
SUBSTITUTE SENATE BILL 5493

State of Washington

56th Legislature

1999 Regular Session

By Senate Committee on Judiciary (originally sponsored by Senators McCaslin and Winsley)

Read first time 03/03/99.

1 AN ACT Relating to operating or having actual physical control of
2 a vessel while under the influence of intoxicating liquor or any drug;
3 amending RCW 88.12.025 and 10.31.100; adding new sections to chapter
4 88.12 RCW; and prescribing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 88.12.025 and 1998 c 213 s 7 are each amended to read
7 as follows:

8 (1) It shall be unlawful for any person to operate a vessel in a
9 reckless manner.

10 (2) ~~((It shall be a violation for a person to operate a vessel~~
11 ~~while under the influence of intoxicating liquor or any drug. A person~~
12 ~~is considered to be under the influence of intoxicating liquor or any~~
13 ~~drug if:~~

14 ~~(a) The person has 0.08 grams or more of alcohol per two hundred~~
15 ~~ten liters of breath, as shown by analysis of the person's breath made~~
16 ~~under RCW 46.61.506; or~~

17 ~~(b) The person has 0.08 percent or more by weight of alcohol in the~~
18 ~~person's blood, as shown by analysis of the person's blood made under~~
19 ~~RCW 46.61.506; or~~

1 ~~(c) The person is under the influence of or affected by~~
2 ~~intoxicating liquor or any drug; or~~

3 ~~(d) The person is under the combined influence of or affected by~~
4 ~~intoxicating liquor and any drug.~~

5 ~~The fact that any person charged with a violation of this section~~
6 ~~is or has been entitled to use such drug under the laws of this state~~
7 ~~shall not constitute a defense against any charge of violating this~~
8 ~~section. A person cited under this subsection may upon request be~~
9 ~~given a breath test for breath alcohol or may request to have a blood~~
10 ~~sample taken for blood alcohol analysis. An arresting officer shall~~
11 ~~administer field sobriety tests when circumstances permit.~~

12 ~~(3))~~) A violation of this section is a misdemeanor, punishable as
13 provided under RCW 9.92.030. In addition, the court may order the
14 defendant to pay restitution for any damages or injuries resulting from
15 the offense.

16 NEW SECTION. Sec. 2. (1) A person is guilty of operating a vessel
17 while under the influence of intoxicating liquor or any drug if the
18 person operates a vessel within this state:

19 (a) And the person has, within two hours after operating a vessel,
20 an alcohol concentration at or above the amount specified in RCW
21 46.61.502 as shown by analysis of the person's breath or blood made
22 under section 6 of this act; or

23 (b) While the person is under the influence of or affected by
24 intoxicating liquor or any drug; or

25 (c) While the person is under the combined influence of or affected
26 by intoxicating liquor and any drug.

27 (2) The fact that a person charged with a violation of this section
28 is or has been entitled to use a drug under the laws of this state
29 shall not constitute a defense against a charge of violating this
30 section.

31 (3) It is an affirmative defense to a violation of subsection
32 (1)(a) of this section which the defendant must prove by a
33 preponderance of the evidence that the defendant consumed a sufficient
34 quantity of alcohol after the time of operating a vessel and before the
35 administration of an analysis of the person's breath or blood to cause
36 the defendant's alcohol concentration to be at or above the amount
37 specified in RCW 46.61.502 within two hours after operating a vessel.
38 The court shall not admit evidence of this defense unless the defendant

1 notifies the prosecution prior to the omnibus or pretrial hearing in
2 the case of the defendant's intent to assert the affirmative defense.

3 (4) Analyses of blood or breath samples obtained more than two
4 hours after the alleged operating a vessel may be used as evidence that
5 within two hours of the alleged operating a vessel, a person had an
6 alcohol concentration at or above the amount specified in RCW 46.61.502
7 in violation of subsection (1)(a) of this section, and in any case in
8 which the analysis shows an alcohol concentration above 0.00 may be
9 used as evidence that a person was under the influence of or affected
10 by intoxicating liquor or any drug in violation of subsection (1)(b) or
11 (c) of this section.

12 (5) A violation of this section is a gross misdemeanor.

