical control of any vehicle on a highway in this State is deemed
10 to have given consent to an evidentiary test of that person's breath for the
11 purpose of determining the person's alcohol concentration or the presence of
12 other drug in the blood. The test shall be administered at the direction of a law
13 enforcement officer.

14 (2) Blood test. If breath testing equipment is not reasonably available or
15 if the officer has reason to believe that the person is unable to give a sufficient
16 sample of breath or saliva for testing or if the law enforcement officer has
17 reasonable grounds to believe that the person is under the influence of a drug
18 other than alcohol, the person is deemed to have given consent to the taking of
19 an evidentiary sample of blood. If in the officer's opinion the person is
20 incapable of decision or unconscious or dead, it is deemed that the person's
21 consent is given and a sample of blood shall be taken. A blood test sought

1 pursuant to this subdivision (2) shall be obtained pursuant to subsection (f) of
2 this section.

3 (3) Saliva test. If the law enforcement officer has reasonable grounds to
4 believe that the person is under the influence of a drug other than alcohol, or
5 under the combined influence of alcohol and a drug, the person is deemed to
6 have given consent to the taking of an evidentiary sample of saliva. A saliva
7 test sought pursuant to this subdivision (3) shall be obtained pursuant to
8 subsection (f) of this section. Any saliva test administered under this section
9 shall be used only for the limited purpose of detecting the presence of a drug in
10 the person's body, and shall not be used to extract DNA information.

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

15 ~~(4)~~(5) Fatal collision or incident resulting in serious bodily injury. The
16 evidentiary test shall also be required if the person is the surviving operator of
17 a motor vehicle involved in a fatal incident or collision or an incident or
18 collision resulting in serious bodily injury and the law enforcement officer has
19 reasonable grounds to believe that the person has any amount of alcohol or
20 other drug in his or her system.

1 (b) A refusal to take a breath or saliva test may be introduced as evidence
2 in a criminal proceeding.

3 * * *

4 (f)(1) If a blood test is sought from a person pursuant to subdivision (a)(2)
5 of this section, or if a person who has been involved in an accident or collision
6 resulting in serious bodily injury or death to another refuses an evidentiary test,
7 a law enforcement officer may apply for a search warrant pursuant to Rule 41
8 of the Vermont Rules of Criminal Procedure to obtain a sample of blood for an
9 evidentiary test. If a blood sample is obtained by search warrant, the fact of
10 the refusal may still be introduced in evidence, in addition to the results of the
11 evidentiary test. Once a law enforcement official begins the application
12 process for a search warrant, the law enforcement official is not obligated to
13 discontinue the process even if the person later agrees to provide an
14 evidentiary ~~breath~~ sample. The limitation created by Rule 41(g) of the
15 Vermont Rules of Criminal Procedure regarding blood specimens shall not
16 apply to search warrants authorized by this section.

17 (2)(A) If a preliminary saliva screen is sought from a person pursuant to
18 this chapter or an evidentiary saliva test is sought from a person pursuant to
19 subdivision (a)(3) of this section, a Drug Recognition Expert may apply for a
20 search warrant pursuant Rule 41 of the Vermont Rules of Criminal Procedure
21 to obtain a sample of saliva for the preliminary screen or evidentiary test.

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

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

5 § 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND
6 VIDEOTAPE

7 (a) A breath or saliva test shall be administered or taken only by a person
8 who has been certified by the Vermont Criminal Justice Training Council to
9 operate the breath or saliva testing equipment being employed. In any
10 proceeding under this subchapter, a person's testimony that he or she is
11 certified to operate the breath testing equipment employed shall be prima facie
12 evidence of that fact.

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

18 (c) When a ~~breath test which is intended to be introduced in evidence is~~
19 ~~taken with a crimper device or when~~ blood or saliva is withdrawn at an
20 officer's request, a sufficient amount of ~~breath~~ saliva or blood, as the case may
21 be, shall be taken to enable the person to have made an independent analysis of

1 the sample, and shall be held for at least 45 days from the date the sample was
2 taken. At any time during that period the person may direct that the sample be
3 sent to an independent laboratory of the person's choosing for an independent
4 analysis. The Department of Public Safety shall adopt rules providing for the
5 security of the sample. At no time shall the defendant or any agent of the
6 defendant have access to the sample. A preserved sample of breath shall not
7 be required when an infrared breath-testing instrument is used. A person tested
8 with an infrared breath-testing instrument shall have the option of having a
9 second infrared test administered immediately after receiving the results of the
10 first test.

