

SUBJECT: Requiring breath or blood samples in accidents involving serious injuries

COMMITTEE: Law Enforcement — favorable, without amendment

VOTE: 7 ayes — Driver, Garza, Burnam, Y. Davis, Hegar, Hupp, Keel

0 nays

WITNESSES: For — Richard Alpert, Tarrant County District Attorney’s Office; Steve Blackstone, National Transportation Safety Board; Bill Lewis, Mothers Against Drunk Driving; David Mahoney and Trent Watts, Austin Police Department; Jette Scott; Ray Shappa, Smithville Police Department; Charlie Wilkison, Combined Law Enforcement Associations of Texas

Against — Keith S. Hampton, Texas Criminal Defense Lawyers

On — Gary Taylor, National Highway Traffic Safety Administration

BACKGROUND: Transportation Code, sec 724.012, requires that a peace officer order the taking of a breath or blood specimen from a person arrested for causing an accident by driving or boating while intoxicated under Penal Code, ch. 49, if the officer reasonably believes that another person has died or will die as a result of the accident. The officer is authorized to order the taking of a specimen over the objections of the person arrested and also determines whether to take a breath or blood specimen.

Penal Code, sec. 1.07, defines “serious bodily injury” as bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

DIGEST: HB 292 would amend Transportation Code, sec. 724.012, to require a peace officer to order the taking of a breath or blood sample from someone arrested for driving or boating while intoxicated in an accident where the officer believed any individual had died or would die or where anyone besides the suspect had suffered serious bodily injury as defined by Penal Code, sec. 1.07.

The bill would take effect September 1, 2003, and would apply only to the taking of specimens after that date.

SUPPORTERS
SAY:

HB 292 would allow for the prompt collection of specimens showing an impaired driver's blood alcohol concentration (BAC), preserving this evidence for prosecution of anyone causing serious injuries to others. Time and the body's metabolism reduce BAC and erode the ability to collect what essentially is crime scene evidence. There is no way to recreate the BAC evidence later, and in the absence of such evidence the impaired driver may be prosecuted only for reckless driving or aggravated assault rather than for driving while intoxicated (DWI) or intoxicated assault offenses that carry enhanced penalties.

Law enforcement officers and emergency medical personnel routinely make common sense determinations about the extent of bodily injuries, even in the chaos that prevails at a major accident scene. Injuries that required transport for further medical treatment could appropriately be deemed serious bodily injuries. Such a standard would provide a reasonable middle ground between an unreasonable search and an essential law enforcement activity. HB 292 would exclude mandatory breath and blood testing if others in the crash suffered only minor injuries, such as a bruised hand or vague complaints about feeling "hurt." However, the bill would recognize the fine line between serious bodily injury and death. For example, an alcohol-related crash on an isolated portion of rural interstate could result in death, while injuries following a similar crash in an urban area might be treated successfully in a nearby advanced trauma facility.

The concept of serious bodily injury has been litigated and well established in case law. The Court of Criminal Appeals held in *Moore v. State* 739 S.W. 2d 347 (Tex. Crim. App. 1987) that the difference in definition between "bodily injury" and "serious bodily injury" indicates that the Legislature intended to draw a meaningful distinction between the two in criminal cases. Prosecutors would act reasonably in applying the standard and would not claim, for example, that a broken nose was a serious bodily injury. Defense attorneys still could act as vigorous advocates for their clients and endeavor to suppress breath or blood evidence obtained inappropriately.

This bill would assist Texas in qualifying for an additional \$2.3 million in federal highway safety funds for 2003 through either the Transportation Equity for the 21st Century Act or Alcohol Driving Prevention Incentive Grants (also known as Section 410 grants). Texas currently meets three of the seven criteria for the grants but must satisfy five to receive the funds. The bill would help Texas qualify for one of the remaining areas by increasing the rate of BAC testing for drivers involved in fatal crashes. According to the National Center for Statistics and Analysis, information about the BAC test rates among drivers, pedestrians, and bicyclists involved in fatal crashes was available only 23 percent of the time for 2001 crashes in Texas. For the same period, BAC was available in 44 percent of fatal crashes nationwide. HB 292 would raise the testing rate by limiting the ability of drivers to refuse to submit to testing in accidents causing serious bodily injury, helping Texas qualify for safety funding in 2003, or at some later time.

Even a symbolic action by the Legislature could have a profound effect on public behavior. Changing attitudes towards drunk driving has been a decades-long struggle, and today these offenses appropriately are viewed and treated as serious crimes. However, Texas still has a serious problem with DWI offenders. This bill would give law enforcement officers and prosecutors more tools to protect public safety and encourage them to uphold existing laws more forcefully.

OPPONENTS
SAY:

HB 292 would further erode Texans' protection against unreasonable searches of their persons as guaranteed by both the U.S. and Texas constitutions. A law enforcement officer typically orders a blood test at a crash scene because other field sobriety or breath tests might not be effective due to injuries or disorientation of the suspect caused by the accident. Drawing blood is invasive and strictly should be limited because of constitutional and public health concerns.

Determining serious bodily injury remains problematic at an automobile crash scene and is not a settled legal concept in court despite extensive litigation. In *Fleming v. State*, 987 S.W. 2d 912 (Tex. App.-Beaumont 1999), an appeals court determined that a passenger in a DWI defendant's car sustained serious bodily injury while the driver of the other vehicle in the collision did not sustain serious bodily injury. Drawing the distinction required extensive investigation and lengthy deliberation in trial and appeals courts. Such

determinations cannot be made in minutes at a confusing and hazardous accident scene.

OTHER
OPPONENTS
SAY:

It is unlikely that the bill as written would lead to additional highway funding. The deadline to apply for federal funding passes in August, and the state would have to show improvement before the federal fiscal year ends on September 30. Congress also could change the criteria to qualify for the highway safety funding after the current program ended. If this bill is designed to secure additional highway funding for Texas, it should seek an immediate effective date.

The bill should set the standard as “bodily injury” rather than “serious bodily injury.” This definition would provide a clearer standard for law enforcement officers and emergency medical personnel at an accident scene and for prosecutors trying these kinds of cases.

NOTES:

SB 46 by Zaffrini, the identical companion bill, was referred to the Senate Criminal Justice Committee on January 27.

On March 17, the House Law Enforcement Committee considered and left pending a related bill, HB 914 by Ritter, which would require taking a breath or blood sample from a person arrested for driving or boating while intoxicated at an accident where someone has suffered bodily injury, rather than serious bodily injury.

On March 26, the House Law Enforcement Committee reported favorably HB 1141 by Riddle, which would permit certified emergency medical technician-intermediates and emergency medical technician-paramedics to draw blood at the scene of an accident.