HB

367

HOUSE COMMITTEE REPORT

5-5-92

(7)

Date Referred: 1/13/92 FURTHER REFERRALS: Judiciary ~~Finance~~

Date of Committee Action: 5/5/92

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: HB 367

HOUSE BILL NO. 367 USE OR INGESTION OF CONTROLLED SUBST.

"An Act relating to the use or ingestion of controlled substances."

RECOMMENDATIONS: [ ] the same title
be replaced with C.S HB 367 (HES) [✓] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[✓] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[✓] zero fiscal note Corrections [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Cheri Davis		Betty Davis		X	
J. E. Lovato	✓				
Mary Miller	✓	Ralph Ivey CARNEY		✓	
		Lincoln		✓	

Ralph Ivey CARNEY
CHAIRMAN'S SIGNATURE

XU

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. H.B. 367

Revision Date: 02/21/92 Department Affected: Corrections

Title: "An Act relating to the use or ingestion of controlled substances." BRU: Statewide Operations

Component: Various

Sponsor: Rep. Zawacki

Requestor: House HESS COMPONENT SERIAL NO.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	262.8	262.8	262.8	262.8	262.8	262.8
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	262.8	262.8	262.8	262.8	262.8	262.8
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	262.8	262.8	262.8	262.8	262.8	262.8
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	262.8	262.8	262.8	262.8	262.8	262.8

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)

This revised fiscal analysis corrects an erroneous assumption made in the fiscal note dated 2/5/92, that the bill would restore past practice.

Prepared By: Diane Schenker, Legislative Liaison Phone: 465-3376

Division: Commissioner's Office Date: 02/20/92

Approved by Commissioner: Lloyd Hames, Commissioner

Agency: Department of Corrections Date: 02/20/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DSR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

FN 262.8 Corrections

CONTINUATION OF FISCAL ANALYSIS (REVISED 2/21/92)

This bill would reverse the recent Thronsen decision which held that a person cannot be prosecuted for "possession by consumption." In Thronsen, the police had a search warrant for a house which authorized them to look for drugs/paraphernalia. The defendant was present and appeared to have ingested drugs, so his blood and urine were tested and confirmed the presence of cocaine. He was charged with possession of paraphernalia as well as possession of cocaine in his blood system. The jury found him not guilty on the syringe charge and the possession by consumption charge was overturned by the courts. The circumstances of this case suggest that charges of "possession by consumption" will stengthen the State's ability to win convictions in drug cases. If this increases the number of felony drug offenders by ten percent, approximately 16 offenders per year will be incarcerated for an average of 12 additional months. If the Department contracted for additional community residential center beds to accomodate this increase, the cost would be 16 offenders X 365 days X $45.00 = $262,800.00.

This estimate is based on costs for contract community beds since it cannot be accurately predicted when the increases in incarceration days will actually result in adding new prison beds to the current correctional system, based on this bill alone. Therefor, using the daily cost of a prison bed for each additional bed-day would not accurately reflect budget increases, since the cost of each existing bed is already reflected in the Department's budget. However, any increase in the number or lengths of prison or probation sentences will accelerate the need for additional prison construction, additional correctional staff and additional probation officers. The probation population is currently growing at a rate of about 4% per year. The prison population is currently remaining fairly stable.

7-LS1617\D
Chenoweth
5/1/92

CS FOR HOUSE BILL NO. 367 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ZAWACKI, Taylor, Leman, Baker, Sharp, G.Phillips, C.Davis

A BILL

FOR AN ACT ENTITLED

"An Act relating to the possession of controlled substances."

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

* Section 1. PURPOSE. In its recent decision in State v. Thronsen, 809 P.2d 941, the Alaska Court of Appeals ruled that a defendant could not be convicted of misconduct involving a controlled substance in the fourth degree based on the presence in the defendant's blood of quantities of cocaine that the defendant had ingested. The appellate court affirmed the trial court's dismissal of the indictment alleging that the defendant had possessed cocaine in the defendant's body. The purpose of this Act is to set aside the ruling of that decision and its effect so that a person may be convicted on the basis of use or ingestion of a controlled substance on the same basis as the person's possession of the substance.

* Sec. 2. AS 11.71.900 is amended by adding a new paragraph to read:

(30) "possess" means exercising dominion or control over or having physical possession of a controlled substance, and includes injecting, inhaling, swallowing, or otherwise introducing the substance into the person's body or bloodstream.

Alaska State Legislature

3111 "C" STREET, SUITE 425
ANCHORAGE, ALASKA 99503
(907) 561-2037

WHILE IN JUNEAU
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-2719/2693

MEMBER
RESOURCES COMMITTEE
LABOR AND COMMERCE COMMITTEE
OIL AND GAS COMMITTEE
FINANCE SUB COMMITTEE
NATURAL RESOURCES

Representative Jim Zawacki

M E M O R A N D U M

TO: ALL LEGISLATORS

FROM: Representative Jim Zawacki

DATE: January 27, 1992

RE: HB367

==========

Attached is a copy of HB367 for your consideration and review. I introduced this legislation to eliminate a loophole that currently exists in AS 11.71.040 (a)(3)(A).

Under current law, a person who has recently or immediately ingested a controlled substance cannot be charged with possession of a controlled substance.

Also attached is page 17 of the Legislative Affairs Agency's report to the Legislature "Examining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes."

The report recommends "legislative review" and describes the current statute as "illogical."

