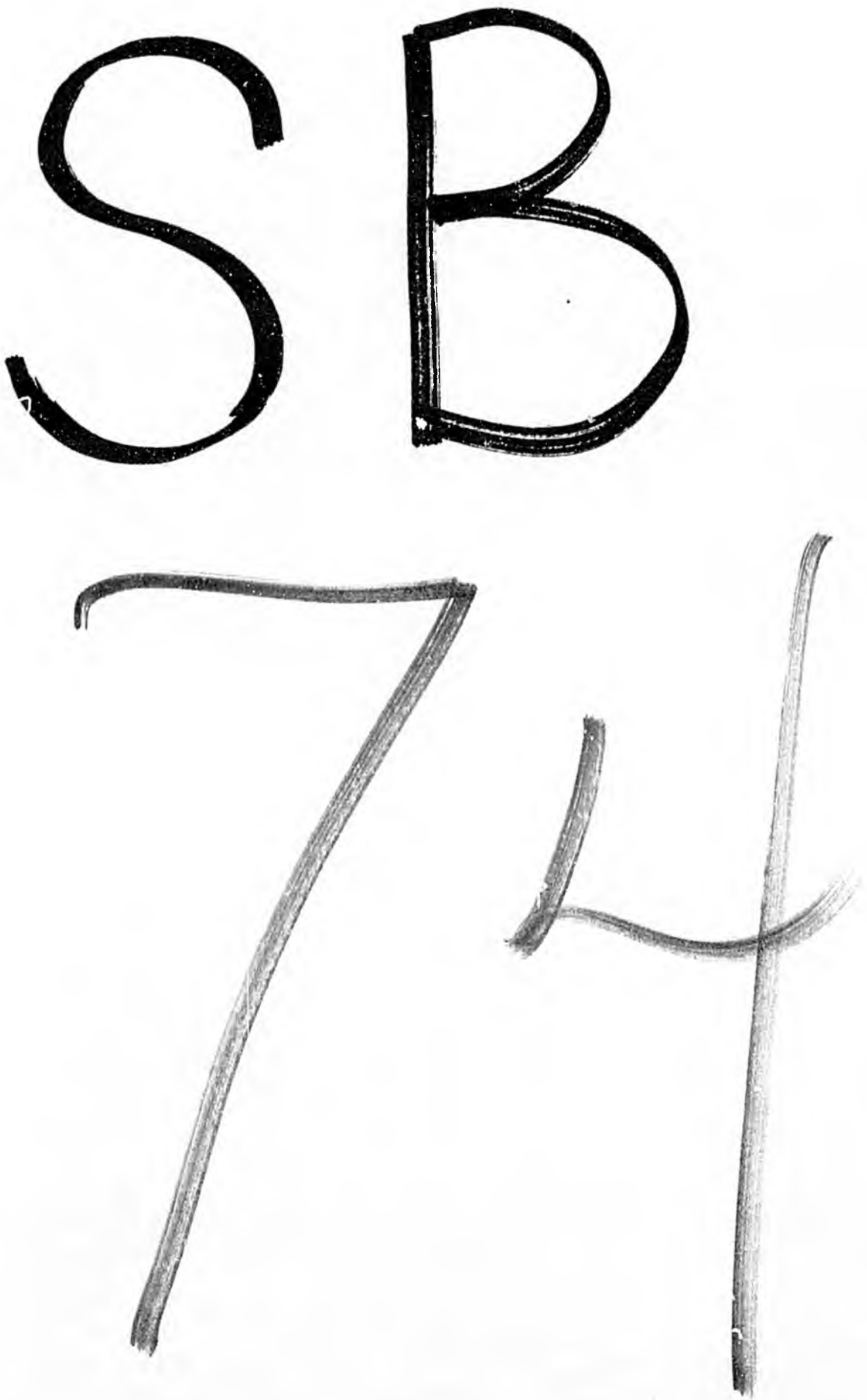
SB
774

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May, 1986

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Jeanie Henry

House Judiciary	5-11-85	1:00 pm
" "	5-12-85	3:00 pm

Edwards ✓ -

AMENDMENT #1

Offered in the HOUSE By Clocksin

TO: CSSB 74(Jud) am

Page 1, lines 9 - 22, delete all material.

Page 1, line 23, delete "* Sec. 2." and insert "* Section 1."

Page 2, lines 5 - 7, delete all material.

Renumber remaining bill section accordingly.

Edwards.

A M E N D M E N T

Offered in the HOUSE By Sund

TO: CSSB 74(Jud) am

Page 1, after line 8, insert new bill sections to read:

"* Section 1. AS 28.15.181(c) is amended to read:

(c) A court convicting a person of an offense described in (a)(5) or (8) of this section arising out of the operation of a motor vehicle for which a driver's license is required shall revoke that person's driver's license. The revocation may be concurrent with or consecutive to an administrative revocation under AS 28.15.165. The court may not, except as provided in (e) and (g) of this section, grant limited license privileges for the following periods:

(1) not less than 90 days if, within the preceding 10 years, the person has not previously been convicted of an offense

(A) described in (a)(5) or (8) of this section; or

(B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section;

(2) not less than one year if, within the preceding 10 years, the person has been previously convicted of one offense

(A) described in (a)(5) or (8) of this section; or

(B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section;

(3) not less than 10 years if, within the preceding 10 years, the person has been previously convicted of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(A) an offense described in (a)(5) or (8) of this section; or

(B) an offense under another law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section.

* Sec. 2. AS 28.15.181 is amended by adding a new subsection to read:

(g) A court revoking a driver's license under (c) of this section, or sustaining the action of the department under AS 28.15.165(c), may grant limited license privileges during the period of revocation in which the person provides satisfactory evidence of a work-related need and abstinence from the use of alcohol and drugs, if the court first determines that

(1) the person has, since the date of arrest in the case before the court, enrolled in and successfully completed an alcohol or drug treatment program specifically recommended in the case by the state office of alcoholism and drug abuse or its representative agency;

(2) consistent with the opinion of the director of the person's alcohol or drug treatment program, a limitation under AS 28.15.201 can be placed on the license that will permit the person to earn a livelihood without excessive danger to the public;

(3) the person's ability to earn a livelihood will be

severely impaired without the limited license;

(4) the person intends to abstain from the use of alcohol and nonprescribed controlled substances described in AS 11.71;

(5) the person intends to satisfactorily participate in a drug and alconol monitoring program that

(A) is approved by the office of alcoholism and drug abuse or its representative agency; and

(B) represents to the court that it will require the person to submit to a testing schedule approved by the court and will immediately report to the court the person's failure to abstain or to submit to a required test."

Page 1, line 9:

Delete "* Section 1." and insert "* Sec. 3."

