Legislative Affairs Agency Report

Alaska State Legislature

House of Representatives

House Judiciary Committee

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MEMORANDUM

TO: All Members of House Judiciary Committee

FROM: Hayden Kaden

SUBJECT: January 15th Hearing

Date: January 13, 1985

AS 24.20.065(a) requires that the Legislative Council annually examine published opinions of state and federal courts and of the Department of Law that rely on state statutes to determine whether or not: (1) the courts or the department are properly implementing legislative purposes; (2) there are court expressions of dissatisfaction with state statutes; (3) the opinions indicate unclear or ambiguous statutes.

Counsel to the House Judiciary Committee has reviewed the Legislative Council report and recommends the committee review the attached summaries to determine what, if anything, should be done in response to the courts' or Attorney General's opinions.

AS 11.46.310(a)
AS 11.46.350(a)

THE COMPONENTS OF THE CRIME OF BURGLARY ARE EXAMINED.

The Court of Appeals of Alaska held that the crime of burglary under AS 11.46.310(a) requires that a person enter or remain unlawfully in a building with the intent to commit a crime within the building. Since the defendant entered the building at a time when it was open for business, the court concluded that his efforts to steal a case of beer from a beer cooler or back room could not constitute the commission of a burglary. Under AS 11.46.350(a), in order to enter or remain unlawfully, a defendant must "enter or remain in or upon premises ... when the premises..., at the time of entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so...." The court noted that the definition of "building" at AS 11.81.900(b)(3) requires all parts of the building to be treated as part of the building unless the building is divided into "units, including apartment units, offices, or rented rooms...." The court noted that while the defendant's entry of the beer cooler or back room might have constituted a criminal trespass under AS 11.46.330(a)(1), they did not amount to unlawful entries of a building. Arabie v. State, 699 P.2d 890.

In a footnote, the court stated: "We note that the Alaska statute does not distinguish buildings that are only partially open to the public. [T]he legislature could choose to enact specific legislation doing just that. * * * See, e.g., Colo. Rev.

Stats. Sec. 18-4-201(3) (1973 & Supp. 1984) ('A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public.'); N.Y. Penal Law Sec. 140.00(5) (McKinney 1973 & Supp. 1984) (prohibiting entry either of a closed building or of 'that part of the building that was not open to the public'). It is particularly relevant that, when it adopted the language of AS 11.46.350(a), the Alaska legislature was specifically aware of and relied on N.Y. Penal Law Sec. 140.00. See Alaska Department of Law Criminal Code Manual, Derivation Table, page 4-7 (1979)."

Review is recommended.

Sec. 11.46.310. Burglary in the second degree. (a) A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building.

(b) Burglary in the second degree is a class C felony. (§ 4 ch 166 SLA 1978)

NOTES TO DECISIONS

For cases construing former law, see notes to AS 11.46.300, analysis line II.

Applied in McManners v. State, Ct. App. Op. No. 123 (File No. 6065), 650 P.2d 414 (1982); Linn v. State, Ct. App. Op. No. 210 (File Nos. 6163, 6188), 658 P.2d 150 (1983).

Quoted in Kirby v. State, Ct. App. Op. No. 117 (File No. 5738), 649 P.2d 963 (1982).

Cited in Ozenna v. State, Sup. Ct. Op. No. 2209 (File No. 4748), 619 P.2d 477 (1980); Zurfluh v. State, Sup. Ct. Op. No. 2238 (File No. 4697), 620 P.2d 690 (1980); Kanipe v. State, Sup. Ct. Op. No. 2242 (File No. 4993), 620 P.2d 678 (1980); Nix v. State, Ct. App. Op. No. 008 (File No. 4879), 624 P.2d 825 (1981); Koteles v. State, Ct. App. Op. No. 232 (File No. 6782), 660 P.2d 1199 (1983).

Sec. 11.46.320. Criminal trespass in the first degree. (a) A person commits the crime of criminal trespass in the first degree if the person enters or remains unlawfully

(1) on land with intent to commit a crime on the land; or

(2) in a dwelling.

(b) Criminal trespass in the first degree is a class A misdemeanor. (§ 4 ch 166 SLA 1978; am § 12 ch 102 SLA 1980)

Effect of amendments. — The 1980 amendment substituted "land" for "real property" at the beginning of paragraph (1) in subsection (a), and substituted "the land" for "that real property" near the end of paragraph (1) in subsection (a).

Collateral references. — 35 Am. Jur. 2d, Forcible Entry and Detainer, §§ 58 — 61; 52 Am. Jur. 2d, Malicious Mischief, § 1 et seq.; 75 Am. Jur. 2d, Trespass, §§ 86 — 94.

36 C.J.S. Forcible Entry and Detainer, § 1 et seq.; 54 C.J.S. Malicious Mischief, § 1 et seq.; 87 C.J.S. Trespass §§ 140 — 165.

Forcible detainer or trespass, where entry was peaceable, 49 ALR 597.

Right to use force to obtain possession of real property to which one is entitled, 141 ALR 273.

Validity, construction, and application of statutes or ordinances penalizing one who enters or remains in dwelling after having been forbidden to do so, 146 ALR 655.

Injunction against repeated or continuing trespasses on real property, 60 ALR2d 310.

Uninvited entry into another's living quarters as invasion of privacy, 56 ALR3d 434.

Sec. 11.46.330. Criminal trespass in the second degree. (a) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully

(1) in or upon premises; or

(2) in a propelled vehicle.

