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76

Introduced: 1/22/85
Referred: State Affairs, Judiciary
and Finance

1 IN THE SENATE

BY ABOOD

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SENATE BILL NO. 76

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6

For an Act entitled: "An Act relating to rights of prisoners; and amending

7

Rule 5(b) of the Alaska Rules of Criminal Procedure."

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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* Section 1. AS 12.25.150(b) is amended to read:

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(b) As soon as feasible [IMMEDIATELY] after an arrest, after law

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enforcement officers have conducted any tests necessary to preserve

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dissipating physical evidence of intoxication, a prisoner shall have

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the right to telephone or otherwise communicate with the prisoner's

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attorney and any relative or friend. Any [, AND ANY] attorney at law

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entitled to practice in the courts of Alaska shall, at the request of

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the prisoner or any relative or friend [FRIENDS] of the prisoner, have

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the right to [IMMEDIATELY] visit the prisoner immediately after the

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testing [PERSON ARRESTED].

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* Sec. 2. Rule 5(b), Alaska Rules of Criminal Procedure, is amended to

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read:

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(b) Rights of Prisoner to Communicate with Attorney or Other

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Person. As soon as feasible [IMMEDIATELY] after [HIS] arrest, after

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law enforcement officers have conducted any tests necessary to pre-

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serve dissipating physical evidence of intoxication, a [THE] prisoner

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shall have the right [FORTHWITH] to telephone or otherwise [TO] commu-

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nicate with the prisoner's [BOTH HIS] attorney and any relative or

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friend. Any attorney at law entitled to practice in the courts of

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Alaska shall, at the request of [EITHER] the prisoner or any relative

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or friend of the prisoner, [SHALL] have the right [FORTHWITH] to visit

1 the prisoner in private immediately after the testing.

2 * Sec. 3. Section 2 amends Rule 5(b) of the Alaska Rules of Criminal
3 Procedure by delaying the right to contact an attorney until after dis-
4 sipating physical evidence of intoxication can be obtained.

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 76
 Title: Rights of prisoners.....

Sponsor: Sen. Abood
 Requestor: Sen. State Affairs
 Date of Request: 2-6-85

FISCAL DETAIL

Agency Affected: Public Safety
 Program Category Affected: Administration of Justice
 BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Paul Conger Phone: 465-4338
 Division: Administrative Services Date: 2-6-85

Approved by Commissioner: Michael J. Cleary Date: 2-6-85
 Agency: Public Safety

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

SENATE BILL 76

"An Act relating to rights of prisoners; and amending Rule 5(b) of the Alaska Rules of Criminal Procedure."

SB 76 modifies AS 12.25.150(b) and Alaska Criminal Rule 5(b) thus eliminating the difficulties caused police officers who are attempting to give breath alcohol test to DWI suspects. Since it would force a change in a rule promulgated by the Alaska Supreme Court, it must be passed by a two-thirds majority of each house of the Alaska Legislature.

The amendment would allow officers to wait until after they have given breath tests to drunk drivers to permit the suspects to call their attorneys. There is no constitutional impediment to this change, as the constitution already permits the gathering of such evidence without a search warrant, or giving the defendant access to an attorney, as a search incident to an arrest. (Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908(1966); Burnett v. Municipality of Anchorage, 678 P.2d 1364 (Alaska App. 1984), cert. den. 36 Cr.L. 2001)

Even though there is no right to refuse a breath test under Alaska law (Palmer v. State, 604 P.2d 1106 (Alaska 1979, and Jensen v. State, 667 P.2d 188 (Alaska App. 1983)), the Supreme Court of Alaska in Copelin v. State, 659 P.2d 1206 (Alaska 1983), stated that AS 12.25.150(b) and Criminal Rule 5(b) required that a DWI suspect be given access to a telephone, if he request it, before taking a breath test or videotaped sobriety test. This causes delay of 15 to 30 minutes, or longer, in giving the breath test--a test for a substance that is quickly disappearing from the defendant's body.