13 NEW SECTION. **Sec. 3.** (1)(a) In addition to penalties set forth in
14 section 4 of this act, a one hundred twenty-five dollar fee shall be
15 assessed to a person who is either convicted, sentenced to a lesser
16 charge, or given deferred prosecution, as a result of an arrest for
17 violating section 2 of this act. This fee is for the purpose of
18 funding the Washington state toxicology laboratory and local government
19 for grants and activities to increase the conviction rate and decrease
20 the incidence of persons operating vessels under the influence of
21 alcohol or drugs.

22 (b) Upon a verified petition by the person assessed the fee, the
23 court may suspend payment of all or part of the fee if it finds that
24 the person does not have the ability to pay.

25 (c) When a minor has been adjudicated a juvenile offender for an
26 offense which, if committed by an adult, would constitute a violation
27 of section 2 of this act, the court shall assess the one hundred
28 twenty-five dollar fee under (a) of this subsection. Upon a verified
29 petition by a minor assessed the fee, the court may suspend payment of
30 all or part of the fee if it finds that the minor does not have the
31 ability to pay the fee.

32 (2) The fee assessed under subsection (1) of this section shall be
33 collected by the clerk of the court and distributed as follows:

34 (a) Ninety percent shall be subject to distribution under RCW
35 3.46.120, 3.50.100, 35.20.220, 3.62.020, 3.62.040, or 10.82.070.

36 (b) The remainder of the fee shall be forwarded to the state
37 treasurer for deposit in the death investigations account to be used

1 solely for funding the state toxicology laboratory blood or breath
2 testing programs.

3 NEW SECTION. **Sec. 4.** (1) A person who is convicted of a violation
4 of section 2 of this act and who has no prior offense within five years
5 shall be punished as follows:

6 (a) In the case of a person whose alcohol concentration was less
7 than 0.15, or for whom for reasons other than the person's refusal to
8 take a test offered pursuant to section 9 of this act there is no test
9 result indicating the person's alcohol concentration:

10 (i) By imprisonment for not less than one day nor more than one
11 year. Twenty-four consecutive hours of the imprisonment may not be
12 suspended or deferred unless the court finds that the imposition of
13 this mandatory minimum sentence would impose a substantial risk to the
14 offender's physical or mental well-being. Whenever the mandatory
15 minimum sentence is suspended or deferred, the court shall state in
16 writing the reason for granting the suspension or deferral and the
17 facts upon which the suspension or deferral is based; and

18 (ii) By a fine of not less than three hundred fifty dollars nor
19 more than five thousand dollars. Three hundred fifty dollars of the
20 fine may not be suspended or deferred unless the court finds the
21 offender to be indigent.

22 (b) In the case of a person whose alcohol concentration was at
23 least 0.15, or for whom by reason of the person's refusal to take a
24 test offered pursuant to section 9 of this act there is no test result
25 indicating the person's alcohol concentration:

26 (i) By imprisonment for not less than two days nor more than one
27 year. Two consecutive days of the imprisonment may not be suspended or
28 deferred unless the court finds that the imposition of this mandatory
29 minimum sentence would impose a substantial risk to the offender's
30 physical or mental well-being. Whenever the mandatory minimum sentence
31 is suspended or deferred, the court shall state in writing the reason
32 for granting the suspension or deferral and the facts upon which the
33 suspension or deferral is based; and

34 (ii) By a fine of not less than five hundred dollars nor more than
35 five thousand dollars. Five hundred dollars of the fine may not be
36 suspended or deferred unless the court finds the offender to be
37 indigent.

1 (2) A person who is convicted of a violation of section 2 of this
2 act and who has one prior offense within five years shall be punished
3 as follows:

4 (a) In the case of a person whose alcohol concentration was less
5 than 0.15, or for whom for reasons other than the person's refusal to
6 take a test offered pursuant to section 9 of this act there is no test
7 result indicating the person's alcohol concentration:

8 (i) By imprisonment for not less than thirty days nor more than one
9 year. Thirty days of the imprisonment may not be suspended or deferred
10 unless the court finds that the imposition of this mandatory minimum
11 sentence would impose a substantial risk to the offender's physical or
12 mental well-being. Whenever the mandatory minimum sentence is
13 suspended or deferred, the court shall state in writing the reason for
14 granting the suspension or deferral and the facts upon which the
15 suspension or deferral is based; and

16 (ii) By a fine of not less than five hundred dollars nor more than
17 five thousand dollars. Five hundred dollars of the fine may not be
18 suspended or deferred unless the court finds the offender to be
19 indigent.

