WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1968

ENROLLED
SENATE BILL NO. 15

PASSED
January 5, 1968

In Effect

FILED IN THE OFFICE
ROBERT O. BALDWIN
SECRETARY OF STATE
THIS DATE 2-16-68
ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 15
(Originating in the Committee on the Judiciary)

[Passed February 8, 1968; in effect ninety days from passage.]

AN ACT to repeal section two-a, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said chapter seventeen-c by adding thereto a new article, designated article five-a, relating to implied consent to a chemical test to determine the alcoholic content of the blood of the operator of a motor vehicle arrested for driving a
motor vehicle while under the influence of intoxicating liquor and the designation and administration of such a chemical test; relating to chemical test requested or demanded by arrested person; granting certain immunity from criminal and civil liability which might otherwise arise incident to the administration of such a chemical test; providing for suspension of such arrested person's operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive for refusal to submit to a designated chemical test; providing hearing and judicial review procedures; specifying certain presumptions with respect to and the evidentiary value of a chemical test as to intoxication; and providing for the payment of a fee for the cost of administering certain chemical tests.

*Be it enacted by the Legislature of West Virginia:*

That section two-a, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter seventeen-c be further amended by adding thereto a new article, designated article five-a, to read as follows:
ARTICLE 5A. IMPLIED CONSENT FOR CHEMICAL TEST FOR INTOXICATION.

§17C-5A-1. Implied consent to test; administration at direction of law enforcement officer; definition of law enforcement officer.

Any person who drives a motor vehicle upon the public streets or highways of this state shall be deemed to have given his consent by the operation thereof, subject to the provisions of this article, to a chemical test of either his blood, breath or urine for the purpose of determining the alcoholic content of his blood whenever he shall be lawfully arrested by a law enforcement officer as hereinafter defined for the offense of driving a motor vehicle upon the public streets or highways of this state while under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and shall be administered at the direction of the arresting law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public streets or highways while under the influence of intoxicating liquor. The law enforcement agency by which such law enforce-
ment officer is employed shall designate which one of the aforesaid tests shall be administered: Provided, That if the test so designated is a blood test and the person so arrested refuses to submit to such blood test, then the law enforcement officer making such arrest shall designate in lieu thereof, either a breath or urine test be administered, and notwithstanding the provisions of section three of this article, such refusal to submit to a blood test only shall not result in the suspension of the arrested person's operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive. The person arrested shall be told that his refusal to submit to the test finally designated as provided in this section, will result in the suspension of his operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive for a period of six months. For the purposes of this article the term "law enforcement officer" shall mean and be limited to (1) any member of the department of public safety of this state, (2) any sheriff and any deputy sheriff of any county, and (3) any member of a municipal police department under civil
service in accordance with the provisions of article five-a, chapter eight of this code.

§17C-5A-2. How blood test administered; use of test results; certain immunity from liability incident to administering test.

Only a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his employment, acting at the request and direction of the law enforcement officer, may withdraw blood for the purpose of determining the alcoholic content thereof. These limitations shall not apply to the taking of a breath test or a urine specimen. In withdrawing blood for the purpose of determining the alcoholic content thereof, only a previously unused and sterile needle and sterile vessel may be utilized and the withdrawal shall otherwise be in strict accord with accepted medical practices. A non-alcoholic antiseptic shall be used for cleansing the skin prior to venapuncture. The person tested may, at his own expense, have a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his employment, of his own choosing, administer
a chemical test in addition to the test administered at the direction of the law enforcement officer. The failure or inability of the person arrested to obtain an additional test shall not preclude the admission into evidence at any administrative or judicial proceeding of the results of the test taken at the direction of the law enforcement officer. Upon the request of the person who is tested, full information concerning the test taken at the direction of the law enforcement officer shall be made available to him. No person who administers any such test upon the request of a law enforcement officer as herein defined, no hospital in or with which such person is employed or is otherwise associated or in which such test is administered, and no other person, firm or corporation by whom or which such person is employed or is in any way associated, shall be in any wise criminally liable for the administration of such test, or civilly liable in damages to the person tested unless for gross negligence or wilful or wanton injury.

§17C-5A-3. Refusal to submit to certain chemical tests; suspension of license or privilege; consent not withdrawn if person arrested is incapable of refusal.