(b) Criminal trespass in the second degree is a class B misdemeanor. (§ 4 ch 166 SLA 1978)

Cross references. — For provisions authorizing arrest without warrant in certain cases where the police officer has reasonable cause to believe that the person has committed a crime under this section, see AS 12.25.030(b).

NOTES TO DECISIONS

Cited in Moxie v. State, Ct. App. Op. No. 246 (File No. 7192), 662 P.2d 990 (1983).

Sec. 11.46.340. Defense: emergency use of premises. In a prosecution under AS 11.46.300, 11.46.310, 11.46.320, or 11.46.330(a)(1), it is an affirmative defense that

(1) the entry, use, or occupancy of premises or use of personal property on the premises is for an emergency in the case of immediate and dire need; and

(2) as soon a reasonably practical after the entry, use, or occupancy, the person contacts the owner of the premises, the owner's agent or, if the owner is unknown, the nearest state or local police agency, and makes a report of the time of the entry, use, or occupancy and any damage to the premises or personal property, unless notice waiving necessity of the report is posted on the premises by the owner or the owner's agent. (§ 4 ch 166 SLA 1978)

Sec. 11.46.350. Definition. (a) As used in AS 11.46.300 — 11.46.350, unless the context requires otherwise, "enter or remain unlawfully" means to

(1) enter or remain in or upon premises or in a propelled vehicle when the premises or propelled vehicle, at the time of the entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so;

(2) fail to leave premises or a propelled vehicle that is open to the public after being lawfully directed to do so personally by the person in charge; or

(3) enter or remain upon premises or in a propelled vehicle in violation of a provision in an order issued under AS 25.35.010(b) or 25.35.020.

(b) For purposes of this section, a person who, without intent to commit a crime on the land, enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, is privileged to do so unless

(1) notice against trespass is personally communicated to that person by the owner of the land or some other authorized person; or

(2) notice against trespass is given by posting in a reasonably conspicuous manner under the circumstances. (§ 4 ch 166 SLA 1978; am § 9 ch 61 SLA 1982)

AS 11.81.620(a) THE SUGGESTED CRIMINAL DEFENSE OF A "MISTAKE OF LAW" IS CONSIDERED.

The Court of Appeals of Alaska held that in the absence of any statutory or case law establishing or rejecting the defense of "mistake of law," a concern for due process of law requires the establishment of at least a limited defense. It quoted the decision of a Federal court: "It would be an act of 'intolerable injustice' to hold criminally liable a person who had engaged in certain conduct in reasonable reliance upon a judicial opinion instructing that such conduct is legal. Indeed, the reliance defense is required by the constitutional guarantee of due process as illuminated by the Supreme Court in Marks v. United States, 430 US 188 (1977), Cox v. Louisiana, 379 U.S. 559 (1965), and Raley v. Ohio, 360 U.S. 423 (1959)." The court therefore held that the defense of mistake of law is an affirmative defense that the defendant must prove by a preponderance of the evidence; this kind of procedure would allow a defendant in a criminal case to obtain relief where it would be unfair to hold him to knowledge of the law. The court further noted that the defendant did not just rely on a trial court decision; he was the party to the decision and his attorney had advised that the decision meant he could fish. Ostrosky v. State, 704 P.2d 786.

One judge dissented: He was unwilling to create the affirmative defense because, in his view of the legislative history of AS 11.81.620(a), it is clear

that the legislature rejected mistake of law as a defense to criminal responsibility. But he then goes on to suggest that the underlying prosecution is "preposterous" and should be dismissed as a matter of law. He notes that the Department of Law initially believed that the defendant was entitled to fish after the superior court decision unless a stay was issued. The state said as much in a motion for a stay after it realized that the defendant was still fishing. The supreme court justice who issued the stay believed that the stay was necessary to prevent the defendant from relying on the superior court decision. "To hold that [the defendant] could subsequently be prosecuted for sharing this same view seems, under the circumstances, preposterous."

Review is recommended.

lished if a person acts intentionally. (§ 10 ch 166 SLA 1978; am § 44 ch 102 SLA 1980)

Effect of amendments. — The 1980 amendment repealed subsection (a).

NOTES TO DECISIONS

Application of subsection (b) to second-degree murder statute. — Since AS 11.41.110(a)(2) does not specifically establish a mental element for the result ("death") or the surrounding circumstances ("under circumstances manifesting an extreme indifference to the value of human life") involved in second-degree murder, a "reckless" mental state is to be imputed to those two factors based on application of subsection (b) of this section. Neitzel v. State, Ct. App. Op. No. 172 (File No. 6243), 655 P.2d 325 (1982).

For discussion of culpable mental states relating to violation of fish and game laws, see Reynolds v. State, Ct. App. Op. No. 182 (File No. 6432), 655 P.2d 1313 (1982).

Sec. 11.81.615. Offenses defined by age or value. Whenever a provision of law defining an offense requires a determination of the age of the victim or the value of property or services, it is not a defense to the lowest class of offense established by the evidence that the age of the victim is less than the age which would make the offense a higher class of offense or that the value of the property or services exceeds the value which would make the offense a higher class of offense, and a person may be charged and convicted accordingly. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Restitution based on actual loss. — Where a defendant is charged with a lesser offense but the evidence establishes that he committed a greater offense, a restitutionary award based on the actual loss to the victim is appropriate, even though the loss exceeds the maximum property-value figure which defines the lesser offense. Fee v. State, Ct. App. Op. No. 187 (File No. 6951), 656 P.2d 1202 (1982).

