

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 187 Lawful Testing for Alcohol, Chemical Substances, or Controlled Substances
SPONSOR(S): Porth and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 232

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Criminal Justice Committee</u>	_____	<u>Kramer</u>	<u>Kramer</u>
2) <u>Transportation Committee</u>	_____	_____	_____
3) <u>Transportation & Economic Development Appropriations Committee</u>	_____	_____	_____
4) <u>Justice Council</u>	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

HB 187 increases the sanction for refusing to submit to a lawful test of breath, urine or blood when an officer has reasonable cause to believe that a person was driving under the influence. Currently, such a refusal is a misdemeanor only if the person's driving privilege has previously been suspended for a prior refusal to submit to such a test. As a result of the bill, a first refusal to submit to a breath, blood or urine test will subject a person to having their driving privilege suspended for a year (as under current law) and to possible imprisonment for up to one year in county jail. The bill makes a corresponding change to the relevant boating under the influence (BUI) statutes.

The bill also expands the circumstances in which a law enforcement officer can request that a blood sample be taken in DUI and BUI cases. Currently, a person who accepts the privilege of driving in this state is deemed to have given his or her consent to a *blood* test if there is reasonable cause to believe the person was driving under the influence, if the person appears for treatment at hospital, clinic or other medical facility and if the administration of a breath or urine test is impractical or impossible. HB 187 provides that a person will be deemed to have given his or her consent to a blood test if the administration of a breath or urine test is impractical or impossible, regardless of whether the person appeared for treatment at a medical facility. The bill makes a corresponding change to the relevant BUI statute.

Current law provides that a law enforcement officer must require that a blood sample be taken when the officer has probable cause to believe that a vehicle driven by a person under the influence has caused the death or serious bodily injury of a human being. An officer is authorized to use reasonable force, if necessary, to require a person to submit to the blood test. The bill will allow an officer to require a blood test if a person refused to submit to a urine test, regardless of whether death or serious bodily injury is involved. In other words, if an officer has probable cause to believe that a motor vehicle driven by a person under the influence has caused the death or serious bodily injury of a human being *or* if the person has refused to submit to a requested urine test, the officer may require that a blood sample be taken and may use reasonable force, if necessary. The bill makes a corresponding change to the relevant BUI statute.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government / Safeguard Individual Liberty: HB 187 will authorize law enforcement to compel a blood test in an increased number of DUI and BUI cases. The bill also makes it a first degree misdemeanor for a person to refuse to submit to a lawful breath, urine or blood test in a DUI or BUI case.

Promote Personal Responsibility: The bill will provide for increased sanctions for refusal to submit to a lawful breath, urine or blood test in DUI and BUI cases.

B. EFFECT OF PROPOSED CHANGES:

DUI/BUI

The offense of driving under the influence¹ (DUI) is committed if a person is driving or in the actual physical control of a vehicle within the state and:

- The person is under the influence of alcoholic beverages, any chemical substance or any controlled substance when affected to the extent that the person's normal faculties are impaired;
- The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
- The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

The offense is punishable as follows²:

- For a first conviction, by a fine of not less than \$250 or more than \$500 and by imprisonment for not more than 6 months
- For a second conviction, by a fine of not less than \$500 or more than \$1000 and by imprisonment for not more than 9 months. If the second conviction was for an offense committed within 5 years of the date of a prior conviction, the court must order imprisonment for not less than 10 days.³
- For a third conviction that is not within 10 years of a prior conviction, by a fine of not less than \$1000 or more than \$2500 and by imprisonment for not more than 12 months.

A third conviction that occurs within 10 years of a prior conviction is a third degree felony, punishable by no less than 30 days in jail⁴ and up to five years in prison and a fine of up to \$1000.⁵ A fourth conviction, regardless of when it occurs, is a third degree felony, punishable by up to five years in prison and a fine of not less than \$1000 or more than \$5000.⁶

Section 327.35, F.S. prohibits the offense of boating under the influence (BUI) which has the same elements (other than the substitution of the word "vessel" for "vehicle") as the offense of driving under the influence. The fine and imprisonment provisions in the BUI statute are identical to those in the DUI statute.

¹ s. 316.193(1), F.S.

² s. 316.193(2), F.S.

³ s. 316.193(6)(b), F.S.

⁴ s. 316.193(6)(c), F.S.

⁵ s. 316.193(2)(b), F.S.

⁶ Additionally, a person who has been convicted of DUI faces suspension of his or her driving privilege and may be required to place an ignition interlock device on his or her vehicle. Section 316.193 also increases sanctions for DUI which results in damage to the property or person of another, serious bodily injury or the death of another person. s. 316.193(3)(c), F.S.

