

# MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document

No. 635

H. P. 556

House of Representatives, February 4, 1981

Referred to the Committee on Judiciary. Sent up for concurrence and ordered printed.

EDWIN H. PERT, Clerk

Presented by Representative Joyce of Portland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY-ONE

**AN ACT to Amend Provisions Concerning the Operation of the Operation after Suspension and Habitual Offender Laws and Certain Nonsentencing Provisions of the Operating under the Influence Law.**

Be it enacted by the People of the State of Maine, as follows:

**Sec. 1. 29 MRSA § 787, sub-§ 7, first sentence is amended to read:**

Any person whose operator's license or registration certificates or other privilege to operate a motor vehicle, trailer or ~~semi-trailer~~ **semitrailer** has been suspended or revoked, restoration thereof or the issuance of a new license or registration being contingent upon the furnishing of security or proof of financial responsibility, and who during such suspension or revocation or in the absence of full authorization from the Secretary of State shall drive any motor vehicle, trailer or semitrailer upon any highway or knowingly permits any motor vehicle, trailer or ~~semi-trailer~~ **semitrailer** owned by such person to be operated by another upon any highway, except as permitted under this subchapter, shall be punished ~~by imprisonment for not more than 6 months or by a fine of not more than \$500, or by both as provided in section 2184.~~

**Sec. 2. 29 MRSA § 1312, first paragraph is amended to read:**

Any person who operates or attempts to operate a motor vehicle within this State shall be deemed to have given consent to a chemical test to determine his blood-alcohol level by analysis of his blood or breath, if ~~arrested for operating or~~

~~attempting~~ **there is probable cause to believe he has operated or attempted to operate a motor vehicle while under the influence of intoxicating liquor.**

**Sec. 3. 29 MRSA § 1312, 2nd ¶**, as repealed and replaced by PL 1971, c. 547, is amended by adding at the end the following new sentence to read:

**If the accused selects a breath test, the law enforcement officer may determine which type of breath test, as described in subsection 6, to be administered.**

**Sec. 4. 29 MRSA § 1312, sub-§ 2, first ¶, 2nd sentence**, as last repealed and replaced by PL 1979, c. 701, § 32, is amended to read:

The Secretary of State, upon the receipt of a written statement under oath, ~~within 20 days of the date, of the arrest of stating that the law enforcement officer had~~ **probable cause to believe that** a person ~~for~~ was operating or attempting to operate a motor vehicle while under the influence of intoxicating liquor, and that such person had revoked his consent by refusing to submit to a chemical test to determine ~~this~~ **the** blood-alcohol level by analysis of his blood or breath, shall immediately notify the person, in writing, as provided in section 2241, that his license or permit and his privilege to operate have been suspended.

**Sec. 5. 29 MRSA § 1312, sub-§ 2, first ¶**, as last repealed and replaced by PL 1979, c. 701, § 32, is amended by adding after the 2nd sentence a new sentence to read:

**The law enforcement officer shall cause the statement to be delivered to the Secretary of State within 20 days of the date of the revocation of consent.**

**Sec. 6. 29 MRSA § 1312, sub-§ 2, 3rd and 4th ¶¶**, as last repealed and replaced by PL 1979, c. 701, § 2, are amended to read:

The scope of such a hearing shall cover whether **there was probable cause to believe that the individual was** ~~lawfully placed under arrest operating under the influence of intoxicating liquor~~ and whether he revoked his prior implied consent by refusing to submit to one of the tests upon the request of a law enforcement officer. Any suspension in effect shall be removed if, after hearing, it is determined that ~~the arrested~~ person who refused to permit the test would not have refused but for the failure of the law enforcement officer to give either or both of the warnings required by subsection 1.

If it is determined, after hearing when such is requested, **that there was not probable cause to believe that such person was** ~~not arrested operating under the influence of intoxicating liquor~~ or did not revoke his implied consent to permit a chemical test to determine his blood-alcohol level by analysis of his blood or breath, any suspension in effect shall be removed immediately.