Sec. 11.81.620. Effect of ignorance or mistake upon liability. (a) Knowledge, recklessness, or criminal negligence as to whether conduct constitutes an offense, or knowledge, recklessness, or criminal negligence as to the existence, meaning, or application of the provision of law defining an offense, is not an element of an offense unless the provision of law clearly so provides. Use of the phrase "intent to commit a crime", "intent to promote or facilitate the commission of a crime", or like terminology in a provision of law does not require that the defendant act with a culpable mental state as to the criminality of the conduct that is the object of the defendant's intent.

(b) A person is not relieved of criminal liability for conduct because the person engages in the conduct under a mistaken belief of fact, unless

(1) the factual mistake is a reasonable one that negates the culpable mental state required for the commission of the offense;

(2) the provision of law defining the offense or a related provision of law expressly provides that the factual mistake constitutes a defense or exemption; or

(3) the factual mistake is a reasonable one that supports a defense of justification as provided in AS 11.81.320 — 11.81.430. (§ 10 ch 166 SLA 1978; am § 28 ch 102 SLA 1980)

Effect of amendments. — The 1980 amendment inserted "is a reasonable one that" following "the factual mistake" near the beginning of paragraph (1) of subsection (b), and substituted "a reasonable one" for "of a kind" following "the factual mistake is" near the beginning of paragraph (3) of subsection (b).

Sec. 11.81.630. Intoxication as a defense. Voluntary intoxication is not a defense to a prosecution for an offense, but evidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

All intoxication is voluntary unless unknowingly or externally compelled. Evans v. State, Sup. Ct. Op. No. 2505 (File No. 4086), 645 P.2d 155 (1982).

Voluntary intoxication will not support insanity defense. Evans v. State, Sup. Ct. Op. No. 2505 (File No. 4086), 645 P.2d 155 (1982), overruling McIntyre v. State, Sup. Ct. Op. No. 136 (File No. 244), 379 P.2d 615 (1963); McKinney v. State, Sup. Ct. Op. No. 1451 (File No. 2758), 566 P.2d 653 (1977); O'Leary v. State, Sup. Ct. Op. No. 2003 (File No. 2466), 604 P.2d 1099 (1979) insofar as they were contrary to the holding that the accused's voluntary state of intoxication is irrelevant to the issue of insanity.

Addiction to drugs. — Evidence that the defendant was a heroin addict before and after committing the offenses is not sufficient to raise a defense of intoxication. There must be proof that he committed the criminal act while in a state of intoxication before he can avail himself of the defense. Pascoe v. State, Sup. Ct. Op. No. 2249 (File No. 4290), 628 P.2d 547 (1980).

Intoxication considered as to specific intent. — Under former AS 11.70.030, intoxication could be considered as to intent only when the intent required was so-called specific intent. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978), decided under former AS 11.30.070.

And where purpose or motive was criminal element. — Former AS 11.70.030 permitted a jury to consider intoxication where purpose or motive was an element of the crime charged. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978), decided under former AS 11.30.070.

Knowledge. — Where one is charged with failure to render assistance under AS 28.35.060, and where there is evidence of intoxication, the jury may consider the fact that the accused was intoxicated in determining whether he had the requisite knowledge. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978), decided under former AS 11.30.070.

Intoxication is not a defense to second-degree murder, since evidence of intoxication is relevant only in regard to an offense involving intention to cause a result (AS 11.81.630), and second-degree murder is an offense in which the culpable mental state pertaining to the result ("death") is imputed to be recklessness. Neitzel v. State, Ct. App. Op. No. 172 (File No. 6243), 655 P.2d 325 (1982).

Nor to be considered in determining recklessness of conduct. — Due process is not violated by the provision in AS 11.81.900(a)(3) that intoxication is not to

AS 22.20.020

THE QUESTION OF THE DISQUALIFICATION OF A JUDGE BECAUSE OF A RELATIONSHIP TO A PARTY IN LITIGATION BEFORE THE JUDGE IS CONSIDERED.

The Supreme Court of Alaska held that under a law requiring a judge to disqualify himself when he is related to a "party" to litigation before him, if the person is not a named party, but merely the business associate of a named party, the judge is not required to disqualify himself in that case. The Court interpreted sec. 20 as an "objective test" but noted that in 1974, Congress decided that disqualification is appropriate as to the Federal judiciary "when a relative has an interest that could be affected" by the litigation and Congress required disqualification in these cases. The Court then stated: "While making this a required ground for disqualification may be a sound measure, the Alaska legislature has not, as yet, chosen to do so." Blake v. Gilbert, 702 P.2d 631.

Review is recommended.

NOTES TO DECISIONS

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Applied in Larson v. State, Sup. Ct. Op. No. 1430 (File No. 2433), 564 P.2d 365 (1977).

Sec. 22.20.020. Disqualification of judicial officer for cause. (a) A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which

(1) the judicial officer is a party or is directly interested;

(2) the judicial officer was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

(3) the judicial officer is a material witness;

(4) the judicial officer is related to either party by consanguinity or affinity within the third degree;

(5) either party has retained the judicial officer as their attorney or has been professionally counseled by him in any matter within two years preceding the filing of the action;

(6) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

(b) In an action specified in (a) (4) and (5) of this section the disqualification may be waived by the parties and is waived unless a party raises the objection.

