

SENATE BILL NO. 42

INTRODUCED BY J. SHOCKLEY

BY REQUEST OF THE LAW AND JUSTICE INTERIM COMMITTEE

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5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAWS RELATING TO ALCOHOL-RELATED OR
6 DRUG-RELATED DRIVING OFFENSES; CLARIFYING THAT SEARCH WARRANTS MAY BE ISSUED FOR
7 BLOOD SAMPLES IF THE OFFENDER HAS A PRIOR REFUSAL OR CONVICTION OR PENDING OFFENSE;
8 REVISING THE IMPLIED CONSENT LAW; PROVIDING THAT A PEACE OFFICER MAY REQUEST A SEARCH
9 WARRANT TO OBTAIN A BLOOD SAMPLE FOR CHEMICAL TESTING IF AN ARRESTED PERSON REFUSES
10 TO SUBMIT TO TESTING; AMENDING SECTIONS 46-5-224, 61-8-402, 61-8-404, ~~AND~~ 61-8-405, AND
11 61-8-409, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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15 **Section 1.** Section 46-5-224, MCA, is amended to read:

16 **"46-5-224. What may be seized with search warrant.** A warrant may be issued under this section to
17 search for and seize any:

- 18 (1) evidence, including blood samples that may yield evidence of any measured amount or detected
19 presence of alcohol or drugs in a person's body when subjected to testing;
- 20 (2) contraband; or
- 21 (3) person for whose arrest there is probable cause, for whom there has been a warrant of arrest issued,
22 or who is unlawfully restrained."

23
24 ~~NEW SECTION. Section 2. Refusal to submit to test -- search warrant.~~ (1) If a person refuses to
25 submit to one or more tests requested and designated by a peace officer as provided in 61-8-402 and the officer
26 has probable cause to believe that the person has been driving or has been in actual physical control of a vehicle
27 upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two
28 and the person has been placed under arrest for a violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-805, a test
29 or tests may be administered without the consent of the person provided that the officer first obtains a search
30 warrant authorizing administration of the test or tests.



- 1 ~~_____ (2) The test or tests must be administered in accordance with 61-8-405.~~
- 2 ~~_____ (3) The results of a test performed pursuant to a search warrant are admissible as competent evidence~~
3 ~~in any civil or criminal prosecution, subject to applicable rules of evidence.~~
- 4 ~~_____ (4) A person's right to refuse to submit to a test under 61-8-402(4) does not apply to this section.~~
- 5 ~~_____ (5) This section does not prevent law enforcement from obtaining tests without a warrant as otherwise~~
6 ~~authorized by law.~~
- 7 ~~_____ (6) A subsequent consent to a test that was initially refused does not prevent the issuance of a search~~
8 ~~warrant under this section.~~

9

10 **Section 2.** Section 61-8-402, MCA, is amended to read:

11 **"61-8-402. Blood Implied consent -- blood or breath tests for alcohol, drugs, or both -- refusal to**
12 **submit to test -- administrative license suspension.** (1) A person who operates or is in actual physical control
13 of a vehicle upon ways of this state open to the public is considered to have given consent to a test or tests of
14 the person's blood or breath for the purpose of determining any measured amount or detected presence of
15 alcohol or drugs in the person's body.

16 (2) (a) The test or tests must be administered at the direction of a peace officer when:

17 (i) the officer has reasonable grounds to believe that the person has been driving or has been in actual
18 physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs,
19 or a combination of the two and the person has been placed under arrest for a violation of 61-8-401;

20 (ii) the person is under the age of 21 and has been placed under arrest for a violation of 61-8-410; or

21 (iii) the officer has probable cause to believe that the person was driving or in actual physical control of
22 a vehicle:

23 (A) in violation of 61-8-401 and the person has been involved in a motor vehicle accident or collision
24 resulting in property damage; or

25 (B) involved in a motor vehicle accident or collision resulting in serious bodily injury, as defined in
26 45-2-101, or death.

27 (b) The arresting or investigating officer may designate which test or tests are administered.

28 (3) A person who is unconscious or who is otherwise in a condition rendering the person incapable of
29 refusal is considered not to have withdrawn the consent provided by subsection (1).

30 (4) If an arrested person refuses to submit to one or more tests requested and designated by the officer

1 as provided in subsection (2), the refused test or tests may not be given, ~~but at the request of the officer unless~~
 2 ~~authorized by a search warrant. Upon refusal,~~ EXCEPT AS PROVIDED IN SUBSECTION (5), BUT the officer shall, on
 3 behalf of the department, immediately seize the person's driver's license. The peace officer shall immediately
 4 forward the license to the department, along with a report certified under penalty of law stating which of the
 5 conditions set forth in subsection (2)(a) provides the basis for the testing request and confirming that the person
 6 refused to submit to one or more tests requested and designated by the peace officer. Upon receipt of the report,
 7 the department shall suspend the license for the period provided in subsection ~~(6)~~ (7).