I firmly believe that this loophole should be corrected in order to aid our law enforcement agencies and personnel and to correct an unfortunate error contained in AS 11.71.040.

Please contact Portia in my office (2724) if you would like to Co-Sponsor HB367 or if you have any questions or would like additional information.

Thank you very much and I look forward to hearing from you.

Sponsor Statement

POSITION PAPER - Department of Public Safety

BILL NO: HB 367

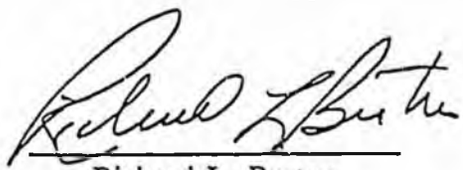
DATE: February 3, 1992

TITLE: An Act relating to the use or ingestion of controlled substances.

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

HB 367 would amend the existing controlled substance laws to make it clear that a person who has ingested a controlled substance is guilty of misconduct involving a controlled substance. This would have the effect of setting aside the Alaska Court of Appeals decision in State v. Thronsen, 809 p. 2d 941 (Ak. App. 1991). In that case the court ruled that a person who injected cocaine into himself at a "crack house" in Fairbanks could not be found guilty of "possession" of that cocaine.

The Legislative Affairs Agency, after reviewing the Thronsen case, recommended that the Legislature consider addressing this anomaly. At page 17 of its report the agency states: "It seems illogical to punish a person possessing a drug for personal use before it is used, but not to punish that person when he or she has just used it." The Department of Public Safety agrees with that statement, and supports HB 367.



Richard L. Burton
Commissioner

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

WALTER J. HICKEL, GOVERNOR

REPLY TO:

P.O. BOX T
JUNEAU, ALASKA 99811-2000
PHONE (907) 465-3376

February 4, 1992

The Honorable Jim Zawacki
Alaska State House of Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Representative Zawacki,

I have reviewed House Bill 367, which you introduced to eliminate a loophole in our statutes dealing with possession of controlled substances. I am responding to your letter dated January 24, 1992 requesting the Department's position on this bill.

The Department of Corrections fully supports this proposed legislation. The availability of urinalysis and other chemical testing to detect illegal drug use has been of immeasurable help to our Department in our efforts to detect and curtail drug use in institutions, as well as by probationers/parolees. It seems unreasonable to prevent law enforcement agencies from using such technology to detect illegal drug use. I concur that recent use or ingestion of a controlled substance should be treated the same as possession without intent to deliver.

Thank you for the opportunity to express the Department's position in support of your bill.

Sincerely,

Lloyd Hames
Commissioner

20-01LH

STATE OF ALASKA
DEPARTMENT OF LAW

MEMORANDUM

TO: Charlie Cole
Attorney General

DATE: February 24, 1992

THRU:

PHONE: 452-1565

FROM: Harry L. Davis
District Attorney
Fairbanks DAO

RE: House Bill #67

House Bill 367 misses the mark in correcting the Thronsen decision. Under present law it is unlawful to knowingly use or ingest a controlled substance since one must possess it in order to use or ingest it. The problem with Thronsen is that it legalizes the possession of controlled substances in one's body. The practical problem of this is that we cannot prove when and where a person knowingly ingested the controlled substance. An example of this would be where a defendant ingests PCP in Seattle, gets on a plane and is arrested in Anchorage a few hours later. Even though the defendant would still have the controlled substance in his body and still be under its influence there would be no crime in Alaska since the ingestion and use occurred outside the jurisdiction of Alaska.

The way to correct this loophole is to amend A.S. 11.71.900 by adding a definition of possess to read as follows:

"possess means having physical possession or the exercise of dominion or control over a drug or having a drug in one's body, urine or blood."

The Supreme Court might declare the statute unconstitutional under Ravin but that is a risk we run every time we pass drug legislation.

HLD/rlr

XO

ANCHORAGE DISTRICT ATTORNEY'S OFFICE *Memorandum*
Alaska Department of Law/Criminal Division

TO: The Hon. Charles E. Cole
Attorney General

FROM: Edward E. McNally
Anchorage District Attorney

DATE: February 28, 1992

RE: Comments for Representative Zawacki on House Bill No. 367

You have asked that the Anchorage District Attorney's Office provide comments concerning House Bill No. 367, a commendable piece of legislation recently submitted by Representative Zawacki.

As is stated on the face of the Bill, the proposals in HB 367 are based on a very sound premise: the need to close a loophole in Alaska's drug possession laws that has resulted from the Alaska Court of Appeals decision in State v. Thronsen, 809 P.2d 941 (Alaska App. 1991). Representative Zawacki is entirely correct that this is a matter that needs to be addressed during this legislative session.

However, as you will recall, when you assembled a team of the State's leading prosecutors last fall in order to prepare the Governor's Crime Bill, you asked that the Department of Law draft language to address this very same loophole. As with HB 367, Section 6 of the Governor's Crime Bill (HB 554) would also have the effect of reversing the Thronsen decision, which held, in essence, that a person cannot be prosecuted for "possession by consumption." As the Legislative Affairs Committee noted in its recent report to the Legislature in Juneau, "It seems illogical to punish a person possessing a drug for personal use before it is used, but not to punish that person when he or she has just used it." Legislative Affairs Agency Report to the 17th State Legislature (October 1991) at p. 17.