(c) If a judicial officer disqualifies himself or herself or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge. (§ 24-2-1 ACLA 1949; am § 1 ch 48 SLA 1967)

Cross references. — For other statutory provisions concerning disqualification of judges, see AS 22.30.070 (a). As to when a judge should disqualify himself, see Canon 3C of the Code of Judicial Conduct.

Editor's notes. — This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

Legislative history reports. — For report on ch. 48, SLA 1967 (SB 66), see 1967 House Journal, p. 311.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

The right of an impartial tribunal is embodied in this section. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

The fact that a judge, as a trier of fact in a pretrial motion, found defendant's testimony "not believable" does not in itself preclude his presiding at the subsequent trial. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Defendant to request appointment of another judge for disqualification question. — Under subsection (c) of this section, it is incumbent on defendant to request the chief justice, as presiding judge of the next higher court, to appoint another judge to determine the question of disqualification. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Where no request was made to appoint another judge to determine the disqualification question, the fact that defendant was faced with imminent commencement of trial did not justify his failure to pursue his rights under subsection (c) of this section since the entrapment ruling which provided the basis for the allegation of bias was entered nearly three months before trial. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Quoted in Wamser v. State, Sup. Ct. Op. No. 1768 (File No. 4166), 587 P.2d 232 (1978).

Cited in Peterson v. State, Sup. Ct. Op. No. 1411 (File No. 2642), 562 P.2d 1350 (1977); Halligan v. State, Sup. Ct. Op. No. 2299 (File No. 5035), 624 P.2d 281 (1981); Deivert v. Oseira, Sup. Ct. Op. No. 2357 (File No. 4910), 628 P.2d 575 (1981).

II. BASES FOR DISQUALIFICATION.

A. Paragraph (a)(2).

Issuing orders based on both live and recorded testimony. — Where, in a superior court proceeding to terminate parental rights in which the judge sat as the trier of fact, one judge presided over the first part of the adjudication hearing, observed the testimony of two of the state's witnesses, and neither made written findings of fact or conclusions of law with respect to this testimony, nor entered an adjudication order; and another judge presided over the continuation of the hearing, observed the testimony of one witness for the state, listened to the tape recorded testimony given before the first judge, and on the basis of both the recorded and live testimony, issued both the order adjudicating the child a neglected child and the order of disposition, the supreme court noted that the terms of paragraph (a)(2) of this section might prohibit the practice adopted by the superior court. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

B. Paragraph (a)(5).

The purposes of paragraph (a)(5) are to ensure the actual impartiality of a judge and to eliminate any possible appearance or suspicion of bias, thereby preserving the integrity of the judicial process and the confidence of the public. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

By expanding paragraph (a)(5) in 1967, Alaska's legislature evidenced concern about a somewhat distinct problem: namely, that any professional relationship between a judge and one of the parties, formed or nurtured in any manner during the months preceding the judge's elevation to the bench, might create a risk of partiality or the appearance of partiality. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

Disqualification where judge previously employed by state government. — The legislature did not intend, in enacting paragraph (a)(5), to disqualify a judge because of his prior employment by the state government from all cases in which the state appears as a party during the prohibited period of time. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

Superior court judge who had been employed as an assistant district attorney was not disqualified in a case brought by the state against a defendant where there was no possibility that he might have learned of the facts of the alleged crime while serving in his prosecu-

torial role. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

C. Paragraph (a)(6).

Maintenance of appearance of impartiality. — Paragraph (a)(6) of this section does not provide for disqualification where the sole concern is maintenance of the appearance of impartiality. However, in light of the importance of promoting public confidence in the integrity and impartiality of the judiciary, it would be well to permit disqualification under such circumstances. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

Review of decisions under paragraph (a)(6). — The supreme court rejected the argument that the disqualification standards under paragraph (a)(6) are wholly subjective and therefore not amenable to appellate review. Clearly, review is contemplated on a challenge for cause grounded in bias. The supreme court's duty to assure that judicial proceedings comply with due process mandates appellate scrutiny of allegations of bias. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Since the initial determination under paragraph (a)(6) of this section has been placed in the discretion of the trial judge, that judge's decision should be given substantial weight. When the judge does not recuse himself or herself, the decision should be reviewable on appeal only if it amounted to an abuse of discretion. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

Collateral references. — Disqualification of judge by relative's ownership of stock in corporation which is a party to action. 8 ALR 295; 110 ALR 472.

Right of party in course of litigation to challenge title or authority of judge. 114 ALR 1207.

Disqualification of judge in pending case as subject to revocation or removal. 162 ALR 641.

Relation of judge to one who is party in an official or representative capacity as disqualification. 10 ALR2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification. 45 ALR2d 937.

Relationship to attorney as disqualifying judge. 50 ALR2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 64 ALR2d 600.

Prior representation or activity as attorney or counsel as disqualifying judge. ALR2d 443.

Time for asserting disqualification. ALR2d 1238.

Intervenor's right to disqualify judge. 92 ALR2d 1110.

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

Disqualification of original trial judge to sit on retrial after reversal or mistrial. 60 ALR3d 176.

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR3d 509.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR3d 1021.

Sec. 22.20.022. Peremptory disqualification of a superior court judge. (a) If a party or a party's attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay.

(b) No judge or court may punish a person for contempt for making, filing or presenting the affidavit provided for in this section, or a motion founded on the affidavit.

AS 28.35.230(b)
AS 28.15.011(a)

THE LAW COVERING THE PROSECUTION OF A PERSON FOR DRIVING WHILE OPERATING PRIVILEGES ARE SUSPENDED (DWLS) IS EXAMINED WHEN THE PERSON WAS WITHOUT A VALID DRIVER'S LICENSE FROM ANY JURISDICTION.

