STORAGE NAME: h0983.jud
DATE: March 6, 2000

HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS

BILL #: HB 983

RELATING TO: DUI and BUI Treatment, Prevention, and Punishment

SPONSOR(S): Representative Byrd

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIARY
(2) TRANSPORTATION
(3) CRIMINAL JUSTICE APPROPRIATIONS
(4)
(5)

I. SUMMARY:

This bill amends the driving under the influence (DUI) and boating under the influence (BUI) statutes to make a third offense of either crime a third degree felony. Currently, DUI and BUI do not become felonies until the fourth offense.

It clarifies the DUI and BUI causing property damage, serious bodily injury, or death to make clear that the driver or operator can be convicted of those crimes even if he or she is not the sole cause of the incident.

It allows police officers to take certain DUI and BUI offenders into protective custody and provides further criteria for a court to determine whether involuntary assessment and stabilization or involuntary treatment are required. If an indigent person is admitted by court order, funds from the surtax collected pursuant to s. 212.055(4), F.S., would be used to pay for the assessment, stabilization or treatment.

The bill makes refusal to submit to a breath or blood-alcohol test a first degree misdemeanor. Currently, persons who refuse are subject only to civil sanctions. The bill requires officers to tell defendants that refusal to submit to testing is a misdemeanor.

It requires law enforcement officers to order breath or blood-alcohol tests in accidents involving death or serious bodily injury. Currently, law enforcement officers may order testing in cases where there is probable cause to believe a driver is impaired.

The bill amends the Criminal Punishment Code to include BUI offenses and reflect that only three prior convictions are required for felony DUI and BUI, rather than the current four.

The bill amends s. 938.07, F.S., to impose court costs imposed in DUI cases in BUI cases as well.

The bill provides a one time appropriation of $3,500,000 to the Florida Department of Law Enforcement for the purchase of breath testing equipment.

The bill takes effect on January 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

B. PRESENT SITUATION:

Section 1

Section 316.193, F.S., prohibits driving under the influence (DUI). The first three times a person commits DUI, he or she is subject to imprisonment of up to one year and fines up to $2,500. s. 316.193(2), F.S. Potential fines and imprisonment are increased if the offender has a blood or breath-alcohol level greater than 0.20 or if a person under age 18 is present in the vehicle. s. 316.193(4), F.S. A fourth DUI conviction is a felony, s. 316.193(2)(b), F.S., and the offender faces up to five years in a state prison and up to a $5,000 fine. ss. 775.082, 775.083, F.S. The minimum fine for felony DUI is $1,000. s. 316.193(2)(b), F.S.

Section 316.193(3), F.S., provides increased penalties for a DUI offender who, by reason of operation of a vehicle, causes damage to property, serious bodily injury to another, or the death of another. The standard jury instruction in DUI manslaughter cases (prosecutions under s. 316.193(3), F.S., where a death is involved) provides that the State must prove that a DUI offender "caused or contributed to the cause" of the death. In State v. Hubbard, Case No. 94,116 (Fla. December 16, 1999), the court held that the jury instruction does not create confusion for the jury and simply makes clear for the jury that the DUI driver need not be the sole cause of the accident. Slip Op. at 27-28. However, two justices felt the language of the jury instruction expanded the reach of the statute and modified "the straightforward causation provision" in the statute. Slip Op. at 32 (Anstead, J., specially concurring), Slip Op. at 38-39 (Pariente, J., concurring in part and dissenting in part).

Section 316.193(9), F.S., provides that a person arrested for DUI shall not be released until the person is no longer impaired, until the person's blood or breath-alcohol level is less than 0.05, or until eight hours have elapsed from the time of arrest.

Section 2

Section 316.1932, F.S., explains that a person who accepts the privilege of driving in this state is deemed to have consented to an appropriate test (blood, urine, or breath) for alcohol, chemical substances, or controlled substances if the person is arrested for driving under the influence. The statute details testing requirements and requires that the person be told that the failure to submit to "any lawful test of his or her [breath, urine, or blood], will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests." ss. 316.1932(1)(a),

316.1932(1)(c), F.S. The refusal to submit to an appropriate test is admissible in criminal prosecutions. Id.

Currently, the penalty for refusal is a suspension of the person's driver's license and use of the refusal as evidence in prosecutions. There are no criminal sanctions for refusal.