This change would also be in response to the recommendation of the Presidential Commission on Drunk Driving "That an individual's right to consult his attorney may not be permitted to unreasonably delay administration of the test." A common defense tactic in drunk driving trials is to suggest that the defendant may have been intoxicated at the time of the breath test, but that his breath alcohol concentration at the time of his driving was not over the legal limit. It is therefore imperative that there be as little delay as possible prior to the breath test.

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - SB 76

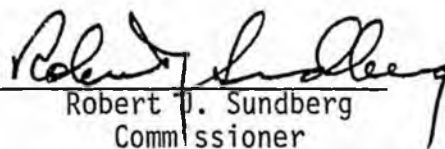
Support

February 1, 1985

SB 76 - "An Act relating to rights of prisoners; and amending Rule 5(b) of the Alaska Rules of Criminal Procedure."

The purpose of this legislation is to clarify the rights of Driving While Intoxicated suspects during the period they are to be tested.

Occasionally suspects have been able to delay the implementation of Driving While Intoxicated testing by demanding to speak to their attorney prior to the admission of the test. This statute establishes the priority of the testing without interfering with the rights of the suspects. This will allow for smoother processing of Driving While Intoxicated suspects by law enforcement officers and thus improve their efficiency.


Robert J. Sundberg
Commissioner

here, and we decline to reverse on the basis of the evidence in the record.

KANSAS RULES THAT DEFENDANT MUST HAVE OPPORTUNITY TO CONTACT COUNSEL BEFORE TAKING BLOOD TEST?

In *State v. Bristor*, 9 Kan. App. 2d 404, 682 P. 2d 122 (1984), the Kansas Court of Appeals upheld the trial court's sustaining a motion to suppress the results of a blood alcohol test where the defendant was not allowed any opportunity whatsoever to contact counsel before making a decision whether to submit to a blood alcohol test.

In determining whether the right to counsel attaches, the court first determined whether the consent to a blood alcohol test is a "critical state" in the prosecution of driving under the influence case. The court concluded:

K.S.A. 8-1001(c) grants the inviolable right to refuse to submit to a BAT [Blood Alcohol Test]. The exercise of this right, however, carries with it two possible sanctions: one, the fact of refusal may be used as evidence against the accused on the DUI charge; and two, the fact of refusal will result in an administrative proceeding against the accused, which proceeding may result in a suspension of driving privileges. If the accused relinquishes his right to refuse, by consenting to a BAT, then K.S.A. 8-1004 operates and the accused has a right to a reasonable opportunity to obtain an independent and objective BAT. Also, K.S.A. 8-1002 gives the accused who submits a right to a copy of the results of the BAT requested by the police.

The Kansas appellate courts have consistently held that there is no duty upon the arresting officer to explain to the accused his rights under the foregoing statutes...

The question obviously is how can an accused make an intelligent decision regarding submission to a BAT if he is ignorant of his various rights, and how can he in his ignorance protect those rights, if the officer is under no duty to enlighten him. The answer, clearly, is that only through the advice and counsel of an attorney can the accused

be expected to make his decisions in an intelligent and knowledgeable manner. We find it particularly noteworthy that at least one court which refused to impose upon the officer a duty to inform the accused of his rights based its holding, at least in part, on the fact that the accused therein had been allowed to consult with counsel prior to submitting to a BAT. See *City of Shawnee v. Gruss*, 2 Kan.App.2d at 134, 576 P.2d 239.

However, the court conceded there were limits to the defendant's right to counsel:

The right to counsel, we have announced today, must be understood as something of a limited right. The accused must be given a reasonable opportunity to contact and to consult with an attorney before being required to elect whether to consent to the administration of a BAT. In his exercise of his right to a reasonable opportunity to consult with counsel, the accused must also act with reasonableness. He cannot be allowed to abuse the right in a manner which would unduly delay or unreasonably interfere with the administration of the BAT. Furthermore, vindication of this right does not necessarily require that the consulting attorney be face-to-face with the accused. Sometimes the accused will have to sacrifice a face-to-face consultation, and settle for telephonic communication, when the delay inherent in arranging a face-to-face meeting would unduly and unreasonably interfere with the administration of the BAT. However, in those cases where the attorney's presence can be secured without unreasonable delay, face-to-face consultations should not be prevented.