8 (5) IF THE ARRESTED PERSON HAS REFUSED TO PROVIDE A BREATH, BLOOD, OR URINE SAMPLE UNDER 61-8-409
 9 OR THIS SECTION IN A PRIOR INVESTIGATION IN THIS STATE OR UNDER A SUBSTANTIALLY SIMILAR STATUTE IN ANOTHER
 10 JURISDICTION OR THE ARRESTED PERSON HAS A PRIOR CONVICTION OR PENDING OFFENSE FOR A VIOLATION OF 45-5-104,
 11 45-5-106, 45-5-205, 61-8-401, OR 61-8-406 OR A SIMILAR STATUTE IN ANOTHER JURISDICTION, THE OFFICER MAY
 12 OBTAIN MAY APPLY FOR A SEARCH WARRANT TO BE ISSUED PURSUANT TO 46-5-224 TO COLLECT A SAMPLE OF THE
 13 PERSON'S BLOOD FOR TESTING.

14 ~~(5)(6)~~ Upon seizure of a driver's license, the peace officer shall issue, on behalf of the department, a
 15 temporary driving permit, which is effective 12 hours after issuance and is valid for 5 days following the date of
 16 issuance, and shall provide the driver with written notice of the license suspension and the right to a hearing
 17 provided in 61-8-403.

18 ~~(6)(7)~~ (a) Except as provided in subsection ~~(6)(b)~~ (7)(B), the following suspension periods are applicable
 19 upon refusal to submit to one or more tests:

20 (i) upon a first refusal, a suspension of 6 months with no provision for a restricted probationary license;
 21 (ii) upon a second or subsequent refusal within 5 years of a previous refusal, as determined from the
 22 records of the department, a suspension of 1 year with no provision for a restricted probationary license.

23 (b) If a person who refuses to submit to one or more tests under this section is the holder of a
 24 commercial driver's license, in addition to any action taken against the driver's noncommercial driving privileges,
 25 the department shall:

26 (i) upon a first refusal, suspend the person's commercial driver's license for a 1-year period; and
 27 (ii) upon a second or subsequent refusal, suspend the person's commercial driver's license for life,
 28 subject to department rules adopted to implement federal rules allowing for license reinstatement, if the person
 29 is otherwise eligible, upon completion of a minimum suspension period of 10 years. If the person has a prior
 30 conviction of a major offense listed in 61-8-802(2) arising from a separate incident, the conviction has the same

1 effect as a previous testing refusal for purposes of this subsection ~~(6)(b)~~ (7)(B).

2 ~~(7)(8)~~ A nonresident driver's license seized under this section must be sent by the department to the
3 licensing authority of the nonresident's home state with a report of the nonresident's refusal to submit to one or
4 more tests.

5 ~~(8)(9)~~ The department may recognize the seizure of a license of a tribal member by a peace officer acting
6 under the authority of a tribal government or an order issued by a tribal court suspending, revoking, or reinstating
7 a license or adjudicating a license seizure if the actions are conducted pursuant to tribal law or regulation
8 requiring alcohol or drug testing of motor vehicle operators and the conduct giving rise to the actions occurred
9 within the exterior boundaries of a federally recognized Indian reservation in this state. Action by the department
10 under this subsection is not reviewable under 61-8-403.

11 ~~(9)(10)~~ A suspension under this section is subject to review as provided in this part.

12 ~~(10)(11)~~ This section does not apply to ~~blood and breath~~ tests, samples, and analyses of blood or breath
13 used for purposes of medical treatment or care of an injured motorist, ~~or~~ related to a lawful seizure for a
14 suspected violation of an offense not in this part, or performed pursuant to a search warrant.

15 ~~(11)(12)~~ This section does not prohibit the release of information obtained from tests, samples, and
16 analyses of blood or breath for law enforcement purposes as provided in 46-4-301 and 61-8-405(6)."

17

18 **Section 3.** Section 61-8-404, MCA, is amended to read:

19 **"61-8-404. Evidence admissible -- conditions of admissibility.** (1) Upon the trial of a criminal action
20 or other proceeding arising out of acts alleged to have been committed by a person in violation of 61-8-401,
21 61-8-406, 61-8-410, or 61-8-805:

22 (a) evidence of any measured amount or detected presence of alcohol, drugs, or a combination of
23 alcohol and drugs in the person at the time of a test, as shown by an analysis of the person's blood or breath, is
24 admissible. A positive test result does not, in itself, prove that the person was under the influence of a drug or
25 drugs at the time the person was in control of a motor vehicle. A person may not be convicted of a violation of
26 61-8-401 based upon the presence of a drug or drugs in the person unless some other competent evidence exists
27 that tends to establish that the person was under the influence of a drug or drugs while driving or in actual
28 physical control of a motor vehicle within this state.

29 (b) a report of the facts and results of one or more tests of a person's blood or breath is admissible in
30 evidence if:

1 (i) a breath test or preliminary alcohol screening test was performed by a person certified by the forensic
2 sciences division of the department to administer the test;

3 (ii) a blood sample was analyzed in a laboratory operated or certified by the department or in a laboratory
4 exempt from certification under the rules of the department and the blood was withdrawn from the person by a
5 person competent to do so under 61-8-405(1);

6 (c) a report of the facts and results of a physical, psychomotor, or physiological assessment of a person
7 is admissible in evidence if it was made by a person trained by the department or by a person who has received
8 training recognized by the department.