In essence, then, Section 6 of the Governor's Crime Bill defines "possession" for drug offenses so that persons who have ingested drugs are subject to prosecution to the same extent as those who are found with drugs in the pockets of their clothing or at their house.

D.O.L. Correspondence

I have reviewed the language in Representative Zawacki's proposed change, and discussed this question with Dean Guaneli. We share the view that as a practical matter, the language drafted at your direction for the Governor's Crime Bill would be somewhat more effective and useful to Alaska's prosecutors in closing the loophole created by the Thronsen decision.

ACTION: It would be our recommendation that you authorize Assistant Attorney General Margo Knuth of the Criminal Division Central Office to work in cooperation with Representative Zawacki's staff in an effort to reach a mutually supported position. Although it is our view that the language in HB 554 would be more effective than that in HB 367, it is clear that we are trying to achieve the same objective.

Thank you for this opportunity to comment, and for your continuing support for improved legislation to fight crime.

cc: Harry Davis
Fairbanks District Attorney

Dean Guaneli
Assistant Attorney General

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

March 9, 1992

Rep. Jim Zawacki
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 367

Dear Representative Zawacki:

This letter is to confirm the Department of Law's support for HB 367, "An Act relating to the use or ingestion of controlled substances." We are pleased with the concept of this legislation, which will have the effect of overruling the recent court of appeals opinion in State v. Thornsen, 809 P.2d 941 (Alaska App. 1991) (holding that a defendant who has ingested cocaine is not "in possession of" the drug under current law).

As we have noted in conversation with your staff, the same issue is addressed in one of the provisions of the Governor's crime bill, but in a much more direct, and in our opinion effective, manner. HB 367 amends three of the state's drug crimes to add "using or ingesting" any amount of a particular drug as one of the ways that the offense can be committed. The Governor's bill, HB 554/SB 444, instead simply amends the definition of "possession" for purposes of the drug laws to include "injecting, inhaling, swallowing, or otherwise introducing the substance into the person's body or bloodstream."

We prefer the language used in the Governor's bill and would be happy to assist your office in preparing a committee substitute for HB 367, using this language.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

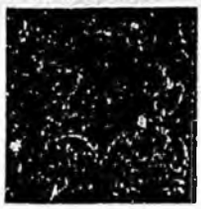
By: Dean J. Guaneli
Dean J. Guaneli
Assistant Attorney General

DJG:jf
cc: Lori Nottingham
Office of the Governor

03-C31LH

Position Papers

J



ALASKA STATE MEDICAL ASSOCIATION

4107 Laurel Street • Anchorage, Alaska 99508-5334 • (907) 562-2662

February 6, 1992

Representative Jim Zawacki
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, AK 99835

Dear Representative Zawacki:

At a recent meeting of the Alaska State Medical Association Legislative Affairs Committee, we reviewed your House Bill 367, an act relating to use of controlled substances. After review of the bill, we have given it our strong endorsement. This bill will close a rather large loophole in the present law and should make prosecution of drug abuse easier.

If I can be of any assistance to you in passing this bill, do not hesitate to call me.

Sincerely yours,

Donald R. Lehmann, M.D., A.B.F.P.
Chairman, Legislative Affairs Committee

DRL:bj

cc: Rick Urion

Misc. Support

Municipality of Anchorage

Tom Fink, Mayor

Department of Public Works

Girdwood Board of Supervisors

P.O. Box 345 • Girdwood, Alaska 99587

February 11, 1992

Representative Jim Zawacki
P.O. Box V
Juneau, AK 99811

Dear Representative Zawacki:

The Girdwood Board of Supervisors unanimously supports the passage of HB 367, an act relating to the use or ingestion of controlled substances. We join you in expressing a desire to see this legislation passed in the coming season.

Sincerely,

Mike Grandinetti
Chairman
Girdwood Board of Supervisors

MG/blp

Kenai Chamber of Commerce
402 Overland
Kenai, Alaska 99611
(907) 283-7989

KENAI CHAMBER OF COMMERCE

RESOLUTION 92 - 2

RESOLUTION IN SUPPORT OF HOUSE BILL 367

WHEREAS, The Kenai area is deemed by its citizens as a law abiding area, and

WHEREAS, drug usage degrades the way of life in any area where it exists, and

WHEREAS, strong anti drug laws are supported to suppress drug activity within Alaska, and

WHEREAS, House Bill 367 will address the closing of a loophole in the present day drug enforcement laws and

WHEREAS, the Kenai Chamber of Commerce represents a large number of businesses and organizations in the Kenai area.

NOW THEREFORE BE IT RESOLVED THAT THE KENAI CHAMBER OF COMMERCE supports House Bill 367.

Approved by the Board of Directors of the Greater Kenai Chamber of Commerce, Kenai. Alaska on this 21st Day of February 1992.

Jeff Belluomini
President
Kenai Chamber of Commerce

Attest

Eleanor Thomson

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

February 14, 1991

MEMORANDUM

TO: Representative Jim Zawacki

FROM: Christine M.Cheff
Legislative Analyst

RE: **Controlled Substances - Does Ingestion Equal Possession?**
Research Request 92.132

You asked if any states have laws which provide that a person who ingests a controlled substance may be criminally convicted for possession of that substance.

Although we conducted a computer search of the statutes for all 50 states and a random manual search of the statutes in approximately 15 states, we were unable to find any statutory provisions pertaining to this issue.[1] There is a Montana statute which states that a person commits the offense of criminal possession of a toxic substance if he or she inhales or ingests substances such as: glue, fingernail polish, chemical solvents, paint and paint thinners (Attachment A). This law does not apply to controlled substances however.

