



**Sub. S.B. 208\***

124th General Assembly  
(As Reported by H. Criminal Justice)

**Sens. Coughlin, Oelslager, Goodman, Amstutz, Carnes, Randy Gardner, Hottinger, White**

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**BILL SUMMARY**

- Provides that, in any criminal or delinquency prosecution for state OMVI, state OMVUAC, municipal OMVI, state watercraft OMVI or state watercraft OMVUAC, or (after January 1, 2004) municipal watercraft OMVI or "having physical control of a vehicle while under the influence," if it is established by clear and convincing evidence that a law enforcement officer has administered a field sobriety test in substantial compliance with testing standards for any reliable, credible, and generally accepted field sobriety tests in effect when the test was administered, including, but not limited to any testing standards then in effect that were set by the National Highway Traffic Safety Administration: (1) the officer may testify concerning the results of the test, (2) the prosecution may introduce the test results as evidence in the prosecution, and (3) if testimony or evidence presented under (1) or (2) is admissible under the Rules of Evidence, the court must admit it, and the trier of fact must give it whatever weight the trier of fact considers appropriate.
- Specifies that the provision described in the preceding paragraph does not limit or preclude a court, in its determination of whether a person's arrest was supported by probable cause or its determination of any other matter in a criminal or delinquency prosecution of a type described in that provision, from considering evidence or testimony that is not otherwise disallowed by the bill's provisions.

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\* *This analysis was prepared before the report of the House Criminal Justice Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Makes technical changes to the Watercraft OMVI Implied Consent Law.

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## CONTENT AND OPERATION

### Overview

The bill enacts provisions relating to the use in court of: (1) the results of *field sobriety tests* administered by a law enforcement officer to a person who allegedly was operating a vehicle while under the influence of alcohol, a drug of abuse, or both or while his or her blood, breath, or urine contained a prohibited concentration of alcohol, and the officer's testimony, and (2) other types of evidence and testimony, in determining whether a person's arrest was supported by probable cause or in determining any other matter.

### Existing law

#### State OMVI, state OMVUAC, and implied consent

Existing law prohibits a person of any age from operating a vehicle, streetcar, or trackless trolley within Ohio if the person is under the influence of alcohol, a drug of abuse, or both or if the person's blood, breath, or urine contains a prohibited concentration of alcohol. It also prohibits a person under 21 years of age from operating a vehicle, streetcar, or trackless trolley within Ohio if the person's blood, breath, or urine contains a prohibited concentration of alcohol (this prohibited concentration is lower than the prohibited concentration specified in the prohibition that applies to a person of any age). The offenses that set forth these prohibitions generally are referred to, respectively, as "state OMVI" and "state OMVUAC" (R.C. 4511.19(A) and (B); see **COMMENT 1**). Many Ohio municipal corporations have enacted ordinances that prohibit a person from operating a vehicle while under the influence of alcohol, a drug of abuse, or both, or from operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine (hereafter, these ordinances collectively are referred to as "municipal OMVI").

Existing law specifies that any person who operates a vehicle upon a highway or any public or private property used by the public for vehicular travel or parking within Ohio is deemed to have given consent to chemical tests of the person's blood, breath, or urine for the purpose of determining its alcohol, drug, or alcohol and drug content *if the person is arrested for committing state OMVI, state OMVUAC, or municipal OMVI*. The chemical tests are administered at the request of a police officer *having reasonable grounds to believe the person operated a vehicle upon a highway or any public or private property used by the public for vehicular travel or parking in Ohio while committing state OMVI, state OMVUAC, or municipal OMVI*. (R.C. 4511.191(A).)

The Revised Code does not address the manner in which a law enforcement officer is to establish: (1) the grounds for arresting a person for state OMVI, state OMVUAC, or municipal OMVI, or (2) the reasonable grounds to believe a person operated a vehicle upon a highway or any public or private property used by the public for vehicular travel or parking in Ohio while committing state OMVI, state OMVUAC, or municipal OMVI that is necessary to request that the person take a chemical test of the person's blood, breath, or urine. It appears that, in practice, the grounds for the arrest and the reasonable grounds for requesting the person to take the test are established by the officer's observation of the way in which the person was operating the vehicle and of the person's physical appearance and demeanor, and through the officer's administration to the person of *field sobriety tests*. The Revised Code does not address field sobriety tests.

