

SESSION OF 2018

**SUPPLEMENTAL NOTE ON HOUSE SUBSTITUTE FOR
SENATE BILL NO. 374**

As Recommended by House Committee on
Judiciary

Brief*

House Sub. for SB 374, as amended, would amend law concerning driving under the influence of alcohol, drugs, or both (DUI). Specifically, the bill would amend statutes governing the crimes of operating or attempting to operate a commercial motor vehicle under the influence (commercial DUI); implied consent; and tests of blood, breath, urine, or other bodily substance. The bill also would repeal the crime of test refusal.

Commercial DUI

The bill would amend language in the commercial DUI implied consent statute to state a person who drives a commercial motor vehicle “consents” to take a test or tests of that person’s blood, breath, urine, or other bodily substance. Current law states a person is “deemed to have given consent” to tests of blood, breath, or urine. The bill would amend the commercial DUI statute to provide a person commits the crime if the person commits an offense “otherwise comparable” to DUI, as defined in Kansas law.

Commercial DUI and DUI Changes

The bill would amend provisions in the commercial DUI and DUI statutes concerning supervision upon release from

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

imprisonment to provide an offender for whom a warrant has been issued by the court alleging a violation of such supervision would be considered a fugitive from justice if it is found the warrant cannot be served. If it is found the offender has violated the provisions of this supervision, the court would determine whether the time from the issuing of the warrant to the date of the court's determination of an alleged violation, or any part of it, would be counted as time served on supervision. Further, the bill would allow the term of supervision to be extended at the court's discretion beyond one year. Any violation of the conditions of such extended term of supervision could subject such person to the revocation of supervision and imprisonment in jail of up to the remainder of the original sentence, not the term of the extended supervision.

Within both statutes, the bill would amend the one-month imprisonment enhancement for convicted persons who had one or more children under the age of 14 in the vehicle at the time of the offense. The bill would specify the enhancement would apply to "any person 18 years of age or older" when one or more children under the age of 18 are in the vehicle at the time of the offense.

In subsections within those statutes stating the fact a person is or has been entitled to lawful use of a drug is not a defense, the bill would replace a reference to a DUI "involving drugs" with references to the subsections in the DUI statute that apply to drugs or a combination of drugs and alcohol.

The bill would remove a requirement for the court to electronically report every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of commercial DUI to the Division of Vehicles. Under continuing law, diversions are not available for commercial DUI.

The bill would amend the definition of "conviction" in these statutes to:

- Replace the phrase “a violation of a crime” with “an offense”;
- Replace the term “state” with “jurisdiction” and remove a provision specific to acts committed on a military reservation; and
- Replace the phrase “a crime” with the phrase “an offense that is comparable to the offense” described in the statute.

The bill would provide that, for the purposes of determining whether an offense is comparable, the following shall be considered:

- The name of the out-of-jurisdiction offense;
- The elements of the out-of-jurisdiction offense; and
- Whether the out-of-jurisdiction offense prohibits conduct similar to the conduct prohibited by the closest approximate Kansas offense.

In the DUI statute, the bill would require the court to electronically report any finding regarding the alcohol concentration in the offender’s blood or breath.

DUI Implied Consent

The bill would amend language in the DUI implied consent statute to state a person who operates or attempts to operate a vehicle “may be requested” to submit to one or more tests of the person’s blood, breath, urine, or other bodily substance. The bill would remove language stating a dead or unconscious person shall be deemed not to have withdrawn consent. Further, the bill would add language requiring the test to be administered at the direction of a law enforcement officer, and the law enforcement officer would determine which manner of test is to be conducted or requested. This would replace language requiring a law enforcement officer to

request the person to submit to testing after providing required notice (described below) and to select the test or tests to be done.

The bill would remove language requiring law enforcement to request a person to submit to a test deemed consented to if at the time of the request the officer has reasonable grounds to believe the person was DUI. Instead, the bill would add language stating one or more tests could be required of a person when, at the time of the request, a law enforcement officer has probable cause to believe the person has committed the crime of DUI. The bill also replaces “reasonable grounds” with “probable cause” elsewhere in the bill to reflect this change in the required standard.

The bill would also revise language in this subsection to allow a test when a person has been involved in a motor vehicle accident or collision resulting in personal injury or death. This new language would replace provisions that distinguish between personal injury and serious injury or death when the operator could be cited for any traffic offense. The bill would remove a definition for “serious injury” and other references to these provisions to reflect this change.

