

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 3055

Chapter 68, Laws of 2004

58th Legislature
2004 Regular Session

DUI TEST ADMISSIBILITY

EFFECTIVE DATE: 6/10/04

Passed by the House February 12, 2004
Yeas 93 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 2, 2004
Yeas 48 Nays 0

BRAD OWEN

President of the Senate

Approved March 22, 2004.

GARY F. LOCKE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 3055** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

March 22, 2004 - 5:14 p.m.

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 3055

Passed Legislature - 2004 Regular Session

State of Washington 58th Legislature 2004 Regular Session

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

READ FIRST TIME 02/06/04.

1 AN ACT Relating to admissibility of DUI tests; amending RCW
2 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and
3 creating a new section.

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

5 NEW SECTION. **Sec. 1.** The legislature finds that previous attempts
6 to curtail the incidence of driving while intoxicated have been
7 inadequate. The legislature further finds that property loss, injury,
8 and death caused by drinking drivers continue at unacceptable levels.
9 This act is intended to convey the seriousness with which the
10 legislature views this problem. To that end the legislature seeks to
11 ensure swift and certain consequences for those who drink and drive.

12 To accomplish this goal, the legislature adopts standards governing
13 the admissibility of tests of a person's blood or breath. These
14 standards will provide a degree of uniformity that is currently
15 lacking, and will reduce the delays caused by challenges to various
16 breath test instrument components and maintenance procedures. Such
17 challenges, while allowed, will no longer go to admissibility of test
18 results. Instead, such challenges are to be considered by the finder

1 of fact in deciding what weight to place upon an admitted blood or
2 breath test result.

3 The legislature's authority to adopt standards governing the
4 admissibility of evidence involving alcohol is well established by the
5 Washington Supreme Court. See generally *State v. Long*, 113 Wn.2d 266,
6 778 P.2d 1027 (1989); *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337
7 (1940) (the legislature has the power to enact laws which create rules
8 of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929)
9 ("rules of evidence are substantive law").

10 **Sec. 2.** RCW 46.20.308 and 1999 c 331 s 2 and 1999 c 274 s 2 are
11 each reenacted and amended to read as follows:

12 (1) Any person who operates a motor vehicle within this state is
13 deemed to have given consent, subject to the provisions of RCW
14 46.61.506, to a test or tests of his or her breath or blood for the
15 purpose of determining the alcohol concentration or presence of any
16 drug in his or her breath or blood if arrested for any offense where,
17 at the time of the arrest, the arresting officer has reasonable grounds
18 to believe the person had been driving or was in actual physical
19 control of a motor vehicle while under the influence of intoxicating
20 liquor or any drug or was in violation of RCW 46.61.503. Neither
21 consent nor this section precludes a police officer from obtaining a
22 search warrant for a person's breath or blood.

23 (2) The test or tests of breath shall be administered at the
24 direction of a law enforcement officer having reasonable grounds to
25 believe the person to have been driving or in actual physical control
26 of a motor vehicle within this state while under the influence of
27 intoxicating liquor or any drug or the person to have been driving or
28 in actual physical control of a motor vehicle while having alcohol in
29 a concentration in violation of RCW 46.61.503 in his or her system and
30 being under the age of twenty-one. However, in those instances where
31 the person is incapable due to physical injury, physical incapacity, or
32 other physical limitation, of providing a breath sample or where the
33 person is being treated in a hospital, clinic, doctor's office,
34 emergency medical vehicle, ambulance, or other similar facility (~~in~~
35 ~~which a breath testing instrument is not present~~) or where the officer
36 has reasonable grounds to believe that the person is under the
37 influence of a drug, a blood test shall be administered by a qualified

1 person as provided in RCW 46.61.506(~~((4))~~) (5). The officer shall
2 inform the person of his or her right to refuse the breath or blood
3 test, and of his or her right to have additional tests administered by
4 any qualified person of his or her choosing as provided in RCW
5 46.61.506. (~~The officer shall warn the driver that:~~