Renumber succeeding bill sections accordingly.

Commentary: CSSB 74 (Jud)

Section 1 of CSSB 74 (Jud) transfers administrative and regulatory authority for the state's alcohol breath testing program from the Department of Health and Social Services (DHSS) to the Department of Public Safety (DPS). This transfer would improve the administration of Alaska's breath testing program by eliminating unnecessary confusion, expense, and duplication of effort, and would help to ensure that the state's breath test program is conducted in the most efficient and legally defensible manner.

Transfer of the breath test program to the DPS was one of the secondary recommendations made by the Governor's Task Force on Drunk Driving in January of this year. In the interests of consolidation of resources and administrative efficiency, both DPS Commissioner Robert Sundberg and DHSS Commissioner John Pugh have recommended that the transfer be made. This change is also supported by the Department of Law.

Under existing law, DHSS possesses regulatory authority for the state's breath test program. Much of the responsibility for the actual administration and day-to-day functioning of the program rests with DPS, however. Historically, DPS has purchased and distributed the breath test instruments, repaired the instruments, purchased and distributed necessary supplies, and conducted the training of breath test operators and supervisor-instructors. This defacto division of functions between the two departments has led to some unfortunate difficulties in the administration of the present program. Since there is no one office or agency with clear administrative oversight authority over the breath test program, some uncertainty about areas of responsibility and lines of authority has developed. Occasionally some necessary duties have "fallen between the cracks." As a direct result of this lack of a centralized oversight authority prosecutors have had to dismiss numerous DWI prosecutions and have had to defend scores of DWI cases on appeal.

Alaska's first "implied consent" statute (requiring all persons suspected of drunken driving to consent to a chemical test to determine blood alcohol content) was adopted in 1969. AS 28.35.033(d) made the Department of Health and Social Services (at that time called the Department of Health and Welfare) responsible for approving "satisfactory techniques, methods, and standards of training" for analysis of the alcohol content of a DWI arrestee's breath sample. This responsibility was given to DHSS at that time because there was no other state agency which had

either the facilities or the technical expertise to perform this function.

In 1978 a state forensic crime laboratory was established in the Department of Public Safety to provide essential scientific support services to local law enforcement officers and state troopers throughout the state. Since that time the state crime laboratory has performed a steadily increasing array of scientific functions and analyses. The laboratory now employs four full time chemists who routinely analyze suspected controlled substances and have testified in numerous criminal trials. In recent years laboratory personnel have begun conducting analyses of diverse crime scene evidence, including physical evidence in arson cases, urine and blood testing, foot print comparisons, and some limited fiber, trace, and serological analyses.

In 1983 and 1984 the legislature appropriated 5½ million dollars to DPS to build and equip a sophisticated new crime laboratory facility in Anchorage. Construction of that facility is underway, and is expected to be complete by September of this year. The new laboratory will provide expanded testing capabilities in the areas of forensic chemistry, serology, toxicology, firearms identification, and trace evidence identification.

In light of this expansion of the public safety laboratory, it makes administrative and public policy sense to transfer the responsibility for administration of Alaska's alcohol breath testing program to the DPS laboratory. Transfer of this function to the DPS laboratory would be consistent with the national trend in DWI law enforcement and breath testing. Currently, over half of the states in the country have placed full administrative responsibility for their alcohol breath test programs with their departments of public safety. Several of these states, such as Texas, Minnesota, New York, New Jersey, and Michigan, have sophisticated programs which serve as models for other states. In only about ¼ of the states does administrative oversight authority for the state breath test program remain in the department of public health.

Section 3 of CSSB 74 (Jud) provides that existing breath test regulations will remain in effect until new regulations are adopted by the Department of Public Safety, and section 4 establishes a special effective date of July 1, 1985. This special effective date has been included because it will be necessary to transfer some resources from DHSS to DPS when the bill takes effect. July 1st is the beginning of the new fiscal year, and a convenient point at which to transfer positions.

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[illegible] HOUSE JUDICIARY COMMITTEE
[illegible] JUNEAU AK 99811

[illegible] 18 1985

DEAR REPRESENTATIVE MILLER:

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TO REPLY BY MAILGRAM, SEE INSTRUCTIONS ON REVERSE SIDE.

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated. (a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of intoxicating liquor, or any controlled substance listed in AS 11.71.140 — 11.71.190;

(2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of intoxicating liquor and another substance.

(b) Driving while intoxicated is a class A misdemeanor.

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the preceding 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under this or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. In addition, if the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked in accordance with AS 28.15.181 and the vehicle used in commission of the offense may be forfeited under AS 28.35.036. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of

alcohol education or rehabilitation that the court, after consideration of any information compiled under (d) of this section, finds appropriate.

(d) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (c) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (c) of this section, or by an officer of the court in preparing a presentence report for the use of the court in sentencing a person convicted under (c) of this section.

(e) A person who is sentenced to imprisonment for 72 consecutive hours upon a first conviction under (c) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(f) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(g) In this section,

(1) "operate an aircraft" means to use, navigate, pilot, or taxi an aircraft in the airspace over this state, or upon the land or water inside this state;

(2) "operate a watercraft" means to navigate or use a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of the state. (§ 50-5-3 ACLA 1949; am § 1 ch 107 SLA 1955; am § 1 ch 121 SLA 1967; am § 45 ch 32 SLA 1971; am § 4 ch 74 SLA 1974; am §§ 2, 3 ch 152 SLA 1978; am § 28 ch 94 SLA 1980; am § 10 ch 129 SLA 1980; am § 21 ch 45 SLA 1982; am §§ 13 — 15 ch 117 SLA 1982; am §§ 13 — 15 ch 77 SLA 1983)

Revisor's notes. — In 1984, former subsection (f) was redesignated as present subsection (g) and former subsection (g) was redesignated as present subsection (f).

Cross references. — For sentences for class A misdemeanors, see AS 12.55.035(b)(3) and 12.55.135(a).

Effect of amendments. — The first 1980 amendment, in subsection (a) as it existed prior to the second 1980 amendment, deleted "under AS 11.05.150" from the end of the third sentence and substituted "AS 28.15.181" for "AS 28.15.210(c)" in the fourth sentence.

The second 1980 amendment rewrote the section.

The first 1982 amendment substituted "or any controlled substance listed in AS 11.71.140 — 11.71.190" for "depressant, hallucinogenic, stimulant or narcotic drug as defined in AS 17.10.230(13) and AS 17.12.150(3)" in subsection (a)(1).

