

# HOUSE BILL REPORT

## SHB 3055

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### As Passed Legislature

**Title:** An act relating to admissibility of DUI tests.

**Brief Description:** Providing uniformity for admissibility of alcohol tests.

**Sponsors:** By House Committee on Judiciary (originally sponsored by Representatives Holmquist, Carrell and O'Brien).

#### **Brief History:**

##### **Committee Activity:**

Judiciary: 1/29/04, 2/5/04 [DPS].

##### **Floor Activity:**

Passed House: 2/12/04, 93-0.

Passed Senate: 3/2/04, 48-0.

Passed Legislature.

#### **Brief Summary of Substitute Bill**

- Makes it explicit that the implied consent law does not prevent the police from getting a search warrant for a person's breath or blood;
- Removes the requirement that no breath testing device be present before a blood test may be requested by the police under certain circumstances;
- Explicitly allows the required implied consent warning given at the time of arrest to be "substantially" in the language of the statute;
- Expands the category of persons who may withdraw blood samples for purposes of the implied consent law; and
- Sets forth in statute the criteria for admissibility of breath test evidence.

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#### **HOUSE COMMITTEE ON JUDICIARY**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

**Staff:** Bill Perry (786-7123).

## **Background:**

Any person who operates a motor vehicle in this state is deemed to have given consent for a blood or breath alcohol concentration (BAC) test if he or she is arrested for driving while under the influence of alcohol or drugs (DUI). This provision in the state's motor vehicle code is known as the implied consent law.

A so-called "per se" violation of the DUI law consists of operating a motor vehicle while having a BAC of 0.08 or more for persons over the age of 21, or having a BAC of 0.02 or more for younger drivers. (The BAC measurement is of either grams of alcohol per 210 liters of breath, or grams of alcohol per 100 milliliters of blood.)

If an arresting officer has reasonable grounds to believe a driver has committed DUI, the officer may request that the driver take a BAC test. If the driver refuses the test, his or her driver's license will be administratively suspended or revoked by the Department of Licensing (DOL). If the driver submits to the test and fails it, i.e., registers above the legal BAC limit, the DOL will also administratively suspend or revoke the license.

The arresting officer is required to inform the driver of his or her right to refuse the BAC test and of the right to have an independent test done. The officer is also required to warn the driver of some of the consequences of his or her decision regarding taking or refusing the test. Specifically, the driver must be told:

- His or her license will be revoked if the driver refuses the test; and
- His or her license will be suspended or revoked if the driver takes the test and fails it by having a BAC of over 0.08 in the case of a person 21 or older or over 0.02 in the case of a person under 21.

The implied consent law also allows the police to offer a blood test instead of a breath test under certain circumstances. The consequences for refusal of such a blood test are the same as for refusing a breath test. The circumstances under which a person may be offered a blood test instead of a breath test include:

- the driver is incapable of providing a breath test due to physical injury, incapacity, or limitation;
- the driver is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility where a breath testing instrument is not present; and
- there are reasonable grounds to believe the driver is under the influence of drugs.

The implied consent law also allows the police to administer a breath or blood test against the will of a driver under certain circumstances. These circumstances include:

- the driver is unconscious;
- the driver is under arrest for vehicular assault or homicide; and
- the driver is under arrest for DUI and was involved in an accident in which another person suffered serious bodily injury.

Withdrawal of blood for a blood test may be done only by a physician, registered nurse or qualified technician. Analysis of blood must be done in accordance with methods approved by the state toxicologist and must be done by a person with a permit from the state toxicologist.

The BAC test results, or the fact of refusal to take a test, are admissible in any civil or criminal action arising out of an alleged DUI incident. Even if the test results show a BAC below 0.08 (or below 0.02 for a person under 21), the results may be introduced along with other evidence to prove that the driver was under the influence.

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### **Summary of Substitute Bill:**

#### Search Warrants.

Nothing in the implied consent law prevents a police officer from getting a search warrant in order to obtain breath or blood evidence samples.