If any person under arrest as specified in section one of
this article refuses to submit to the test finally designated in the manner provided in section one hereof, no test shall be given, but the commissioner of motor vehicles, upon receipt of a sworn statement of the law enforcement officer that (1) he had reasonable grounds to believe such person had been driving a motor vehicle upon the public or highways of this state while under the influence of intoxicating liquor, (2) such person was lawfully placed under arrest for the offense of driving a motor vehicle upon the public streets or highways of this state while under the influence of intoxicating liquor, (3) such person refused to submit to the test finally designated in the manner provided in section one of this article, and (4) such person was told that his operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive would be suspended for a period of six months if he refused to submit to the test finally designated in the manner provided in section one of this article, shall make and enter an order suspending such person's operator's or chauffeur's license, or junior or probationary operator's license, or
23 nonresident privilege to drive for a period of six months.
24 A copy of such order shall be forwarded to such person
25 by registered or certified mail, return receipt requested.
26 No such suspension shall become effective until ten days
27 after receipt of the copy of such order. Any person who
28 is unconscious or who is otherwise in a condition render-
29 ing him incapable of refusal, shall be deemed not to have
30 withdrawn his consent for a test of his blood, breath or
31 urine as provided in section one of this article and the test
32 may be administered although such person is not told
33 that his failure to submit to the test will result in the
34 suspension of his operator's or chauffeur's license, or
35 junior or probationary operator's license, or nonresident
36 privilege to operate a motor vehicle for a period of six
37 months.
38 A suspension hereunder shall run concurrently with
39 the period of any suspension or revocation imposed in
40 accordance with other provisions of this code and grow-
41 ing out of the same incident which gave rise to the arrest
42 for driving a motor vehicle while under the influence of
43 intoxicating liquor and the subsequent refusal to undergo
the test finally designated in accordance with the provi-
sions of section one of this article.

§17C-5A-4. Hearing procedures; judicial review.

1 Upon the written request of a person whose operator’s
2 or chauffeur’s license, or junior or probationary operator’s
3 license, or nonresident privilege to drive has been so
4 suspended, the commissioner of motor vehicles shall afford
5 the person an opportunity to be heard. Such written re-
6 quest must be filed with the commissioner in person or
7 by registered or certified mail, return receipt requested,
8 within ten days after receipt of a copy of the order of
9 suspension. The hearing shall be before said commis-
10 sioner or authorized deputy or agent of said commissioner,
11 and all of the pertinent provisions of article five, chapter
12 twenty-nine-a of this code shall apply to and govern the
13 hearing and the administrative procedures in connection
14 with and following such hearing, with like effect as if the
15 provisions of said article five were set forth in extenso
16 in this section, except that in the case of a resident of
17 this state the hearing shall be held in the county where-
18 in the person resides unless the commissioner or his
authorized deputy or agent and such person agree that
the hearing may be held in some other county. Any such
hearing shall be held within twenty days after the date
upon which the commissioner received the timely writ-
ten request therefor, unless there is a postponement or
continuance. The commissioner may postpone or continue
any hearing on his own motion, or upon application of
such person for good cause shown. For the purpose of
conducting such hearing, the commissioner shall have the
power and authority to issue subpoenas and subpoenas
duces tecum in accordance with the provisions of section
one, article five, chapter twenty-nine-a of this code. All
subpoenas and subpoenas duces tecum shall be issued
and served within the time and for the fees and shall be
enforced, as specified in section one, article five of said
chapter twenty-nine-a, and all of the said section one
provisions dealing with subpoenas and subpoenas duces
tecum shall apply to subpoenas and subpoenas duces
tecum issued for the purpose of a hearing hereunder.
The scope of such hearing shall be (1) whether the
arresting law enforcement officer had reasonable grounds
to believe such person had been driving a motor vehicle
upon the public streets or highways of this state while
under the influence of intoxicating liquor, (2) whether
such person was lawfully placed under arrest for the
offense of driving a motor vehicle upon the public streets
or highways of this state while under the influence of
intoxicating liquor, (3) whether such person refused to
submit to the test finally designated in the manner pro-
vided in section one of this article, and (4) whether such
person had been told that his operator's or chauffeur's
license, or junior or probationary operator's license, or
nonresident privilege to drive would be suspended for a
period of six months if he refused to submit to the test
finally designated in the manner provided in section one
of this article.