The Court of Appeals of Alaska held that no present law effectively permitted the prosecution for driving while operator's license was suspended (AS 28.15.291) of a person who had no valid driver's license from this state or any other. The court noted that it was similar to the situation of the 15 year old; the minor could not be prosecuted for driving while his license was suspended if he had no suspended license. Francis v. Anchorage, 641 P.2d 226 (Alaska App. 1982). Finally, the court noted: "We are not insensitive to the fact that the current statutory scheme governing the suspension of driver's licenses and the offense of DWLS, as interpreted by this court in Francis, may in certain instances lead to undesirable results. * * * At this stage, we believe that the solution for any problems stemming from the current statutory language should properly be resolved through legislative action rather than by the process of judicial interpretation." The court further noted that the New York legislature has expressly provided for suspension of the privilege of obtaining a license; for the purposes of DWLS, the New York law defines an expired license as a license. Roberts v. State, 700 P.2d 815.

Review is recommended.

Chapter 15. Drivers' Licenses.

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 96 et seq.

60 C.J.S., Motor Vehicles, §§ 146 to 164.50.

Article 1. Issuance, Expiration and Renewal of Licenses.

Sec. 28.15.010. License required. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.011. Drivers must be licensed. (a) A person may not be denied the privilege to drive a motor vehicle upon a highway in this state, except as prescribed by law.

(b) Every person exercising the person's privilege to drive, or exercising any degree of physical control of a motor vehicle upon a highway, vehicular way or area, or other public property in this state, is required to have in the possession of the person a valid Alaska driver's license issued under the provisions of this chapter for the type or class of vehicle driven, unless expressly exempted by law from this requirement.

(c) A person licensed under the provisions of this chapter may exercise in this state the privilege to drive a motor vehicle and is subject to the restrictions prescribed by this chapter. A municipality may not require a person to obtain any other driver's license to drive or operate a motor vehicle in this state. (§ 19 ch 178 SLA 1978)

or it must meet lighting and audible signalling requirements of law for law enforcement vehicles. If the peace officer is not driving or operating a vehicle or motor vehicle, or operating an aircraft or watercraft, the officer shall wear the uniform of office or display a badge or other symbol of authority so as to be reasonably identifiable as a peace officer.

(c) A person who knowingly fails to stop in violation of (a) of this section is guilty of a class B misdemeanor.

(d) In this section

(1) "lawful purpose" includes making an arrest or issuing a citation, preventing personal injury or property damage in an emergency, and investigating a situation when the peace officer has a reasonable suspicion that imminent public danger exists or that serious harm has recently occurred;

(2) "signal" means a hand motion, audible mechanical or electronic noise device, visual light device, or combination of them, used in a manner that a reasonable person would understand to mean that the peace officer intends that the person stop. (§ 1 ch 66 SLA 1984)

Sec. 28.35.190. Penalty for violation of certain sections. [Repealed, § 47 ch 32 SLA 1971.]

Sec. 28.35.200. Unlawful operation of vehicles. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.210. Seizure of unsafe or defectively equipped vehicles. [Repealed by implication by AS 28.05.091, enacted by § 6 ch 178 SLA 1978.]

Sec. 28.35.220. Action by state for damages. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.225. Enforcement. All law enforcement officers in this state and employees of the department designated by the commissioner shall enforce this title and regulations adopted under this title. The state troopers shall advise and instruct all other law enforcement officers in the state concerning the requirements of this title and regulations adopted under this title. (§ 11 ch 241 SLA 1976; am § 7 ch 54 SLA 1979)

Sec. 28.35.230. [Renumbered as AS 28.40.050.]

Sec. 28.35.240. Duty to obey school patrol. [Repealed, § 3 ch 68 SLA 1964.]

Sec. 28.35.245. Motorcycle helmet. (a) After January 1, 1978, motorcycle helmets may not be manufactured or sold in Alaska that do not conform to standards established by regulation by the commissioner of public safety. The regulations shall provide for helmets that allow normal peripheral vision and hearing and minimize neck injuries

to the wearer potentially caused by the helmet. The adoption of these regulations shall be under the provisions of the Administrative Procedure Act (AS 44.62).

(b) A person who has reached the age of majority as defined by AS 25.20.010 may not be required to wear a helmet while operating a motorcycle if the person is the holder of a license which, under regulations adopted under AS 28.15.041, is classified singly as a license to operate a motorcycle. (§ 1 ch 230 SLA 1976)

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 210.

Sec. 28.35.250. Application of law. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.260. [Renumbered as AS 28.40.100.]

Sec. 28.35.270. [Renumbered as AS 28.40.110.]

Chapter 40. General Provisions.

Sec. 28.40.050. Penalty for violations of law, regulations, and municipal ordinances. (a) It is a misdemeanor for a person to violate a provision of this title unless the violation is by this title or other law declared to be a felony or an infraction.

(b) A person convicted of a misdemeanor for a violation of a provision of this title for which another penalty is not specifically provided is punishable by a fine of not more than $500, or by imprisonment for not more than 90 days, or by both. In addition, the privilege to drive or the registration of vehicles may be suspended or revoked.

(c) Unless otherwise specified by law a person convicted of a violation of a regulation adopted under this title, or a municipal ordinance regulating vehicles or traffic when the municipal ordinance does not correspond to a provision of this title, is guilty of an infraction and is punishable by a fine not to exceed $300.