#### Absence of Breath Testing Equipment.

The absence of a breath testing device is no longer necessary before a police officer may request a blood test in lieu of a breath test when a driver is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility.

#### Implied Consent Warning.

The implied consent warning to be given at the time of arrest need only be "substantially" the same as the wording of the implied consent statute.

#### Drawing Blood.

The category of person who may withdraw blood samples is expanded to include licensed practical nurses, nursing assistants, physician assistants, first responders, emergency medical technicians, health care assistants, or any trained technician.

#### Admissibility of Breath Test Results.

Breath test results are admissible in a judicial or administrative proceeding if the test was performed by an instrument approved by the state toxicologist, and *prima facie* evidence is presented that:

- the test was done by a person authorized by the toxicologist;
- the person tested did not vomit, eat, drink, smoke or have any foreign substance in his or her mouth for at least 15 minutes before the test;
- the temperature of the test simulator solution was at the appropriate level as measured by a thermometer approved by the toxicologist;
- the internal standard test produced a "verified" message;
- two samples agreed to within a specified limit;
- the simulator test was within a specified range; and
- blank tests showed a .000 result.

A *prima facie* showing is one that provides evidence "of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved." Any prosecution

evidence regarding the foundational facts of a breath test will be assumed to be true, and all reasonable inferences from that evidence are to be construed in a light most favorable to the prosecution.

Defense challenges to the reliability or accuracy of a breath test may not be used to prevent the introduction of the evidence once the prosecution has made a *prima facie* case. However, evidence presented by the defense in making such a challenge may be considered by the trier of fact in determining the weight to be given to the breath test results.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** The BAC test results are the most important pieces of evidence in DUI trials. The current law allows for mass BAC evidence suppression rulings. Although these suppression rulings are ultimately overturned, they can disrupt prosecutions for years and lead to substantial miscarriages of justice. Judges may rule county by county on these evidence matters, making for inconsistent results statewide. The bill will appropriately eliminate purely technical arguments from questions of admissibility, but will allow the arguments to be made on the weight of the evidence once it is before the jury. Currently, evidence is excluded not because it is wrong or unreliable, but merely because some highly technical procedure is not followed exactly.

The bill will level the playing field. When BAC evidence is inappropriately suppressed, juries will often acquit the defendant just because the evidence is not available and they expect it to be. The bill puts the important standards in the law and eliminates arguments over silly technicalities. The bill treats BAC evidence the same way other scientific evidence, such as DNA evidence, is treated.

The bill is extremely important because without convictions, none of the DUI laws mean anything. There is no deterrent without convictions.

**Testimony Against:** The bill will be very expensive. Currently, arguments on a question of compliance with BAC testing requirements can be consolidated in a single suppression hearing. If the bill passes, all of these arguments will have to be made individually in each DUI case after the evidence has been admitted. This will cause delays and extra time for prosecutors. In addition, the public will pay for the increased need for expert witnesses for indigent defendants.

Putting this kind of detail in statute will cause problems as technology evolves. The current system of having the technical details in the administrative code makes much more sense. The administrative code is more flexible than the statutes. The administrative rules can be modified quickly to adjust to changing technology. The specific technical details and

procedures are in these administrative rules for a reason. The state toxicologist has determined that they are important steps that must be taken to insure the reliability of BAC evidence. They would not be in the rules if they were not necessary.

**Persons Testifying:** (In support) Representative Holmquist, prime sponsor; Ted Chow, Grant County Prosecuting Attorney's Office; Tom Carr, Seattle City Attorney; Pam Loginsky, Washington Association of Prosecuting Attorneys; and Rod Gullberg, Washington State Patrol.

(Opposed) Diego Vargas and Geoffrey Burg, Washington Association of Criminal Defense Lawyers.

**Persons Signed In To Testify But Not Testifying:** None.