Section 2 of the bill addresses a problem which has surfaced as a result of the Court of Appeals decision in Bass v. Municipality of Anchorage, Op. No. 429 (Alaska Ct. App., December 14, 1984). Bass overturned his car in a one-car accident in September of 1983. When the police arrived at the scene of the accident Bass appeared to be extremely intoxicated. Bass had been injured in the accident, and so was immediately taken to a hospital. Because Bass was required to remain at the hospital for several hours, he could not be taken to the police station for a breath test.

After consulting with the municipal prosecutor, the investigating officer asked Bass to provide a sample of his blood for analysis to determine alcohol content. Bass refused, but a blood sample was taken over his objections. The sample was taken under the authority of AS 28.35.-035(b), which allows a blood alcohol test to be administered to a DWI suspect who is "unconscious or otherwise in a condition rendering that person incapable" of refusing a breath test.

The appellate court held that Bass, who was injured and hospitalized but not unconscious, did not fall under the "narrow language" of AS 28.35.035 and therefore suppressed the result of the defendant's blood alcohol test (0.243). The amendment to AS 28.35.035(b) contained in section 2 of this bill would plug this "loophole" and allow collection of essential evidence of the blood alcohol level of a DWI suspect who cannot be transported to the police station for a breath test.

purposes of statute or ordinance making it a criminal offense to operate an automobile while in that condition, 142 ALR 555.

What is a "motor vehicle" within statutes making it an offense to drive while intoxicated, 66 ALR2d 1146.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR3d 1373.

Driving under the influence, or when addicted to the use, of drugs as criminal offense, 17 ALR3d 815.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 29 ALR3d 938.

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 ALR3d 1138.

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 ALR3d 7.

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 ALR4th 1252.

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 ALR4th 705.

Sec. 28.35.031. Implied consent. (a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(g)(1) or who operates a watercraft as defined by AS 28.35.030 (g)(2) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

(b) A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. A law enforcement officer may administer a preliminary breath test at the scene of the incident if the officer has reasonable grounds to believe that a person's ability to operate a motor vehicle is impaired by the ingestion of alcoholic beverages and that the person

(1) was driving a motor vehicle that is involved in an accident; or

(2) committed a moving traffic violation.

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

(d) The result of the test under (b) of this section may be used by the law enforcement officer to determine whether the driver should be arrested.

(e) Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

(f) If a driver is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section. (§ 1 ch 83 SLA 1969; am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am § 16 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment, in present subsection (a), inserted "or breath" in the first sentence and substituted "intoxicated" for "under the influence of intoxicating liquor" in the first and second sentences.

The 1982 amendment, in present subsection (a), inserted the language beginning "or who operates an aircraft" and ending "described by AS 28.35.030 (f)(2)" in the first sentence and inserted "or operating an aircraft or a watercraft" in the first and second sentences.

The 1983 amendment added subsections (b), (c), (d), (e), and (f).

NOTES TO DECISIONS

Editor's notes. — Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979), and other cases cited in the notes below, were decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

Consent to breathalyzer test when driver operates motor vehicle in state. — It is clear from this section that a driver consents to take the breathalyzer test when he operates a motor vehicle in the State of Alaska. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Analysis of this section and AS 28.35.032 demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

As the supreme court analyzes the legislature's intent in enacting this section and AS 28.35.032, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Application of case law. — Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File No. 6275), 649 P.2d 256 (1982), and Cooley v. Municipality of Anchorage, Ct. App. Op. No. 114 (File Nos. 5859, 6112, 6151), 649 P.2d 251 (1982), apply to only three categories of cases: (1) cases formally joined with those decided in Serrano and Cooley; (2) cases in which suppression had already been ordered on or before August 6, 1982; and (3) cases in which breathalyzer tests were administered after August 6, 1982. State v. Lamb, Ct. App. Op. No. 119 (File No. 7071), 649 P.2d 971 (1982).

Statutes do not explicitly grant right to refuse test. — Neither this section nor AS 28.35.032(a) explicitly grants or recognizes a right on the part of an arrestee to refuse to take a breathalyzer test. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

One required to take a breathalyzer test under this section does not have any statutory or constitutional right to refuse to take it. Pears v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983).

Nor do they impose a duty upon the arresting officer to advise the driver that he has the right to refuse to take the test. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Neither this section nor AS 28.35.032 requires that the arrested operator be advised he has the right to refuse to take a chemical test for the purpose of determining the alcohol content of his blood. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

One required to take a breathalyzer test under this section does not have to be

v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Applied in Nelson v. State, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982).

Quoted in Simpson v. Municipality of Anchorage, Ct. App. Op. No. 57 (File Nos. 4945, 4946, 5288), 635 P.2d 1197 (1981); Lundquist v. Department of Pub. Safety, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983); Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Cited in Coleman v. State, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Collateral references. — 60 C.J.S., Motor Vehicles, § 164.16.

Duty of law enforcement officer to offer suspect chemical sobriety test under implied consent law, 95 ALR3d 710.

Sec. 28.35.032. Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

(b) *[Repealed, § 25 ch 77 SLA 1983.]*

(c) *[Repealed, § 25 ch 77 SLA 1983.]*

(d) *[Repealed, § 25 ch 77 SLA 1983.]*

(e) The refusal of a person to submit to a chemical test of breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while intoxicated.

(f) Refusal to submit to the chemical test of breath authorized by AS 28.35.031(a) is a class A misdemeanor.

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding

10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

(h) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (g) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (g) of this section, or by an officer of the court in preparing a pre-sentence report for the use of the court in sentencing a person convicted under (g) of this section.

(i) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under

AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction. (§ 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment, in subsection (a), inserted the language beginning "and that the refusal may" and ending "under the influence of intoxicating liquor", in subsection (b), inserted "or driving" in the first sentence and in paragraph (1) and "or operate" in the first sentence, in subsection (c), inserted "or drive" in the last sentence, and in subsection (d) inserted "or driving" and substituted "denial of" for "denial or." The amendment also added subsection (e).

The 1982 amendment, in subsection (a), inserted "if that person was arrested while operating or driving a motor vehicle," substituted "license or nonresident privilege to drive" for "license and" and "motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor" for "vehicle under the influence of intoxicating liquor," and added "except as provided by AS 28.35.035" to the end; in subsection (b), substituted "intoxicated" for "under the influence of intoxicating liquor" in paragraph (1) and inserted "or nonresident privilege to drive and that the refusal is a misdemeanor" in paragraph (2); in subsection (d), deleted "within two years previous to his arrest" following "AS 28.35.031" and inserted "or of refusal to submit to a chemical test of breath under this section" and "or revocation"; in subsection (e), substituted "motor vehicle or operating an aircraft or watercraft while intoxicated" for "vehicle under the influence of intoxicating liquor" at the end; and added subsections (f)-(i).