6 ~~(a) His or her license, permit, or privilege to drive will be~~
7 ~~revoked or denied if he or she refuses to submit to the test;~~

8 ~~(b) His or her license, permit, or privilege to drive will be~~
9 ~~suspended, revoked, or denied if the test is administered and the test~~
10 ~~indicates the alcohol concentration of the person's breath or blood is~~
11 ~~0.08 or more, in the case of a person age twenty one or over, or in~~
12 ~~violation of RCW 46.61.502, 46.61.503, or 46.61.504 in the case of a~~
13 ~~person under age twenty one; and~~

14 ~~(c) His or her refusal to take the test may be used in a criminal~~
15 ~~trial.)) The officer shall warn the driver, in substantially the~~
16 ~~following language, that:~~

17 (a) If the driver refuses to take the test, the driver's license,
18 permit, or privilege to drive will be revoked or denied for at least
19 one year; and

20 (b) If the driver refuses to take the test, the driver will not be
21 eligible for an occupational permit; and

22 (c) If the driver refuses to take the test, the driver's refusal to
23 take the test may be used in a criminal trial; and

24 (d) If the driver submits to the test and the test is administered,
25 the driver's license, permit, or privilege to drive will be suspended,
26 revoked, or denied for at least ninety days if the driver is age
27 twenty-one or over and the test indicates the alcohol concentration of
28 the driver's breath or blood is 0.08 or more, or if the driver is under
29 age twenty-one and the test indicates the alcohol concentration of the
30 driver's breath or blood is 0.02 or more, or if the driver is under age
31 twenty-one and the driver is in violation of RCW 46.61.502 or
32 46.61.504.

33 (3) Except as provided in this section, the test administered shall
34 be of the breath only. If an individual is unconscious or is under
35 arrest for the crime of vehicular homicide as provided in RCW 46.61.520
36 or vehicular assault as provided in RCW 46.61.522, or if an individual
37 is under arrest for the crime of driving while under the influence of
38 intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest

1 results from an accident in which there has been serious bodily injury
2 to another person, a breath or blood test may be administered without
3 the consent of the individual so arrested.

4 (4) Any person who is dead, unconscious, or who is otherwise in a
5 condition rendering him or her incapable of refusal, shall be deemed
6 not to have withdrawn the consent provided by subsection (1) of this
7 section and the test or tests may be administered, subject to the
8 provisions of RCW 46.61.506, and the person shall be deemed to have
9 received the warnings required under subsection (2) of this section.

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

15 (6) If, after arrest and after the other applicable conditions and
16 requirements of this section have been satisfied, a test or tests of
17 the person's blood or breath is administered and the test results
18 indicate that the alcohol concentration of the person's breath or blood
19 is 0.08 or more if the person is age twenty-one or over, or (~~is in~~
20 ~~violation of RCW 46.61.502, 46.61.503, or 46.61.504~~) 0.02 or more if
21 the person is under the age of twenty-one, or the person refuses to
22 submit to a test, the arresting officer or other law enforcement
23 officer at whose direction any test has been given, or the department,
24 where applicable, if the arrest results in a test of the person's
25 blood, shall:

26 (a) Serve notice in writing on the person on behalf of the
27 department of its intention to suspend, revoke, or deny the person's
28 license, permit, or privilege to drive as required by subsection (7) of
29 this section;

30 (b) Serve notice in writing on the person on behalf of the
31 department of his or her right to a hearing, specifying the steps he or
32 she must take to obtain a hearing as provided by subsection (8) of this
33 section;

34 (c) Mark the person's Washington state driver's license or permit
35 to drive, if any, in a manner authorized by the department;

36 (d) Serve notice in writing that the marked license or permit, if
37 any, is a temporary license that is valid for sixty days from the date
38 of arrest or from the date notice has been given in the event notice is

1 given by the department following a blood test, or until the
2 suspension, revocation, or denial of the person's license, permit, or
3 privilege to drive is sustained at a hearing pursuant to subsection (8)
4 of this section, whichever occurs first. No temporary license is valid
5 to any greater degree than the license or permit that it replaces; and

