
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1829 **Hearing Date:** June 14, 2016
Author: Levine
Version: March 17, 2016
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Vessels: Operation Under the Influence of Alcohol or Drugs: Chemical Testing*

HISTORY

Source: California State Sheriffs' Association

Prior Legislation: AB 538 (Levine) – Chapter 118, Stats. 2015
SB 717 (DeSaulnier) – Chapter 317, Stats. 2013

Support: Unknown

Opposition: None known

Assembly Floor Vote: 79 - 0

PURPOSE

This bill requires that a person stopped for boating under the influence be informed that a criminal complaint may be filed against them, that a warrant may be sought to obtain a blood sample and that they do not have the right to have an attorney present during chemical testing.

Existing law provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 13.)

Existing law defines a "search warrant" as a written order in the name of the people, signed by a magistrate and directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and in the case of a thing or things or personal property, bring the same before the magistrate. (Penal Code § 1523.)

Existing law specifically authorizes the issuance of a search warrant when all of the following apply:

a) A sample of the blood of a person constitutes evidence that tends to show a violation of specified boating under the influence provisions.

- b) The person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test as required.
- c) The sample will be drawn from the person in a reasonable, medically approved manner. (Penal Code, § 1524 (a)(16).)

Existing law states that a search warrant may also be issued upon any of the following grounds:

- a) When the property was stolen or embezzled.
- b) When the property or things were used as the means of committing a felony.
- c) When the property or things are in the possession of any person with the intent to use them as a means of committing a public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing them from being discovered.
- d) When the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.
- e) When the property or things to be seized consist of evidence that tends to show that sexual exploitation of a child, or possession of matter depicting sexual conduct of a person under the age of 18 years, has occurred or is occurring.
- f) When there is a warrant to arrest a person.
- g) When a provider of electronic communication service or remote computing service has records or evidence, showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery.
- h) When a provider of electronic communication service or remote computing service has records or evidence showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery.
- i) When the property or things to be seized include an item or any evidence that tends to show a violation of the Labor Code, as specified.
- j) When the property or things to be seized include a firearm or any other deadly weapon at the scene of, or at the premises occupied or under the control of the person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault.
- k) When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in the possession of, or in the custody or control of, a person described in subdivision (a) of Section 8102 of the Welfare and Institutions Code.
- l) When the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under specified provisions of the Family Code.
- m) When the information to be received from the use of a tracking device constitutes evidence that tends to show that either a felony or a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code.
- n) When a sample of the blood of a person constitutes evidence that tends to show a violation of misdemeanor driving under the influence and the person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test.

o) When the property or things to be seized are firearms or ammunition or both that are owned by, in the possession of, or in the custody or control of a person who is the subject of a gun violence restraining order. (Penal Code § 1524 (a).)

Existing law provides that a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. (Penal Code § 1525.) 6

Existing law requires a magistrate to issue a search warrant if he or she is satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence. (Penal Code § 1528 (a).)

Existing law prohibits a person from operating a vessel or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage, any drug, or the combined influence of an alcoholic beverage and any drug. (Harbors & Navigation Code, § 655 (b).)

Existing law prohibits a person from operating any recreational vessel or manipulating any water skis, aquaplane, or similar device if the person has an alcohol concentration of 0.08 percent or more in his or her blood. (Harbors & Navigation Code, § 655(c).)

Existing law prohibits a person from operating any vessel other than a recreational vessel if the person has an alcohol concentration of 0.04 percent or more in his or her blood. (Harbors & Navigation Code, § 655 (d).)

Existing law authorizes a peace officer who arrests a person for boating under the influence to ask that person to submit to chemical testing of his or her blood, breath, or urine for the purpose of determining the drug or alcohol content of the blood. (Harbors & Navigation Code, § 655.1.)

Existing law provides that an officer shall also advise persons arrested for driving under the influence that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law. (Penal Code, § 23612 (a)(4).)

This bill requires that persons arrested for boating under the influence be advised that a criminal complaint may be filed against him or her for operating a vessel or water-related device while under the influence of an alcoholic beverage or any drug, or both.

This bill provides that persons arrested for boating under the influence be notified that they have a right to refuse chemical testing.