The bill would remove “accident” from language allowing a law enforcement officer directing administration of a test to act on the basis of the collective information available to law enforcement officers involved in the investigation or arrest.

DUI Testing

Notice When Requesting a Test and Exceptions

The bill would remove provisions governing the oral and written notice required to be given to a person when requesting a test or tests of blood, breath, urine, or other bodily substance. Instead, the bill would add two new subsections governing notice for tests of breath or other bodily substance other than blood or urine and for tests of blood and urine.

The notice for tests of breath or other bodily substance other than blood or urine would state the following: there is no right to consult with an attorney regarding whether to submit to testing, but, after the completion of the testing, the person may request and has the right to consult with an attorney and may secure additional testing; if the person refuses to submit to and complete the test or tests, or if the person fails a test, the person's driving privileges will be suspended for a period of at least 30 days and up to a year; refusal to submit to testing may be used against the person at any trial or hearing on a charge arising out of refusal to submit to testing or DUI, or both; and the results of the testing may be used against the person at any trial or hearing on a DUI charge.

The notice for tests of blood or urine would state the following: if the person refuses to submit to and complete the test or tests, or if the person fails a test, the person's driving privileges will be suspended for a period of at least 30 days and up to a year; the results of the testing may be used against the person at any trial or hearing on a DUI charge; and after the completion of the testing, the person may request and has the right to consult with an attorney and may secure additional testing.

The bill would state nothing in this section would be construed to limit the right of a law enforcement officer to conduct any search of a person's breath or other bodily substance, other than blood or urine, incident to a lawful arrest pursuant to the *U.S. Constitution*, with or without providing the person the notice outlined above for requesting a test of breath or other bodily substance, other than blood or urine, nor limit the admissibility at any trial or hearing of alcohol or drug concentration testing results obtained pursuant to such a search. Additionally, the bill would state nothing in this section would be construed to limit the right of a law enforcement officer to conduct or obtain a blood or urine test of a person pursuant to a warrant under the Kansas Code of Criminal Procedure, the *U.S. Constitution*, or a judicially recognized exception to the search warrant requirement, with or without providing the person the notice

outlined above for requesting a test of blood or urine, nor limit the admissibility at any trial or hearing of alcohol or drug concentration testing results obtained pursuant to such a search. Similarly, the bill would state nothing in this section would be construed to limit the admissibility at trial of test results obtained pursuant to a judicially recognized exception to the warrant requirement.

The bill would amend a subsection stating no test results shall be suppressed because of technical irregularities in the consent or notice required. Instead, the bill would state no test results shall be suppressed because of irregularities not affecting the substantial rights of the accused in the consent or notice authorized. The bill would replace notice “required” with notice “authorized” elsewhere in the bill consistent with this change.

The bill would state failure to provide any or all notice would not be an issue or defense in any action other than an administrative action regarding the subject’s driving privileges.

Collection of Test Samples

The bill would revise law allowing a law enforcement officer to direct a medical professional to draw one or more samples of blood from a person to determine the blood’s alcohol or drug concentration under certain circumstances. Pursuant to the bill, an officer could direct such withdrawal if the person has given consent, with or without the notice outlined above, and the officer has the required probable cause; law enforcement has obtained a search warrant authorizing the collection of blood from the person; or the person refuses or is unable to consent to submit to and complete a test, and another judicially recognized exception to the warrant requirement applies.

The bill would revise language in a subsection outlining who may perform such withdrawal of blood to apply when a

law enforcement officer “is authorized to collect one or more tests of blood,” rather than when an officer “requests a person to submit to a test.” The bill would also clarify language prohibiting a medical professional from requiring a person to sign any additional consent or waiver form to prohibit the medical professional from requiring the person “that is the subject of the test or tests to provide any additional consent or sign any waiver form.”

Similarly, the bill would revise language in a subsection outlining who may collect urine samples to apply when a law enforcement officer “is authorized to collect one or more tests of urine,” rather than when an officer “requests a person to submit to a test.”

The bill would clarify test results would be made available to any person submitting to testing “when available.” The bill would also state any person who participates in good faith in the obtaining, withdrawal, collection, or testing of blood, breath, urine, or other bodily substance as authorized by law would not incur any civil, administrative, or criminal liability.