(d) An infraction, as provided for in (c) of this section, is not considered a criminal offense and may not result in imprisonment, nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may the commission of a single infraction result in the loss of a driver's license or privilege to drive in this state except as may result from the accumulation of points under AS 28.15.221 — 28.15.261, or the registration of vehicles; nor does a person cited with an infraction have a right to trial by jury or to court-appointed counsel.

(e) Notwithstanding the maximum fine provided for infractions under (c) of this section, for the violation of regulations or special permits issued governing vehicle weight limits, overweight penalties shall be imposed at the rate of five cents for each pound of weight over the authorized weight limit for that vehicle. (§ 50-1-8 ACLA 1949; am § 12 ch 241 SLA 1976; am §§ 22, 23 ch 144 SLA 1977)

Revisor's notes. — Formerly AS 28.35.230. Renumbered in 1984.

NOTES TO DECISIONS

This section governs the penalties for violations of this title, and creates three categories of traffic offenses: felonies, misdemeanors and infractions. State v. Clayton, Sup. Ct. Op. No. 1734 (File No. 3983), 584 P.2d 1111 (1978).

Violations of AS 28.35.050(a) are punishable under this section. Drahosh v. State, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

Meaning of "law" in subsection (c). — The term "law," as used in subsection (c) of this section, refers to statutory enactments of the Alaska legislature and cannot be read to include the provisions of municipal ordinances. Anderson v. Municipality of Anchorage, Ct. App. Op. No. 89 (File No. 5318), 645 P.2d 205 (1982).

Nature of "correspondence" between ordinance and statute required by subsection (c). — The requirement of correspondence stated in subsection (c) of this section calls for a level of similarity between a municipal ordinance and a provision of AS 28 that would make the ordinance a functional equivalent of its statutory counterpart. Anderson v. Municipality of Anchorage, Ct. App. Op. No. 89 (File No. 5318), 645 P.2d 205 (1982).

The legislature's purpose in enacting subsection (d) was to eliminate the criminal stigma from minor traffic offenses while keeping the enforcement of such offenses within the criminal system's procedures. State v. Clayton, Sup. Ct. Op. No. 1734 (File No. 3983), 584 P.2d 1111 (1978).

A prosecution for a traffic infraction is a quasi-criminal proceeding to which certain criminal procedures including the issuance of warrants are applicable. State v. Clayton, Sup. Ct. Op. No. 1734 (File No. 3983), 584 P.2d 1111 (1978).

Although the language in subsection (d) with regard to an infraction not being considered a criminal offense nor a fine therefor a criminal punishment indicates that the legislature did not intend to make minor traffic offenses criminal offenses, it does not follow that the legislature by labeling infractions "noncriminal" meant that they are civil in nature and thus that criminal procedures are not available for the enforcement of infractions. State v. Clayton, Sup. Ct. Op. No. 1734 (File No. 3983), 584 P.2d 1111 (1978).

Notwithstanding the legislative labeling of a traffic infraction a noncriminal offense by this section, it retains many criminal terms, such as "convicted," "violation," "guilty," and "punishable by a fine." State v. Clayton, Sup. Ct. Op. No. 1734 (File No. 3983), 584 P.2d 1111 (1978).

An infraction is not an offense for double jeopardy purposes. Carlson v. State, Ct. App. Op. No. 339 (File No. 7338), 676 P.2d 603 (1984).

Jury trial. — AS 28.10.105(a) and the other registration statutes in pari materia do not specify a violation of the registration statutes as an infraction, and thus under this section, such a violation is a misdemeanor punishable by up to 90 days' imprisonment, and entitling a defendant to a jury trial, denial of which right constitutes prejudicial error, requiring a new trial. Epperly v. State, Ct. App. Op. No. 111 (File No. 659[illegible], 648 P.2d 609 (1982).

Traditional use of criminal process not affected. — In the absence of express contrary declaration, the legislature did not intend by the enactment of subsection (d) to affect the traditional use of the criminal process for enforcement of traffic infractions. State v. Clayton, Sup. Ct. Op. No. 1734 (File No. 3983), 584 P.2d 1111 (1978).

This section makes no changes in the traditional mode of proceeding in criminal matters with the exception of its declaration that a person cited with an infraction does not have a right to trial by jury

or to court-appointed counsel. The action is brought in the name of the state; it is commenced by the filing of a complaint by a law enforcement official; it is prosecuted by the district attorney. The exceptions appear to merely codify existing constitutional law. State v. Clayton, Sup. Ct. Op. No. 1734 (File No. 3983), 584 P.2d 1111 (1978).

Applied in Manderson v. State, Ct. App. Op. No. 198 (File No. 6894), 655 P.2d 1320 (1983).

Stated in Francis v. Municipality of Anchorage, Ct. App. Op. No. 70 (File No. 5659), 641 P.2d 226 (1982).

Cited in Lowry v. State, Ct. App. Op. No. 181 (File Nos. 6328, 6434), 655 P.2d 780 (1982).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 204.

61A C.J.S., Motor Vehicles, §§ 588 to 595.