We also reviewed opinions for several court cases in which the key issue was possession of a controlled substance. In general the courts have found that possession of a controlled substance must be either actual or constructive to be considered a crime.[2] Actual possession means that a person has physical control of a substance, while a person who merely knows of the presence and nature of a controlled substance may be said to have constructive possession.[3],[4] In 1983 the Kansas Supreme Court (659 P2d 208) ruled that once ingested a controlled substance cannot be controlled, possessed, used, disposed

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[1]Research conducted in West Publishing Company's WESTLAW service and the statutes for: Alabama, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Massachusetts, Minnesota, Montana, Nevada, New Jersey, Oregon, South Dakota and Texas.

[2]*Words and Phrases*, West Publishing Co., Vol. 33, pp. 149 - 150.

[3]*Black's Law Dictionary*, 6th Edition (1990).

[4]*Words and Phrases*

Legislative Research

of or cause harm (Attachment B).[5] As you know, that opinion has been cited and affirmed in subsequent cases, including the 1991 Alaska Court of Appeals case State v. Thronsen (809 P2d 941).

Please let us know if we can be of further assistance on this or any other matter.

Attachments

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[5]*State v. Flinchpaugh*, 232 Kan. 831, 659 P2d 208 (1983).

ATTACHMENT A
Montana Statutes

MONTANA CODE ANNOTATED
1991

CONTENTS

45-9-116. Imitation dangerous drugs — exemptions — rules. (1) Sections 45-9-111 through 45-9-115 do not apply to:

(a) a person authorized by rules adopted by the board of pharmacy to possess with purpose to sell or sell imitation dangerous drugs;

(b) law enforcement personnel selling or possessing with purpose to sell imitation dangerous drugs while acting within the scope of their employment; and

(c) a person registered under the provisions of Title 50, chapter 32, part 3, who sells, or possesses with purpose to sell an imitation dangerous drug for use as a placebo, by that person or any other person so registered, in the course of professional practice or research.

(2) The board of pharmacy shall adopt, amend, or repeal rules in accordance with the Montana Administrative Procedure Act to authorize the possession with purpose to sell or sale of imitation dangerous drugs whenever it determines that there is a legitimate need and that the drugs will be used for a lawful purpose.

History: En. Sec. 6, Ch. 451, L. 1983; amd. Sec. 1, Ch. 247, L. 1983; amd. Sec. 20, Ch. 3, L. 1985.

45-9-117 through 45-9-120 reserved.

45-9-121. Criminal possession of toxic substances — penalty. (1) A person commits the offense of criminal possession of a toxic substance if he inhales or ingests or possesses with the purpose to inhale or ingest, for the purpose of altering his mental or physical state, any substance with toxic effects that is not manufactured for human consumption or inhalation, including but not limited to glue, fingernail polish, paint and paint thinners, petroleum products, aerosol propellants, and chemical solvents.

(2) The provisions of subsection (1) do not apply to a bona fide institution of higher education conducting research with human volunteers pursuant to guidelines adopted by the institution or any federal or state agency.

(3) A person convicted under this section shall be imprisoned in the county jail for a term not to exceed 6 months or be fined an amount not to exceed $500, or both.

(4) The youth court has jurisdiction of any violation of subsection (1) by a person under 18 years of age.

History: En. Sec. 1, Ch. 482, L. 1983.

45-9-122 through 45-9-124 reserved.

45-9-125. Continuing criminal enterprise — penalty. (1) A person who engages in a continuing criminal enterprise is guilty of a crime and upon conviction is punishable by a term of imprisonment and a fine not exceeding two times those authorized for the underlying offense. For purposes of this subsection, a person is engaged in a continuing criminal enterprise if:

(a) the person violates any provision of this chapter that is a felony; and

(b) the violation is a part of a continuing series of two or more violations of this chapter on separate occasions:

ATTACHMENT B
Kansas Supreme Court (659 P2d 208)

232 Kan. 831

STATE of Kansas, Appellant,

v.

Janet P. FLINCHPAUGH, Appellee.

No. 54756.

Supreme Court of Kansas.

Feb. 19, 1983.

The defendant was charged with possession of cocaine and following a preliminary hearing where the magistrate found probable cause, defendant moved to dismiss. The District Court, Dickinson County, John F. Christner, J., sustained the defendant's motion to dismiss and the State appealed. The Supreme Court, Floyd H. Coffman, District Judge, Assigned, held that evidence of a controlled substance assimilated in defendant's blood did not establish possession of that substance, nor was it adequate circumstantial evidence to show prior possession by defendant.

Affirmed.

must be charged in Statute to prosecute

1. Drugs and Narcotics ⇐63, 64

Possession of controlled substance requires having control over substance with knowledge of and intent to have such control; knowledge of the presence of controlled substance as embraced within the concept of physical control with intent to exercise such control is essential.

2. Drugs and Narcotics ⇐63

"Control," as used in statute making it unlawful for any person to possess or control any narcotic drug, is given its ordinary meaning, namely, to exercise restraining or directing influence over.

See publication Words and Phrases for other judicial constructions and definitions.