The 1983 amendment, in subsection (a), modified the internal reference following "submit to a chemical test," inserted "for which a driver's license is required" following "driving a motor vehicle," and deleted "suspension," preceding "denial or revocation"; repealed subsections (b), (c), and (d); in subsection (f), revised the internal reference; rewrote subsection (g); and added subsection (j).

Legislative history reports. — For report on ch. 71, SLA 1972 (HCSSB 38[illegible] am H), see 1972 House Journal, p. 898.

NOTES TO DECISIONS

Editor's notes. — Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979), cited in the notes below, was decided prior to the enactment of AS 28.35.035, which authorizes the administration of a chemical test without consent in certain circumstances to determine the amount of alcohol in breath or blood.

Purpose of section. — This section, which directs the Department of Public Safety to suspend or revoke the licenses of those who refuse to submit to a breath-analysis, is merely an internal operating procedure that provides a sanction for those persons who refuse to submit to the test in order to compel submission to a test that provides evidence of intoxication; and although this section may have the effect of keeping the roads safe from drunk drivers by suspending the licenses of those who refuse the test, this was not an intended statutory purpose. Lundquist v. Department of Pub. Safety, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983).

The Implied Consent Statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

Constitutionality of subsection (f). — Subsection (f) of this section is reasonably related to the public purpose of obtaining evidence of drunk driving. Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Subsection (f) of this section is sufficiently analogous to a statute punishing concealment of evidence such as AS 11.56.610 to satisfy substantive due process. Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Subsection (f) of this section does not violate the prohibition against cruel and unusual punishment since imposing punishment for refusal to take a breathalyzer test serves the legitimate public goals of deterring such conduct and ensuring that such conduct will not benefit a defendant and the penalty does not result in subjecting a defendant to punishment out of proportion to the conduct in which he has engaged. Jensen v. State, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Punishing a refusal to take a breathalyzer test bears a fair and substantial relation to the legitimate governmental objective of gathering evidence of possible drunken driving and does not deny equal protection. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal provision nearly identical to subsection (f) of this section.

Miranda rights. — Defendant's constitutional rights were not violated by not informing him of his Miranda rights prior to asking him to take a breathalyzer exam. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal law.

No other chemical test allowed after breath test refused. — The express language of subsection (a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

The language of this section providing that, upon a person's refusal to submit to a chemical test of his breath, "a chemical test shall not be given," means that law enforcement officials are precluded from performing other chemical tests in order to determine whether alcohol is present in the person's blood. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor (now driving while intoxicated), law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

"Chemical test" means any chemical test. — The language of subsection (a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," means any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

There is no due process requirement that a person be advised of the right to refuse to submit to a breathalyzer examination. Palmer v. State, Sup. Ct. Op. No. 2002 (File No. 3651), 604 P.2d 1106 (1979).

While subsection (a) of this section prohibits the giving of any other blood test when the person arrested refuses to submit to a breathalyzer examination, it does not otherwise grant or recognize a right on the part of the arrested person to refuse that examination. Palmer v. State, Sup. Ct. Op. No. 2002 (File No. 3651), 604 P.2d 1106 (1979).

Right to refuse test is only to protect against forcible submission to test. — The right of refusal contained in subsection (a) is to only protect an individual from being physically forced to submit to the test. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

There is no right involved requiring assistance of counsel. — The right to refuse to take the breathalyzer test under subsection (a) is only to protect a person from being physically forced to submit to the test, and since there is implied consent to the test under AS 28.35.031, there is no right that can be knowingly waived which would require the assistance of counsel. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

The results of the breathalyzer test are nontestimonial in nature, therefore the provisions of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) do not apply. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Where a driver operated a motor vehicle in the State of Alaska and was lawfully arrested for operating a motor vehicle while under the influence of intoxicating liquor, such driver had no right to refuse taking the breathalyzer test, and such a test does not violate an individual's right against self-incrimination. Therefore, the absence of counsel is immaterial since the driver had no rights which counsel might have assisted him in asserting. State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972).

Right to counsel before breathalyzer test. — When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances,

Duty to public. — This section does not create a duty by the Department of Public Safety toward the public which, if breached, can form the basis of a civil action for negligence against the department. Lundquist v. Department of Pub. Safety, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983).

Limitation for purposes other than DWI prosecutions. — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." Penn v. State, Ct. App. Op. No. 345 (File No. 6174), 664 P.2d 169 (1983).

Former subsection (b) construed. — See Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Cited in Wilson v. State, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), P.2d (1984).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 122 to 132, 141.

60 C.J.S., Motor Vehicles, § 164.16; 61A C.J.S., Motor Vehicles, § 593(1).

Requiring submission to physical examination or test as violation of constitutional rights, 25 ALR2d 1407.

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, 87 ALR2d 370, 26 ALR4th 1112.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 ALR3d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law, 98 ALR3d 572.

Sec. 28.35.033. Chemical analysis of blood. (a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) *[Repealed, § 13 ch 129 SLA 1980.]*

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters of the person's blood, or 0.10 grams or more of alcohol per 210 liters of the person's breath, it shall be presumed that the person was under the influence of intoxicating liquor.

(b) For purposes of this chapter, percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 milliliters of blood.

(c) The provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Health and Social Services. The Department of Health and Social Services is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods and standards of training approved by the Department of Health and Social Services, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

(e) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable so to do, is likewise admissible in evidence.

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or the person's attorney. (§ 1 ch 83 SLA 1969; am § 6 ch 104 SLA 1971; am § 13 ch 129 SLA 1980; am §§ 18 — 20 ch 117 SLA 1982)

Effect of amendments. — The 1980 amendment, in subsection (a), inserted "or driving" and "or breath" in the introductory paragraph, deleted "as shown by chemical analysis of the person's breath" following "time alleged" in the introductory paragraph, inserted the language beginning "or 50 milligrams" and ending "210 liters of his breath" in paragraph (1), inserted the language beginning "or in excess of 50" and ending "210 liters of his breath" in paragraph (2), and repealed paragraph (3), which read: "If there was 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

Discretion of district court properly exercised in requiring production of ampoules used in breathalyzer test. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

This section contains no requirement that advice of the right to obtain an independent blood alcohol test be given, and it is not required by any provision of the state or federal constitution. Palmer v. State, Sup. Ct. Op. No. 2002 (File No. 3651), 604 P.2d 1106 (1979).

Cross-examination improperly restricted. — In a prosecution for operation of a motor vehicle while intoxicated, the court improperly restricted defendant's cross-examination of the person who administered the breathalyzer test when it sustained the state's objection to defendant's line of inquiry, where defendant was seeking through his attempted questioning to raise doubts in the jury's mind regarding the reliability of the test. Keel v. State, Sup. Ct. Op. No. 2063 (File No. 4408), 609 P.2d 555 (1980).