Sec. 28.40.100. Definitions for title. (a) Unless otherwise specifically defined or unless the context otherwise requires, in this title and in regulations adopted under this title

(1) "cancel" means the annulment or termination by formal action of the department of a certification, registration, license, permit or privilege issued or allowed under this title or regulations adopted under this title, because of an error or defect in the document issued or the application for issuance or because the person holding the document is no longer entitled to it;

(2) "commissioner" means the commissioner of public safety;

(3) "department" means the Department of Public Safety;

(4) "driver" means a person who drives or is in actual physical control of a vehicle;

(5) "driver's license", or "license" when used in relation to driver licensing, means a license, permit or privilege, whether or not a person holds a valid license issued in this or another jurisdiction, to drive a motor vehicle under the laws of this state;

(6) "highway" means the entire width between the boundary lines of every way that is publicly maintained when a part of it is open to the public for purposes of vehicular travel, including but not limited to every street and the Alaska state marine highway system but not vehicular ways or areas;

(7) "motor vehicle" means a vehicle which is self-propelled except a vehicle moved by human or animal power;

(8) "motorcycle" means a vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground; the term does not include a tractor;

(9) "motor-driven cycle" means a motorcycle, motor scooter, motorized bicycle, or similar conveyance with a motor attached and having an engine with less than 150 cubic centimeters of displacement or with not to exceed five brake-horsepower;

(10) "municipality" means a home rule or general law borough or city including, but not limited to, a unified municipality organized under AS 29.68;

AS 12.25.150(b) THE RIGHTS OF AN ARRESTEE UNDER A BURDEN TO TAKE A BREATHALYZER TEST TO COMMUNICATE AND VISIT WITH AN ATTORNEY ARE DISCUSSED.

The Court of Appeals of Alaska held that the police have no obligation to interrupt or delay a breathalyzer test to permit the arrestee to consult with his attorney who had just arrived. "In so doing, we are not unaware of the provision in AS 12.25.150(b) which expressly provides for an immediate visit with counsel following arrest. We do not construe the statute to give an arrestee who has spoken with counsel by telephone and had a reasonable opportunity to speak with him, a right to delay administration of the breathalyzer examination to permit further consultation." The court apparently concluded that the breathalyzer test was given before the attorney arrived. Municipality of Anchorage v. Marrs, 694 P.2d 1163.

The law cited gives both the "right to telephone or otherwise communicate" and the "right to (have an attorney) immediately visit" the arrestee. Review is recommended.

AS 12.25.150(b) THE RIGHTS OF A PERSON ARRESTED FOR DRIVING WHILE INTOXICATED ARE DISCUSSED.

The Court of Appeals of Alaska held that it is only where the totality of the arrestee's words constitute a request, express or implied, for an opportunity to contact counsel for the purpose of discussing a breathalyzer examination that an opportunity to consult counsel must be provided before the administration of the breathalyzer. The court held that the trial court's conclusion that the arrestee did not "properly" invoke his rights was permissible and therefore the results of the breathalyzer examination need not be suppressed. Van Wormer v. State, 699 P.2d 895.

In a footnote, the court stated, in part: "Our decision in this case depends in large part on Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), in which the supreme court held that a person arrested for DWI need not be informed of the right to contact counsel before submitting to a breath test. We note, nevertheless, that the time may be ripe for the supreme court to reexamine the continued vitality of its Geber holding. Geber was decided four year's before Copelin v. State, 659 P.2d 1206 (Alaska 1983), which for the first time firmly established an arrestee's right to contact counsel before submitting to a breath test. Moreover, at the time Geber was decided, an individual's refusal to submit to a breath test was not yet subject to criminal prosecution by the state. * * * Both the establishment of the right to

contact counsel and the advent of statewide criminal prosecution of breath tests refusals have immeasurably increased the significance of informing an arrestee of the right to contact counsel. Each person arrested for DWI is required to choose between taking and refusing a breath test. In effect, an incorrect choice results in the commission of a new crime. In these circumstances, advising an arrestee of the right to contact counsel will often be the only way to assure that the arrestee does not, through a mistake or misunderstanding as to what the law requires, commit yet another offense. * * * Adoption by the supreme court of a rule requiring DWI arrestees to be informed of their right to contact counsel may now be justified "

Review is recommended.

Sec. 12.25.110. Breaking open building or vessel to liberate. A peace officer may break open a building or vessel to liberate a person who entered to make an arrest and is detained, or to liberate oneself when necessary. (§ 2.12 ch 34 SLA 1962)

Sec. 12.25.120. Retaking escaped prisoner. If a person arrested escapes or is rescued, the person from whose custody that person escaped or was rescued may immediately pursue and retake that person at any time and in any place in the state. (§ 2.13 ch 34 SLA 1962)

Sec. 12.25.130. Means usable to retake prisoner. [Repealed, § 21 ch 166 SLA 1978. For present provisions, see AS 11.81.370 — 11.81.390.]

Sec. 12.25.140. Property taken from defendant on arrest. When money or other property is taken from a person arrested upon a charge of a crime, the officer taking it shall immediately make duplicate receipts for the property, specifying particularly the amount of money or kind of property taken. The officer shall deliver one receipt to the person arrested and the other to the judge or magistrate who examines the charge or, if the arrest is after the information or indictment, to the clerk of the court where the action is pending. (§ 2.15 ch 34 SLA 1962; am § 9 ch 8 SLA 1971)

Legislative history reports. — For report on ch. 8, SLA 1971 (HB 15), see 1971 House Journal, p. 52.

Sec. 12.25.150. Rights of prisoner after arrest. (a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within 24 hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers.

(b) Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with the prisoner's attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friends of the prisoner, have the right to immediately visit the person arrested.

(c) It shall be unlawful for an officer having custody of a person so arrested to wilfully refuse or neglect to grant the prisoner the rights provided by this section. A violation of this section is a misdemeanor, and, upon conviction, the offender is punishable by a fine of not more than $100, or by imprisonment for not more than 30 days, or by both.