3. Drugs and Narcotics ⇐63

Once controlled substance is within a person's system, power of person to control, possess, use, dispose of, or cause harm is at an end, and thus presence of the substance in the blood is not "possession" or "control" of the substance within statutory prohibition. K.S.A. 65–4127a.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐552(1)

"Circumstantial evidence" is evidence that tends to prove a fact in issue by proving other events or circumstances which, according to common experience of mankind, are usually or always attended by the fact in issue, and therefore affords basis for reasonable inference by jury or court of the occurrence of fact in issue.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐561(1)

In criminal prosecution, defendant must be proven guilty beyond reasonable doubt of each element of crime charged. U.S.C.A. Const.Amend. 14.

6. Drugs and Narcotics ⇐64

Knowledge is essential ingredient of crime of illegal possession of controlled substance; defendant must know of presence of controlled substance. K.S.A. 65–4107(b)(5), 65–4127a.

7. Drugs and Narcotics ⇐64

Intent to possess, to appropriate the drug to oneself, constitutes requisite mental attitude for conviction of possession of a controlled substance. K.S.A. 65–4127a.

8. Drugs and Narcotics ⇐117

Discovery of drug in person's blood is circumstantial evidence tending to prove prior possession of drug, but is not sufficient evidence to establish guilt beyond reasonable doubt, since the drug might have been injected involuntarily, or introduced by artifice, into defendant's system. K.S.A. 65–4127a.

9. Drugs and Narcotics ⇐117

Evidence of controlled substance assimilated in defendant's blood did not establish possession of that substance, as defined by statute making it unlawful for any person to possess or distribute any narcotic drug, nor was it adequate circumstantial evidence

to show prior possession by defendant, since prosecution failed to establish that defendant ever knowingly had control of controlled substance. K.S.A. 65–4127a.

10. Drugs and Narcotics ⇐117

In prosecution for possession of controlled substance based on evidence of controlled substance assimilated in defendant's blood, other corroborating evidence, combined with positive blood test could be sufficient evidence to prove guilt beyond reasonable doubt, depending on probative value of corroborating evidence. K.S.A. 65–4127a.

11. Drugs and Narcotics ⇐63

Purpose of Uniform Controlled Substances Act is to regulate drug traffic, and once controlled substance is in human system it is beyond control which the Act contemplated; therefore, without proof of person's knowledgeable prior possession of drug, punishment for presence of drug in person's system is not consistent with design of the Act. K.S.A. 65–4101 et seq.

Syllabus by the Court

1. Possession of a controlled substance requires having control over the substance with knowledge of and the intent to have such control. Knowledge of the presence of the controlled substance with the intent to exercise control is essential.

2. Control as used in K.S.A. 65–4127a means to exercise a restraining or directing influence over the controlled substance.

3. Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body and the ability to control the drug is beyond human capabilities. Presence of the substance in the blood is not possession or control of the substance within K.S.A. 65–4127a.

4. Circumstantial evidence is evidence that tends to prove a fact in issue by proving other events or circumstances which, according to the common experience of mankind, are usually or always attended by the fact in issue, and therefore affords a basis for a reasonable inference by the jury or court of the occurrence of the fact in issue. *Casey v. Phillips Pipeline Co.*, 199 Kan. 538, Syl. ¶ 6, 431 P.2d 518 (1967).

5. In a criminal prosecution, the defendant must be proven guilty beyond a reasonable doubt of each element of the crime charged. *State v. Douglas*, 230 Kan. 744, Syl. ¶ 1, 640 P.2d 1259 (1982).

6. Discovery of a controlled substance in a person's bloodstream is circumstantial evidence tending to prove prior possession of the substance, but it is not sufficient evidence to establish guilt beyond a reasonable doubt of possession or control of the substance. A blood test alone fails to establish knowledge of the presence of the substance and the intent to exercise control over the substance.

7. The purpose of the Uniform Controlled Substances Act is to control illicit and legitimate drug traffic. Once a controlled substance is in the bloodstream it is beyond the control which the uniform act contemplated.

Keith D. Hoffman, County Atty., argued the cause, and Robert T. Stephan, Atty. Gen., was with him on brief for appellant.

No appearance by appellee.

FLOYD H. COFFMAN, District Judge, Assigned:

The State of Kansas appeals the dismissal of its prosecution against Janet Flinchpaugh for possession of cocaine, its salts, isomers, and salts of isomers, pursuant to K.S.A. 65–4127a and K.S.A. 65–4107(*b*)(5). Possession of cocaine is a class C felony. The defendant was charged with involuntary manslaughter in a separate prosecution.

Following a preliminary hearing the magistrate found probable cause. The defendant moved to dismiss and the parties stipulated to these facts. Janet Flinchpaugh, while driving in Abilene, Kansas during the late evening hours of November 13, 1981, was involved in an automobile collision. As

a result of the impact, the driver of the other car died. Defendant suffered injuries and was taken to the hospital where she consented to the drawing of her blood. Samples of her blood were sent to the Kansas Department of Health and Environment in Topeka. Cocaine and/or benzoylecgonine was found in the blood samples. Benzoylecgonine is a metabolite of cocaine. In order for traces to be in the blood, cocaine must first have been present. The State had no direct evidence of how or when the chemicals were introduced into the defendant's system. The charge of possession is based solely on the result of the testing of the defendant's blood. The trial court, taking the case under advisement following oral argument, observed: "[A] controlled substance in the system controls the body and it is impossible to control the substance once in the bloodstream." Later, by memorandum decision, Judge Christner sustained the defendant's motion to dismiss stating "[a] human being does not possess a narcotic drug which is located in his bloodstream." The State appeals the dismissal through K.S.A. 22-3602(*b*)(1), and (*b*)(3). (Jurisdiction is taken under the former.)

