WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 2000

ENROLLED
Committee Substitute for
SENATE BILL NO. 372

(By Senators Mitchell and Hunter)

PASSED March 11, 2000
In Effect ninety days from Passage
ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 372
(SENATORS MITCHELL AND HUNTER, original sponsors)

[Passed March 11, 2000; in effect ninety days from passage.]

AN ACT to amend and reenact section four, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section two, article five-a of said chapter, all relating generally to the offense of driving under the influence of alcohol, controlled substances or drugs; procedures for conducting a secondary test; administrative sanctions for driving under the influence; and amending the hearing procedure for revocation of license.

Be it enacted by the Legislature of West Virginia:

That section four, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that section two,
article five-a of said chapter be amended and reenacted, all to read as follows:

ARTICLE 5. SERIOUS TRAFFIC OFFENSES.

§17C-5-4. Implied consent to test; administration at direction of law-enforcement officer; designation of type of test; definition of law-enforcement officer.

Any person who drives a motor vehicle in this state shall be deemed to have given his consent by the operation thereof, subject to the provisions of this article, to a preliminary breath analysis and a secondary chemical test of either his blood, breath or urine for the purposes of determining the alcoholic content of his blood. A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has reasonable cause to believe a person to have committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in said section two of this article. A secondary test of blood, breath or urine 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 committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in said section two of this article. The law-enforcement agency by which such law-enforcement officer is employed shall designate which one of the aforesaid secondary 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 to be administered, and notwithstanding the provisions of section seven of this article, such refusal to
submit to a blood test only shall not result in the revocation of the arrested person's license to operate a motor vehicle in this state. Any person to whom a preliminary breath test is administered who is then arrested shall be given a written statement advising him that his refusal to submit to the secondary chemical test finally designated as provided in this section, will result in the revocation of his license to operate a motor vehicle in this state for a period of at least one year and up to life.

For the purpose of this article, the term "law-enforcement officer" or "police 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; (3) any member of a police department in any municipality as defined in section two, article one, chapter eight of this code; (4) any conservation officer of the division of natural resources; and (5) any special police officer appointed by the governor pursuant to the provisions of section forty-one, article three, chapter sixty-one of this code who has completed the course of instruction at a law-enforcement training academy as provided for under the provisions of section nine, article twenty-nine, chapter thirty of this code. Any law-enforcement officer who has been properly trained in the administration of any secondary chemical test which a law-enforcement officer may conduct under this article, including, but not limited to, certification by the division of health in the operation of any equipment required for the collection and analysis of a breath sample, may conduct such test at any location in the county wherein the arrest is made that the equipment and the facilities may be found. However, when the arresting officer lacks such training, then any other law-enforcement officer who has received training in the administration of the secondary chemical test to be administered may, upon the request of such arresting law-enforcement officer and in his presence, conduct such
secondary test and the results of such test may be used in
evidence to the same extent and in the same manner as if
such test had been conducted by such arresting law-
enforcement officer. Only the person actually adminis-
tering or conducting such test shall be competent to testify as
to the results and the veracity of such test.

ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND
REVOCATION OF LICENSES FOR DRIVING UNDER THE
INFLUENCE OF ALCOHOL, CONTROLLED SUB-
STANCES OR DRUGS.

§17C-5A-2. Hearing; revocation; review.

(a) Upon the written request of a person whose license to
operate a motor vehicle in this state has been revoked or
suspended under the provisions of section one of this
article or section seven, article five of this chapter, the
commissioner of motor vehicles shall stay the imposition
of the period of revocation or suspension and afford the
person an opportunity to be heard. The written request
must be filed with the commissioner in person or by
registered or certified mail, return receipt requested,
within thirty calendar days after receipt of a copy of the
order of revocation or suspension or no hearing will be
granted. The hearing shall be before the commissioner or
a hearing examiner retained by the commissioner who
shall rule on evidentiary issues and submit proposed
findings of fact and conclusions of law for the consider-
ation of the commissioner and all of the pertinent provi-
sions of article five, chapter twenty-nine-a of this code
shall apply. The hearing shall be held at an office of the
division located in or near the county wherein the arrest
was made in this state or at some other suitable place in
the county wherein the arrest was made if an office of the
division is not available.