(d) In addition to the criminal liability in (c) of this section, an officer having a prisoner in custody who refuses to allow an attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of $500, recoverable in a court of competent jurisdiction. (§ 2.16 ch 34 SLA 1962; am § 10 ch 8 SLA 1971; am § 2 ch 31 SLA 1973; am § 18 ch 127 SLA 1974)

Sec. 12.25.100. Breaking into building or vessel to effect arrest.

NOTES TO DECISIONS

Conduct constituting substantial compliance.

Though the "knock and announce" rule requires that the police announce their authority and purpose before breaking into dwellings to execute a search warrant, there was substantial compliance with the "knock and announce" sections where the defendant had called the police to turn herself in for possessing over five pounds of marijuana, she refused to admit the police when they arrived, the police staked out her house while they acted to secure a warrant, they knocked on the door after securing the warrant, announced "It's the police," waited approximately a minute without getting a response, and forced open the door. Fleener v. State, Ct. App. Op. No. 396 (File No. A-9), 686 P.2d 730 (1984).

Sec. 12.25.150. Rights of prisoner after arrest.

NOTES TO DECISIONS

III. RIGHT TO CONTACT ATTORNEY.

Right of driving while intoxicated suspect to contact attorney. — Phone conversation with the public defender constituted contact with an attorney under Copelin. Pappas v. Municipality of Anchorage, Ct. App. Op. No. 470 (File No. A-170), P.2d (1985).

Right to private consultation with a lawyer was not abrogated during a phone call with the public defender even though the police officer could overhear the suspect due to his yelling and shouting. Pappas v. Municipality of Anchorage, Ct. App. Op. No. 470 (File No. A-170), P.2d (1985).

A DWI suspect cannot be forced to contact an attorney chosen by the police; but where the suspect agreed to speak with the public defender, argument that if the suspect is dissatisfied with an attorney he has agreed to speak with, he should be permitted another opportunity to contact counsel was foreclosed where the suspect never requested a specific attorney or even asked to see a phone book. Pappas v. Municipality of Anchorage, Ct. App. Op. No. 470 (File No. A-170), P.2d (1985).

Right to counsel before breathalyzer test.

It is only where the totality of the arrestee's words constitute a request, express or implied, for an opportunity to contact counsel for the purpose of discussing a breathalyzer examination that an opportunity to consult counsel must be provided prior to administration of the breathalyzer. Once the breathalyzer examination is completed or refused and videotaping finished, the suspect is entitled to the full use of the rights guaranteed by subsection (b) and Criminal Rule 5(b). Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), P.2d (1985), summarizing Copelin v. State, 659 P.2d 1206 (Alaska 1983), Svedlund v. Anchorage, 671 P.2d 378 (Alaska App. 1983), and Anchorage v. Erickson, 690 P.2d 20 (Alaska App. 1984).

Where the judge determined, based on the evidence, that the DWI defendant's statements regarding having somebody present did not relate to a desire to consult with counsel about breathalyzer examinations or field sobriety test, but rather related to having someone present to observe the administration of the test, perhaps a technician, to insure its validity, the judge was not clearly erroneous in concluding that the defendant did not properly invoke his Copelin rights and that the results of the breathalyzer examination should not be suppressed. Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), P.2d (1985). The court noted that its decision in the case depended in large part on Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), in which the supreme court held that a person arrested for DWI need not be informed of the right to contact counsel

before submitting to a breath test and further noted, that the time may be ripe for the supreme court to reexamine the continued vitality of its Geber holding.

Arrestee has no right to delay administering of breathalyzer test for further attorney consultation. — The Court of Appeals does not construe this section to give an arrestee who has spoken with counsel by phone and had a reasonable opportunity to speak with him a right to delay administration of a breathalyzer examination to permit further consultation. Municipality of Anchorage v. Marrs, Ct. App. Op. No. 440 (File No. A-352), 694 P.2d 1163 (1985).

Where a defendant had the opportunity to consult on the telephone with counsel, he received the rights guaranteed him by Copelin v. State; and the police were under no duty to delay administration of a breathalyzer examination until counsel could be present, regardless of how short a period that might, in fact, have entailed. Municipality of Anchorage v. Marrs, Ct. App. Op. No. 440 (File No. A-352), 694 P.2d 1163 (1985).

Sec. 12.25.160. Arrest defined.

NOTES TO DECISIONS

Arrest for speedy trial purposes.

Where a defendant was suspected of driving while intoxicated leading to an injury accident, was informed that he could submit to a blood test at the hospital or be arrested and transported to the state police where he would be required by law to submit to a breath test to determine his blood-alcohol level, was released after the blood sample was taken, and was never handcuffed or moved from the hospital, the trial court could find that although the defendant was in police custody, the custody never amounted to an arrest as defined in this section. Greenawalt v. Municipality of Anchorage, Ct. App. Op. No. 434 (File No. A-536), 692 P.2d 983 (1985).

Chapter 30. Bail.

Sec. 12.30.060. Violation of conditions.

NOTES TO DECISIONS

Cited in Lipscomb v. State, Ct. App. Op. No. 477 (File Nos. A-67/68), P.2d (1985).

Chapter 35. Search and Seizure.

Sec. 12.35.015. Issuance of search warrant upon testimony communicated by telephone or other means.

Revisor's notes. Criminal Rule 38.1(b), effective June 15, 1985, provides that AS 12.35.015 governs the issuance of search warrants by telephone.