The State's information charged the defendant with unlawfully, feloniously, and willfully possessing or having under her control cocaine, its salts, isomers; and salts of isomers. The relevant statutes are K.S.A. 65-4127a and K.S.A. 65-4107(*a*) and (*b*)(5):

"Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture, possess, have under his control, possess with intent to sell, sell, prescribe, administer, deliver, distribute, dispense or compound any opiates, opium or narcotic drugs. Any person who violates this section shall be guilty of a class C felony, except that, upon conviction for the second offense, such person shall be guilty of a class B felony, and upon conviction for a third or subsequent offense, such person shall be guilty of a class A felony, and the punishment shall be life imprisonment."

"(*a*) The controlled substances listed in this section are included in schedule II;

"(*b*) any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by combination of extraction and chemical synthesis: . . .

. . . .

(5) cocaine, its salts, isomers and salts of isomers."

[1] These statutes are similar to the Uniform Controlled Substances Act. This court in *State v. Faulkner*, 220 Kan. 153, 156, 551 P.2d 1247 (1976), in an opinion by Chief Justice Fatzer, observed:

"The Uniform Controlled Substances Act, (K.S.A. 65-4101 et seq.) does not define 'possession.' (See K.S.A. 21-3102[1].) In *State v. Neal*, 215 Kan. 737, 529 P.2d 114, we defined 'possession,' citing PIK Criminal, Ch. 53.00, at p. 69 (1971):

"'*Possession.* Having control over a place or thing with knowledge of and the intent to have such control. *State v. Metz*, 107 Kan. 593, 193 P. 177 (1920); *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952)....'

"... Knowledge signifies awareness and is a requirement for 'possession.'

" 'Knowledge of the presence of a narcotic or dangerous drug as embraced within the concept of physical control with the intent to exercise such control is essential....' (28 C.J.S., Drugs and Narcotics Supplement, § 160 [1974], p. 235.)"

Justice Burch, in a case concerning alleged unlawful possession of liquor, wrote:

"[C]orporeal possession is the continuing exercise of a claim to the exclusive use of a material thing. The elements of this possession are, first, the mental attitude of the claimant, the intent to possess, to appropriate to oneself; and second, the effective realization of this attitude." *State v. Metz*, 107 Kan. 593, 596, 193 P. 177 (1920).

Cite as, 655 P.2d 208 (Kan. 1983)

The editors of PIK Crim.2d 64.06 in defining Unlawful Possession of a Firearm —Felony, added to the requirement in the statute (K.S.A. 21–4204) that the element of "possession of the firearm" be done "knowingly," commenting:

> "This construction of the word 'possession' is consistent with many Kansas cases which recognize that the elements of possession require a mental attitude that the possessor intended to possess the property in question and to appropriate it to himself." See *State v. Metz*, 107 Kan. 593, 193 P. 177, and *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952).

[2] "'Control,' as used in [the] statute making it unlawful for any person to possess or control any narcotic drug, is given its ordinary meaning, namely, to exercise restraining or directing influence over . . . *Speaks v. State*, 3 Md.App. 371, 239 A.2d 600, 604." Black's Law Dictionary 298 (5th ed. 1979).

[3] Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance. The Court of Special Appeals of Maryland has agreed:

> "Once a narcotic drug is injected into the vein, or swallowed orally, we think it apparent that it is no longer within 'one's control' or held at 'one's disposal.' And it would likewise be beyond the taker's ability to exercise any restraining or directing influence over it. Consequently, once the drug is ingested and assimilated into the taker's bodily system, it is no longer within his control and/or possession in the sense contemplated by Section 277." *Franklin v. State*, 8 Md.App. 134, 138, 258 A.2d 767 (1969), *cert. denied* 257 Md. 733 (1970).

See *State v. Downes*, 31 Or.App. 1183, 572 P.2d 1328 (1977); and *State v. Yanez*, 89 N.M. 397, 553 P.2d 252 (Ct.App.1976).

The State also contends the presence of a controlled substance in one's bloodstream is sufficient circumstantial evidence alone to prove possession of the substance at the time immediately before the substance was introduced into the person's system. In other words, the person must have possessed the drug before it was ingested.

In *Franklin v. State*, 8 Md.App. 134, 258 A.2d 767, the defendant was brought to a hospital in a semi-conscious state. Several hours later he acknowledged he had taken heroin; the treating doctor testified the defendant's condition was entirely compatible with having had an overdose of heroin; and this evidence was held sufficient to support a conviction for possession of heroin.

In *State v. Yanez*, 89 N.M. 397, 553 P.2d 252, the defendant was convicted of possession of morphine. The defendant was observed by police participating in what was thought to be a drug sale. After the occurrence, the defendant purchased two hypodermic needles and went to a service station restroom. There police found one of the needles which they believed the defendant had used. Marks on the defendant's arm were thought to be from use of the needle. Defendant was arrested for possession of heroin and transported to a hospital where a urine test revealed the presence of morphine. The court found the evidence sufficient to support the conviction.

In *State v. Downes*, 31 Or.App. 1183, 572 P.2d 1328, an undercover police officer saw a third person inject phencyclidine (PCP) into the defendant's arm. The Oregon Court of Appeals held this was use but not possession of the drug, noting Oregon had one criminal statute for "use," and another statute for "possession" of dangerous drugs.