Presumption in breathalyzer result. — Under the wording of this section, the breathalyzer result is clearly viewed as the presumptive equivalent of the amount of alcohol in the person's blood "at the time alleged"; in other words, at the time that the offense was committed, not just when the breathalyzer examination was administered. Doyle v. State, Ct. App. Op. No. 43 (File No. 5115), 633 P.2d 306 (1981).

Substantial compliance with regulations. — Under subsection (d), even if the state does not strictly comply with the regulations, it can still show that it has substantially complied with the regulations in order to establish a sufficient foundation to admit the breathalyzer examination. Ahsogaek v. State, Ct. App. Op. No. 147 (File No. 6601), 652 P.2d 505 (1982).

Results of the breathalyzer test were admissible even though the records for the breathalyzer instrument showed that it had been calibrated at an interval of 61 days instead of within 60 days as required by 7 AAC § 30.050. Ahsogaek v. State, Ct. App. Op. No. 147 (File No. 6601), 652 P.2d 505 (1982).

Breathalyzer packet admissible as evidence. — The admission of the breathalyzer packet as a foundation for the introduction of breathalyzer evidence in a drunk driving case is the introduction of a public record of factual findings recorded in the regular course of official business, made independently and well in advance of any particular prosecution, and does not violate the defendant's right to confrontation under the 6th amendment. State v. Huggins, Ct. App. Op. No. 127 (File Nos. 6535, 6595), 659 P.2d 613 (1982).

Documents referred to as a breathalyzer packet were admissible under the public records exception to the hearsay rule. State v. Huggins, Ct. App. Op. No. 127 (File Nos. 6535, 6595), 659 P.2d 613 (1982).

Effect of alcohol consumption after accident is jury question. — The issue of whether and to what extent defendant's consumption of alcohol after the accident but before a breathalyzer examination affected his breathalyzer result was a question which was properly left for the jury. Doyle v. State, Ct. App. Op. No. 43 (File No. 5115), 633 P.2d 306 (1981).

Applied in Catlett v. State, Sup. Ct. Op. No. 1752 (File No. 3213), 585 P.2d 553 (1978); Erickson v. Municipality of Anchorage, Ct. App. Op. No. 238 (File No. 7058), 662 P.2d 963 (1983).

Quoted in Godwin v. State, Sup. Ct. Op. No. 1276 (File No. 2793), 554 P.2d 453 (1976); Simpson v. Municipality of Anchorage, Ct. App. Op. No. 57 (File Nos. 4945, 4946, 5288), 635 P.2d 1197 (1981); Cooley v. Municipality of Anchorage, Ct. App. Op. No. 114 (File Nos. 5859, 6112, 6151), 649 P.2d 251 (1982).

Stated in Wren v. State, Sup. Ct. Op. No. 1598 (File No. 3156), 577 P.2d 235 (1978); Lyle v. State, Sup. Ct. Op. No. 1944 (File No. 3162), 600 P.2d 1357 (1979); O'Leary v. State, Sup. Ct. Op. No. 2003 (File No. 3466), 604 P.2d 1099 (1979); Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File Nos. 6447, 6724, 6725), 649 P.2d 256 (1982).

Cited in Sullivan v. Municipality of Anchorage, Sup. Ct. Op. No. 1617 (File No. 3357), 577 P.2d 1070 (1978); Reeves v. State, Sup. Ct. Op. No. 1924 (File No. 3161), 599 P.2d 727 (1979); Nygren v. State, Sup. Ct. Op. No. 2164 (File No. 4219), 616 P.2d 20 (1980); Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981); Morris v. Farley Enterp., Inc., Sup. Ct. Op. No. 2636 (File Nos. 6013, 6042), 661 P.2d 167 (1983); Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 361, 375 to 380.

61A C.J.S., Motor Vehicles, § 633(2).

Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system, 127 ALR 1513, 159 ALR 209.

Degree or nature of intoxication for purposes of statute making it a criminal offense to operate an automobile while in that condition, 142 ALR 555.

Validity, construction, and application of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 ALR2d 1176, 16 ALR3d 748.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 ALR2d 971.

Constitutional right of one charged with intoxication to summon a physician at accused's own expense to make test for alcohol in system, 78 ALR2d 905.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 ALR3d 325.

Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods, 96 ALR3d 745.

Admissibility in criminal case of blood alcohol test where blood was taken despite defendant's objection or refusal to submit to test, 14 ALR4th 690.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 ALR4th 509.

Sec. 28.35.034. Surrender of license or permit. A person whose license or permit to operate or drive a motor vehicle has been revoked under AS 28.15.165 or AS 28.15.181 shall surrender the license or permit to the department on receipt of notice of the revocation. After the period of revocation has expired, the person may make application for a new license as provided by law. (§ 1 ch 83 SLA 1969; am § 14 ch 129 SLA 1980; am § 21 ch 77 SLA 1983)

Effect of amendments. — The 1980 amendment inserted "operate or" in the first sentence.

The 1983 amendment in the first sentence deleted "suspended or" preceding "revoked," revised the internal reference, and made a minor word change; deleted the former second sentence, regarding a three-month suspension of an operator's license; and in the last sentence substituted "period of revocation" for "three months' period."

NOTES TO DECISIONS

Quoted in Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Cited in Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979); Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 141.

60 C.J.S., Motor Vehicles, § 164.24.

Sec. 28.35.035. Administration of chemical tests without consent. (a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031(a) and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(c) If a chemical test is administered to a person under (a) or (b) of this section, that person is not subject to the penalties for refusal to submit to a chemical test provided by AS 28.35.032 and 28.35.034. (§ 21 ch 117 SLA 1982; am § 22 ch 77 SLA 1983)

Effect of amendments. — The 1983 amendment in subsection (a) substituted "an offense . . . driving a motor vehicle" for "the crime of driving" and in subsection (b) revised the internal reference in the present first sentence and added the present second sentence.

NOTES TO DECISIONS

Stated in Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983); Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Sec. 28.35.036. Forfeiture of motor vehicle. (a) After conviction of an offense under AS 28.35.030 or AS 28.35.032 involving a motor vehicle of a type for which a driver's license is required, the state may move the court to order the forfeiture of the motor vehicle involved in the commission of the offense if the convicted person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; or

(2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements.

(b) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(c) Upon receipt of a motion for forfeiture, the court shall schedule a hearing on the matter and shall notify the state and the convicted

person of the time and place set for the hearing. At the hearing, the court may order the forfeiture of the motor vehicle if the court, sitting without a jury, determines by a preponderance of the evidence that the forfeiture of the motor vehicle will serve one or more of the following purposes:

(1) deterrence of the convicted person from the commission of future offenses under AS 28.35.030;

(2) protection of the safety and welfare of the public;

(3) deterrence of other persons who are potential offenders under AS 28.35.030; or

(4) expression of public condemnation of the serious or aggravated nature of the convicted person's conduct.