(b) Any such hearing shall be held within one hundred
eighty days after the date upon which the commissioner
received the timely written request therefor, unless there
is a postponement or continuance. The commissioner may
postpone or continue any hearing on the commissioner's
own motion, or upon application for each person for good
cause shown. The commissioner shall adopt and imple-
ment by a procedural rule written policies governing the
postponement or continuance of any such hearing on the
commissioner's own motion or for the benefit of any law-
enforcement officer or any person requesting the hearing,
and such policies shall be enforced and applied to all
parties equally. For the purpose of conducting the hear-
ing, the commissioner shall have the power and authority
to issue subpoenas and subpoenas duces tecum in accor-
dance with the provisions of section one, article five,
chapter twenty-nine-a of this code: Provided, That the
notice of hearing to the appropriate law-enforcement
officers by registered or certified mail, return receipt
requested, shall constitute a subpoena to appear at the
hearing without the necessity of payment of fees by the
division of motor vehicles.

(c) Law-enforcement officers shall be compensated for
the time expended in their travel and appearance before
the commissioner by the law-enforcement agency by
whom they are employed at their regular rate if they are
scheduled to be on duty during said time or at their
regular overtime rate if they are scheduled to be off duty
during said time.

(d) The principal question at the hearing shall be
whether the person did drive a motor vehicle while under
the influence of alcohol, controlled substances or drugs, or
did drive a motor vehicle while having an alcohol concen-
tration in the person's blood of ten hundredths of one
percent or more, by weight, or did refuse to submit to the
designated secondary chemical test, or did drive a motor
vehicle while under the age of twenty-one years with an
alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than ten hundredths of one percent, by weight.

The commissioner may propose a legislative rule in compliance with the provisions of article three, chapter twenty-nine-a of this code, which rule may provide that if a person accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of ten hundredths of one percent or more, by weight, or accused of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than ten hundredths of one percent, by weight, intends to challenge the results of any secondary chemical test of blood, breath or urine, or intends to cross-examine the individual or individuals who administered the test or performed the chemical analysis, the person shall, within an appropriate period of time prior to the hearing, notify the commissioner in writing of such intention. The rule may provide that when there is a failure to comply with the notice requirement, the results of the secondary test, if any, shall be admissible as though the person and the commissioner had stipulated the admissibility of such evidence. Any such rule shall provide that the rule shall not be invoked in the case of a person who is not represented by counsel unless the communication from the commissioner to the person establishing a time and place for the hearing also informed the person of the consequences of the person's failure to timely notify the commissioner of the person's intention to challenge the results of the secondary chemical test or cross-examine the individual or individuals who administered the test or performed the chemical analysis.
(e) In the case of a hearing wherein a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of ten hundredths of one percent or more, by weight, or accused of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than ten hundredths of one percent, by weight, the commissioner shall make specific findings as to: (1) Whether the arresting law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person’s blood of ten hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (3) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

(f) If, in addition to a finding that the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person’s blood of ten hundredths of one percent or more, by weight, or did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than ten hundredths of one percent, by weight,
weight, the commissioner also finds by a preponderance of the evidence that the person when so driving did an act forbidden by law or failed to perform a duty imposed by law, which act or failure proximately caused the death of a person and was committed in reckless disregard of the safety of others, and if the commissioner further finds that the influence of alcohol, controlled substances or drugs or the alcohol concentration in the blood was a contributing cause to the death, the commissioner shall revoke the person's license for a period of ten years: Provided, That if the commissioner has previously suspended or revoked the person's license under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(g) If, in addition to a finding that the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of ten hundredths of one percent or more, by weight, the commissioner also finds by a preponderance of the evidence that the person when so driving did an act forbidden by law or failed to perform a duty imposed by law, which act or failure proximately caused the death of a person, the commissioner shall revoke the person's license for a period of five years: Provided, That if the commissioner has previously suspended or revoked the person's license under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(h) If, in addition to a finding that the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the
person's blood of ten hundredths of one percent or more,
by weight, the commissioner also finds by a preponderance
of the evidence that the person when so driving did an act
forbidden by law or failed to perform a duty imposed by
law, which act or failure proximately caused bodily injury
to a person other than himself or herself, the commissioner
shall revoke the person's license for a period of two years:
Provided, That if the commissioner has previously sus-
pended or revoked the person's license under the provi-
sions of this section or section one of this article within the
ten years immediately preceding the date of arrest, the
period of revocation shall be ten years: Provided, how-
ever, That if the commissioner has previously suspended or
revoked the person's license more than once under the
provisions of this section or section one of this article
within the ten years immediately preceding the date of
arrest, the period of revocation shall be for the life of the
person.