Preliminary Testing

The bill would revise the statute governing preliminary screening tests to remove provisions stating a person is deemed to have given consent to a preliminary screening test of the person’s breath, saliva, or both and to remove notice provided at the time of the request. The bill would allow an officer to request a preliminary screening test of the person’s breath, oral fluid, or both if otherwise permitted by law. The bill also replaces “saliva” with “oral fluid” elsewhere in the bill consistent with this change.

The bill provides preliminary screening tests of a person’s oral fluid would be conducted in accordance with any rules and regulations adopted by the Kansas Bureau of Investigation (KBI). Additionally, the bill would amend statutes

authorizing the Secretary of Health and Environment and the Director of the KBI to adopt rules and regulations concerning preliminary screening devices to clarify such devices could be used as aids in determining grounds for requesting testing pursuant to state law or as otherwise authorized by law.

Repeal of the Crime of Test Refusal

The bill would repeal the crime of test refusal, a class A, nonperson misdemeanor, for which penalties include between 90 days and 1 year of imprisonment and a fine of between \$1,250 and \$1,750 for a first conviction. The bill would also remove references to this statute throughout numerous statutes and make other technical amendments to ensure statutory consistency.

Background

The bill was introduced by the Senate Committee on Judiciary at the request of the Kansas County and District Attorneys Association (KCDAA). In the Senate Committee hearing on the bill, representatives of the Johnson County and Sedgwick County District Attorneys, the KCDAA, and the League of Kansas Municipalities (LKM) appeared in support of the bill. Proponents explained the bill would address a series of U.S. Supreme Court, Kansas Supreme Court, and Kansas Court of Appeals decisions; address issues already decided by the appellate courts; provide flexibility for law enforcement to adapt to future judicial action without jeopardizing ongoing investigations or prosecutions; and address the increased prevalence of driving while under the influence of drugs. The McPherson County Attorney and a representative of the Office of the Attorney General offered written-only proponent testimony. Representatives of the Kansas Association of Criminal Defense Lawyers and a Kansas attorney provided opponent testimony on the bill. No other testimony was provided.

At the Committee's request, the KCDAAs offered an amendment to remove certain amendments to statutes included in the bill as introduced, including amendments that would have revised how prior DUI convictions are counted and requests for a test of blood, breath, or urine. The Committee adopted the proposed amendment and also agreed to repeal the statute governing test refusal.

In the House Committee on Judiciary hearing, representatives of the Sedgwick County and Wyandotte County District Attorneys and the KCDAAs testified in support of the bill. Representatives of the Attorney General's Office, the Johnson County District Attorney, Kansas Association of Chiefs of Police, Kansas Highway Patrol, Kansas Peace Officers Association, Kansas Sheriffs Association, and Mothers Against Drunk Driving submitted written testimony supporting the bill. A representative of the Kansas Association of Criminal Defense Lawyers and an attorney testified as opponents. An attorney provided written-only opponent testimony. Representatives of the LKM and the Emergency Medical Services Board testified as neutral conferees.

The House Committee recommended a substitute bill retaining most of the language passed by the Senate, with the following changes:

- Adjusting the definition of "conviction" and setting forth the determination of comparable offenses in the DUI and commercial DUI statutes;
- Changing "consents" to "may be requested" in the implied consent statute;
- Removing outdated notices regarding Kansas law when tests are requested;
- Removing a provision allowing amendment of notices by the Attorney General following court decisions; and

- Removing references to the repealed crime of test refusal in numerous statutes.

According to the fiscal note prepared by the Division of the Budget, the Office of Judicial Administration (OJA) indicates enactment of the bill, as introduced, would significantly increase expenditures of the Judicial Branch because it would increase the amount of time spent by Court Services Officers (CSOs) in performing DUI pre-sentence investigations and likely require hiring additional CSOs to assume the workload; however, the precise impact cannot be provided. The OJA also indicates enactment could have a significant impact on law enforcement because of changes to DUI-related procedures. The Department of Corrections and Kansas Sentencing Commission (KSC) indicate enactment would have no fiscal effect on prison admissions or beds. The KSC indicates enactment would reduce the journal entry workload of the KSC, but the reduction would be negligible. The Department of Revenue indicates enactment would have no impact on its operations. The LKM and Kansas Association of Counties indicate the bill would have no fiscal effect on local units of government. Any fiscal effect associated with enactment of the bill, as introduced, is not reflected in *The FY 2019 Governor's Budget Report*.