After such hearing and consideration of all of the testi-
mony, evidence and record in the case, the commissioner
shall make and enter an order affirming or rescinding
his earlier order of suspension. The commissioner shall
affirm his earlier order of suspension if he finds that (1)
the arresting law enforcement officer had reasonable
grounds to believe such person had been driving a motor vehicle upon the public streets or highways of this state while under the influence of intoxicating liquor, (2) such person was lawfully placed under arrest for the offense of driving a motor vehicle upon the public streets or highways of this state while under the influence of intoxicating liquor, (3) such person refused to submit to the test finally designated in the manner provided in section one of this article, and (4) such person had been told that his operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive would be suspended for a period of six months if he refused to submit to the test finally designated in the manner provided in section one of this article. If the commissioner finds to the contrary with respect to any one of the above issues, he shall rescind his earlier order of suspension.

A copy of the commissioner's order made and entered following the hearing shall be served upon such person by registered or certified mail, return receipt requested.

During the pendency of any such hearing, the suspension
of the operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive of such person shall be stayed, and if the commissioner has possession of such person's operator's or chauffeur's license, or junior or probationary operator's license, the same shall be forthwith returned to him pending the outcome of such hearing or any judicial review thereafter, as hereinafter provided.

If the commissioner shall after hearing make and enter an order affirming his earlier order of suspension, such person shall be entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code shall apply to and govern such review with like effect as if the provisions of said section four were set forth in extenso in this section. The judgment of the circuit court shall be final unless reversed on appeal to the supreme court of appeals, in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code, except that notwithstanding the provisions of said section one, the petition seeking such review must be filed with said
supreme court of appeals within thirty days from the date of entry of the judgment of the circuit court. Notwithstanding any provisions in said chapter twenty-nine-a to the contrary, during the pendency of any appeal to the circuit court or supreme court of appeals, the suspension of the operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive of such person shall be stayed, pending the outcome of such judicial review.

§17C-5A-5. Interpretation and use of chemical test.

Upon trial for the offense of driving a motor vehicle on the public streets or highways of this state while under the influence of intoxicating liquor, or upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving a motor vehicle while under the influence of intoxicating liquor, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of
arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of intoxicating liquor;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of intoxicating liquor;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of intoxicating liquor.

Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the
effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory, of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of intoxicating liquor.

§17C-5A-6. Right to demand test.

1 Any person lawfully arrested for driving a motor vehicle on the public streets or highways of this state while under the influence of intoxicating liquor and who is not tested at the direction of the arresting law enforcement officer under the provisions of this article, or who is lawfully arrested as aforesaid by any other police officer, shall have the right to demand that a sample or specimen
of his blood, breath or urine be taken within two hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand.

§17C-5A-7. Fee for withdrawing blood sample and making urine test.

A fee not exceeding five dollars shall be allowed to the person withdrawing a blood sample or administering a urine test at the request and direction of a law enforcement officer in accordance with the provisions of this article. If the person whose blood sample was withdrawn or whose urine was tested was arrested and charged with a violation of subsection (a) of section two, article five of this chapter, the county having venue of such charge shall pay said fee, and if said person is subsequently convicted of such charge, such fee shall be taxed as a part of the costs of the criminal proceeding and shall be paid, notwithstanding any other provision of this code to the contrary, into the general fund of said county. If the person whose blood sample was withdrawn or whose
urine was tested was arrested and charged with a violation of a similar ordinance of any municipality, said municipality shall pay said fee, and if said person is subsequently convicted of such charge, such fee shall be taxed as a part of the costs of the criminal proceeding and shall be paid, notwithstanding any other provision of this code to the contrary, into the general fund of said municipality.

§17C-5A-8. Severability.

If any provision of this article or its application to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications of this article, and to this end the provisions of this article are declared to be severable.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

William Tampas  
Chairman Senate Committee

Clayton C. Davidson  
Chairman House Committee

Originated in the Senate.

To take effect 90 days from passage.

J. Howard May  
Clerk of the Senate

M. Blythe Hunter  
Clerk of the House of Delegates

Howard W. Causer  
President of the Senate

Robert L. Byrd  
Speaker House of Delegates

The within approved this the 14th day of February, 1968.

Hewitt C. Smith  
Governor
PRESENTED TO THE GOVERNOR

Date 2/12/68
Time 3:00 P.M.