Breath, urine and blood tests

A chemical or physical test of a person's breath can be used to determine the alcoholic content of a person's blood or breath. A breath test cannot detect the presence of a controlled substance or a chemical substance. A urine test can be used to detect the presence of a controlled substance or a chemical substance but is not used for the purpose of determining alcoholic content. A blood test can be used to detect controlled substances and chemical substances and to determine alcoholic content.

Implied consent

Section 316.1932, F.S., sets forth what is commonly known as the implied consent law. Specifically, section 316.1932(1)(a)1, F.S. provides that:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her *breath* for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages.

Similarly, section 316.1932(1)(a)2, F.S. provides that a person who accepts the privilege of driving in the state is deemed to have consented to a *urine* test for the purpose of detecting the presence of a chemical substance or controlled substance. A breath or urine test must be incidental to a lawful arrest at the request of a law enforcement officer who has reasonable cause to believe the offender was driving under the influence.

A person is deemed to have given his or her consent to a *blood* test even if the person has not yet been arrested, if there is reasonable cause to believe the person was driving under the influence, if the person appears for treatment at a medical facility and if the administration of a breath or urine test is impractical or impossible.⁷

When an officer requests the breath, urine or blood test, the offender must be told that:

- Refusal to submit to the test will result in the suspension of the offender's driving privilege for one year.
- Refusal to submit to the test will result in the suspension of the offender's driving privilege for 18 months if the offender's driving privilege has previously been suspended for a refusal to submit.
- Refusal to submit to test is a misdemeanor if the offender's driving privilege has previously been suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood.

According to the Department of Highway Safety & Motor Vehicles, there were 23,517 driver license suspensions in 2003 and 23,058 in 2004 for refusal to consent to a lawful test of breath, urine or blood.

Sanctions for refusing to comply

Prior to the 2002 legislative session, if a person refused to submit to a breath, blood or urine test after an arrest for driving under the influence (DUI), the offender's driving privilege would be suspended. The refusal to submit was not a criminal offense. During the 2002 session, the law was changed to make a refusal to submit to a breath, urine or blood test a first degree misdemeanor if the offender's driving privilege has previously been suspended for a refusal to submit. See 2002-263, Laws of Fla.

⁷ s. 316.1932(1)(c), F.S. The refusal to submit to a breath, urine or blood test is admissible into evidence in any criminal proceeding. The result of any test pursuant to this section which indicates the presence of a controlled substance is not admissible in a trial for the possession of a controlled substance. s. 316.1932(2), F.S.

Specifically, section 316.1939, F.S. provides that a person who has refused to submit to a chemical or physical test of his or her breath, blood, or urine as described in s. 316.1932, F.S., and whose driving privilege was previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine or blood:

1. Who the arresting law enforcement officer had probable cause to believe was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances.
2. Who was placed under lawful arrest for a violation of s. 316.193, unless such test was requested pursuant to s. 316.1932(1)(c)⁸.
3. Who was informed that if he or she refused to submit to such test, his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months, and that the refusal to submit to such test is a misdemeanor.
4. Who, after having been so informed, refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer

commits a first degree misdemeanor, punishable by up to one year in jail.

Blood test for impairment in cases of death or serious bodily injury Section 316.1933, F.S., requires a person to submit to a blood test, upon request of a law enforcement officer, when a law enforcement officer has probable cause to believe the person was driving under the influence and caused death or serious bodily injury⁹. The law enforcement officer may use reasonable force if necessary to require the person to submit to the blood test. The testing does not need to be incidental to a lawful arrest of a person. The blood must be withdrawn by a medical professional or technician.

Constitutional law According to the Florida courts, the implied consent statutes discussed above place greater limitations on law enforcement's authority to obtain breath, urine or blood samples than is constitutionally required. The Third District Court of Appeal discussed the issue as follows:

Indeed, it is the established law of this state that Florida's implied consent statutes [§§ 316.1932, 316.1933, 316.1934, Fla. Stat. (1991)] impose, in certain respects, higher standards on police conduct in obtaining breath, urine, and blood samples from a defendant in a DUI case than those required by the Fourth Amendment. The Florida Supreme Court in *Sambrine v. State*, 386 So.2d 546, 548 (Fla.1980), has so stated:

What is at issue here ... is ... the right of the state of Florida to extend to its citizenry protections against unreasonable searches and seizures greater than those afforded by the federal constitution [through the Fourth Amendment]. This it has done through the enactment of section 322.261, Florida Statutes (1975) [now sections 316.1932, 316.1933, Florida Statutes (1991)]

As further stated by the Fifth District Court of Appeal in *State v. McInnis*, 581 So.2d 1370, 1374 (Fla. 5th DCA), *cause dismissed*, 584 So.2d 998 (Fla.1991),

⁸ s. 316.1932(1)(c) applies in cases in which there is reasonable cause to believe that the person was driving which under the influence and the person appears for treatment at a hospital, clinic or other medical facility and the administration of a breath or urine test is impractical or impossible.