This bill specifies that persons arrested for boating under the influence be informed that the officer has the authority to seek a search warrant compelling him or her to submit a blood sample

This bill states that persons arrested for boating under the influence be advised they do not have a right to have an attorney present before stating whether he or she will submit to the chemical testing, before deciding which chemical test or tests to take, or during the administration of the chemical test or tests chosen.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

AB 1829 clarifies existing law and removes obsolete language regarding the arrest of a person suspected of operating a boat or vessel under the influence of alcohol and/or drugs.

AB 1829 clarify that an officer who arrests a person on suspicion of operating a vessel or watercraft while under the influence shall inform the person that he or she may be charged with a crime, has the right to refuse chemical testing, and that the officer has the authority to seek a search warrant to compel a blood draw if the person refuses to submit to, or fails to complete, a blood test. All of these items reflect current California law.

Given recent changes to case law and state statute, the Harbors and Navigation Code contains obsolete language regarding the arrest of a person suspected of operating a boat or vessel under the influence of alcohol and/or drugs. Specifically, existing law requires an officer to inform a person arrested for boating under the influence that a refusal to submit to, or failure to complete, the required chemical testing may be used against the person in a court of law and that the court may impose increased penalties for that refusal or failure, upon conviction, despite the fact that neither of those statements is accurate.

Vehicle Code Section 23612 provides that a person arrested for driving under the influence shall submit to chemical testing or face sanctions for the refusal to submit. The fact that the person refused testing can also be used as an aggravating factor when he or she is being sentenced for a conviction of driving under the influence. Conversely, despite the fact that similar language exists in the Harbors and Navigation Code, there is no analogous sanction for a person suspected of boating under the influence, largely because there is no comprehensive licensing scheme or implied consent standard.

2. Search Warrant for BUI

Earlier this session, the legislature passed, and the Governor signed AB 539 (Levine), Chapter 118, Statutes of 2015. This new law authorizes the issuance of a search warrant when all of the following apply: a) A sample of the blood of a person constitutes evidence that tends to show a violation of specified boating under the influence provisions; b) The person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test as required; and c) The sample will be drawn from the person in a reasonable, medically approved manner. (Penal Code, § 1524 (a)(16).)

This bill conforms the notification requirements placed upon law enforcement to the provisions implemented by AB 539.

3. *Missouri v. McNeely*

In *Missouri v. McNeely* (2013) 133 S. Ct. 1552, the United States Supreme Court held that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every drunk-driving investigation sufficient to justify conducting a blood test without a warrant. Rather, the court directed that the matter be determined on a case-by-case assessment of the totality of the circumstances, in which the dissipation element is a factor in evaluating whether an exigency exists. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." (Id. at p. 1561.) Before the *McNeely* decision, the California Supreme Court had applied older U.S. Supreme Court precedent, *Schmerber v. California* (1966) 384 U.S. 757, and held that the evanescent nature of blood alcohol created exigent circumstances and sufficient rationale for permitting warrantless chemical testing following a DUI arrest. (See *People v. Superior Court (Hawkins)* (1972) 6 Cal.3d 757, 761.) When *Missouri v. McNeely* was decided, there was nothing in the statute listing the types of evidence that may be obtained by means of a search warrant that would authorize a warrant for a DUI blood draw unless the crime under investigation was a felony. The Legislature subsequently amended the statute pertaining to grounds for the issuance of a search warrant to allow law enforcement to obtain one on this basis. (Penal Code, § 1524 (a)(13).) However, the amendment to the statute did not cover misdemeanor offenses involving boating under the influence.

4. Boating Accident Statistics

According to a 2013 report by the California State Parks Division of Boating and Waterways, between 2009 and 2013 32% of all boating fatalities in the state involved alcohol. (See 2013 California Recreational Boating Accident Statistics, p. 17, http://dbw.ca.gov/Reports/BSRs/2013/2013_AccidentStats_CA_05_08_2014.pdf .) 6)

5. Advisement Regarding Presence of Attorney

This bill states that persons arrested for boating under the influence be advised they do not have a right to have an attorney present before stating whether he or she will submit to the chemical testing, before deciding which chemical test or tests to take, or during the administration of the chemical test or tests chosen. While advising a criminal defendant that they do not have a right to have their attorney present and that they cannot consult an attorney seems contrary to public policy, this provision is consistent with existing law. Existing California law states that an officer shall advise persons arrested for driving under the influence that "he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law." (Penal Code, § 23612 (a)(4).) Therefore, this provision of the bill conforms the boating while under the influence provisions to existing law.