Section 3

Section 316.1933(1), F.S., permits a law enforcement officer, if the officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, chemical substances, or controlled substances caused the death or serious bodily injury of a person, to require the person to submit to a blood test. The officer can use reasonable force to require submission to the test. The statute defines "serious bodily injury" as an injury "which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

Section 4

Currently, Florida imposes administrative drivers license suspensions if a driver refuses to submit to a lawful blood or breath-alcohol test. s. 322.2615, F.S. Suspensions last for up to 18 months, depending on whether there has been a prior refusal. s. 322.2615(1)(b), F.S. While the fact that a person refused to submit to a blood or breath-alcohol test is admissible in criminal proceedings for other crimes, the refusal itself is not a crime.

Sections 5-8

Section 327.35, F.S., prohibits boating under the influence (BUI) and provides for penalties. It is analogous to the DUI statute. The laws for failing to submit to a blood or breath-alcohol test parallel those in a DUI situation. The discussions of Sections 1-4 of the bill apply to Sections 5-8.

Section 9

Part V of Chapter 397, F.S., deals with involuntary admissions for evaluations of persons who may have substance abuse problems. Section 397.675, F.S., explains that a person meets the criteria for involuntary admission if there is a good faith basis to believe that the person is substance abuse impaired and, because of the impairment, has lost the power of self-control with respect to substance use and (a) inflicted, attempted to inflict, or threatened physical harm on the person or others or (b) is in need of substance abuse treatment and unable to recognize the need for such treatment. When a person appears to meet these conditions and is brought to the attention of law enforcement, a law enforcement officer may take the person into protective custody. s. 397.677, F.S. Within 72 hours after being taken into protective custody, the person must be evaluated by an attending physician and can only be retained in custody if a petition is filed with the court. s. 397.6773, F.S. The court must hold a hearing on the petition and can issue an order authorizing involuntary assessment and stabilization or involuntary treatment if the person meets the criteria of s. 397.675, F.S.

There are currently no procedures in place that deal specifically with involuntary admissions for persons whose alcohol or drug impairment prevents them from realizing they should not drive automobiles or operate vessels while impaired.

Section 10

The Criminal Punishment Code does not score BUI offenses. Felony DUI is a Level 6 Offense and DUI manslaughter is a Level 9 Offense. s. 921.0022, F.S.

Section 11

Section 938.07, F.S., imposes an additional $135 court cost on fines imposed pursuant to DUI violations. It does not impose the court cost for BUI violations. The statute also contains an incorrect statutory reference to the Brain and Spinal Cord Injury Rehabilitation Trust Fund. The Fund is now created in s. 381.79, F.S., and not s. 413.613, F.S.

C. EFFECT OF PROPOSED CHANGES:

Section 1 of the bill amends s. 316.193, F.S. It makes a third DUI conviction a felony. Potentially, offenders convicted of a third DUI could be sentenced to five years imprisonment and fined $5,000. ss. 775.082, 775.083, F.S. If an offender's blood or breath-alcohol level exceeds 0.20, the minimum fine for felony DUI would be increased to $2,000. According to the Department of Highway Safety and Motor Vehicles, there were 1,536 convictions for third time DUI in 1998. Under this bill, those convictions could have been felony convictions.

In Hubbard, Justices Anstead and Pariente expressed concern that the jury instruction improperly modified the statute. The majority found the instruction was adequate. The bill amends the statute to mirror the instruction and prevent future confusion by clarifying that a DUI offender who, by operation of a vehicle, causes or contributes to the cause of damage to property, serious bodily injury, or death to another is guilty of the crimes specified in s. 316.193(3), F.S.

The bill amends s. 316.193(9), F.S., to permit a law enforcement officer to place a person in protective custody pursuant to s. 397.6772, F.S., if the person has previously been convicted of a DUI or BUI offense, if the person's blood or breath-alcohol level is 0.20 or greater, or if the person is on pretrial release for a previous DUI or BUI offense. If the person is subsequently convicted of DUI, the court shall order the person to pay the costs of evaluation and treatment. The bill does not alter any of the requirements of 316.193(5), F.S.

Section 2 of the bill amends s. 316.1932, F.S., to require that law enforcement officers inform persons arrested for DUI that refusing a test requested by a law enforcement officer is a misdemeanor. This warning is in addition to the other warnings required by s. 316.1932, F.S.