Existing law prescribes a written warning that must be given to a person who is arrested for state OMVI, state OMVUAC, or municipal OMVI and who is requested to submit to a chemical test (R.C. 4511.191(C)). It also addresses the administration of the chemical tests and permits a person tested to obtain the results of the test and to take his or her own tests (R.C. 4511.19(D)(1) and (3)). Existing law further provides sanctions in specified circumstances for a person so arrested who either refuses upon request to submit to a chemical test or who submits to a test and is found to have a prohibited concentration of alcohol in his or her blood, breath or urine (R.C. 4511.191(D) to (N)). Finally, it provides for the use in court of the results of any chemical analysis of the blood, urine, breath, or other bodily substance of a person so arrested that is withdrawn within two hours of the time of the alleged violation (R.C. 4511.19(D)(1) and (2)).

In August 2000, the Supreme Court restricted the use of the results of field sobriety tests in court proceedings. It held that, in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the involved law enforcement officer must have administered the test in strict compliance with standardized testing procedures (see **COMMENT 2**). *State v. Homan* (2000), 89 Ohio St.3d 421, reconsid. denied (2000), 90 Ohio St.3d 1431.

### **Having physical control of a vehicle while under the influence**

Beginning January 1, 2004, the Traffic Law also prohibits a person being in physical control of a vehicle, streetcar, or trackless trolley while under the influence of alcohol, a drug of abuse, or a combination of them or while the person's whole blood, blood serum or plasma, breath, or urine contains a prohibited concentration of alcohol. "Physical control" means being in the driver's position of the front seat of a vehicle or in the driver's position of a streetcar or trackless trolley and having possession of the vehicle's, streetcar's, or trackless trolley's ignition key or other ignition device. A person who violates this prohibition is guilty of having physical control of a vehicle while under the

influence. (R.C. 4511.194.) The Implied Consent Law is expanded to also apply to this new offense (R.C. 4511.191 to 4511.193).

**State watercraft OMVI, state watercraft OMVUAC, and implied consent**

Existing law prohibits a person from operating or being in physical control of any vessel underway or from manipulating any water skis, aquaplane, or similar device on Ohio waters if the person is under the influence of alcohol or a drug of abuse, or the combined influence of alcohol and a drug of abuse or if the person's blood, breath, or urine contains a prohibited concentration of alcohol. A violation of this prohibition is generally referred to as "state watercraft OMVI" or "state watercraft OMVUAC" (R.C. 1547.11(A)). Ohio municipal corporations also have enacted ordinances substantially equivalent to state watercraft OMVI and state watercraft OMVUAC (municipal watercraft OMVI).

Existing law specifies that any person who operates a vessel or uses any water skis, aquaplane, or similar device upon any Ohio waters is deemed to have given consent to chemical tests of the person's blood, breath, or urine for the purpose of determining its alcohol, drug, or alcohol and drug content *if the person is arrested for committing state watercraft OMVI, state watercraft OMVUAC, or (after January 1, 2004) municipal watercraft OMVI*. The chemical tests are administered at the direction of a police officer *having reasonable grounds to believe the person operated or was in physical control of a vehicle or used any water skis, aquaplane, or similar device upon any Ohio waters while committing an offense of that nature*. (R.C. 1547.111(A).)

The Revised Code does not address the manner in which a law enforcement officer is to establish: (1) the grounds for arresting a person for state watercraft OMVI, state watercraft OMVUAC, or municipal watercraft OMVI, or (2) the reasonable grounds to believe a person operated or was in physical control of a vessel or used any water skis, aquaplane, or similar device upon any Ohio waters while committing state watercraft OMVI, state watercraft OMVUAC, or municipal watercraft OMVI that is necessary to request that the person take a chemical test of the person's blood, breath, or urine. It appears that, in practice, the grounds for the arrest and the reasonable grounds for requesting the person to take the test are established by the officer's observation of the way in which the person was operating the vessel or used the water skis, aquaplane, or similar device and of the person's physical appearance and demeanor, and through the officer's administration to the person of *field sobriety tests*. The Revised Code does not address field sobriety tests.