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

1 method or methods. Failure of a person to provide an adequate breath or saliva
2 sample constitutes a refusal.

3 (e) [Repealed.]

4 (f) When a law enforcement officer has reason to believe that a person may
5 be violating or has violated section 1201 of this title, the officer may request
6 the person to provide a sample of breath or saliva for a preliminary screening
7 test using a device approved by the Commissioner of Public Safety for this
8 purpose. The person shall not have the right to consult an attorney prior to
9 submitting to this preliminary ~~breath alcohol~~ screening test. The results of this
10 preliminary screening test may be used for the purpose of deciding whether an
11 arrest should be made and whether to request an evidentiary test and shall not
12 be used in any court proceeding except on those issues. Following the
13 screening₂ test additional tests may be required of the operator pursuant to the
14 provisions of section 1202 of this title.

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

19 (h) A Vermont law enforcement officer shall have a right to request a
20 breath, saliva or blood sample in an adjoining state or country under this
21 section unless prohibited by the law of the other state or country. If the law in

1 an adjoining state or country does not prohibit an officer acting under this
2 section from taking a breath, saliva, or blood sample in its jurisdiction,
3 evidence of such sample shall not be excluded in the courts of this State solely
4 on the basis that the test was taken outside the State.

5 (i)(1) The Commissioner of Public Safety shall adopt emergency rules
6 relating to the operation, maintenance, and use of preliminary alcohol
7 screening devices for use by law enforcement officers in enforcing the
8 provisions of this title. ~~The commissioner~~ Commissioner shall consider
9 relevant standards of the National Highway Traffic Safety Administration in
10 adopting such rules. Any preliminary alcohol screening device authorized for
11 use under this title shall be on the qualified products list of the National
12 Highway Traffic Safety Administration.

13 (2) The Commissioner shall adopt rules pursuant to 3 V.S.A. chapter 25
14 relating to the operation, maintenance, and use of saliva testing devices for use
15 by Drug Recognition Experts in enforcing the provisions of this title, and the
16 training required for officers to use such devices. The Commissioner shall
17 consider relevant standards of the National Highway Traffic Safety
18 Administration in adopting such rules. Any saliva testing device authorized
19 for use under this title shall be determined by at least two peer reviewed
20 studies to be a reliably accurate method of detecting the presence of drug
21 metabolites in the body.

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Sec. I. 23 V.S.A. § 1203a(b) is amended to read:

(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.

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

§ 1204. PERMISSIVE INFERENCES

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

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

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

4 (3) If the person’s alcohol concentration at any time within two hours of
5 the alleged offense was 0.10 or more, it shall be a permissive inference that the
6 person was under the influence of alcohol in violation of subdivision
7 1201(a)(2) or (3) of this title.

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

14 Sec. K. ELECTRONIC WARRANTS; JUDICIAL MASTERS

15 (a) Electronic warrant system. On or before XXX, the Vermont State
16 Police shall ensure that all Drug Recognition Evaluators (DREs) in the State
17 have access to an electronic system that allows a search warrant request to be
18 conducted from a DRE’s vehicle. The electronic system shall:

19 (1) provide a secure portal for document transmission that includes
20 identity verification protocols;

1 (2) be a means by which law enforcement may transmit an expedited
2 affidavit to a dedicated judicial officer and a judicial officer may return a
3 signed warrant; and

4 (3) allow for electronic or digital signature by the officer and the
5 dedicated judicial officer.

6 (b) Dedicated Judicial Masters. On or before XXX, the Chief Superior
7 Judge shall appoint two dedicated Judicial Masters to review affidavits and
8 issue or deny warrants pursuant to Rule 41 of the Vermont Rules of Criminal
9 Procedure. The Judicial Masters shall have specialized training or experience
10 in Fourth Amendment U.S. Constitutional law and Article 11 Vermont
11 Constitutional law.

12 (c) Policies and expedited affidavit form.

13 (1) The Department of Public Safety shall establish written policies and
14 procedures for the electronic warrant system, and shall provide progress
15 reports on the development of the policies and procedures to the Justice
16 Oversight Committee, and shall submit the final policies and procedures to the
17 Committee for approval on or before XXX.

18 (2) The Office of the Court Administrator shall establish an expedited
19 affidavit form for use in obtaining an electronic warrant pursuant to Rule 41 of
20 the Vermont Rules of Criminal Procedure.