Section 3 amends s. 316.1933, F.S. Under the bill, if a law enforcement officer has probable cause to believe a vehicle has caused the death or serious bodily injury of a person, the officer shall require "any person driving or in actual physical control of the motor vehicle or any motor vehicle involved in the incident" to submit to a blood test for alcohol, chemical substances, or controlled substances. Under current law, if the officer had probable cause to believe that the driver who caused the incident was under the influence, the officer could require a blood test. Under this bill, the officer is required to order the testing of all drivers involved in the incident even if there is no probable cause to believe anyone was under the influence. The bill also states that the testing need not be incident to a lawful arrest.

The law enforcement officer is required to offer any person subject to a blood test the opportunity to submit to a breath test, if the person is conscious and capable of submitting to a breath test. If the person submits to a breath test and a valid reading is obtained, the blood test shall be waived.

Section 4 of the bill creates s. 316.1939, F.S. The new statute would create a crime for refusing to submit to a breath, blood or urine test as described in s. 316.1932, F.S., when the officer requesting the test has reasonable cause to believe the person was driving or in actual physical control of a vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances.

A person convicted of refusing a test is guilty of a first degree misdemeanor and subject to up to one year in the county jail and a $1,000 fine. Currently, drivers who refuse are subject to administrative suspensions of their drivers licenses. Under the bill, such suspensions are not affected by the outcome of any criminal proceedings and any administrative proceedings will not affect any criminal proceedings.

Other states, including Minnesota, Nebraska, Rhode Island, Vermont, and Alaska, have similar laws to make refusal a crime. The Fifth Amendment privilege against self-incrimination is not implicated by the taking of blood or breath samples since such samples are physical evidence and are not testimonial in nature. See Schmerber v. California, 384 U.S. 757, 760-765 (1966), Pennsylvania v. Muniz, 496 U.S. 582 (1990).

Section 5 amends the boating under the influence statute (BUI), s. 327.35, F.S., to conform to the changes made by Section 1 to the DUI statute. As described in the analysis of Section 1, it makes a third offense a felony, it amends the statute to prevent any confusion (discussed in Hubbard) with the jury instruction, and permits civil commitment under certain situations. It also amends statutory references to apply to the boating under the influence statute rather than the driving under the influence statute.

Section 6 of the bill amends the BUI statute to conform to the changes made by Section 2 to the DUI statute. This section requires the law enforcement officer to inform the defendant, in addition to the other warnings already required, that refusal to submit to required test is a misdemeanor.

Section 7 amends the BUI statute to conform to the changes made by Section 3 to the DUI statute. Under the bill, if a law enforcement officer has probable cause to believe a vessel has caused the death or serious bodily injury of a person, the officer shall require “any person driving or in actual physical control of the vessel or any vessel involved in the incident” to submit to a blood test for alcohol, chemical substances, or controlled substances.

Section 8 makes refusal to submit to a lawful test for drugs or alcohol in BUI situation a crime just as Section 4 makes refusal a crime in a DUI situation.

Section 9 adds new conditions under which a court may find meets the criteria for involuntary admission under s. 387.675, F.S. Under the bill, a court may find that a person has lost the power of self-control with regard to substance abuse and is likely to inflict physical harm on himself, herself, or others if the person has been arrested for DUI or BUI and the person:

(a) has a prior DUI or BUI conviction;
(b) has a blood or breath-alcohol level of 0.20 or greater;
(c) has, by reason of operation of a motor vehicle or vessel, caused death or serious bodily injury; or
(d) is on pretrial release for prior DUI or BUI arrest.

Once such a finding has been made, the court may order involuntary admission and stabilization or involuntary treatment if, after a hearing, it finds it necessary. ss. 397.6811-397.6977, F.S.

The bill provides that if a person is placed in protective custody, meets the criteria for involuntary admission, and is a qualified resident pursuant to s. 212.055(4)(d), F.S. Under s. 212.055(4), F.S., counties can collect an indigent health care sales surtax. Under the bill, funds from this surtax would be used to pay for the costs of evaluation and treatment of qualified residents, as defined by s. 212.055(4)(d), F.S. If a person who is treated with these funds is subsequently convicted of DUI or BUI, the court shall enter a civil judgment against the person for the cost of evaluation and treatment.