20 (b) In the case of a person whose alcohol concentration was at
21 least 0.15, or for whom by reason of the person's refusal to take a
22 test offered pursuant to section 9 of this act there is no test result
23 indicating the person's alcohol concentration:

24 (i) By imprisonment for not less than forty-five days nor more than
25 one year. Forty-five days of the imprisonment may not be suspended or
26 deferred unless the court finds that the imposition of this mandatory
27 minimum sentence would impose a substantial risk to the offender's
28 physical or mental well-being. Whenever the mandatory minimum sentence
29 is suspended or deferred, the court shall state in writing the reason
30 for granting the suspension or deferral and the facts upon which the
31 suspension or deferral is based; and

32 (ii) By a fine of not less than seven hundred fifty dollars nor
33 more than five thousand dollars. Seven hundred fifty dollars of the
34 fine may not be suspended or deferred unless the court finds the
35 offender to be indigent.

36 (3) A person who is convicted of a violation of section 2 of this
37 act and who has two or more prior offenses within five years shall be
38 punished as follows:

1 (a) In the case of a person whose alcohol concentration was less
2 than 0.15, or for whom for reasons other than the person's refusal to
3 take a test offered pursuant to section 9 of this act there is no test
4 result indicating the person's alcohol concentration:

5 (i) By imprisonment for not less than ninety days nor more than one
6 year. Ninety days of the imprisonment may not be suspended or deferred
7 unless the court finds that the imposition of this mandatory minimum
8 sentence would impose a substantial risk to the offender's physical or
9 mental well-being. Whenever the mandatory minimum sentence is
10 suspended or deferred, the court shall state in writing the reason for
11 granting the suspension or deferral and the facts upon which the
12 suspension or deferral is based; and

13 (ii) By a fine of not less than one thousand dollars nor more than
14 five thousand dollars. One thousand dollars of the fine may not be
15 suspended or deferred unless the court finds the offender to be
16 indigent.

17 (b) In the case of a person whose alcohol concentration was at
18 least 0.15, or for whom by reason of the person's refusal to take a
19 test offered pursuant to section 9 of this act there is no test result
20 indicating the person's alcohol concentration:

21 (i) By imprisonment for not less than one hundred twenty days nor
22 more than one year. One hundred twenty days of the imprisonment may
23 not be suspended or deferred unless the court finds that the imposition
24 of this mandatory minimum sentence would impose a substantial risk to
25 the offender's physical or mental well-being. Whenever the mandatory
26 minimum sentence is suspended or deferred, the court shall state in
27 writing the reason for granting the suspension or deferral and the
28 facts upon which the suspension or deferral is based; and

29 (ii) By a fine of not less than one thousand five hundred dollars
30 nor more than five thousand dollars. One thousand five hundred dollars
31 of the fine may not be suspended or deferred unless the court finds the
32 offender to be indigent.

33 (4) In exercising its discretion in setting penalties within the
34 limits allowed by this section, the court shall particularly consider
35 whether the person's vessel operation at the time of the offense was
36 responsible for injury or damage to another or another's property.

37 (5) An offender punishable under this section is subject to the
38 alcohol assessment and treatment provisions of RCW 46.61.5056.

1 (6) An offender punishable under subsection (2) or (3) of this
2 section shall be required by the court to complete a course in boating
3 safety approved by the commission pursuant to section 5 of this act.

4 (7)(a) In addition to any nonsuspendable and nondeferrable jail
5 sentence required by this section, whenever the court imposes less than
6 one year in jail, the court shall also suspend but shall not defer a
7 period of confinement for a period not exceeding two years. The court
8 shall impose conditions of probation that include: (i) Not operating
9 a vessel within this state while having an alcohol concentration of
10 0.08 or more within two hours after operating a vessel; and (ii) not
11 refusing to submit to a test of his or her breath or blood to determine
12 alcohol concentration upon request of a law enforcement officer who has
13 reasonable grounds to believe the person was operating or was in actual
14 physical control of a vessel within this state while under the
15 influence of intoxicating liquor. The court may impose conditions of
16 probation that include nonrepetition, alcohol or drug treatment,
17 supervised probation, or other conditions that may be appropriate. The
18 sentence may be imposed in whole or in part upon violation of a
19 condition of probation during the suspension period.