[4] Circumstantial evidence is evidence that tends to prove a fact in issue by proving other events or circumstances which, according to the common experience of mankind, are usually or always attended by the fact in issue, and therefore affords a basis for a reasonable inference by the jury

or court of the occurrence of the fact in issue. *Casey v. Phillips Pipeline Co.*, 199 Kan. 538, Syl. ¶ 6, 431 P.2d 518 (1967).

[5] In a criminal prosecution, the defendant must be proven guilty beyond a reasonable doubt of each element of the crime charged. Fourteenth Amendment of the United States Constitution; *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); *State v. Douglas*, 230 Kan. 744, 640 P.2d 1259 (1982).

[6, 7] Returning to the definition of possession, knowledge is an essential ingredient of the crime of illegal possession of a controlled substance. The defendant must know of the presence of the controlled substance. *State v. Faulkner*, 220 Kan. at 156, 551 P.2d 1247. The intent to possess, to appropriate the drug to oneself, constitutes the requisite mental attitude for conviction of possession. *State v. Metz*, 107 Kan. at 596, 193 P. 177.

[8–10] Discovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of the drug, but it is not sufficient evidence to establish guilt beyond a reasonable doubt. The absence of proof to evince knowledgeable possession is the key. The drug might have been injected involuntarily, or introduced by artifice, into the defendant's system. The prosecution did not establish that defendant ever knowingly had control of the cocaine. None of the courts in the three cases cited previously upheld possession convictions based on the physical condition of the defendant alone. In the narrow holding of this case, we find that evidence of a controlled substance assimilated in one's blood does not establish possession of that substance as defined by K.S.A. 65–4127a, nor is it adequate circumstantial evidence to show prior possession by that person. Other corroborating evidence combined with positive results of a blood test could be sufficient evidence to prove guilt beyond a reasonable doubt depending on the probative value of the corroborating evidence.

[11] The purpose of the Uniform Controlled Substances Act, 9 Uniform Laws Annotated, p. 197 (1979), is to regulate the drug traffic. The Commissioners on Uniform State Laws explained:

"The Uniform Controlled Substances Act is designed to supplant the Uniform Narcotic Drug Act, adopted by the National Conference of Commissioners on Uniform States Laws in 1933, and the Model State Drug Abuse Control Act, relating to depressant, stimulant, and hallucinogenic drugs, promulgated in 1966. With the enactment of the new Federal narcotic and dangerous drug law, the 'Comprehensive Drug Abuse Prevention and Control Act of 1970' (Public Law 91–513, short title 'Controlled Substances Act' [21 U.S.C.A. § 801 et seq.]), it is necessary that the States update and revise their narcotic, marihuana, and dangerous drug laws.

"This Uniform Act was drafted to achieve uniformity between the laws of the several States and those of the Federal government. It has been designed to complement the new Federal narcotic and dangerous drug legislation and provide an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem.

"The exploding drug abuse problem in the past ten years has reached epidemic proportions. No longer is the problem confined to a few major cities or to a particular economic group. Today it encompasses almost every nationality, race, and economic level. It has moved from the major urban areas into the suburban and even rural communities, and has manifested itself in every State in the Union.

"Much of this major increase in drug use and abuse is attributable to the increased mobility of our citizens and their affluence. As modern American society becomes increasingly mobile, drugs clandestinely manufactured or illegally diverted from legitimate channels in one part of a State are easily transported for sale to another part of that State or even to another State. Nowhere is this mobili-

Cite as, 659 P.2d 213 (Kan. 1983)

ty manifested with greater impact than in the legitimate pharmaceutical industry. The lines of distribution of the products of this major national industry cross in and out of a State innumerable times during the manufacturing or distribution processes. To assure the continued free movement of controlled substances between States, while at the same time securing such States against drug diversion from legitimate sources, it becomes critical to approach not only the control of illicit and legitimate traffic in these substances at the national and international levels, but also to approach this problem at the State and local level on a uniform basis." 9 U.L.A. at 188.

Once a controlled substance is in the human system it is beyond the control which the uniform act contemplated. The deleterious effects of the drug are already in progress. What the act seeks to prevent has occurred. The "controlled substance" is no longer susceptible to the control the act seeks to regulate. Without proof of a person's knowledgeable prior possession of the drug, punishment for presence of the drug in a person's system is not consistent with the design of the Uniform Controlled Substances Act.

We affirm dismissal by the trial court.

232 Kan. 843

STATE of Kansas, ex rel., Robert T. STEPHAN, Attorney General, Appellant,

v.

PEPSI-COLA GENERAL BOTTLERS, INC., Appellee.

No. 54813.

Supreme Court of Kansas.

Feb. 19, 1983.

Appeal was taken from an order of the Shawnee District Court, James M. MacNish, J., denying State's motion for summary judgment against soft drink bottler for violation of Trading Stamp Act. The Supreme Court, Herd, J., held that: (1) appeal from trial court's order denying State's motion for summary judgment and entering judgment for soft drink bottler was not moot; (2) Act was applicable to promotion by soft drink bottler by which bottle caps were redeemed for prizes and/or money, where bottle caps were furnished to others at least in part in conjunction with sale of bottler's products; bottle caps constituted "other similar devices" within meaning of Act; and (3) promotion did not violate Act, under exception stating that Act would not apply to any bottle cap redeemed for "one specified and particular product not manufactured or packed by the manufacturer or packer."