**Sec. 7. 29 MRSA § 1312, sub-§ 3**, as last repealed and replaced by PL 1979, c. 701, § 32, is amended to read:

**3. Review.** Any person, whose license, permit or privilege to operate is suspended for revoking his implied consent to submit to a chemical test to

determine his blood-alcohol level by analysis of his blood or breath at the direction of a law enforcement officer ~~after having been arrested for operating or attempting~~ **claiming to have had probable cause to believe that the person operated or attempted** to operate while under the influence of intoxicating liquor, shall have the right to file a petition in the Superior Court in the county where he resides, or in Kennebec County, to review the order of suspension by the Secretary of State by the same procedure as is provided in section 2242.

**Sec. 8. 29 MRSA § 1312, sub-§ 6, 2nd and 3rd ¶¶**, as last amended by PL 1975, c. 293, § 4, are further amended to read:

Only a duly licensed physician, registered nurse or a person certified by the Department of Human Services under certification standards to be set by that department, acting at the request of a law enforcement officer, ~~with the consent of the defendant~~ **may draw a specimen of blood for the purpose of determining the blood-alcohol level thereof of a person who has not revoked his implied consent and who has selected a blood test.** This limitation shall not apply to the taking of breath specimens.

A law enforcement officer ~~with the consent of the person from whom the sample is to be taken~~ **may take a sample specimen of the breath of any person arrested for operating or attempting whom he has probable cause to believe has operated or attempted** to operate a motor vehicle while under the influence of intoxicating liquor **and who has not revoked his implied consent and who has selected a breath test,** ~~said~~ the sample specimen to be submitted to the Department of Human Services or a person certified by the Department of Human Services for the purpose of conducting chemical tests of the sample specimen to determine the blood-alcohol level thereof.

**Sec. 9. 29 MRSA § 1312, sub-§ 6, 5th ¶**, as enacted by PL 1977, c. 603, is amended to read:

As an alternative to the method of breath testing described in paragraph 3 a law enforcement officer ~~with the consent of the person upon whom the test is to be made~~ **may test the breath of any person arrested for operating whom there is probable cause to believe has operated or attempting attempted** to operate a motor vehicle while under the influence of intoxicating liquor **and who has chosen a breath test,** by use of a self-contained, breath-alcohol testing apparatus to determine the breath-alcohol level, provided the testing apparatus is reasonably available.

**Sec. 10. 29 MRSA § 1312, sub-§ 8, 2nd ¶, 3rd sentence,** as amended by PL 1979, c. 663, § 171, is amended to read:

It shall be prima facie evidence that the **person taking a specimen of blood was a person authorized by subsection 6, that the equipment, chemicals and other materials used in the taking of the blood specimen or a breath sample were of a quality appropriate for the purpose of producing reliable test results, that any equipment, chemicals or materials required by subsection 6 to be approved by the**

Department of Human Services were in fact approved, that the sample tested by the person certified under subsection 6 was in fact the same sample taken from the defendant and that the percentage by weight of alcohol in the blood of the defendant was, at the time the blood or breath sample was taken, as stated in the certificate, unless with 10 days written notice to the prosecution, the defendant requests that a qualified witness testify as to the results of the chemical analysis any of the matters as to which the certificate constitutes prima facie evidence. The notice shall specify those matters concerning which the defendant requests testimony.

Sec. 11. 29 MRSA § 1312, sub-§ 8, 4th ¶, 2nd sentence, as repealed and replaced by PL 1979, c. 701, § 33, is amended to read:

If the ~~arresting~~ law enforcement officer **having probable cause to believe that the person operated or attempted to operate a motor vehicle under the influence of intoxicating liquor** fails to give either of the warnings required under subsection 1, the revocation of the person's implied consent by refusing to submit to a chemical test shall not be admissible.

Sec. 12. 29 MRSA § 1312, sub-§ 11, ¶¶ A and B, as enacted by PL 1977, c. 626, § 3, are amended to read:

A. After ~~making an arrest for a person has been charged with~~ a violation of this section, the ~~investigating or~~ arresting officer shall investigate to determine whether the ~~arrested charged~~ person has any prior convictions under this section. As part of his investigation, the ~~arresting~~ officer shall make the necessary inquiries of the Secretary of State. If the ~~arresting~~ officer determines that the ~~arrested charged~~ person has a prior conviction, he shall cause to be issued a complaint for a 2nd violation in accordance with subsection 10, paragraph B.

B. Any officer authorized to arrest for violations of this section may arrest, without a warrant, any person ~~involved in a motor vehicle accident,~~ if the officer has probable cause to believe ~~that that person~~ has violated this section if the arrest occurs within a period following the offense reasonably likely to result in the obtaining of probative evidence of blood-alcohol level.