Existing law prescribes a written warning that must be given to a person who is arrested for state watercraft OMVI, state watercraft OMVUAC, or municipal watercraft OMVI and who is requested to submit to a chemical test

(R.C. 1547.111(C)). It also addresses the administration of the chemical tests and permits a person tested to obtain the results of the test and to take his or her own tests (R.C. 1547.11(D)(1) and (3)). Existing law further provides sanctions in specified circumstances for a person so arrested who either refuses upon request to submit to a chemical test or who submits to a test and is found to have a prohibited concentration of alcohol in his or her blood, breath, or urine (R.C. 1547.111(D) to (I)). Finally, it provides for the use in court of the results of any chemical analysis of the blood, urine, breath, or other bodily substance of a person so arrested that is withdrawn within two hours of the time of the alleged violation. (R.C. 1547.11(D)(1)).

### **Operation of the bill**

The bill provides that, in any criminal prosecution or juvenile court proceeding for state OMVI, state OMVUAC, municipal OMVI, state watercraft OMVI, state watercraft OMVUAC, or (after January 1, 2004) municipal watercraft OMVI or "having physical control of a vehicle while under the influence," if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including but not limited to, any testing standards then in effect that were set by the National Highway Traffic Safety Administration of the United States Department of Transportation (the NHTSA) (see **COMMENT 3**), all of the following apply: (1) the officer may testify concerning the results of the field sobriety test, (2) the prosecution may introduce the results of the field sobriety test as evidence in any proceedings in the criminal prosecution or juvenile court proceeding, and (3) if testimony is presented or evidence is introduced under the provisions described in clauses (1) and (2) and the testimony or evidence is admissible under the Rules of Evidence, the court must admit the testimony or evidence, and the trier of fact must give it whatever weight the trier of fact considers to be appropriate (see **COMMENT 4**).

The bill specifies that the above-described provision does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that provision, from considering evidence or testimony that is not otherwise disallowed by the provisions described in the preceding paragraph. (R.C. 1547.11(E), 4511.19(D)(4), and 4511.194(C).)

The bill also makes technical changes to the Watercraft OMVI Law and Watercraft OMVI Implied Consent Law. For the version of the sections in effect

prior to January 1, 2004, the bill makes those laws more closely parallel the version of OMVI Implied Consent Law in effect until January 1, 2004. For the version in effect on and after January 1, 2004, the bill amends the Watercraft OMVI Implied Consent Law to ensure consistent terminology regarding the manipulation of water skis, aquaplanes, and similar devices. (R.C. 1547.111.)

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## COMMENT

1. Existing law, in the offense generally referred to as "state OMVI," prohibits a person from operating any vehicle, streetcar, or trackless trolley within Ohio if (R.C. 4511.19(A)): (a) the person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, (b) the person has a concentration of .10 of one per cent or more but less than .17 of one per cent by weight of alcohol in the person's blood, (c) the person has a concentration of .10 of one gram or more but less than .17 of one gram by weight of alcohol per 210 liters of the person's breath, (d) the person has a concentration of .14 of one gram or more but less than .238 of one gram by weight of alcohol per 100 milliliters of the person's urine, (e) the person has a concentration of .17 of one per cent or more by weight of alcohol in the person's blood, (f) the person has a concentration of .17 of one gram or more by weight of alcohol per 210 liters of the person's breath, or (g) the person has a concentration of .238 of one gram or more by weight of alcohol per 100 milliliters of the person's urine.

Existing law, in the offense generally referred to as "state OMVUAC," prohibits a person under 21 years of age from operating any vehicle, streetcar, or trackless trolley within Ohio if (R.C. 4511.19(B)): (a) the person has a concentration of at least .02 of one per cent but less than .10 of one per cent by weight of alcohol in the person's blood, (b) the person has a concentration of at least .02 of one gram but less than .10 of one gram by weight of alcohol per 210 liters of the person's breath, or (c) the person has a concentration of at least .028 of one gram but less than .14 of one gram by weight of alcohol per 100 milliliters of the person's urine.