(i) If the commissioner finds by a preponderance of the
evidence that the person did drive a motor vehicle while
under the influence of alcohol, controlled substances or
drugs, or did drive a motor vehicle while having an alcohol
concentration in the person's blood of ten hundredths of
one percent or more, by weight, or finds that the person,
being an habitual user of narcotic drugs or amphetamine
or any derivative thereof, did drive a motor vehicle, or
finds that the person knowingly permitted the person's
vehicle to be driven by another person who was under the
influence of alcohol, controlled substances or drugs, or
knowingly permitted the person's vehicle to be driven by
another person who had an alcohol concentration in his or
her blood of ten hundredths of one percent or more, by
weight, the commissioner shall revoke the person's license
for a period of six months: Provided, That if the commis-
sioner has previously suspended or revoked the person's
license under the provisions of this section or section one
of this article within the ten years immediately preceding
the date of arrest, the period of revocation shall be ten
years: Provided, however, That if the commissioner has
previously suspended or revoked the person's license more
than once under the provisions of this section or section
one of this article within the ten years immediately
preceding the date of arrest, the period of revocation shall
be for the life of the person.

(j) If, in addition to a finding that the person did drive a
motor vehicle while under the age of twenty-one years
with an alcohol concentration in his or her blood of two
hundredths of one percent or more, by weight, but less
than ten hundredths of one percent, by weight, the com-
missioner also finds by a preponderance of the evidence
that the person when so driving did an act forbidden by
law or failed to perform a duty imposed by law, which act
or failure proximately caused the death of a person, and if
the commissioner further finds that the alcohol concen-
tration in the blood was a contributing cause to the death, the
commissioner shall revoke the person's license for a period
of five years: Provided, That if the commissioner has
previously suspended or revoked the person's license under
the provisions of this section or section one of this article
within the ten years immediately preceding the date of
arrest, the period of revocation shall be for the life of the
person.

(k) If, in addition to a finding that the person did drive
a motor vehicle while under the age of twenty-one years
with an alcohol concentration in his blood of two hun-
dredths of one percent or more, by weight, but less than
ten hundredths of one percent, by weight, the commis-
ioner also finds by a preponderance of the evidence that
the person when so driving did an act forbidden by law or
failed to perform a duty imposed by law, which act or
failure proximately caused bodily injury to a person other
than himself or herself, and if the commissioner further finds that the alcohol concentration in the blood was a contributing cause to the bodily injury, the commissioner shall revoke the person’s license for a period of two years: Provided, That if the commissioner has previously suspended or revoked the person’s license under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: Provided, however, That if the commissioner has previously suspended or revoked the person’s license more than once under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(1) If the commissioner finds by a preponderance of the evidence that the person did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than ten hundredths of one percent, by weight, the commissioner shall suspend the person’s license for a period of sixty days: Provided, That if the commissioner has previously suspended or revoked the person’s license under the provisions of this section or section one of this article, the period of revocation shall be for one year, or until the person’s twenty-first birthday, whichever period is longer.

(m) If, in addition to a finding that the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person’s blood of ten hundredths of one percent or more, by weight, the commissioner also finds by a preponderance of the evidence that the person when so driving did have on or within the motor vehicle another person who has not
272 reached his or her sixteenth birthday, the commissioner
273 shall revoke the person's license for a period of one year:
274 Provided, That if the commissioner has previously sus-
275 pended or revoked the person's license under the provi-
276 sions of this section or section one of this article within the
277 ten years immediately preceding the date of arrest, the
278 period of revocation shall be ten years: Provided, how-
279 ever, That if the commissioner has previously suspended or
280 revoked the person's license more than once under the
281 provisions of this section or section one of this article
282 within the ten years immediately preceding the date of
283 arrest, the period of revocation shall be for the life of the
284 person.

