

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 196 (Substitute S-2 as passed by the Senate)
Sponsor: Senator William Van Regenmorter
Committee: Judiciary

Date Completed: 3-13-01

RATIONALE

Under the Michigan Vehicle Code's implied consent provisions, in Section 625c, a person who operates a vehicle upon a public highway or other public place in the State is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol and/or presence of a controlled substance in his or her blood or urine, or the amount of alcohol in his or her breath, if the person is arrested for a driving offense listed in Section 625c (described in **BACKGROUND**, below).

The Code also allows a peace officer to require a person to submit to a *preliminary* chemical breath analysis if the officer has reasonable cause to believe that the person was operating a vehicle upon a public highway or other public place and the person's ability to operate may have been affected by the consumption of liquor; that the person was operating a commercial motor vehicle while his or her blood, breath, or urine contained any measurable amount of alcohol or while the person had any detectable presence of intoxicating liquor; or that the person was operating a vehicle while he or she had any bodily alcohol content (BAC), if he or she is under 21. Under limited circumstances, the results of a preliminary chemical breath test may be admitted in a criminal prosecution for a crime described in Section 625c or in an administrative hearing. In general, the results may be introduced only to rebut testimony elicited on cross-examination.

This limitation on the admission of preliminary breath test (PBT) results apparently has made it difficult for prosecutors to refute claims by defense witnesses that a driver's BAC was lower at the time he or she was driving than shown by a subsequent chemical test, even though the PBT result would indicate otherwise. Under the Code, a prosecutor may not use PBT results to rebut such claims by defense witnesses, but may use the results only to rebut testimony elicited from the prosecutor's own witnesses upon cross-examination by the defense.

Some people believe that PBT results should be admissible as evidence to rebut any claim or argument that a driver's BAC was different at the time charged than when the driver later submitted to a chemical test other than a PBT.

CONTENT

The bill would amend the Michigan Vehicle Code to provide that, in a prosecution for a drunk driving offense, either party could introduce the results of a preliminary chemical breath analysis in order to rebut testimony or argument that the defendant's breath alcohol content was different at the time of the offense than when a chemical test was administered.

Currently, a preliminary breath test result is admissible as evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test (other than a PBT) was administered, or if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test (other than a PBT) was administered.

The bill provides, instead, that PBT results would be admissible as evidence of a defendant's breath alcohol content if offered by either party to rebut testimony or argument that the defendant's breath alcohol content was different at the time of the charged offense than when a chemical test (other than a PBT) was administered.

(As currently provided, PBT results also could be introduced to assist the court or hearing officer in determining a challenge to the validity of an arrest.)

The bill would take effect on June 1, 2001.

BACKGROUND

Under Section 625c of the Michigan Vehicle Code, a driver is considered to have consented to chemical tests of his or her blood, breath, or urine, if the driver is arrested for operating under the influence of alcohol and/or a controlled substance (OUI); operating while impaired due to the consumption of alcohol and/or a controlled substance (OWI); OUI or OWI causing death or a serious impairment of a body function; committing one of those violations with a passenger under 16; driving with any bodily alcohol content, if the driver is under 21; driving a commercial vehicle with an unlawful BAC; refusing to submit to a preliminary chemical breath analysis, if the person is driving a commercial vehicle; or felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle while under the influence or with an unlawful BAC.

The Code contains various provisions that apply with respect to chemical tests and analysis of a person's blood, urine, or breath (other than a preliminary chemical breath analysis). A chemical test must be administered at the request of a peace officer having reasonable grounds to believe a person committed a crime described in Section 625c. If a person is arrested for a crime described in Section 625c, he or she must be informed that the test results are admissible in a judicial proceeding and will be considered with other admissible evidence in determining the defendant's innocence or guilt.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Under the Michigan Vehicle Code's restriction on the admission of PBT results, a defense attorney can elicit testimony from a defense witness that a driver's BAC was lower at the time he or she was driving than it was later when the defendant was subjected to a chemical analysis of blood, breath, or urine. The prosecutor, however, cannot introduce the PBT results to rebut that witness's claims. A prosecutor may introduce the PBT results only to rebut testimony elicited from his or her own witness on cross-examination by the defense. Consequently, if the results of a PBT show that a driver's BAC was indeed the same or greater than the level shown by the later chemical analysis, the defense surely will be careful not to elicit testimony from a prosecution witness that the driver's BAC was lower at the time of the charge, because that testimony then could be rebutted by the prosecutor's introduction of the PBT result.

Similarly, a defendant may introduce PBT results only to rebut testimony elicited from a defense witness on cross examination by the prosecution suggesting that the defendant's BAC was higher at the time of the charged offense than when a chemical analysis was later administered. So, if a PBT result would in fact show that a driver's BAC may have been lower at the time of arrest, a savvy prosecutor will avoid eliciting testimony to the contrary when cross-examining a defense witness.

This restriction on the introduction of PBT results in drunk driving cases serves only to obfuscate a drunk driving defendant's condition at the time he or she was behind the wheel of a vehicle. On the other hand, the bill would allow either party to introduce the results of a PBT in order to rebut any testimony or argument as to a difference in a driver's BAC when he or she was driving and when the driver's blood, breath, or urine later was subjected to a chemical analysis. This would enable a judge or jury to hear the full range of evidence in the case and to make a more informed judgment of the defendant's guilt or innocence. The bill therefore would facilitate the decision of drunk driving cases on their merits, rather than on courtroom tactics.

Opposing Argument

Issues relating to the admission of evidence at trial should be left to the discretion of the court. Reportedly, the Michigan District Judges Association has previously indicated that PBT results should be

considered for admission in accordance with established rules of evidence relating generally to the scientific reliability of the testing instrument and the procedures for using it. Preliminary breath test results should not be admissible at some times, or for some offenses, but inadmissible at other times or for other offenses. For instance, PBT results may be admitted in a misdemeanor prosecution for minor in possession of alcohol (MCL 436.1703(5)), but are not necessarily admissible in drunk driving prosecutions. These statutory distinctions should not be drawn; the PBT results are either reliable, or they are not. Trial judges have a proper set of rules to make that determination.

Opposing Argument

The admission of PBT results should not be expanded because their reliability in measuring BAC levels accurately is questionable. According to an article in the October 30, 2000, edition of *Michigan Lawyer's Weekly*, defense lawyers are questioning the accuracy of the PBT device used by police departments throughout the State. Backed up by a researcher in Western Michigan University's Department of Toxicology, they contend that the devices produce differing results based upon the amount and type of air that is blown into the breathalyzer unit. Apparently, demonstrations have shown that longer and deeper breaths exhaled into the device produce higher BAC readings. This suggests that the devices can be manipulated and that they may discriminate against healthier individuals. If a person gave a short breath for one reading and long breath for a second measurement, the difference in the two readouts could be too great for the test to be considered valid. In addition, someone who was physically fit could potentially blow more air into the unit and get a higher reading even if he or she had the same BAC as an out-of-shape smoker who could not breathe as well.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government. There are no data available to indicate whether convictions for drunk driving would increase if the results of a preliminary chemical breath analysis were admissible to rebut testimony elicited on direct examination. For felony drunk driving, the State government incurs the costs of incarceration for minimum sentences greater than 18 months, probation costs, and jail stays qualifying for reimbursement through the County Jail Reimbursement Program, while lesser drunk driving crimes are misdemeanor offenses or ordinance violations for which local government incurs the cost of incarceration or receives the fine revenue.

The bill would have no fiscal impact on the Department of State, except to the extent that the bill could affect the number of license revocations.

Fiscal Analyst: K. Firestone
J. Runnels

A0102\196a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.