

SENATE BILL NO. 42

INTRODUCED BY J. SHOCKLEY

BY REQUEST OF THE LAW AND JUSTICE INTERIM COMMITTEE

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

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

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

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

(1) evidence, including blood samples that may yield evidence of any measured amount or detected presence of alcohol or drugs in a person's body when subjected to testing;

(2) contraband; or

(3) person for whose arrest there is probable cause, for whom there has been a warrant of arrest issued, or who is unlawfully restrained."

**NEW SECTION. Section 2. Refusal to submit to test -- search warrant.** (1) If a person refuses to submit to one or more tests requested and designated by a peace officer as provided in 61-8-402 and the officer has probable cause to believe that the person has been driving or has been in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two 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 or tests may be administered without the consent of the person provided that the officer first obtains a search 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 3.** 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, the officer shall, on behalf of the department, immediately seize  
3 the person's driver's license. The peace officer shall immediately forward the license to the department, along  
4 with a report certified under penalty of law stating which of the conditions set forth in subsection (2)(a) provides  
5 the basis for the testing request and confirming that the person refused to submit to one or more tests requested  
6 and designated by the peace officer. Upon receipt of the report, the department shall suspend the license for the  
7 period provided in subsection (6).

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

12 (6) (a) Except as provided in subsection (6)(b), the following suspension periods are applicable upon  
13 refusal to submit to one or more tests:

14 (i) upon a first refusal, a suspension of 6 months with no provision for a restricted probationary license;

15 (ii) upon a second or subsequent refusal within 5 years of a previous refusal, as determined from the  
16 records of the department, a suspension of 1 year with no provision for a restricted probationary license.

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

20 (i) upon a first refusal, suspend the person's commercial driver's license for a 1-year period; and

21 (ii) upon a second or subsequent refusal, suspend the person's commercial driver's license for life,  
22 subject to department rules adopted to implement federal rules allowing for license reinstatement, if the person  
23 is otherwise eligible, upon completion of a minimum suspension period of 10 years. If the person has a prior  
24 conviction of a major offense listed in 61-8-802(2) arising from a separate incident, the conviction has the same  
25 effect as a previous testing refusal for purposes of this subsection (6)(b).

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

29 (8) The department may recognize the seizure of a license of a tribal member by a peace officer acting  
30 under the authority of a tribal government or an order issued by a tribal court suspending, revoking, or reinstating

1 a license or adjudicating a license seizure if the actions are conducted pursuant to tribal law or regulation  
 2 requiring alcohol or drug testing of motor vehicle operators and the conduct giving rise to the actions occurred  
 3 within the exterior boundaries of a federally recognized Indian reservation in this state. Action by the department  
 4 under this subsection is not reviewable under 61-8-403.

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

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

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

11

12 **Section 4.** Section 61-8-404, MCA, is amended to read:

13 **"61-8-404. Evidence admissible -- conditions of admissibility.** (1) Upon the trial of a criminal action  
 14 or other proceeding arising out of acts alleged to have been committed by a person in violation of 61-8-401,  
 15 61-8-406, 61-8-410, or 61-8-805:

16 (a) evidence of any measured amount or detected presence of alcohol, drugs, or a combination of  
 17 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  
 18 admissible. A positive test result does not, in itself, prove that the person was under the influence of a drug or  
 19 drugs at the time the person was in control of a motor vehicle. A person may not be convicted of a violation of  
 20 61-8-401 based upon the presence of a drug or drugs in the person unless some other competent evidence exists  
 21 that tends to establish that the person was under the influence of a drug or drugs while driving or in actual  
 22 physical control of a motor vehicle within this state.

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

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

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

30 (c) a report of the facts and results of a physical, psychomotor, or physiological assessment of a person

1 is admissible in evidence if it was made by a person trained by the department or by a person who has received  
2 training recognized by the department.

3 (2) If the person under arrest refused to submit to one or more tests ~~as provided in this section~~ under  
4 61-8-402, whether or not a sample was subsequently collected for any purpose, proof of refusal is admissible in  
5 any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving  
6 or in actual physical control of a vehicle upon the ways of this state open to the public, while under the influence  
7 of alcohol, drugs, or a combination of alcohol and drugs. The trier of fact may infer from the refusal that the person  
8 was under the influence. The inference is rebuttable.

9 (3) The provisions of this part do not limit the introduction of any other competent evidence bearing on  
10 the question of whether the person was under the influence of alcohol, drugs, or a combination of alcohol and  
11 drugs."  
12

13 **Section 5.** Section 61-8-405, MCA, is amended to read:

14 **"61-8-405. Administration of tests.** (1) Only a physician, ~~or~~ registered nurse, or other qualified person  
15 acting under the supervision and direction of a physician or registered nurse; may, at the request of a peace  
16 officer, withdraw blood for the purpose of determining any measured amount or detected presence of alcohol,  
17 drugs, or any combination of alcohol and drugs in the person. This limitation does not apply to the sampling of  
18 breath.

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

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

29 (4) A physician, ~~or~~ registered nurse, or other qualified person acting under the supervision and direction  
30 of a physician or registered nurse; does not incur any civil or criminal liability as a result of the proper

1 administering of a blood test when requested in writing by a peace officer to administer a test.

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

4 (6) If a peace officer has probable cause to believe that a person has violated 61-8-401, 61-8-406,  
5 61-8-410, or 61-8-805 and a sample of blood, breath, urine, or other bodily substance is taken from that person  
6 for any reason, a portion of that sample sufficient for analysis must be provided to a peace officer if requested  
7 for law enforcement purposes and upon issuance of a subpoena as provided in 46-4-301."

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9 **NEW SECTION. Section 6. Codification instruction.** [Section 2] is intended to be codified as an  
10 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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12 **NEW SECTION. Section 7. Effective date.** [This act] is effective on passage and approval.

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

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