20 (b) For each violation of mandatory conditions of probation under
21 (a)(i) and (ii) of this subsection, the court shall order the convicted
22 person to be confined for thirty days, which shall not be suspended or
23 deferred.

24 (8)(a) A "prior offense" means any of the following:

25 (i) A conviction for a violation of section 2 of this act or an
26 equivalent local ordinance;

27 (ii) An out-of-state conviction for a violation that would have
28 been a violation of (a)(i) of this subsection if committed in this
29 state; or

30 (iii) A deferred prosecution under chapter 10.05 RCW granted in a
31 prosecution for a violation of section 2 of this act, or an equivalent
32 local ordinance.

33 (b) "Within five years" means that the arrest for a prior offense
34 occurred within five years of the arrest for the current offense.

35 NEW SECTION. **Sec. 5.** The commission shall prescribe standards for
36 approval of boating safety courses qualifying for referral of offenders
37 pursuant to section 4 of this act. The commission shall adopt such
38 rules as are necessary to carry out this section.

1 NEW SECTION. **Sec. 6.** (1) Upon the trial of any civil or criminal
2 action or proceeding arising out of acts alleged to have been committed
3 by any person while operating a vessel while under the influence of
4 intoxicating liquor or any drug, if the person's alcohol concentration
5 is less than the amount specified in RCW 46.61.502, it is evidence that
6 may be considered with other competent evidence in determining whether
7 the person was under the influence of intoxicating liquor or any drug.

8 (2) The breath analysis shall be based upon grams of alcohol per
9 two hundred ten liters of breath. The foregoing provisions of this
10 section shall not be construed as limiting the introduction of any
11 other competent evidence bearing upon the question whether the person
12 was under the influence of intoxicating liquor or any drug.

13 (3) Analysis of the person's blood or breath to be considered valid
14 under the provisions of this section or section 2 of this act shall
15 have been performed according to methods approved by the state
16 toxicologist and by an individual possessing a valid permit issued by
17 the state toxicologist for this purpose pursuant to RCW 46.61.506.

18 (4) When a blood test is administered under the provisions of
19 section 9 of this act, the withdrawal of blood for the purpose of
20 determining its alcoholic or drug content may be performed only by a
21 physician, a registered nurse, or a qualified technician. This
22 limitation shall not apply to the taking of breath specimens.

23 (5) The person tested may have a physician, or a qualified
24 technician, chemist, registered nurse, or other qualified person of his
25 or her own choosing administer one or more tests in addition to any
26 administered at the direction of a law enforcement officer. The
27 failure or inability to obtain an additional test by a person shall not
28 preclude the admission of evidence relating to the test or tests taken
29 at the direction of a law enforcement officer.

30 (6) Upon the request of the person who shall submit to a test or
31 tests at the request of a law enforcement officer, full information
32 concerning the test or tests shall be made available to him or her or
33 his or her attorney.

34 NEW SECTION. **Sec. 7.** A sentencing court may allow persons
35 convicted of violating section 2 of this act to fulfill the terms of
36 the sentence provided in section 4 of this act in nonconsecutive or
37 intermittent time periods. However, any mandatory minimum sentence

1 under section 4 of this act shall be served consecutively unless
2 suspended or deferred as otherwise provided by law.

3 NEW SECTION. **Sec. 8.** The refusal of a person to submit to a test
4 of the alcoholic content of the person's blood or breath under section
5 9 of this act is admissible into evidence at a subsequent criminal
6 trial.

7 NEW SECTION. **Sec. 9.** (1) Any person who operates a vessel within
8 this state is deemed to have given consent, subject to the provisions
9 of section 6 of this act, to a test or tests of his or her breath or
10 blood for the purpose of determining the alcohol concentration or
11 presence of any drug in his or her breath or blood if arrested for any
12 offense where, at the time of the arrest, the arresting officer has
13 reasonable grounds to believe the person had been operating a vessel
14 while under the influence of intoxicating liquor or any drug.