(d) Upon forfeiture of a motor vehicle the court shall require the surrender of the registration and certificate of title of that motor vehicle. The registration and certificate of title shall be delivered to the department.

(e) If not released under AS 28.35.037, a motor vehicle forfeited under this section may be disposed of at the discretion of the department. (§ 23 ch 77 SLA 1983)

Sec. 28.35.037. Remission of forfeitures. (a) Upon receiving notice from the court of the time and place set for a hearing under AS 28.35.036, the state shall provide to every person who has an ascertainable ownership or security interest in the motor vehicle written notice that includes

(1) a description of the motor vehicle;

(2) the time and place of the forfeiture hearing;

(3) the legal authority under which the motor vehicle may be forfeited;

(4) notice of the right to intervene to protect the interest in the motor vehicle.

(b) At the hearing, a person who claims an ownership or security interest in the motor vehicle must establish by a preponderance of the evidence that

(1) the petitioner has an interest in the motor vehicle acquired in good faith;

(2) a person other than the petitioner was convicted of the offense that resulted in the forfeiture; and

(3) before parting with the motor vehicle, the petitioner did not know or have reasonable cause to believe that it would be used in the commission of an offense.

(c) If a person satisfies the requirements of (b) of this section, the court shall order that an amount equal to the value of the petitioner's interest in the motor vehicle be paid to the petitioner or the court shall order that the motor vehicle be released to the petitioner together with title to the motor vehicle.

...moot.[1] The terms of the March ... settlement agreement resolved ... over the Alatna Street easement ... agreed to waive any claim of int... to the Alatna Street easement, ... or alternate access to its property ... easement along Pioneer Drive. ... agreement, Gavora contracted ... rights it had to the easement. ... eal No. 5934, challenging Gavora's ... to the Alatna Street easement.

[3] Furthermore, Gavora signed ... sfaction of Judgment" on March ... The general rule is that a payment ... action operates as a discharge ... ent.[2]

[O]nce a judgment has been ... fully satisfied according to its ... becomes extinguished, a dead thing ... is no longer a judgment in the ... a judgment fixes and finally estab... the rights and obligations of the par... thereto.

Mitchell v. Lindly, 351 P.2d 1063, ... Okla.1960), quoting *Sweeney v. Block Bo... Lumber Co.*, 4 La.App. 244 (La.App. ...

[4] The judgment which fixed and ... blished Gavora's rights in the Alat... reet easement is now "extinguished," ... ad thing." To preclude this extinguis... dgment from operating in any future ... n between the parties, as res judicata, ... adopt the federal practice which is to ... verse or vacate the judgment below and ... mand the case, with directions to dismiss ... complaint. *United States v. Munsing... ear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, ... 95 L.Ed. 36, 41 (1950).[4] This practice ...

1. Even though the parties have not raised the issue of mootness themselves, this court has the power to dismiss moot appeals. *Johnson v. State*, 491 P.2d 759, 761 (Alaska 1971).

2. *See* 47 Am.Jur.2d *Judgments* § 992 (1969).

See generally Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U.Chi.L.Rev. 77 (1955). *See also Paul v. Mesa Depots, Inc.*, 62 Cal.2d 129, 41 Cal.Rptr. 468, 396 P.2d 924 (1964); *Moon v. Investment Bd.*, 102 Idaho 131, 627 P.2d 310 (1981); *People ex rel. Cowdelman v. Weaver*, 50 Ill.2d 237, 278 N.E.2d 81 (1972); *Rio Arriba County Bd. of Ed. v. Martinez*, 74 N.M. 674, 397 P.2d 471 (1964); *Merhish v. H.A. Folsom & Assoc.*, 646 P.2d 731 (Utah 1982); *Board of Trustees v. Bell*, 662 P.2d 410 (Wyo.1983).

intended to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."[5]

Accordingly, without commenting on the merits, we vacate the judgment which restored the Alatna Street easement to Gavora and remand the case to the superior court, with directions to dismiss Gavora's complaint.

In view of this ruling, the companion appeal, No. S-251, challenging the superior court's denial of Valdez's Civil Rule 60(b) Motion to Amend or Vacate the Judgment, is also moot, since the city has now obtained the relief sought by that motion. The appeal, therefore, will be dismissed.

The judgment in Appeal No. 5934 is VACATED and the case REMANDED, with directions. Appeal No. S-251 is DISMISSED.

Michael BASS, Appellant,

v.

MUNICIPALITY OF ANCHORAGE, Appellee.

No. A-273.

Court of Appeals of Alaska.

Dec. 14, 1984.

Defendant was convicted in the District Court, Third Judicial District, Anchorage, John D. Mason, J., of driving while intoxicated, and he appealed. The Court of Appeals, Coats, J., held that statute, which authorized police to forcibly take blood alcohol test where person was unconscious or otherwise in condition rendering that person incapable of refusal, did not authorize police to initiate blood alcohol test on defendant who had been in car accident and who needed immediate medical attention since defendant definitely refused to consent to blood test.

Reversed.

1. Criminal Law ⇐388

Statute, which authorizes police to forcibly take blood alcohol test where person is unconscious or otherwise in condition rendering that person incapable of refusal, should not be read broadly, since statute was intended to apply only to situations where blood alcohol test could be conducted without any violence, such as where an arrestee is unconscious. AS 28.35.035(b).

2. Criminal Law ⇐388

Statute, which authorized police to forcibly take blood alcohol test where person was unconscious or otherwise in condition rendering that person incapable of refusal, did not authorize police to initiate blood alcohol test on defendant who had been in car accident and who needed immediate medical attention since defendant definitely refused to consent to blood test and resisted the test, even if defendant was physically incapable of taking breath test and even though it was not practical to offer breath test. AS 28.35.035(b).

3. Criminal Law ⇐1169.1(7)

Erroneous admission of defendant's blood test result was not harmless error since evidence could have been critical evidence for charge of driving while intoxicated.

John T. Maltas, Asst. Public Defender, Kenai, Sen K. Tan, Asst. Public Defender, Anchorage, and Dana Fabe, Public Defender, Anchorage, for appellant.

5. *Munsingwear*, 340 U.S. at 41, 71 S.Ct. at 107, 95 L.Ed. at 42.

Shelley K. Owens and James A. Crary, Asst. Municipal Prosecutors, Allen M. Bailey, Municipal Prosecutor, and Jerry Wertzbaugher, Municipal Atty., Anchorage, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

Anchorage Police Officer Baker was dispatched to a single-car, injury accident in the area of Spenard Road at 3:00 a.m. on September 3, 1983. Baker saw Michael Bass being escorted back to the scene of the accident by an airport security officer. Bass's vehicle was overturned. Baker was told by a security officer that Bass had been in an accident, had fled the scene on foot, and had been pursued by the officer.