Section 10 amends s. 921.0022, F.S., to score BUI offenses in the Criminal Punishment Code (Code). Under the bill, felony BUI is a Level 6 offense and BUI manslaughter is a Level 9 offense. The bill also amends references to felony DUI in the Code to reflect that only 3 convictions are required rather than the current 4 convictions.

Section 11 amends s. 938.07, F.S., to impose additional court costs of $135 in cases of BUI. The court costs are currently imposed in DUI cases. The bill also corrects a statutory reference to the Brain and Spinal Cord Injury Rehabilitation Trust Fund.

Section 12 of the bill appropriates $3,500,000 to the Florida Department of Law Enforcement for the purchase of breath testing equipment.

Section 13 provides an effective date of January 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

See Section II.C. - Effect of Proposed Changes.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Revenues may be generated through fines associated with DUI and BUI prosecutions.

2. Expenditures:

The bill provides a one time appropriation of $3,500,000 to FDLE for the purchase of breath testing equipment for state and local law enforcement agencies.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Revenues may be generated through fines associated with DUI and BUI prosecutions.

2. Expenditures:

Counties may have to spend some monies on treatment of indigent residents placed in involuntary treatment. Some of that money may be recovered since a judgment will be entered against the residents if they are subsequently convicted of a DUI or BUI offense.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Mandatory blood testing of drivers involved in serious crashes

Section 3 of the bill amends s. 316.1933(1), F.S., to require law enforcement officers to require alcohol or drug testing of all drivers involved in incidents involving death or serious bodily injury. Similar statutes have generated Fourth Amendment challenges. Currently, a law enforcement officer may order alcohol or drug testing if the officer if the officer has probable cause to believe the driver of the vehicle that caused a crash that caused death or serious bodily injury of a human being is under the influence of alcohol or drugs. The First District Court of Appeal has implicitly held that more than the fact that a serious accident has occurred is required for probable cause to order testing under s. 316.1933(1), F.S. In White v. State, 492 So. 2d 1163, 1164 (Fla. 1st DCA 1986), a police officer ordered the driver of a vehicle involved in a fatal crash submit to a blood test pursuant to s. 316.1933(1), F.S. The officer testified "that he had no indication that White had had anything of an alcoholic nature, that he had not talked to anyone nor had he seen anything which led him to believe that there was alcohol involved, that he did not detect any odor of alcohol on White's breath nor observe White walk or talk." White, 492 So. 2d at 1164. The court said no probable cause to order the alcohol testing of White existed and reversed White's conviction. Id. Recently, in State v. Webb, 2000 WL 15915 (Fla. 3d DCA February 16, 2000), the court affirmed the trial court's granting of a motion to suppress when a police officer ordered an alcohol test pursuant to s. 316.1933, F.S., because he had a policy of ordering such tests in cases of serious injury or death. The court held that there must be probable cause to order a test. The Florida Supreme Court has not ruled on this issue.

This bill directs law enforcement to order testing of all drivers involved in serious crashes. Essentially, the bill indicates that the fact that a serious accident has occurred is probable cause that alcohol or drugs were involved. While no court has made such a finding, there is

statistical evidence to support the concept. One court gave statistics regarding alcohol's involvement in traffic fatalities:

> In 1990, 44,529 people were killed in traffic crashes in the United States, 40% of which involved an intoxicated driver or occupant of the vehicle. At the same time, there were 58,797 drivers involved in fatal crashes, in which 14,558 of the drivers were intoxicated. In Florida, out of a total of 2,951 traffic fatalities in 1990, 1,365 were alcohol related.

Lindsay v. State, 606 So. 2d 652, 655 (Fla. 4th DCA 1992)(footnotes and citations omitted).

According to Mothers Against Drunk Driving, alcohol was involved in 925 of the 2,824 traffic crash deaths in Florida in 1998.[1] Given such statistics, it could be argued that there is probable cause in any crash involving death or serious bodily injury but no court has yet so held.