2. In *State v. Homan* (2000), 89 Ohio St.3d 421, reconsid. denied (2000), 90 Ohio St.3d 1431, the Supreme Court restricted the use of the results of field sobriety tests in court proceedings. In the case before it, a law enforcement officer had observed a vehicle drive left of center two times and stopped the vehicle. When the officer approached the vehicle, he smelled a strong odor of alcohol on the driver's breath and observed her eyes to be red and glassy. The officer administered three field sobriety tests to the driver, but, in administering two of the tests, he admittedly at times deviated from established testing procedures. Based upon the results of the tests, the driver's demeanor, and the driver's admission that she had consumed three beers, the officer arrested the driver for state OMVI and two other violations. Prior to trial, the driver argued in a motion

that: (a) because the officer did not administer the field sobriety tests in strict compliance with standardized methods and procedures, the results of the tests were unreliable and could not serve as the basis for probable cause to arrest, and (b) therefore, the evidence gathered as a result of the vehicle stop, arrest, and subsequent detention had to be suppressed. The trial court denied the motion and, at trial, the driver was convicted of state OMVI (the other charges also were resolved). Upon appeal, the court of appeals affirmed the conviction. It agreed with the driver that, because the officer did not strictly comply with standardized testing procedures in administering two of the field sobriety tests, the tests could not form the basis for probable cause to arrest, but it concluded that, even with the suppression of the two tests, there remained sufficient evidence upon which the officer could have relied in arresting the driver.

On appeal, the Supreme Court held that, *in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the involved law enforcement officer must have administered the test in strict compliance with standardized testing procedures.* The Court, citing a NHTSA study and the opinions of experts on the subject, stated that, when field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable.

But the Court also agreed with the court of appeals *that the totality of facts and circumstances surrounding the driver's arrest in the case supported a finding of probable cause.* It stated that, in determining whether a law enforcement officer who arrests a person for OMVI had probable cause to make the arrest, it will examine the "totality" of facts and circumstances surrounding the arrest and consider whether, at the moment of arrest, the officer had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. It also stated that, while field sobriety tests must be administered in strict compliance with standardized procedures, probable cause to arrest does not necessarily have to be based upon a suspect's poor performance on the tests; rather, *the totality of the facts and circumstances can support a finding of probable cause to arrest even if no field sobriety tests were administered or if test results must be excluded for lack of strict compliance.*

The Court, in its decision, did not cite any Constitutional provision or any Rule of Evidence as the basis of the decision.

3. According to the Supreme Court (*Homan, supra*, at 424, note 4), the "NHTSA has been a leader in the study and development of field sobriety testing policy and procedure" and has developed standardized field sobriety test manuals that "form the basis for manuals used by state law enforcement agencies across the

country." The NHTSA has developed a Desk Book, which states that (<http://www.nhtsa.dot.gov/people/injury/enforce/DESKBK.html>):

(t)he Standardized Field Sobriety Test (SFST) is a battery of three tests administered and evaluated in a standardized manner to obtain validated indicators of impairment and establish probable cause for arrest. These tests were developed as a result of research sponsored by the National Highway Traffic Safety Administration (NHTSA) and conducted by the Southern California Research Institute. A formal program of training was developed and is available through NHTSA to help police officers become more skillful at detecting DWI suspects, describing the behavior of these suspects, and presenting effective testimony in court. Formal administration and accreditation of the program is provided through IACP. The three tests of the SFST are:

- the horizontal gaze nystagmus (HGN)
- the walk-and-turn
- the one-leg stand.

4. Article II, section 39 of the Ohio Constitution states that "(l)aws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings."

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	12-21-01	p. 1265
Reported, S. Judiciary on Criminal Justice	02-20-02	pp. 1486-1487
Passed Senate (33-0) Reported, H. Criminal Justice	02-26-02 ---	pp. 1507-1508 ---

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