Baker asked Bass what happened and was told that Bass's vehicle went out of control and rolled when Bass swerved to avoid hitting another car. Baker observed the strong odor of alcohol, slurred speech and unsteadiness as Bass stood in the area. According to Baker, Bass was also extremely belligerent and noncooperative with paramedic rescue personnel at the scene of the accident.

Baker observed that Bass needed immediate medical attention. He noted that Bass had a hand injury which would require stitching and had hit his chest hard against the steering wheel. Bass was taken to Providence Hospital for treatment.

Baker arrived at the hospital emergency room at about 3:45 a.m. Upon arrival, he spoke to hospital personnel and learned that Bass had a lacerated hand which would require stitching and a severely bruised chest, with possibly some broken ribs. Baker was told that the hospital personnel did not anticipate knowing whether Bass would actually be admitted for at least two hours.

Baker then apparently called the municipal prosecutor, Allen Bailey, and explained that (1) because of the severity of Bass's injuries, Baker did not know when Bass's treatment would be completed; (2) even if Bass was not admitted, it would be several hours before a breathalyzer test could be done, and (3) based on what Baker was told about Bass's chest injuries, Baker was unsure whether Bass could blow into a breathalyzer sufficiently to give an accurate reading. Bailey advised Baker to obtain a blood sample.

When Baker informed Bass that blood would be drawn, Bass objected. He said that he was not going to have his blood drawn and started to walk out of the hospital. Baker then placed Bass under arrest, handcuffed him, and placed him back on the gurney. Officer Honnen assisted Baker in restraining Bass, putting Bass in a wristlock to assist Baker in handcuffing Bass. Honnen and Baker then restrained Bass, holding him onto the gurney while the laboratory technician drew blood from him. Baker admitted that there was some bleeding from Bass's lacerations at this time and that Baker was aware that Bass might have had cracked ribs, but that they restrained him as gently as they could.

Bass, on the other hand, indicated that the officers forced him down on the floor, dragged him over to the gurney, and inflicted so much pain that he could not move. He said he protested throughout the procedure. After the blood was drawn, Bass was issued a citation and the officers left him at the hospital. Bass's blood alcohol level was 0.243.

Both parties agree that Bass was conscious and alert at the time of the extraction of his blood. He actually walked into the hospital himself. He understood what was going on around him and verbalized his refusal to consent to the extraction.

On January 1, 1984, Bass moved to suppress the results of the blood-alcohol test. He based his motion upon the ground that he was not unconscious or otherwise in a condition rendering him incapable of refusing which would permit the nonconsensual extraction of his blood under AS 28.35.035(b).

District Court Judge John D. ... nied Bass's motion, making extu ... tual findings. Judge Mason inter ... 28.35.035(b), which allows non ... blood testing where a person is ... tion rendering him incapable of ... include "a person being hospita ... result of incidents that have occu ... cannot fairly be offered a bn ... test." Judge Mason refused to ... the results of the blood test. At ... trial in which the results of his ... admitted into evidence, Bass was ... of driving while intoxicated in vi ... AMC 9.28.020. Bass now appe...

Municipality of Anchorage ordinan... dress this situation. They are virtua... to the state statutes. Implied consen... 28.35.031(a) is equivalent to AMC ... which provides:

"A person who operates, drives or ... physical control of a motor vehicl... municipality or wh... operates an ... defined by AMC 9.2...020E.1 or wi... a watercraft as defined by AMC ... shall be considered to have given c... chemical test or tests of his or her ... the purpose of determining the alc... tent of his or her blood or breath ... arrested for an offense arising ... alleged to have been committed ... person was operating, driving or ... physical control of a motor vehicl... ing an aircraft or a watercraft whil... ed. The test or tests shall be admi... the direction of a law enforcem... who has reasonable ground to beli... person was operating, driving, or ... physical control of a motor vehicl... ing an aircraft or a watercraft in t... pality while intoxicated.

AS 28.35.032(a), "Refusal to submit t... test," is equivalent to AMC 9.28.02... provides:

If a person under arrest refuses th... a law enforcement officer to su... chemical test under AMC 9.28.021... ing advised by the officer that the r... if that person was arrested while o... driving a motor vehicle for which ... license is required, result in the ... revocation of the license or nonres... lege to drive, that the refusal ma... against the person in a civil or crim... or proceeding arising out of an act... have been committed by the pe... operating or driving a motor vehic... ating an aircraft or a watercraft w... cated, and that the refusal is a mis... a chemical test shall not be given, ... provided by AMC 9.28.025.

District Court Judge John D. Mason denied Bass's motion, making extensive factual findings. Judge Mason interpreted AS 28.35.035(b), which allows nonconsensual blood testing where a person is in a condition rendering him incapable of refusal, to include "a person being hospitalized as a result of incidents that have occurred" who "cannot fairly be offered a breathalyzer test." Judge Mason refused to suppress the results of the blood test. After a jury trial in which the results of his test were admitted into evidence, Bass was convicted of driving while intoxicated in violation of AMC 9.28.020. Bass now appeals to this court and argues that Judge Mason erred in not suppressing the results of the blood test. We reverse.

This case requires us to analyze the state statutes which authorize the police to initiate blood alcohol tests following an arrest for driving while intoxicated.[1] Under the state statutes, a person who drives a motor vehicle in the state implicitly consents to submit to a breath test to determine the amount of alcohol in his blood if he is lawfully arrested for driving while intoxicated. AS 28.35.031(a).[2] If one arrested for driving while intoxicated refuses to

1. Municipality of Anchorage ordinances also address this situation. They are virtually identical to the state statutes. Implied consent statute AS 28.35.031(a) is equivalent to AMC 9.28.021(A), which provides:

> A person who operates, drives or is in actual physical control of a motor vehicle within the municipality or who operates an aircraft as defined by AMC 9.28.020E.1 or who operates a watercraft as defined by AMC 9.28.020E.2 shall be considered to have given consent to a chemical test or tests of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating, driving or in actual physical control of a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable ground to believe that the person was operating, driving, or in actual physical control of a motor vehicle or operating an aircraft or a watercraft in the municipality while intoxicated.

AS 28.35.032(a), "Refusal to submit to chemical test," is equivalent to AMC 9.28.022(A), which provides:

> If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AMC 9.28.021A, after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AMC 9.28.025.