15 (2) The test or tests of breath shall be administered at the
16 direction of a law enforcement officer having reasonable grounds to
17 believe the person to have been operating a vessel within this state
18 while under the influence of intoxicating liquor or the person to have
19 been operating a vessel while having alcohol in a concentration of 0.02
20 or more in his or her system and being under the age of twenty-one.
21 However, in those instances where the person is incapable due to
22 physical injury, physical incapacity, or other physical limitation, of
23 providing a breath sample or where the person is being treated in a
24 hospital, clinic, doctor's office, emergency medical vehicle,
25 ambulance, or other similar facility in which a breath testing
26 instrument is not present or where the officer has reasonable grounds
27 to believe that the person is under the influence of a drug, a blood
28 test shall be administered by a qualified person as provided in section
29 6 of this act. The officer shall inform the person of his or her right
30 to refuse the breath or blood test, and of his or her right to have
31 additional tests administered by any qualified person of his or her
32 choosing as provided in section 6 of this act. The officer shall warn
33 the operator that:

34 (a) The operator's refusal to take the test may subject him or her
35 to civil penalty; and

36 (b) His or her refusal to take the test may be used in a criminal
37 trial.

1 (3) Except as provided in this section, the test administered shall
2 be of the breath only. If an individual is unconscious or is under
3 arrest for the crime of homicide by watercraft as provided in RCW
4 88.12.029, assault by watercraft as provided in RCW 88.12.032, or
5 operating a vessel while under the influence of intoxicating liquor or
6 drugs as provided in section 2 of this act, which arrest results from
7 an accident in which there has been serious bodily injury to another
8 person, a breath or blood test may be administered without the consent
9 of the individual so arrested.

10 (4) Any person who is dead, unconscious, or who is otherwise in a
11 condition rendering him or her incapable of refusal, shall be deemed
12 not to have withdrawn the consent provided by subsection (1) of this
13 section and the test or tests may be administered, subject to the
14 provisions of section 6 of this act, and the person shall be deemed to
15 have received the warnings required under subsection (2) of this
16 section.

17 (5) If, following his or her arrest and receipt of warnings under
18 subsection (2) of this section, the person arrested refuses upon the
19 request of a law enforcement officer to submit to a test or tests of
20 his or her breath or blood, no test shall be given except as authorized
21 under subsection (3) or (4) of this section.

22 (6) A person's refusal to submit to a test or tests pursuant to
23 subsection (5) of this section shall constitute a class 1 civil
24 infraction, pursuant to RCW 7.80.120.

25 **Sec. 10.** RCW 10.31.100 and 1997 c 66 s 10 are each amended to read
26 as follows:

27 A police officer having probable cause to believe that a person has
28 committed or is committing a felony shall have the authority to arrest
29 the person without a warrant. A police officer may arrest a person
30 without a warrant for committing a misdemeanor or gross misdemeanor
31 only when the offense is committed in the presence of the officer,
32 except as provided in subsections (1) through (10) of this section.

33 (1) Any police officer having probable cause to believe that a
34 person has committed or is committing a misdemeanor or gross
35 misdemeanor, involving physical harm or threats of harm to any person
36 or property or the unlawful taking of property or involving the use or
37 possession of cannabis, or involving the acquisition, possession, or
38 consumption of alcohol by a person under the age of twenty-one years

1 under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070
2 or 9A.52.080, shall have the authority to arrest the person.

3 (2) A police officer shall arrest and take into custody, pending
4 release on bail, personal recognizance, or court order, a person
5 without a warrant when the officer has probable cause to believe that:

6 (a) An order has been issued of which the person has knowledge
7 under RCW 10.99.040(2), 10.99.050, 26.09.050, 26.09.060, 26.10.040,
8 26.10.115, 26.44.063, chapter 26.26 RCW, or chapter 26.50 RCW
9 restraining the person and the person has violated the terms of the
10 order restraining the person from acts or threats of violence or
11 restraining the person from going onto the grounds of or entering a
12 residence, workplace, school, or day care or, in the case of an order
13 issued under RCW 26.44.063, imposing any other restrictions or
14 conditions upon the person; or

