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Memorandum in Opposition

CRIMINAL JUSTICE SECTION

CJS #2 May 18, 2017

S. 2306 By: Senator Murphy
A. 3955 By: M. of A. Ortiz
Senate Committee: Finance
Assembly Committee: Transportation
Effective Date: Immediately

AN ACT to amend the vehicle and traffic law and the executive law, in relation to the field testing of mobile telephones and protable electronic devices after a motor vehicle accident or collision involving damage to real or personal property, personal injury or death.

LAW & SECTION REFERRED TO: Section 215 of the Vehicle and Traffic Law.

THE CRIMINAL JUSTICE SECTION OPPOSES THIS LEGISLATION

This bill, known as "Evan's Law", would amend the Vehicle and Traffic Law (VTL) and the Executive Law in relation to the field testing of mobile telephones and portable electronic devices after a motor vehicle accident or collision involving damage to real or personal property, personal injury or death. It would add a new §1225-e to the VTL to establish that refusal to submit a mobile telephone or personal electronic device to the "field testing" will result in the revocation of the driver's license or permit.

Should the driver refuse to submit to such field test, the officer will inform the driver that the person's license or permit to drive and/or any non-resident operating privilege shall be immediately suspended and subsequently revoked. The statutory scheme attempts to model the DWI breath test screening and chemical test refusal provisions of VTL §1194. However, the field test screening and refusal procedures pursuant to this bill fail to require the same constitutional protections afforded motorists in DWI refusal cases for failure to take the chemical test (blood).

The Criminal Justice Section's primary basis of objection to the legislation is that the road side request by the police officer to search the mobile device is an unlawful search, which is not required to be based on the probable cause standard. This would be a violation of the driver's Fourth Amendments right against unconstitutional searches.

The bill seems to equate the "field test" of a mobile electronic device to an officer's request of a motorist to submit to a chemical test in the context of a DWI case.

However, the analogy fails. The proper analogy would be more closely related to the portable breath test, commonly referred to as a "PBT". A PBT is also referred to as an Alco-Sensor test and is a portable pocket-sized device that many police officers keep in their cars while on patrol. The Alco-Sensor test is usually the last "field test" administered to the suspect at the scene prior to his or her arrest for DWI. That is a test administered after a variety of other standardized field sobriety tests are used to establish probable cause for the arrest. VTL §1194(1)(b) makes clear that a person is under no obligation to submit to a breath screening test unless he or she has either operated a motor vehicle that has been involved in an accident or operated a motor vehicle in violation of any of the provisions of the VTL.

By contrast, a chemical test is a term used to describe the test of the alcoholic and/or drug content of a DWI suspect's blood using an instrument other than a PBT. VTL §1194(2) governs the field of chemical testing. A chemical test is authorized under VTL §1194(2) and provides, in pertinent part:

> 2. Chemical test (a) when authorized. Any person who operates a motor vehicle in the State shall be deemed to have given consent to a chemical test of one or more of the following:
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> > Breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or with respect to a chemical test of blood, at the direction of a police officer.

Obtaining a breath sample from a DWI suspect for alcohol analysis constitutes a "search" within the meaning of the Fourth Amendment. See, Skinner v. Railway Labor Executives Association, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989). See also, Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966); People v. Johnson, 134 Misc. 2d 474 (1987); People v. McMillan, 112 Misc. 2d 901 (1982). As such, submission to an Alco-Sensor test cannot lawfully be required in the absence of probable cause. See, People v. Pecora, 123 Misc. 2d 259 (1984). Thus, ironically, although the Government generally attempts to use the Alco-Sensor test to establish probable cause for a DWI suspect's arrest it is arguable that probable cause must already exist before the Alco-Sensor test can lawfully be required.