In Fink v. Ryan, 673 N.E.2d 281 (Ill. 1996), the Illinois Supreme Court rejected a claim that a similar statute violated the Fourth Amendment. The Illinois statute provided that any person involved in an accident involving death or personal injury[2] consented to a test for alcohol or drugs even without individualized suspicion. Fink, 673 N.E.2d at 283. Fink was involved in a serious crash and consented to a blood test. Id. at 284. When the result came back 0.14, Fink was charged with DUI. Id. Fink argued that the statute violated the Fourth Amendment and the court rejected his claim. Id. at 285-289. The court held that a driver has a reduced expectation of privacy while driving on regulated roads. Id. at 286. The court noted that the Legislature had limited the testing provisions to crashes involving death or Type A injuries. Id. Accordingly, a person involved in such an accident would not expect to be permitted to immediately leave the scene. Id. Further, Illinois statute allowed testing only if the person had been issued a traffic citation. Id.

The court also rejected Fink's claim that the statute violated the Fourth Amendment because the results of the test could be used in criminal proceedings. Id. at 287. The court found that the primary purpose of the statute was to remove dangerous drivers through civil driver's license revocation proceedings and that the use of the results in criminal proceedings was only incidental. Id.

In many respects, this bill is similar to the statute at issue in Finks. It allows testing without any belief that the driver is impaired by alcohol or drugs. It limits the mandatory testing to situations involving serious crashes. Florida also provides for driver's license suspension if the driver tests at higher than 0.08 so it could be argued that the primary purpose of the statute is not criminal. However, the bill does not require that the driver be arrested or issued a traffic ticket before testing is ordered.

The Pennsylvania Supreme Court struck down, on Fourth Amendment grounds, a statute similar to the provision proposed in this bill. At issue in Commonwealth v. Kohl, 615 A.2d 308, 313 (Pa. 1992), was a statute that allowed "the seizure and search of an individual's blood based solely on the fact that the police officer has reasonable grounds to believe the individual was operating a vehicle that was involved in an accident in which death or injury requiring medical treatment occurred." Further, the statute did not "require any individualized suspicion of alcohol or drug use by the driver." Kohl, 615 A.2d at 313. The court held that there must

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[1] Source: MADD, Rating the States 2000, page 29.

[2] "Personal injury" was defined as "Type A" injuries involving "severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from the scene." Fink, 673 N.E.2d at 283.

some individualized suspicion of alcohol use for the statute to pass Fourth Amendment scrutiny. Id. The Kohl dissent would have found that the fact that there is a death or serious injury justifies testing since almost 50% of all fatal accidents involve alcohol. Id. at 316-317 (Larsen, J., dissenting).

Involuntary admissions

Section 9 permits the court to find a person has lost the power of self-control with respect to substance abuse and is likely to inflict physical harm on himself or others if the person has a prior DUI or BUI conviction, if the person's BAL is 0.20 or greater, if the person has caused death or serious bodily injury, or if the person is on pretrial release for another DUI or BUI offense. In Kansas v. Hendricks, 521 U.S. 346 (1997), the court approved a Kansas statute authorizing the civil commitment of sexual predators if the person has been charged or convicted of a sexual violent offense and suffers from a mental disorder that makes it likely that the person will engage in such behavior again. This bill does not specifically require a mental disorder and one could argue that it permits commitment upon a finding that a person has committed a crime and might commit another one. Hendricks warned that "a finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite voluntary civil commitment." Hendricks, 521 U.S. at 358.

Hendricks did not address a situation, like here, where a person has consistently engaged in substance abuse and endangered self and others by driving or operating vehicles or vessels. Further, a person committed under chapter 397 is not committed indefinitely. If the court orders assessment and stabilization, the person is released once stabilization is complete and cannot be held longer than 5 days absent court order. ss. 397.6811-397.6822, F.S. If the court orders involuntary treatment, the period cannot exceed 60 days absent a court order. ss. 397.693-397.6977, F.S. Clients can be released from involuntary treatment early if the conditions requiring treatment no longer exist. s. 397.6971, F.S.

Hendricks rejected arguments that civil commitment violated double jeopardy or ex post facto principles. Hendricks, 521 U.S. at 361-370. The proceedings in Hendricks, as here, are civil in nature and not criminal. Id. at 361. Neither the Kansas act nor this one implicates the primary objectives of criminal punishment: retribution and punishment. Id. at 361-362. The bill's purpose is to see if DUI and BUI offenders have a substance abuse problem and provide treatment if necessary.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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