⁹ Serious bodily injury is defined 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." Sec. 316.1933(1)(b), F.S.

One public policy reason for enacting such a statutory scheme [Florida's implied consent statutes] is the legislature's decision to extend to some motorists driving in Florida greater protection and rights of privacy than are provided by the state or federal constitutions.

In particular, Florida's implied consent statutes (1) limit the power of the police to require a person who is lawfully arrested for DUI to give samples of his/her breath, urine, or blood without the person's consent, and (2) prescribe the exact methods by which such samples may be taken and tested. These limitations and prescribed procedures represent higher standards for police conduct in obtaining samples of this nature from a DUI defendant than those required by the Fourth Amendment and are entirely permissible as a matter of state law.

State v. Langsford, 816 So.2d 136, 139 (Fla. 4th DCA 2002); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)(holding that it is not an unreasonable search under the Fourth Amendment for police to obtain a warrantless involuntary blood sample from a defendant who is under arrest for DUI if there is probable cause to arrest the defendant for that offense, and the blood is extracted in a reasonable manner by medical personnel pursuant to medically approved procedures).

Effect of HB 187

HB 187 amends s. 316.1939, F.S. to make it a first degree misdemeanor to refuse to consent to a lawful test of breath, urine or blood. Currently, such a refusal is a misdemeanor only if the person's driving privilege has previously been suspended for a refusal to submit to such a test. As a result, a first refusal to submit to a breath, blood or urine test will subject a person to having their driving privilege suspended for a year (as under current law) and to possible imprisonment for up to one year in county jail. The bill also amends s. 316.1932, F.S. to require that an officer inform a person that his or her refusal to submit to the test will be punishable as a misdemeanor. The bill makes a corresponding change to the relevant BUI statutes, ss. 327.352 and 327.359, F.S.

As discussed above, s. 316.1932(1)(c), F.S. currently provides that a person is deemed to have given his or her consent to a blood test if there is reasonable cause to believe the person was driving under the influence, if the person appears for treatment at hospital, clinic or other medical facility and if the administration of a breath or urine test is impractical or impossible. HB 187 removes the requirement that the person appeared for treatment at a hospital, clinic or other medical facility. As such, a person will be deemed to have given his or her consent to a blood test if the administration of a breath or urine test is impractical or impossible, regardless of whether the person has appeared for treatment at a medical facility. The bill makes a corresponding change to the relevant BUI statute, s. 327.352(1)(c), F.S.

The bill also amends s. 316.1933, F.S. which currently provides that a law enforcement officer must require a blood test when the officer has probable cause to believe that a vehicle driven by a person under the influence has caused the death or serious bodily injury of a human being. An officer is authorized to use reasonable force, if necessary, to require a person to submit to the blood test. The bill will allow an officer to require a blood test if a person refused to submit to a urine test requested pursuant to s. 316.1932, F.S., regardless of whether death or serious bodily injury is involved. In other words, if an officer has probable cause to believe that a motor vehicle driven by a person under the influence has caused the death or serious bodily injury of a human being *or* if the person has refused to submit to a requested urine test, the officer may require that a blood test be taken and may use reasonable force, if necessary. The bill makes a corresponding change to the relevant BUI statute, s.327.353, F.S.

C. SECTION DIRECTORY:

Section 1. Amends s. 316.1932, F.S. relating to refusal to submit to a breath, urine or blood test.

Section 2. Amends s. 316.1933, F.S.; permitting law enforcement to require person to submit to blood test if person has refused to take urine test.

Section 3. Amends s. 316.1939, F.S.; removing prior suspension as a condition for commission of misdemeanor by refusal to submit to a breath, urine or blood test in DUI case.

Section 4. Amends s. 327.352, F.S. relating to refusal to submit to breath, urine or blood test in BUI cases.

Section 5. Amends s. 327.353, F.S.; permitting law enforcement officer to require person to submit to blood test in BUI case if person has refused to submit to urine test.

Section 6. Amends s. 327.359, F.S.; removing prior suspension as a condition for commission of misdemeanor by refusal to submit to a breath, urine or blood test in BUI case.

Section 7. Provides October 1, 2005 effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Department of Highway Safety and Motor Vehicles reports that the bill will not have a fiscal impact on the department.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill will make a first refusal to submit to a lawful breath, urine or blood test a first degree misdemeanor. Currently, a person commits a misdemeanor in refusing to submit to a breath, urine or blood test only if the person's driving privilege had previously been suspended for a refusal to submit to a test. A first degree misdemeanor is punishable by up to a year in county jail. This may have an impact on county jail populations.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES