



DUI INFO BOOKLET

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INTRODUCTION

This information is intended as general information ONLY. It is NOT legal advice. You should consult with an attorney if you have a specific question about your case. In addition, reading this booklet does NOT create an attorney-client relationship between the reader and AMABLE and/or any of its agents

AMABLE has put together this booklet in an effort to explain difficult legal concepts regarding DUI and all issues that flow therein. This is just a general information booklet and in no way should be understood as an all-encompassing guide to DUI. The issues associated with DUIs are very complex and cannot be fully explained in an information booklet. The way AMABLE has approached this packet is in a Question and Answer form. The questions chosen are among the most common among individuals who have been charged with a DUI.

VOCABULARY

Alcohol or drug: “means alcohol, a drug or drugs, or any combination of alcohol and a drug or drugs.” Va. Code § 18.2-268.1.

Blood-alcohol concentration (“BAC”): The concentration of alcohol in the blood, expressed as the weight of alcohol in a fixed volume of blood and used as a measure of the degree of intoxication in an individual. The concentration depends on body weight, the quantity and rate of alcohol ingestion, and the rates of alcohol absorption and metabolism.

Driving under the influence (“DUI”): a crime that makes it “unlawful for any person to drive or operate any motor vehicle, engine or train” while one or more of the following has occurred:

- (i) “while such person has a blood alcohol concentration of 0.08 percent or more,”
- (ii) “while such person is under the influence of alcohol,
- (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely,
- (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or
- (v) while such person has a blood concentration of any of the following substances at a level that is equal to or greater than:
 - o (a) 0.02 milligrams of cocaine per liter of blood,
 - o (b) 0.1 milligrams of methamphetamine per liter of blood,
 - o (c) 0.01 milligrams of phencyclidine per liter of blood, or
 - o (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood.” Va. Code § 18.2-266.

Driver or Operator: “every person who either (i) drives or is in actual physical control of a motor vehicle on a highway or (ii) is exercising control over or steering a vehicle being towed by a motor vehicle.” Va. Code § 46.2-100. “When an intoxicated person is seated behind the steering wheel and the key is in the ignition switch, he [or she] is in actual physical control of the vehicle.” *Sarafin v. Commonwealth*, 288 Va. 320, 327 (2014).

Field sobriety tests: tests that are conducted during a stop of a vehicle where the officer believes that the driver of the vehicle is under the influence of alcohol and/or drugs. The three field sobriety tests that are most commonly used are the: (1) horizontal gaze nystagmus test; (2) walk and turn test; and (3) one-leg-stand test.

Ignition interlock system: this is “a device that (i) connects a motor vehicle ignition system to an analyzer that measures a driver’s blood alcohol content; (ii) prevents a motor vehicle ignition from starting if a driver’s blood alcohol content exceeds 0.02 percent; and (iii) is equipped with

the ability to perform a rolling retest and to electronically log the blood alcohol content during ignition, attempted ignition and rolling retest.” Va. Code § 18.2-270.1.

Implied consent: In the context of a DUI, implied consent means that, as a result of operating a vehicle on the roads of Virginia, a driver is considered to have consented to giving a breath and/or blood sample upon being arrested for DUI in order for a chemical analysis test to be conducted to determine the alcohol and/or drug content of his or her blood.

License: “any driver’s license, temporary driver’s license, or instruction permit authorizing the operation of a motor vehicle upon the highways.” Va. Code § 18.2-268.1.

Motor vehicle: A motor vehicle is any vehicle “that is self-propelled or designed for self-propulsion.” Further, “[a]ny structure designed, used, or maintained primarily to be loaded on or affixed to a motor vehicle to provide a mobile dwelling, sleeping place, office, or commercial space shall be considered a part of a motor vehicle.” Va. Code § 46.2-100. Additionally, the Virginia DUI statute expressly provides that “the term ‘motor vehicle’ includes mopeds, while operated on the public highways of this Commonwealth.” Va. Code § 18.2-266.

Probable cause: “Probable cause exists when the facts and circumstances within the arresting officer’s knowledge and of which he [or she] has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Schaum v. Commonwealth*, 215 Va. 498, 500 (1975).

Reasonable suspicion: reasonable suspicion exists where the detaining officer has “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

Rolling retest: a rolling retest is “a test of the vehicle operator’s blood alcohol content required at random intervals during operation of the vehicle, which triggers the sounding of the horn and flashing of lights if (i) the test indicates that the operator has a blood alcohol content which exceeds 0.02 percent or (ii) the operator fails to take the test. Va. Code § 18.2-270.1.

Trauma Center Fund: a fund that was established in an attempt to help defray “the costs of providing emergency medical care to victims of automobile accidents attributable to alcohol or drug use.” Va. Code § 18.2-270.01(A).

Virginia Alcohol Safety Action Program (“VASAP”): a program that improves highway safety by decreasing the incidence of driving under the influence of alcohol and other drugs. VASAP offers many educational programs designed to improve highway safety.

Frequently Asked Questions

Can I be charged with a DUI if I was asleep in my vehicle with the engine off?

Yes, if the key was in the ignition. In order to be charged/convicted of a DUI, you must either be the driver of the vehicle or the operator of the vehicle (see definition for “Driver or Operator”). Under Virginia law, an operator of a motor vehicle is anyone who is in actual physical control of the vehicle. The Supreme Court of Virginia has held that “[w]hen an intoxicated person is seated behind the steering wheel and the key is in the ignition switch, he [or she] is in actual physical control of the vehicle.” *Sarafin v. Commonwealth*, 288 Va. 320, 327 (2014).

Can I be charged with a DUI if I was parked on private property? Even if it is my own driveway?

Yes, an individual can be charged with a DUI while on private property, even if the property is that individual’s own driveway, because Virginia’s DUI statute does not contain an ‘on a highway’ requirement for the operation of motor vehicles. However, the statute does include an ‘on a highway’ requirement for the operation of a moped. Therefore, an intoxicated operator of a car or truck can be charged with a DUI while on private property, but an intoxicated operator of a moped cannot be charged with a DUI while on private property. *Sarafin v. Commonwealth*, 288 Va. 320, (2014).

What are the penalties for being convicted of a DUI?

The penalties associated with a DUI conviction depend on a variety of factors, such as (i) number of previous DUI convictions; (ii) what the driver’s blood-alcohol concentration (“BAC”) was; and (iii) whether there were any passengers under 18 years of age in the vehicle at the time. The penalties are described in more detail below.

First Offense

- Class 1 misdemeanor
- Maximum of 12 months in jail
 - o If BAC is 0.15-0.20, a mandatory minimum of 5 days in jail
 - o If BAC is greater than 0.20, a mandatory minimum of 10 days in jail
- Minimum \$250 fine
- License suspended for 12 months
- Able to get restricted license?

Second Offense Within 5 Years From Previous DUI Conviction

- Class 1 misdemeanor
- Minimum of 20 days in jail, Maximum of 12 months in jail
 - o If BAC is 0.15-0.20, additional mandatory minimum of 10 days in jail

- If BAC is greater than 0.20, additional mandatory minimum of 20 days in jail
- Minimum \$500 fine
- \$50 payment to the Trauma Center Fund
- License suspended for 3 years
- Not able to get a restricted license for the first year of suspension

Second Offense Within 10 Years From Previous DUI Conviction

- Class 1 misdemeanor
- Minimum of 10 days in jail, Maximum of 12 months in jail
 - If BAC is 0.15-0.20, additional mandatory minimum of 10 days in jail
 - If BAC is greater than 0.20, additional mandatory minimum of 20 days in jail
- Minimum \$500 fine
- \$50 payment to the Trauma Center Fund
- License suspended for 3 years
- Not able to get a restricted license for the first 4 months of suspension

Third Offense Within a 10 Year Period

- Class 6 felony
- Minimum of 90 days in jail, Maximum
- Minimum \$1,000 fine
- \$50 payment to the Trauma Center Fund
- License suspended indefinitely
 - After five years from the last conviction, you may petition the court to restore your driving privileges
- Not able to get a restricted license

Third Offense Within a 5 Year Period

- Class 6 felony
- Minimum of 6 months in jail, Maximum
- Minimum \$1,000 fine
- \$50 payment to the Trauma Center Fund
- License suspended indefinitely
 - After five years from the last conviction, you may petition the court to restore your driving privileges
- Not able to get a restricted license

Fourth Offense Within a 10 Year Period

- Minimum of 12 months in jail
- Minimum \$1,000 fine
- \$50 payment to the Trauma Center Fund
- License suspended indefinitely

- After five years from the last conviction, you may petition the court to restore your driving privileges
- Not able to get a restricted license

Subsequent Offense

- Minimum of 12 months in jail
- Minimum \$1,000 fine
- \$50 payment to the Trauma Center Fund

*Any person convicted of a DUI that was committed while transporting a person under the age of 18 shall be:

- (i) fined an additional \$500 – \$1,000; and
- (ii) sentenced to an additional mandatory minimum of 5 days in jail.

*The vehicle that is solely owned and operated by an individual convicted of a felony violation of DUI shall be subject to seizure and forfeiture. Va. Code § 18.2-270.

*Anyone convicted of a first or second offense of Virginia DUI must be ordered to enter into and complete VASAP. Va. Code § 18.2-271.1(A).

If I am convicted of a DUI, will I be forced to have a breathalyzer installed in my car?

As a condition of a restricted license, the court shall “prohibit an offender from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system for any period of time not to exceed the period of license suspension and restriction, not less than six consecutive months without alcohol-related violations of the interlock requirements.” Va. Code § 18.2-270.1(B).

What will happen if I drive while my license is suspended or restricted as a result of a DUI conviction?

If you are caught driving after your license has been suspended as a result of a DUI conviction, you will be guilty of a Class 1 misdemeanor for the first offense. This is also true if you are caught driving in violation of the terms of a restricted license (for example, you are only allowed to drive to and from work but you are pulled over while driving to visit friends or family). If you violate this law three times in a 10-year period, you will be guilty of a Class 6 felony. Va. Code § 18.2-272(A). Further, if you operate a motor vehicle with a BAC of 0.02 or higher while your license has been suspended or restricted as a result of a DUI conviction, you will be guilty of an additional offense. Va. Code § 18.2-272(B).

If I am stopped and the officer suspects that I am under the influence of alcohol, can I refuse to submit to a breath test on the scene?

Yes, you have the right to refuse to take a *roadside breath test* and it is in your best interest to refuse to take such test if you have been drinking. Although the results of a roadside breath test cannot be introduced as evidence against you, the fact that alcohol was detected in your system can lead to an officer having probable cause to arrest you for DUI. However, if you refuse to take the roadside breath test, the officer will be forced to rely on other evidence (evidence which might be lacking) in order to have probable cause to arrest you for DUI. Further, the fact that you refused to permit your breath to be analyzed cannot be used as evidence against you. Va. Code § 18.2-267(C), (E).

If I am stopped and the officer asks me to perform field sobriety tests, can I refuse to perform those tests?

Yes, you have the right to refuse to perform field sobriety tests and it is in your best interest to refuse to perform such tests, even if you haven't been drinking. Field sobriety tests are entirely voluntary, despite officers' best attempts to coax drivers into feeling that they are required to perform them. The primary reason that you want to refuse to perform field sobriety tests is that the tests are flawed and, therefore, can be self-incriminatory. Sober drivers can easily fail field sobriety tests. Do not succumb to the pressure to perform field sobriety tests.

If I am arrested for DUI, can I refuse to take a breath and/or blood test after my arrest?

Once you are *arrested* for DUI, you will face legal consequences if you refuse to take submit to a breath and/or blood test. When you are given your driver's license, you impliedly consented to submit a sample of your breath and/or blood for chemical analysis testing upon being arrested for DUI.