Sec. 13. 29 MRSA § 2184, sub-§ 1, first sentence, as enacted by PL 1975, c. 770, § 159, is amended to read:

Any person who operates a motor vehicle on any public highway of this State at a time when his license, permit or right to operate has been suspended or revoked, **except for a revocation for habitual offender pursuant to chapter 18-A or former chapter 18,** shall be punished by a fine of not less than \$100 nor more than \$500, or by imprisonment for not more than 6 months, or by both.

Sec. 14. 29 MRSA § 2296, first sentence, as enacted by PL 1979, c. 10, § 2, is amended to read:

At the expiration of one year from the date of the revocation under this chapter,

or by the Superior Court under former chapter 18, a person whose license has been ~~so~~ revoked may petition the Secretary of State for relief from his habitual offender status.

#### STATEMENT OF FACT

Sections 1, 13 and 14 of this bill are designed to remedy problems in the operation of the operating after suspension and habitual offender laws. Section 1 of the bill eliminates the slightly different special penalty for operating after suspension when the suspension is for financial responsibility reasons and subjects such violations to the general operating after suspension statute. This change is made so that it will not be necessary to allege in the criminal complaint the particular reason for the suspension.

Section 13 of the bill makes clear that the operating after suspension statute should not apply to habitual offender violations. Because the statute covers suspensions and "revocation," and because a person's license is "revoked" as a habitual offender, it is possible for persons to be mistakenly prosecuted under this section. Such a prosecution may act as a bar to proper prosecution under the habitual offender law, which carries a Class C penalty.

Section 14 of the bill remedies an omission created by the repeal of former Maine Revised Statutes, Title 29, chapter 18, the old habitual offender law. There is no express provision for the restoration of a license revoked under the prior chapter. See *State v. Albert*, Me., 418 A.2d 190, 193 (1980). By incorporating new restoration provision of the Maine Revised Statutes, Title 29, chapter 18-A, both the reasons for restoration and the time limit are specified.

Sections 2 to 12 amend the operating under the influence statute. These amendments are designed to remove certain impediments in the current statute, not constitutionally required, in the obtaining of blood-alcohol tests and to make the use of those test results in court more efficient.

Section 2 removes the apparent requirement that there be an arrest in order to trigger the implied consent revisions. There are situations, typically where the driver is receiving medical treatment, in which it is neither necessary or even possible to make a custodial arrest. The requirement of an arrest is thus replaced by the constitutional requirement that the officer have probable cause.

Sections 3 through 9 and 11-12 of the bill conform existing language concerning "arrest" to the basic change in section 2 of the bill from arrest to a probable cause standard. They also change the language in subsection 6 concerning "consent" to conform to the conceptual change introduced last year changing "refusal" to "revocation of a person's implied consent," thus clearing up a certain degree of ambiguity.

Section 10 of the bill, amending the Maine Revised Statutes, Title 29, section 1312, subsection 8, is based on the reliability of present methods routinely in use in this State for the gathering of blood-alcohol evidence. The bill makes clear that

when a test result is finally certified by a qualified chemist, that the certificate constitutes prima facie evidence that all the steps which must be taken to ensure that the chemical analysis of a sample is reliable were in fact taken. The bill should result in savings of time and witness fees by reducing the need for usually predictable testimony about matters routinely performed. Of course, a defendant may always insist that the witnesses be produced to testify about any of these matters.

Section 12 of the bill, amending the Maine Revised Statutes, Title 29, section 1312, subsection 11, paragraph B, extend the present power to arrest on probable cause, without a warrant although the offense was not committed in the officer's presence, to situations other than accidents. There are situations where an officer, based on reports by reliable members of the public, has probable cause to believe that a person has operated a motor vehicle under the influence. In those instances it would be too late to obtain a blood or breath test of any evidentiary value if it were necessary to obtain an arrest warrant. The Criminal Code, Maine Revised Statutes, Title 17-A, section 15, contains a number of situations in which arrests for less than Class D and E crimes may take place on probable cause although the offense was not committed in the officer's presence. This bill also contains a limitation making clear that warrantless arrests may only take place in such a time period that probative blood-alcohol evidence will be obtained.