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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~~

1 ~~which that is intended to be introduced as evidence~~

2 * * *

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

4 § 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF
5 INTOXICATING LIQUOR OR OTHER SUBSTANCE; CRIMINAL
6 REFUSAL; ENHANCED PENALTY FOR BAC OF 0.16 OR MORE

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

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

10 (A) 0.08 or more; or

11 (B) 0.02 or more if the person is operating a school bus as defined in

12 subdivision 4(34) of this title; or

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

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

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

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

20 (4) when the person's alcohol concentration is 0.04 or more if the

21 ~~person is operating a commercial motor vehicle as defined in subdivision~~

1 ~~4103(4) of this title.~~

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

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

14 * * *

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

16 § 1202. CONSENT TO TAKING OF TESTS TO DETERMINE BLOOD
17 ALCOHOL CONTENT OR DRUG IMPAIRMENT

18 (a)(1) Implied consent.

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

1 ~~purpose of determining the person's alcohol concentration or the presence of~~
2 other drug in the blood. The test shall be administered at the direction of a law
3 enforcement officer.

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

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

7 (ii) the law enforcement officer has reason reasonable grounds to
8 believe that the person:

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

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

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

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

18 (3) Saliva test. If the law enforcement officer has reasonable grounds to
19 believe that the person is under the influence of a drug other than alcohol, the
20 person is deemed to have given consent to the taking of an evidentiary sample
21 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
21 ~~screening test, additional tests may be required of the operator pursuant to the~~

1 provisions of section 1202 of this title.

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

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

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

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

2 § 1203a. INDEPENDENT CHEMICAL TEST; BLOOD TESTS

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

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

17 * * *

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

19 § 1204. PERMISSIVE INFERENCES

20 (a) Upon the trial of any civil or criminal action or proceeding arising out
21 of acts alleged to have been committed by a person while operating,

1 ~~attempting to operate, or in actual physical control of a vehicle on a highway,~~
2 ~~the person's alcohol concentration or alcohol concentration and evidence of~~
3 ~~delta-9 tetrahydrocannabinol shall give rise to the following permissive~~
4 ~~inferences:~~

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

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

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

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

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

6 Sec. 7. EFFECTIVE DATE

7 ~~This act shall take effect on July 1, 2017.~~

~~*Sec. 1. LEGISLATIVE INTENT; DRUG RECOGNITION EXPERTS*~~

~~*It is the intent of the General Assembly that the State have a sufficient
number of drug recognition experts available to screen all drivers suspected of
operating in violation of 23 V.S.A. § 1201. To this end, there are many
categories of professionals associated with drug recognition that can be
trained to recognize impairment in drivers under the influence of drugs other
than, or in addition to, alcohol. It is the intent of the General Assembly that
Vermont expand the type of professionals qualified to become drug recognition
experts to include professions other than law enforcement.*~~

Sec. 1. LEGISLATIVE INTENT; DRUG RECOGNITION EXPERTS

*It is the intent of the General Assembly that the State have a sufficient
number of drug recognition experts available to screen all drivers suspected of
operating in violation of 23 V.S.A. § 1201.*

Sec. 2. 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 indicates the person’s alcohol concentration or the presence of other drug and which is intended to be introduced as evidence.*

* * *

(11) “Preliminary screening” means a breath or saliva test administered by a law enforcement officer for the purpose of deciding whether an arrest should be made and whether to request an evidentiary test. The results of a preliminary screening shall not be introduced as evidence of impairment in any court proceeding. A preliminary saliva screening result detecting the presence of a drug shall not, by itself, constitute grounds for probable cause for an arrest.

Sec. 3. 23 V.S.A. § 1201 is amended to read:

§ 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF ALCOHOL
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 vehicle as defined in subdivision 4103(4) of this title; or

(2) when the person is under the influence of alcohol; 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.~~

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

(c) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway and be involved in an accident or collision resulting in serious bodily injury or death to another and refuse a law enforcement officer's reasonable request under the circumstances for an

evidentiary test where the officer has reasonable grounds to believe the person has any amount of alcohol or drugs in ~~the~~ his or her system.

* * *

Sec. 4. 23 V.S.A. § 1202 is amended to read:

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

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

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

this section.

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

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

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

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

* * *

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

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

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

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

(a) A breath or saliva test shall be administered or taken only by a person who has been certified by the Vermont Criminal Justice Training Council to

operate the breath or saliva testing equipment being employed. In any proceeding under this subchapter, a person's testimony that he or she is certified to operate the breath testing equipment employed shall be prima facie evidence of that fact.

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

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

of having a second infrared test administered immediately after receiving the results of the first test.

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

(e) [Repealed.]

(f) When a law enforcement officer has reason to believe that a person may be violating or has violated section 1201 of this title, the officer may request the person to provide a sample of breath or saliva for a preliminary screening test using a device approved by the Commissioner of Public Safety for this purpose. The person shall not have the right to consult an attorney prior to

submitting to this preliminary ~~breath alcohol~~ screening test. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request an evidentiary test and shall not be used in any court proceeding except on those issues. Following the screening, test additional tests may be required of the operator pursuant to the provisions of section 1202 of this title.

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

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

(i)(1) The Commissioner of Public Safety shall adopt emergency rules relating to the operation, maintenance, and use of preliminary alcohol screening devices for use by law enforcement officers in enforcing the provisions of this title. The ~~commissioner~~ Commissioner shall consider

relevant standards of the National Highway Traffic Safety Administration in adopting such rules. Any preliminary alcohol screening device authorized for use under this title shall be on the qualified products list of the National Highway Traffic Safety Administration.

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

* * *

Sec. 6. 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. 7. 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.

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

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

(b) The foregoing provisions shall not be construed as limiting the

introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcohol or under the combined influence of alcohol and another drug, nor shall they be construed as requiring that evidence of the amount of alcohol or drug in the person's blood, breath, urine, or saliva must be presented.

Sec. 8. EFFECTIVE DATE

This act shall take effect on July 1, 2018.