If you have been arrested for DUI because you blew at least a 0.08 on a roadside breath test or the officer had probable cause to believe that you were under the influence of alcohol, you shall submit to a post-arrest breath test. If you take a breath test and the officer has reasonable cause to believe that you may have been impaired by drug use or a combination of drug and alcohol use, you may be required to submit to a blood test. If a breath test is unavailable, or if you are physically unable to take the breath test, then a blood test will be administered.

If you have been arrested for DUI because drug use or a combination of drug and alcohol use impaired your ability to drive safely, you shall submit to a blood test to determine the drug, or both drug and alcohol, content of your blood. Va. Code § 18.2-268.2.

What are the consequences if I refuse to take a breath and/or blood test after being arrested for DUI?

It is unlawful for a person who is *arrested* for DUI to unreasonably refuse to give a breath and/or blood sample to be used to determine the alcohol and/or drug content of his or her blood. Va. Code § 18.2-268.3(A). If you refuse to permit breath and/or blood samples to be taken, the officer must advise you of several things:

- that, as a licensed driver, you have consented to have samples of your breath and/or blood taken after being arrested for DUI;
- an unreasonable refusal of providing a breath and/or blood sample may be used as evidence against you;
- an unreasonable refusal will result in your license being suspended;
- the criminal penalty for unreasonable refusal within 10 years of a prior conviction for DUI or unreasonable refusal is a Class 2 misdemeanor; and
- the criminal penalty for unreasonable refusal within 10 years of any two prior convictions for DUI or unreasonable refusal is a Class 1 misdemeanor. Va. Code § 18.2-268.3(B).

If you refuse to permit a sample of your breath and/or blood to be taken after being informed of this information, you may be arrested for unreasonable refusal. A first violation is a civil offense but, nonetheless, you will lose your license for 12 months. This suspension is in addition to the suspension associated with a DUI conviction. Subsequent violations are criminal offenses. If you unreasonably refuse within 10 years of a prior conviction for DUI or unreasonable refusal, you will be guilty of a Class 2 misdemeanor and your license will be suspended for 3 years. If you unreasonably refuse within 10 years of any two prior convictions for DUI or unreasonable refusal, you are guilty of a Class 1 misdemeanor and your license will be suspended for 3 years. Again, these periods of suspension are in addition to the period of suspension associated with a conviction for DUI. Va. Code § 18.2-268.3(D).

If I am charged with a DUI, am I presumed to be innocent until proven guilty?

It depends. If your BAC was 0.05 or lower, it will be presumed that you were not under the influence of alcohol. Va. Code § 18.2-269(A)(1). If your BAC was greater than 0.05 but less than 0.08, there will not be any presumption as to whether you were under the influence of alcohol. Va. Code § 18.2-269(A)(2). However, if your BAC was 0.08 or greater, there is a presumption that you were under the influence of alcohol. Va. Code § 18.2-269(A)(3).

If I am convicted of DUI, will the Department of Motor Vehicles (“DMV”) be notified?

Yes, within 30 days after your conviction, the court is obligated to report your DUI conviction, your name, your address, and the license plate number on the vehicle that you were operating while under the influence to the DMV. Va. Code § 18.2-273.

If I am not under the influence of any drugs and/or alcohol and my blood alcohol concentration is less than 0.08 by weight by volume (or the equivalent of 0.08 grams per 210 liters of breath), can I be charged with a crime?

Yes, if the following elements are met:

- (1) you are under the age of 21;
- (2) you were the operator of the motor vehicle;
- (3) your blood alcohol concentration is between 0.02 percent by weight by volume (or the equivalent of 0.02 grams per 210 liters of breath) and 0.08 percent by weight by

volume (or the equivalent of 0.08 grams per 210 liters of breath). Va. Code Ann. § 18.2-266.1(A).

An individual who is convicted of this offense is guilty of a Class 1 misdemeanor. The penalty for this crime is:

- Loss of driver's license for one year from the date of the conviction; and
- A fine of at least \$500; or
- Performing at least 50 hours of community service. Va. Code Ann. § 18.2-266.1(B).