This bill would allow police officers to demand a search of a motorist's electronic device on the mere occurrence of an accident involving personal property, (ie. fender bender). It would allow a police officer to conduct a search prior to having any probable cause; and before issuing any citation under the Vehicle and Traffic Law; and prior to any arrest that would permit a lawful search and seizure. Moreover, Proposed VTL Section 1225-e (f) provides that "evidence of a refusal to submit to field testing shall be admissible in any trial, proceeding or hearing…."

Contrast VTL Section 1225-e (f), with VTL Sec 1194(1)(d), whereby the refusal to submit to a validly requested Alco-Sensor test is a mere traffic infraction. There are no driver's license consequences associated with the refusal to submit to an Alco-Sensor test. It is also important to note that the Alco-Sensor test refusal is not admissible at trial. See, People v. Ottino, 178 Misc. 2d 416 (1998). In so holding, the Court reasoned that: "Since the results of the Alco-Sensor field test are not admissible to prove intoxication at trial, the refusal to take the field test must also be inadmissible."

This bill at prpoposed VTL Section 1225-e(3)(5)(f) states that "evidence of a refusal to submit to field testing shall be admissible in any trial, proceeding or hearing…."

Hypothetical:

Under this bill, an innocent motorist could be the victim of a vehicle and traffic accident. At the scene, a police officer would conduct an investigation to determine if any motorist committed a traffic infraction prior to issuing a citation. This bill would permit field testing of the electronic devices of both motorists in the context of such investigation without any demonstration of reasonable cause to believe the "innocent motorist" committed an infraction. This bill would permit a search of the innocent motorist's mobile device without a warrant and based on mere speculation. Most electronic devices contain a significant amount of personal information such as client contacts, family contacts, personal photographs and other financial and private information.

For these reasons the Criminal Justice Section opposes this legislation and concludes that it violates constitutional protections against unreasonable searches and seizures afforded by both the Fourth Amendment to the United States Constitution and Article I, Section 12 of the New York State Constitution.

Collateral Issues:

We are also concerned about the technology issues of the so-called "field testing device." Does such technology exist? What is it? How does it work?

Under existing law a motorist can use an electronic device with an authorized bluetoothor other hands free device. How would the screening device determine whether or not a motorist was utilizing the electronic device through these lawful means? What if the motorist was using voice activated text messaging software? As a result, assuming the field testing device merely determines when the person last used their mobile device, this information is not helpful in determining whether the person's conduct was unlawful. Rather, this bill would shift the burden of proof on those issues to the motorist to demonstrate that he/she was using the device in a lawful manner.

The legislation also attempts to invoke the implied consent rule that is utilized in DWI legislation. It is respectfully submitted that the DWI implied consent rule relates to

a chemical test situation. The request to take a chemical test is based on an arrest for Driving While Intoxicated and/or after a positive PBT test has been administered or other indicia of intoxication are revealed to the police officer so that probable cause could be established. This bill requires no such probable cause.

There also is concern that the "surrender" of the device would put electronic devices' content in "plain view" of the police officer and thereafter permit a seizure of additional evidence and provide a basis to conduct additional searches based on viewed content. The legislation would allow the field screening to be conducted by a police officer "or at the direction of a police officer." The Section cannot comprehend a circumstance under which it would be permissible for anyone other than a police officer to conduct such search.

Finally, the legislation fails to limit the proposed search with respect to time. There is no time limit such as a "two-hour rule" established in DWI cases. Does the so called field testing device limit the search to a specific time period?

CONCLUSION:

This bill is constitutionally defective. The purported safeguards fail to meet the requirements of established case law or the protections afforded by the Fourth Amendment. The bill fails to require the police officer to establish probable cause. The entire statutory scheme seems to be modeled after the DWI refusal statute. However, the DWI refusal statutes passes constitutional muster because of its requirement that the arresting officer have probable cause for a DWI arrest before subjecting a motorist to take a chemical test based on implied consent. Based on the foregoing, the Criminal Justice Section **OPPOSES** the passage and enactment of this bill.