We deem it important to note that Kansas has always held that the lapse of time between the operation of a motor vehicle and the administration of a BAT does not reflect on the admissibility of the test results, but only goes to the weight of such evidence. See *State v. Parson*, 226 Kan. 491, 495, 601 P.2d 680 (1979). Therefore, any delays in the administration of a BAT which are not unreasonable should not be justification for denying the accused his right to consult with an attorney.

In summary, we do not herein hold that the defendant's attorney must be

present when the BAT is administered. Neither do we hold that a defendant in every instance is entitled to consult with an attorney before he must make a choice as to whether to take the BAT or not. What we do hold is that the defendant must be afforded a reasonable opportunity to consult with an attorney as to whether or not to submit to the BAT. In the instant case, the defendant was not afforded any opportunity whatsoever to attempt to contact an attorney before making such choice. We are well aware that some defendants might, by their alleged desire to confer with counsel, attempt to postpone the BAT until sufficient time has elapsed for their blood alcohol level to diminish. There is no excuse, at all, however, in not allowing the defendant at least to attempt telephonic consultation with an attorney, or where such can be done with reasonable expedition, to have his attorney come to the place of defendant's confinement for personal consultation. This is a matter that is not, in our opinion, susceptible to hard and fast rules or procedures, but is a matter within the sound discretion of the trial court when that court is faced with a decision as to whether to suppress the results of such a test. It is clear that a decision on suppression must be made on a case by case method by the trial court. Where, as in the instant case, the trial court ordered suppression of the BAT results, where no opportunity of any kind, and however brief, was afforded the defendant to confer with an attorney, it is clear to us, and we hold, that the trial court was correct.

DO ALCOHOLICS BURN OFF FASTER?

It was concluded that ethanol elimination is a zero order process. For subjects classified as non-drinkers (consume less than 6 ounces of ethanol/month), the mean ethanol elimination rate as determined in the study was 12 ± 4 mg%/hr. For subjects classified as social drinkers (consume more than 6 ounces but less than 30 ounces of ethanol/month), the mean ethanol elimination rate was 15

± 4 mg%/hr, and for alcoholics, the mean ethanol elimination rate was 30 ± 9 mg%/hr. These results indicate that the rate of ethanol elimination increases with drinking experience.

This conclusion, published in *Forensic Science International*, 25, 159 (1984), is offered in an attempt to further define the extent of ability to predict the number of drinks that are required to reach a specified level of alcohol concentration, or to predict an alcohol concentration from a specified number of drinks over a specified period of time. This article, **The Rate and Kinetic Order of Ethanol Elimination**, by Charles L. Winek and Kathy L. Murphy, indicates that an individual's past drinking history is far more important in the elimination of ethanol from the body than is the concentration or amount of ethanol consumed.

Twenty individuals were selected for this study in which they were instructed to fast for a period of at least 3 hours prior to initiation of testing. Subjects were given measured amounts of ethyl alcohol on two separate occasions. On both occasions the entire dose of ethanol was to be consumed within a 40 minute period. Simultaneous blood and breath alcohol determinations were carried out employing a Perkin Elmer Sigma 4B Gas Chromatograph and a Breathalyzer™ Model 1000.

Based on the data presented in this study, ethanol elimination is more accurately described as a zero order process over the concentration range of interest. This conclusion is in agreement with the generally accepted position. This study also demonstrated that a variance in ethanol elimination rates exists among individuals.

More accurate predictions of blood ethanol concentrations could be made if two breath samples were collected over a specific spaced time period. Analysis of two spaced samples would allow a calculation of elimination rate and a determination of an individual's position on the blood ethanol curve.

Another factor which often enters into the prediction of a BAC is the time required after drinking for an individual to reach his peak ethanol concentration. In contrast to the absorption rate values reported in this study, [other studies] in-