9 (2) If the person under arrest refused to submit to one or more tests ~~as provided in this section~~ under
10 61-8-402, whether or not a sample was subsequently collected for any purpose, proof of refusal is admissible in
11 any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving
12 or in actual physical control of a vehicle upon the ways of this state open to the public, while under the influence
13 of alcohol, drugs, or a combination of alcohol and drugs. The trier of fact may infer from the refusal that the person
14 was under the influence. The inference is rebuttable.

15 (3) The provisions of this part do not limit the introduction of any other competent evidence bearing on
16 the question of whether the person was under the influence of alcohol, drugs, or a combination of alcohol and
17 drugs."
18

19 **Section 4.** Section 61-8-405, MCA, is amended to read:

20 "**61-8-405. Administration of tests.** (1) Only a physician, ~~or~~ registered nurse, or other qualified person
21 acting under the supervision and direction of a physician or registered nurse; may, at the request of a peace
22 officer, withdraw blood for the purpose of determining any measured amount or detected presence of alcohol,
23 drugs, or any combination of alcohol and drugs in the person. This limitation does not apply to the sampling of
24 breath.

25 (2) In addition to any test administered at the direction of a peace officer, a person may request that an
26 independent blood sample be drawn by a physician or registered nurse for the purpose of determining any
27 measured amount or detected presence of alcohol, drugs, or any combination of alcohol and drugs in the person.
28 The peace officer may not unreasonably impede the person's right to obtain an independent blood test. The
29 officer may but has no duty to transport the person to a medical facility or otherwise assist the person in obtaining
30 the test. The cost of an independent blood test is the sole responsibility of the person requesting the test. The

1 failure or inability to obtain an independent test by a person does not preclude the admissibility in evidence of any
2 test given at the direction of a peace officer.

3 (3) Upon the request of the person tested, full information concerning any test given at the direction of
4 the peace officer must be made available to the person or the person's attorney.

5 (4) A physician, ~~or~~ registered nurse, or other qualified person acting under the supervision and direction
6 of a physician or registered nurse, does not incur any civil or criminal liability as a result of the proper
7 administering of a blood test when requested in writing by a peace officer to administer a test.

8 (5) The department in cooperation with any appropriate agency shall adopt uniform rules for the giving
9 of tests and may require certification of training to administer the tests as considered necessary.

10 (6) If a peace officer has probable cause to believe that a person has violated 61-8-401, 61-8-406,
11 61-8-410, or 61-8-805 and a sample of blood, breath, urine, or other bodily substance is taken from that person
12 for any reason, a portion of that sample sufficient for analysis must be provided to a peace officer if requested
13 for law enforcement purposes and upon issuance of a subpoena as provided in 46-4-301."

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15 **SECTION 5. SECTION 61-8-409, MCA, IS AMENDED TO READ:**

16 **"61-8-409. Preliminary alcohol screening test.** (1) A person who operates or is in actual physical
17 control of a vehicle upon ways of this state open to the public is considered to have given consent to a preliminary
18 alcohol screening test of the person's breath, for the purpose of estimating the person's alcohol concentration,
19 upon the request of a peace officer who has a particularized suspicion that the person was driving or in actual
20 physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol or in
21 violation of 61-8-410.

22 (2) The person's obligation to submit to a test under 61-8-402 is not satisfied by the person submitting
23 to a preliminary alcohol screening test pursuant to this section.

24 (3) The peace officer shall inform the person of the right to refuse the test and that the refusal to submit
25 to the preliminary alcohol screening test will result in the suspension for up to 1 year of that person's driver's
26 license.

27 (4) If the person refuses to submit to a test under this section, a test will not be given except as provided
28 in 61-8-402(5). However, the refusal is sufficient cause to suspend the person's driver's license as provided in
29 61-8-402.

30 (5) A hearing as provided for in 61-8-403 must be available. The issues in the hearing must be limited

1 to determining whether a peace officer had a particularized suspicion that the person was driving or in actual
2 physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol or in
3 violation of 61-8-410 and whether the person refused to submit to the test.

4 (6) The provisions of 61-8-402(3) through ~~(8)~~ (9) that do not conflict with this section are applicable to
5 refusals under this section. If a person refuses a test requested under 61-8-402 and this section for the same
6 incident, the department may not consider each a separate refusal for purposes of suspension under 61-8-402.

7 (7) A test may not be conducted or requested under this section unless both the peace officer and the
8 instrument used to conduct the preliminary alcohol screening test have been certified by the department pursuant
9 to rules adopted under the authority of 61-8-405(5)."

10
11 ~~NEW SECTION. Section 6. Codification instruction. [Section 2] is intended to be codified as an~~
12 ~~integral part of Title 61, chapter 8, part 4, and the provisions of Title 61, chapter 8, part 4, apply to [section 2].~~

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14 NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval.

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16 NEW SECTION. Section 7. Applicability. [This act] applies to violations of Title 61, chapter 8, part 4,
17 that occur on or after [the effective date of this act].

18 - END -