FIGHTING A DUI CHARGE

A police officer needs to have probable cause to believe that you were operating a motor vehicle while under the influence of alcohol and/or drugs in order to arrest you for a DUI. There are many sources of information that an officer can rely upon in developing probable cause to arrest you for DUI, including, but not limited to:

- (1) the results of a roadside breathalyzer;
- (2) your driving mannerisms, including:
 - o (i) weaving in and out of your lane;
 - o (ii) excessive speeding;
 - o (iii) unable to maintain constant speed;
 - o (iv) prolonged period of stopping at a stop sign;
 - o (v) failing to notice that a red light has turned green
- (3) your appearance once you are pulled over and the officer approaches you, including:
 - o (i) glassy, bloodshot eyes;
 - o (ii) disheveled look
- (4) the officer's sensory observations, including:
 - o (i) the smell of alcohol on your breath and/or in the vehicle;
 - o (ii) the officer can see alcoholic beverages and/or drugs in the vehicle;
 - o (iii) your speech is slurred;
 - o (iv) poor fine motor control/having trouble finding license and registration
- (5) your performance during field sobriety tests

Although these observations could give rise to probable cause to believe that you were driving under the influence, the presence of most of these DUI indicators could have an innocent explanation. For example, a driver could have glassy, bloodshot eyes because he or she is tired or his or her eyes are infected. Similarly, a driver might perform poorly on a field sobriety test, such as the walk and turn test or one-leg-stand test, because of a preexisting physical condition or injury. Also, the smell of alcohol on a driver's breath cannot give an officer probable cause to believe he or she is driving under the influence, as it is not against the law to drive after consuming alcohol; rather, it is against the law to drive under the influence of alcohol. Interestingly, the ability of field sobriety tests to accurately determine whether a driver is under the influence of alcohol has been questioned by many. A failed field sobriety test can be reasonably explained by one or more of the following: (1) the officer gives improper instructions for the test; (2) the driver's physical condition, such as injury, age, or disability reduces his or her ability to adequately perform the tests; (3) the conditions that the tests were performed under, such as lighting conditions, surface conditions, and weather conditions; and (4) the officer's subjective scoring method. Depending upon the facts and circumstances of your arrest, an experienced DUI defense attorney might be able to prove that the arresting officer lacked probable cause to arrest you for DUI. An arrest that is not based on probable cause is unconstitutional and will result in any evidence obtained as a result of the arrest being suppressed. Suppressing the evidence obtained as a result of your arrest could significantly strengthen your defense.

In order to stop your vehicle, an officer must have: (1) probable cause to believe that you committed a traffic violation; (2) probable cause to believe that you are driving under the influence of alcohol and/or drugs; or (3) reasonable suspicion to believe that criminal activity is afoot. Based upon the facts and circumstances of your case, we can attempt to prove that the stop was illegal, therefore, any evidence that was obtained as a result of that illegal stop cannot be used against you. Again, this could significantly strengthen your defense.

There are strict protocols for taking post-arrest breath and blood samples. For example, “chemical analysis of a person’s breath shall be performed by an individual possessing a valid license to conduct such tests, with a type of equipment and in accordance with methods approved by [the Department of Forensic Science].” Va. Code § 18.2-268.9(A). Further, “only a physician, registered nurse, licensed practical nurse, phlebotomist, graduate laboratory technician or a technician or nurse designated by order of a circuit court acting upon the recommendation of a licensed physician” are permitted to withdraw a person’s blood for the purpose of determining its alcohol and/or drug content. Va. Code § 18.2-268.5. Additionally, only certain substances are allowed to be used to clean the surface of the skin prior to withdrawing blood and only certain instruments that are sterilized in a way that will not affect the accuracy of the test can be used during the procedure. *Id.* Based upon the facts and circumstances of your case, we could potentially attack the procedures used in obtaining your breath and/or blood sample in order to strengthen your defense.

Depending upon the facts and circumstances of your case, there may be other ways that we can defend against your DUI charge. Since Virginia’s DUI laws are complex, if you have been charged with a DUI, please do not hesitate to contact an experienced DUI attorney today.