285 (n) For purposes of this section, where reference is made
286 to previous suspensions or revocations under this section,
287 the following types of criminal convictions or administra-
288 tive suspensions or revocations shall also be regarded as
289 suspensions or revocations under this section or section
290 one of this article:

291 (1) Any administrative revocation under the provisions
292 of the prior enactment of this section for conduct which
293 occurred within the ten years immediately preceding the
294 date of arrest.

295 (2) Any suspension or revocation on the basis of a
296 conviction under a municipal ordinance of another state or
297 a statute of the United States or of any other state of an
298 offense which has the same elements as an offense de-
299 scribed in section two, article five of this chapter, for
300 conduct which occurred within the ten years immediately
301 preceding the date of arrest.

302 (3) Any revocation under the provisions of section seven,
303 article five of this chapter, for conduct which occurred
304 within the ten years immediately preceding the date of
305 arrest.
(o) In the case of a hearing wherein a person is accused of refusing to submit to a designated secondary test, the commissioner shall make specific findings as to: (1) whether the arresting law-enforcement officer had reasonable grounds to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (2) whether the person was lawfully placed under arrest for an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (3) whether the person refused to submit to the secondary test finally designated in the manner provided in section four, article five of this chapter; and (4) whether the person had been given a written statement advising the person that the person's license to operate a motor vehicle in this state would be revoked for at least one year and up to life if the person refused to submit to the test finally designated in the manner provided in section four, article five of this chapter.

(p) If the commissioner finds by a preponderance of the evidence that: (1) The arresting law-enforcement officer had reasonable grounds to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (2) the person was lawfully placed under arrest for an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (3) the person refused to submit to the secondary chemical test finally designated; and (4) the person had been given a written statement advising the person that the person's license to operate a motor vehicle in this state would be revoked for a period of at least one year and up to life if the person refused to submit to the test finally designated, the commissioner shall revoke the person's license to operate a motor vehicle in this state for the periods specified in section seven, article five of this chapter. The
revocation period prescribed in this subsection shall run concurrently with any other revocation period ordered under this section or section one of this article arising out of the same occurrence.

(q) If the commissioner finds to the contrary with respect to the above issues, the commissioner shall rescind his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section, or section seven, article five of this chapter.

A copy of the commissioner's order made and entered following the hearing shall be served upon the person by registered or certified mail, return receipt requested. During the pendency of any such hearing, the revocation of the person's license to operate a motor vehicle in this state shall be stayed.

If the commissioner shall after hearing make and enter an order affirming the commissioner's earlier order of revocation, the person shall be entitled to judicial review as set forth in chapter twenty-nine-a of this code. The commissioner may not stay enforcement of the order. The court may grant a stay or supersedeas of the order only upon motion and hearing, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits, and the appellant will suffer irreparable harm if the order is not stayed: Provided, That in no event shall the stay or supersedeas of the order exceed one hundred fifty days. Notwithstanding the provisions of section four, article five, chapter twenty-nine-a of this code, the commissioner may not be compelled to transmit a certified copy of the transcript of the hearing to the circuit court in less than sixty days.

(r) In any revocation or suspension pursuant to this section, if the driver whose license is revoked or suspended
had not reached the driver's eighteenth birthday at the
time of the conduct for which the license is revoked or
suspended, the driver's license shall be revoked or sus-
pended until the driver's eighteenth birthday, or the
applicable statutory period of revocation or suspension
prescribed by this section, whichever is longer.

(s) Funds for this section's hearing and appeal process
may be provided from the drunk driving prevention fund,
as created by section forty-one, article two, chapter fifteen
of this code, upon application for such funds to the
commission on drunk driving prevention.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the Senate.
In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within... this the 3rd Day of April, 2000.

Governor
PRESENTED TO THE GOVERNOR

Date: 3/3/00
Time: 2:50 pm