15 (b) The person is sixteen years or older and within the preceding
16 four hours has assaulted a family or household member as defined in RCW
17 10.99.020 and the officer believes: (i) A felonious assault has
18 occurred; (ii) an assault has occurred which has resulted in bodily
19 injury to the victim, whether the injury is observable by the
20 responding officer or not; or (iii) that any physical action has
21 occurred which was intended to cause another person reasonably to fear
22 imminent serious bodily injury or death. Bodily injury means physical
23 pain, illness, or an impairment of physical condition. When the
24 officer has probable cause to believe that family or household members
25 have assaulted each other, the officer is not required to arrest both
26 persons. The officer shall arrest the person whom the officer believes
27 to be the primary physical aggressor. In making this determination,
28 the officer shall make every reasonable effort to consider: (i) The
29 intent to protect victims of domestic violence under RCW 10.99.010;
30 (ii) the comparative extent of injuries inflicted or serious threats
31 creating fear of physical injury; and (iii) the history of domestic
32 violence between the persons involved.

33 (3) Any police officer having probable cause to believe that a
34 person has committed or is committing a violation of any of the
35 following traffic laws shall have the authority to arrest the person:

36 (a) RCW 46.52.010, relating to duty on striking an unattended car
37 or other property;

38 (b) RCW 46.52.020, relating to duty in case of injury to or death
39 of a person or damage to an attended vehicle;

1 (c) RCW 46.61.500 or 46.61.530, relating to reckless driving or
2 racing of vehicles;

3 (d) RCW 46.61.502 or 46.61.504, relating to persons under the
4 influence of intoxicating liquor or drugs;

5 (e) RCW 46.20.342, relating to driving a motor vehicle while
6 operator's license is suspended or revoked;

7 (f) RCW 46.61.5249, relating to operating a motor vehicle in a
8 negligent manner.

9 (4) A law enforcement officer investigating at the scene of a motor
10 vehicle accident may arrest the driver of a motor vehicle involved in
11 the accident if the officer has probable cause to believe that the
12 driver has committed in connection with the accident a violation of any
13 traffic law or regulation.

14 (5) Any police officer having probable cause to believe that a
15 person has committed or is committing a violation of RCW 88.12.025 or
16 section 2 of this act shall have the authority to arrest the person.

17 (6) An officer may act upon the request of a law enforcement
18 officer in whose presence a traffic infraction was committed, to stop,
19 detain, arrest, or issue a notice of traffic infraction to the driver
20 who is believed to have committed the infraction. The request by the
21 witnessing officer shall give an officer the authority to take
22 appropriate action under the laws of the state of Washington.

23 (7) Any police officer having probable cause to believe that a
24 person has committed or is committing any act of indecent exposure, as
25 defined in RCW 9A.88.010, may arrest the person.

26 (8) A police officer may arrest and take into custody, pending
27 release on bail, personal recognizance, or court order, a person
28 without a warrant when the officer has probable cause to believe that
29 an order has been issued of which the person has knowledge under
30 chapter 10.14 RCW and the person has violated the terms of that order.

31 (9) Any police officer having probable cause to believe that a
32 person has, within twenty-four hours of the alleged violation,
33 committed a violation of RCW 9A.50.020 may arrest such person.

34 (10) A police officer having probable cause to believe that a
35 person illegally possesses or illegally has possessed a firearm or
36 other dangerous weapon on private or public elementary or secondary
37 school premises shall have the authority to arrest the person.

1 For purposes of this subsection, the term "firearm" has the meaning
2 defined in RCW 9.41.010 and the term "dangerous weapon" has the meaning
3 defined in RCW 9.41.250 and 9.41.280(1) (c) through (e).

4 (11) Except as specifically provided in subsections (2), (3), (4),
5 and (6) of this section, nothing in this section extends or otherwise
6 affects the powers of arrest prescribed in Title 46 RCW.

7 (12) No police officer may be held criminally or civilly liable for
8 making an arrest pursuant to RCW 10.31.100 (2) or (8) if the police
9 officer acts in good faith and without malice.

10 NEW SECTION. **Sec. 11.** Sections 2 through 9 of this act are each
11 added to chapter 88.12 RCW.

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