6 (e) Immediately notify the department of the arrest and transmit to
7 the department within seventy-two hours, except as delayed as the
8 result of a blood test, a sworn report or report under a declaration
9 authorized by RCW 9A.72.085 that states:

10 (i) That the officer had reasonable grounds to believe the arrested
11 person had been driving or was in actual physical control of a motor
12 vehicle within this state while under the influence of intoxicating
13 liquor or drugs, or both, or was under the age of twenty-one years and
14 had been driving or was in actual physical control of a motor vehicle
15 while having an alcohol concentration in violation of RCW 46.61.503;

16 (ii) That after receipt of the warnings required by subsection (2)
17 of this section the person refused to submit to a test of his or her
18 blood or breath, or a test was administered and the results indicated
19 that the alcohol concentration of the person's breath or blood was 0.08
20 or more if the person is age twenty-one or over, or was (~~in violation~~
21 ~~of RCW 46.61.502, 46.61.503, or 46.61.504~~) 0.02 or more if the person
22 is under the age of twenty-one; and

23 (iii) Any other information that the director may require by rule.

24 (7) The department of licensing, upon the receipt of a sworn report
25 or report under a declaration authorized by RCW 9A.72.085 under
26 subsection (6)(e) of this section, shall suspend, revoke, or deny the
27 person's license, permit, or privilege to drive or any nonresident
28 operating privilege, as provided in RCW 46.20.3101, such suspension,
29 revocation, or denial to be effective beginning sixty days from the
30 date of arrest or from the date notice has been given in the event
31 notice is given by the department following a blood test, or when
32 sustained at a hearing pursuant to subsection (8) of this section,
33 whichever occurs first.

34 (8) A person receiving notification under subsection (6)(b) of this
35 section may, within thirty days after the notice has been given,
36 request in writing a formal hearing before the department. The person
37 shall pay a fee of one hundred dollars as part of the request. If the
38 request is mailed, it must be postmarked within thirty days after

1 receipt of the notification. Upon timely receipt of such a request for
2 a formal hearing, including receipt of the required one hundred dollar
3 fee, the department shall afford the person an opportunity for a
4 hearing. The department may waive the required one hundred dollar fee
5 if the person is an indigent as defined in RCW 10.101.010. Except as
6 otherwise provided in this section, the hearing is subject to and shall
7 be scheduled and conducted in accordance with RCW 46.20.329 and
8 46.20.332. The hearing shall be conducted in the county of the arrest,
9 except that all or part of the hearing may, at the discretion of the
10 department, be conducted by telephone or other electronic means. The
11 hearing shall be held within sixty days following the arrest or
12 following the date notice has been given in the event notice is given
13 by the department following a blood test, unless otherwise agreed to by
14 the department and the person, in which case the action by the
15 department shall be stayed, and any valid temporary license marked
16 under subsection (6)(c) of this section extended, if the person is
17 otherwise eligible for licensing. For the purposes of this section,
18 the scope of the hearing shall cover the issues of whether a law
19 enforcement officer had reasonable grounds to believe the person had
20 been driving or was in actual physical control of a motor vehicle
21 within this state while under the influence of intoxicating liquor or
22 any drug or had been driving or was in actual physical control of a
23 motor vehicle within this state while having alcohol in his or her
24 system in a concentration (~~((in violation of RCW 46.61.503 and))~~) of 0.02
25 or more if the person was under the age of twenty-one, whether the
26 person was placed under arrest, and (a) whether the person refused to
27 submit to the test or tests upon request of the officer after having
28 been informed that such refusal would result in the revocation of the
29 person's license, permit, or privilege to drive, or (b) if a test or
30 tests were administered, whether the applicable requirements of this
31 section were satisfied before the administration of the test or tests,
32 whether the person submitted to the test or tests, or whether a test
33 was administered without express consent as permitted under this
34 section, and whether the test or tests indicated that the alcohol
35 concentration of the person's breath or blood was 0.08 or more if the
36 person was age twenty-one or over at the time of the arrest, or (~~was~~
37 ~~in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~) 0.02 or more
38 if the person was under the age of twenty-one at the time of the