AS 28.35.035(a) and (b) have municipal code counterparts in AMC 9.28.025(A) and (B), which provide:

> A. If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.
>
> B. A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AMC 9.28.021A and AS 28.35.031(a), and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

The motion and the arguments of both parties below, as well as the court's findings and ruling, referred to the state statutes. We thus refer to those statutes in this opinion. No party has suggested that the municipal ordinances would differ in application from the state statutes.

2. AS 28.35.031(a) provides:

> *Implied Consent.* (a) A person who operates or drives a motor vehicle in this state ... shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle ... while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle ... in this state while intoxicated.

take a blood test, after being informed of the consequences of such refusal, "a chemical test shall not be given, except as provided by AS 28.35.035." AS 28.35.032[3]. AS 28.35.035 provides in part:

Administration of chemical tests without consent.

(a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031(a) and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

In *Pena v. State*, 684 P.2d 864 (Alaska 1984), the supreme court held that "[t]he Implied Consent Statute provides the exclusive authority for the administration of police-initiated chemical sobriety tests to a driver arrested for acts allegedly committed while operating a motor vehicle."[4] *Id.* at 867 (footnote omitted). It therefore seems clear that the municipality can justify forcibly taking the blood sample from Bass only if the taking falls under AS 28.35.035(b).

It seems clear to us that AS 28.35.035(b) does not apply to this case. In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged with driving while intoxicated. The legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. The legislature has provided for giving breath tests without the cooperation of the defendant only in two situations. In AS 28.35.035(a), the statute provides that if a person is under arrest for driving while intoxicated and the arrest results from an accident which caused death or physical injury to another person, a chemical test of the defendant's blood alcohol may be administered without consent. The policy behind this provision seems clear. If the driving while intoxicated offense is of the most serious type, involving death or physical injury, the legislature will allow taking a blood-alcohol test without consent.

The other situation in which the legislature has authorized taking a blood-alcohol test under AS 28.35.035 is where "a person ... is unconscious or otherwise in a condition rendering that person incapable of refusal." The trial judge read this statute broadly. He found that Bass needed to be at the hospital for treatment and that the police could not give a breath test at the hospital. He also found that there was a possibility that, even if offered a breath test, the defendant would not physically be able to take it because of his injuries. He concluded that Bass was "in a ... rendering [him] incapable of refu

[1,2] We believe that, in ligh fact that the legislature has gone lengths to not authorize the polic bly take blood tests, AS 28.35.0 not be read broadly. Certainly have been easy for the legislatu that the police could forcibly take alcohol test if there were exigen stances which prevented the pol administering a breath test. Th language which the legislature cl cludes this interpretation. There fact that it was not practical to ol a breathalyzer test does not bring within AS 28.35.035(b). What doc fall within AS 28.35.035(b) is a nar of cases where the defendant i scious or otherwise incapable of ming his intent to refuse. In these police would be able to take a b without the person's contemporan sent, but without having to use an means to obtain the blood-alcohol t bote that the legislature did not s 28.35.035(b) that the police coul blood alcohol test *without consent* in AS 28.35.035(a). Rather, the le said that "a person who is uncon *otherwise in a condition incapa fusal* is considered *not to have wi the consent provided under A 031(a)*." (Emphasis supplied.) Th ture's choice of language seems to consistent with the theory that A 035(b) was intended to apply only tions where a blood-alcohol test conducted without any violence where an arrestee is unconscious. son who is unconscious is consider have withdrawn s implied conse blood-alcohol test can thus be adm under AS 28.35.035(b). This langu not seem to apply to a person i position, who definitely refused to to the blood test and resisted Under these circumstances, we that AS 28.35.035(b) did not auth police to initiate a blood-alcohol tes Bass was physically incapable of breath test. We hold that Bass w

3. AS 28.35.032(a) provides:
Refusal to submit to chemical test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

4. The only exception to this principle would be consent to the blood-alcohol test. Consent is not an issue in this case.

concluded that Bass was "in a condition rendering [him] incapable of refusal."

[1, 2] We believe that, in light of the fact that the legislature has gone to great lengths to not authorize the police to forcibly take blood tests, AS 28.35.035 should not be read broadly. Certainly it would have been easy for the legislature to say that the police could forcibly take a blood alcohol test if there were exigent circumstances which prevented the police from administering a breath test. The narrow language which the legislature chose precludes this interpretation. Therefore, the fact that it was not practical to offer Bass a breathalyzer test does not bring this case within AS 28.35.035(b). What does seem to fall within AS 28.35.035(b) is a narrow class of cases where the defendant is unconscious or otherwise incapable of manifesting his intent to refuse. In these cases the police would be able to take a blood test without the person's contemporaneous consent, but without having to use any violent means to obtain the blood-alcohol test. We note that the legislature did not say in AS 28.35.035(b) that the police could take a blood alcohol test *without consent* as it did in AS 28.35.035(a). Rather, the legislature said that "a person who is unconscious or *otherwise in a condition incapable of refusal* is considered *not to have withdrawn the consent provided under AS 28.35.031(a).*" (Emphasis supplied.) The legislature's choice of language seems to us to be consistent with the theory that AS 28.35.035(b) was intended to apply only to situations where a blood-alcohol test could be conducted without any violence such as where an arrestee is unconscious. A person who is unconscious is considered not to have withdrawn his implied consent and a blood-alcohol test can thus be administered under AS 28.35.035(b). This language does not seem to apply to a person in Bass's position, who definitely refused to consent to the blood test and resisted the test. Under these circumstances, we conclude that AS 28.35.035(b) did not authorize the police to initiate a blood-alcohol test, even if Bass was physically incapable of taking a breath test. We hold that Bass was not "a person who [was] unconscious or otherwise in a condition incapable of refusal" for purposes of AS 28.35.035(b). Therefore, the police should not have forced Bass to have the blood sample drawn and Judge Mason should have suppressed the evidence.

[3] The municipality argues that the evidence against Bass at trial was strong, and that admission of the blood test result was, if error, harmless. We disagree. The blood alcohol test result of 0.243 was admitted at trial and could certainly have been critical evidence for this charge of driving while intoxicated.

The conviction is REVERSED.

Ronald WILLIAMSON, Appellant,

v.

STATE of Alaska, Appellee.

No. 6950.

Court of Appeals of Alaska.

Dec. 21, 1984.

Defendant was convicted in the Superior Court, Thi d Judicial District, Anchorage, J. Justin Ripley, J., of manslaughter, as lesser included offense of second-degree murder, and two counts of tampering with physical evidence, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) trial court committed reversible error in admitting, under coconspirator's exception to hearsay rule, testimony by state witness that defendant's alleged accomplice had said that defendant left bar to commit robbery (2) testimony of defense witness that he had a homosexual encounter with victim one year previously was admissible as probative of defendant's self-defense testimo-