

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Criminal Justice Committee

BILL: CS/SB 232

INTRODUCER: Criminal Justice Committee and Senators Fasano, Baker, and Lynn

SUBJECT: Lawful Testing/DUI

DATE: March 9, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Dugger</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	_____	_____	<u>TR</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill would amend s. 316.1939, F.S., to make a first time refusal to submit to a lawful breath, urine, or blood test when an officer has reasonable cause to believe that a person was DUI punishable by possible imprisonment up to 6 months in county jail and a fine up to \$500, if he or she is adjudicated guilty. (Currently, a refusal is a first degree misdemeanor only if the person's driving privilege has previously been suspended for a refusal to submit to such a test.) This new criminal penalty is essentially the same penalty for a first time DUI offense involving no injury or property damage. The bill makes the same conforming changes to the relevant boating under the influence (BUI) statutes.

The bill also specifies what information must be provided to the person tested and states that full information does not include manual, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information will not include information in the possession of the manufacturer of the test instrument. (Currently, upon the request of a person tested, the law requires that full information concerning the test taken at the direction of a law enforcement officer must be made available to the person or his or her attorney.)

This bill substantially amends the following sections of the Florida Statutes: 316.1932, 316.1939, 327.352, and 327.359.

II. Present Situation:

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.

Implied consent

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

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, F.S., 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.

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, s. 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 offenders driving privilege has previously been suspended for a refusal to submit.
- Refusal to submit to the 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 driver refused to submit to a breath, blood or urine test after an arrest for driving under the influence (DUI), his or her 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.⁸

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 substances is not admissible in a trial for the possession of a controlled substance. s. 316.1932(2), F.S.

⁸ See 2002-263, L.O.F.

Specifically, s. 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, F.S., unless such test was requested pursuant to s. 316.1932(1)(c), F.S.⁹
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.

Full information

In order for a breath or blood test to be considered valid it must be performed substantially in accordance with methods approved by the Department of Law Enforcement and by an individual possessing a valid permit issued by the department.¹⁰ Upon the request of the person tested, full information concerning the test taken at the direction of the law enforcement officer must be made available to the person or his or her attorney.¹¹

In *State v. Muldowny*, 871 So.2d 911 (Fla. 2005), the Fifth District Court of Appeal stated because this section requires that full information be disclosed:

“It must necessarily follow that when a person risks the loss of driving privileges or perhaps freedom based upon the use and operation of a particular machine, full information includes operating manuals, maintenance manuals and schematics in order to determine whether the machine actually used to determine the extent of a defendant’s intoxication is the same unmodified model that was approved pursuant to statutory procedures. It seems to us that one should not have privileges and freedom jeopardized by the results of a mystical machine that is immune from discovery, that inhales breath samples and that produces a report specifying a degree of intoxication.” *Id.*

⁹ s. 316.1932(1)(c), F.S., applies in cases in which there is reasonable cause to believe that the person was driving 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.

¹⁰ ss. 316.1934(3) and 327.354(3), F.S.

¹¹ s. 316.1932(1)(f)4, F.S.

The State had argued that it did not have possession of the requested information and that it was trade secret. The DCA affirmed the trial court's ruling excluding the breath test results. This is the only reported decision on this issue. Trial courts around the state have been divided on the issue.

III. Effect of Proposed Changes:

The bill would amend s. 316.1939, F.S., to make a first time refusal to submit to a lawful breath, urine, or blood test when an officer has reasonable cause to believe that a person was DUI punishable by possible imprisonment up to 6 months in county jail and a fine up to \$500, if he or she is adjudicated guilty. (Currently, a refusal is a first degree misdemeanor only if the person's driving privilege has previously been suspended for a refusal to submit to such a test.) This new criminal penalty is essentially the same penalty for a first time DUI offense involving no injury or property damage. The bill would also amend s. 316.1932, F.S., to require that an officer inform a person that his or her refusal to submit to the test is punishable as a misdemeanor. The bill would make these same conforming changes to the relevant BUI statutes, ss. 327.352 and 327.359, F.S.

In addition, the bill would mandate that full information be provided to the driver and his or her attorney, upon request, concerning the *results of the test taken*. The bill would specify that full information is limited to the following:

1. The type of test administered and the procedures followed;
2. The time of the collection of the blood or breath test sampled;
3. The numerical results of the test indicating the alcohol content of the blood and breath;
4. The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; and
5. If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance of such instrument.

The bill would also provide that full information does not include manual, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information would not include information in the possession of the manufacturer of the test instrument.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Individuals refusing for the first time to submit to a lawful breath, urine, or blood test for DUI will be subject to possible imprisonment up to 6 months in county jail and a possible fine not exceeding \$500 under the bill.

C. Government Sector Impact:

This bill will make a first refusal to submit to a lawful breath, urine, or blood test punishable by imprisonment up to 6 months in county jail, which could increase the number of offenders incarcerated in county jails. (Currently, a person commits a misdemeanor in refusing to submit to a breath, urine, or blood test only if the person's driving privilege has previously been suspended for a refusal to submit to a test.)

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

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