1 arrest. The sworn report or report under a declaration authorized by
2 RCW 9A.72.085 submitted by a law enforcement officer is prima facie
3 evidence that the officer had reasonable grounds to believe the person
4 had been driving or was in actual physical control of a motor vehicle
5 within this state while under the influence of intoxicating liquor or
6 drugs, or both, or the person had been driving or was in actual
7 physical control of a motor vehicle within this state while having
8 alcohol in his or her system in a concentration (~~in violation of RCW~~
9 ~~46.61.503~~) of 0.02 or more and was under the age of twenty-one and
10 that the officer complied with the requirements of this section.

11 A hearing officer shall conduct the hearing, may issue subpoenas
12 for the attendance of witnesses and the production of documents, and
13 shall administer oaths to witnesses. The hearing officer shall not
14 issue a subpoena for the attendance of a witness at the request of the
15 person unless the request is accompanied by the fee required by RCW
16 5.56.010 for a witness in district court. The sworn report or report
17 under a declaration authorized by RCW 9A.72.085 of the law enforcement
18 officer and any other evidence accompanying the report shall be
19 admissible without further evidentiary foundation and the
20 certifications authorized by the criminal rules for courts of limited
21 jurisdiction shall be admissible without further evidentiary
22 foundation. The person may be represented by counsel, may question
23 witnesses, may present evidence, and may testify. The department shall
24 order that the suspension, revocation, or denial either be rescinded or
25 sustained.

26 (9) If the suspension, revocation, or denial is sustained after
27 such a hearing, the person whose license, privilege, or permit is
28 suspended, revoked, or denied has the right to file a petition in the
29 superior court of the county of arrest to review the final order of
30 revocation by the department in the same manner as an appeal from a
31 decision of a court of limited jurisdiction. Notice of appeal must be
32 filed within thirty days after the date the final order is served or
33 the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ
34 1.1, or other statutes or rules referencing de novo review, the appeal
35 shall be limited to a review of the record of the administrative
36 hearing. The appellant must pay the costs associated with obtaining
37 the record of the hearing before the hearing officer. The filing of
38 the appeal does not stay the effective date of the suspension,

1 revocation, or denial. A petition filed under this subsection must
2 include the petitioner's grounds for requesting review. Upon granting
3 petitioner's request for review, the court shall review the
4 department's final order of suspension, revocation, or denial as
5 expeditiously as possible. The review must be limited to a
6 determination of whether the department has committed any errors of
7 law. The superior court shall accept those factual determinations
8 supported by substantial evidence in the record: (a) That were
9 expressly made by the department; or (b) that may reasonably be
10 inferred from the final order of the department. The superior court
11 may reverse, affirm, or modify the decision of the department or remand
12 the case back to the department for further proceedings. The decision
13 of the superior court must be in writing and filed in the clerk's
14 office with the other papers in the case. The court shall state the
15 reasons for the decision. If judicial relief is sought for a stay or
16 other temporary remedy from the department's action, the court shall
17 not grant such relief unless the court finds that the appellant is
18 likely to prevail in the appeal and that without a stay the appellant
19 will suffer irreparable injury. If the court stays the suspension,
20 revocation, or denial it may impose conditions on such stay.

21 (10) If a person whose driver's license, permit, or privilege to
22 drive has been or will be suspended, revoked, or denied under
23 subsection (7) of this section, other than as a result of a breath or
24 blood test refusal, and who has not committed an offense for which he
25 or she was granted a deferred prosecution under chapter 10.05 RCW,
26 petitions a court for a deferred prosecution on criminal charges
27 arising out of the arrest for which action has been or will be taken
28 under subsection (7) of this section, the court may direct the
29 department to stay any actual or proposed suspension, revocation, or
30 denial for at least forty-five days but not more than ninety days. If
31 the court stays the suspension, revocation, or denial, it may impose
32 conditions on such stay. If the person is otherwise eligible for
33 licensing, the department shall issue a temporary license, or extend
34 any valid temporary license marked under subsection (6) of this
35 section, for the period of the stay. If a deferred prosecution
36 treatment plan is not recommended in the report made under RCW
37 10.05.050, or if treatment is rejected by the court, or if the person
38 declines to accept an offered treatment plan, or if the person violates

1 any condition imposed by the court, then the court shall immediately
2 direct the department to cancel the stay and any temporary marked
3 license or extension of a temporary license issued under this
4 subsection.

5 A suspension, revocation, or denial imposed under this section,
6 other than as a result of a breath or blood test refusal, shall be
7 stayed if the person is accepted for deferred prosecution as provided
8 in chapter 10.05 RCW for the incident upon which the suspension,
9 revocation, or denial is based. If the deferred prosecution is
10 terminated, the stay shall be lifted and the suspension, revocation, or
11 denial reinstated. If the deferred prosecution is completed, the stay
12 shall be lifted and the suspension, revocation, or denial canceled.

13 (11) When it has been finally determined under the procedures of
14 this section that a nonresident's privilege to operate a motor vehicle
15 in this state has been suspended, revoked, or denied, the department
16 shall give information in writing of the action taken to the motor
17 vehicle administrator of the state of the person's residence and of any
18 state in which he or she has a license.

19 **Sec. 3.** RCW 46.20.3101 and 1998 c 213 s 2, 1998 c 209 s 2, and
20 1998 c 207 s 8 are each reenacted and amended to read as follows:

21 Pursuant to RCW 46.20.308, the department shall suspend, revoke, or
22 deny the arrested person's license, permit, or privilege to drive as
23 follows:

24 (1) In the case of a person who has refused a test or tests:

25 (a) For a first refusal within seven years, where there has not
26 been a previous incident within seven years that resulted in
27 administrative action under this section, revocation or denial for one
28 year;

29 (b) For a second or subsequent refusal within seven years, or for
30 a first refusal where there has been one or more previous incidents
31 within seven years that have resulted in administrative action under
32 this section, revocation or denial for two years or until the person
33 reaches age twenty-one, whichever is longer. A revocation imposed
34 under this subsection (1)(b) shall run consecutively to the period of
35 any suspension, revocation, or denial imposed pursuant to a criminal
36 conviction arising out of the same incident.

1 (2) In the case of an incident where a person has submitted to or
2 been administered a test or tests indicating that the alcohol
3 concentration of the person's breath or blood was 0.08 or more:

4 (a) For a first incident within seven years, where there has not
5 been a previous incident within seven years that resulted in
6 administrative action under this section, suspension for ninety days;

7 (b) For a second or subsequent incident within seven years,
8 revocation or denial for two years.

9 (3) In the case of an incident where a person under age twenty-one
10 has submitted to or been administered a test or tests indicating that
11 the alcohol concentration of the person's breath or blood was (~~in~~
12 ~~violation of RCW 46.61.502, 46.61.503, or 46.61.504~~) 0.02 or more:

13 (a) For a first incident within seven years, suspension or denial
14 for ninety days;

15 (b) For a second or subsequent incident within seven years,
16 revocation or denial for one year or until the person reaches age
17 twenty-one, whichever is longer.

18 **Sec. 4.** RCW 46.61.506 and 1998 c 213 s 6 are each amended to read
19 as follows:

20 (1) Upon the trial of any civil or criminal action or proceeding
21 arising out of acts alleged to have been committed by any person while
22 driving or in actual physical control of a vehicle while under the
23 influence of intoxicating liquor or any drug, if the person's alcohol
24 concentration is less than 0.08, it is evidence that may be considered
25 with other competent evidence in determining whether the person was
26 under the influence of intoxicating liquor or any drug.

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

32 (3) Analysis of the person's blood or breath to be considered valid
33 under the provisions of this section or RCW 46.61.502 or 46.61.504
34 shall have been performed according to methods approved by the state
35 toxicologist and by an individual possessing a valid permit issued by
36 the state toxicologist for this purpose. The state toxicologist is
37 directed to approve satisfactory techniques or methods, to supervise

1 the examination of individuals to ascertain their qualifications and
2 competence to conduct such analyses, and to issue permits which shall
3 be subject to termination or revocation at the discretion of the state
4 toxicologist.

5 (4)(a) A breath test performed by any instrument approved by the
6 state toxicologist shall be admissible at trial or in an administrative
7 proceeding if the prosecution or department produces prima facie
8 evidence of the following:

9 (i) The person who performed the test was authorized to perform
10 such test by the state toxicologist;

11 (ii) The person being tested did not vomit or have anything to eat,
12 drink, or smoke for at least fifteen minutes prior to administration of
13 the test;

14 (iii) The person being tested did not have any foreign substances,
15 not to include dental work, fixed or removable, in his or her mouth at
16 the beginning of the fifteen-minute observation period;

17 (iv) Prior to the start of the test, the temperature of the
18 simulator solution as measured by a thermometer approved of by the
19 state toxicologist was thirty-four degrees centigrade plus or minus 0.3
20 degrees centigrade;

21 (v) The internal standard test resulted in the message "verified";

22 (vi) The two breath samples agree to within plus or minus ten
23 percent of their mean to be determined by the method approved by the
24 state toxicologist;

25 (vii) The simulator external standard result did lie between .072
26 to .088 inclusive; and

27 (viii) All blank tests gave results of .000.

28 (b) For purposes of this section, "prima facie evidence" is
29 evidence of sufficient circumstances that would support a logical and
30 reasonable inference of the facts sought to be proved. In assessing
31 whether there is sufficient evidence of the foundational facts, the
32 court or administrative tribunal is to assume the truth of the
33 prosecution's or department's evidence and all reasonable inferences
34 from it in a light most favorable to the prosecution or department.

35 (c) Nothing in this section shall be deemed to prevent the subject
36 of the test from challenging the reliability or accuracy of the test,
37 the reliability or functioning of the instrument, or any maintenance
38 procedures. Such challenges, however, shall not preclude the

1 admissibility of the test once the prosecution or department has made
2 a prima facie showing of the requirements contained in (a) of this
3 subsection. Instead, such challenges may be considered by the trier of
4 fact in determining what weight to give to the test result.

5 (5) When a blood test is administered under the provisions of RCW
6 46.20.308, the withdrawal of blood for the purpose of determining its
7 alcoholic or drug content may be performed only by a physician, a
8 registered nurse, (~~or a qualified technician~~) a licensed practical
9 nurse, a nursing assistant as defined in chapter 18.88A RCW, a
10 physician assistant as defined in chapter 18.71A RCW, a first responder
11 as defined in chapter 18.73 RCW, an emergency medical technician as
12 defined in chapter 18.73 RCW, a health care assistant as defined in
13 chapter 18.135 RCW, or any technician trained in withdrawing blood.
14 This limitation shall not apply to the taking of breath specimens.

15 (~~(+5)~~) (6) The person tested may have a physician, or a qualified
16 technician, chemist, registered nurse, or other qualified person of his
17 or her own choosing administer one or more tests in addition to any
18 administered at the direction of a law enforcement officer. The test
19 will be admissible if the person establishes the general acceptability
20 of the testing technique or method. The failure or inability to obtain
21 an additional test by a person shall not preclude the admission of
22 evidence relating to the test or tests taken at the direction of a law
23 enforcement officer.

24 (~~(+6)~~) (7) Upon the request of the person who shall submit to a
25 test or tests at the request of a law enforcement officer, full
26 information concerning the test or tests shall be made available to him
27 or her or his or her attorney.

Passed by the House February 12, 2004.

Passed by the Senate March 2, 2004.

Approved by the Governor March 22, 2004.

Filed in Office of Secretary of State March 22, 2004.