Affirmed.

1. Appeal and Error ⇐843(1)

Supreme Court will not consider and decide questions when its decision would not be applicable to any actual controversy and where judgment itself would be unavailing; at same time, however, an appeal will only be dismissed when it clearly and convincingly appears actual controversy has ceased and only judgment which could be entered would be ineffectual for any purpose.

2. Injunction ⇐4

When properly applied; an injunction operates only in futuro, and not to provide relief for past or completed acts. K.S.A. 60-901.

3. Appeal and Error ⇐790(1)

Where need for an injunction has ceased Supreme Court will not review merits of issue on appeal. K.S.A. 60-901.

4. Injunction ⇐12, 16

To obtain injunctive relief from prospective injury it must be shown that there

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

February 14, 1992

TO: Representative Jim Zawacki

FROM: Christine M. Cheff
Legislative Analyst

RE: **Controlled Substances - Does Ingestion Equal Possession?**
Research Request 92.132

Please check the appropriate box and return to Mail Stop 3100 or the above mailing address.

( ) I approve the release of this information.

( ) I approve the release of this information, but remove my name.

( ) Keep confidential.

_____ _____

Date Signature

To assist us in improving the quality of our research services, we would appreciate your response to the following questions. Please be assured that we will take your comments seriously in performing future research for you.

Was the information objective?

Was it clearly written?

Did it provide answers to (or, at least, useful information on) all the questions you posed?

Was the research completed and delivered to you in a timely manner?

AS 11.71.040

DEFENDANT MAY NOT BE CONVICTED OF POSSESSION OF COCAINE WHEN COCAINE IS IN DEFENDANT'S BODY.

The Alaska Court of Appeals ruled that a defendant could not be convicted of possession of cocaine (misconduct involving controlled substances in the fourth degree, AS 11.71.040(a)(3)(A), a class C felony) based on the presence in the defendant's blood of cocaine that the defendant had ingested before arrest. It accordingly affirmed the trial court's dismissal of the count of an indictment alleging that Thronsen had possessed cocaine in his body. The appeals court relied on cases from other states holding that possession implies control, and that a person with a drug in his or her body no longer has the necessary control.

State v. Thronsen, 809 P.2d 941 (Alaska App. 1991)

The court's decision is not clearly contrary to the language of AS 11.71.040(a)(3)(A), which merely uses the term "possesses". The decision also does appear to be consistent with the case law from other states. Nevertheless, it seems illogical to punish a person possessing a drug for personal use before it is used, but not to punish that person when he or she has just used it. Legislative review is recommended.

Court of Appeals Decision

an even simpler answer to the state's argument is that the motion is not a separate cause of action at all. Rather, because Danielson's motion was properly filed under Criminal Rule 35(a), it is a component part of the original criminal case; as such, it seeks relief that is within the scope of the court's sentencing authority to give. We concur with the reasoning of the South Dakota Supreme Court in *State v. Piekkola*, 90 S.D. 335, 241 N.W.2d 563 (1976), a case in which the court ordered reimbursement of a fine paid pursuant to a conviction under an unconstitutional statute. The court stated:

> [T]he State contends that the doctrine of sovereign immunity bars this action. Sovereign immunity, however, is a doctrine properly invoked in questions of suit and liability for tort as in *Conway v. Humbert*, 1966, 82 S.D. 317, 145 N.W.2d 524, or in questions of contract (*see Mullen & Rouke v. Dwight*, 1919, 42 S.D. 171, 173 N.W. 645). It is not an issue in the case presently before us. To petition for the return of a fine and of costs imposed on the basis of unlawful authority is no more a suit against the state barred by sovereign immunity than to petition or file for the return of money paid to the government as income tax in excess of the amount due. To make more of the action than that offends common sense and severely distorts the image of justice as fairness.

Id. 241 N.W.2d at 564. Danielson's Rule 35(a) motion for return of his fine is not barred by sovereign immunity because it is not an action against the state.

The judgment of the district court is AFFIRMED.

MANNHEIMER, J., not participating.

[T]he State's Attorneys of Jackson and Cook Counties argue that a county cannot be held liable for fines and costs illegally collected. We do not agree. The Local Governmental and Governmental Employees Tort Immunity Act, as its title implies, applies to torts. An action to recover fine monies paid under an unconstitutional statute would more nearly resemble the common law action for money had and received.

Id. 335 N.E.2d at 7 (citation omitted).

* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

STATE of Alaska, Appellant,

v.

Earl J. THRONSEN, Appellee.

No. A-3431.

Court of Appeals of Alaska.

April 26, 1991.

Defendant was convicted of possession of cocaine following a jury trial in the Superior Court, Fourth Judicial District, Fairbanks, Richard D. Savell, J., and he appealed. The Court of Appeals, Coats, J., held that defendant could not be convicted of possession of cocaine "in his body."

Affirmed.

Drugs and Narcotics ⇐63

A defendant may not be convicted of possession of cocaine "in his body"; a person who has cocaine in his body has no control over the cocaine and therefore does not have possession. AS 11.71.040(a)(3)(A).

Richard J. Ray, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Douglas B. Baily, Atty. Gen., Juneau, for appellant.

J. John Franich, Asst. Public Advocate, Fairbanks, and Brant McGee, Public Advocate, Anchorage, for appellee.

OPINION

Before BRYNER, C.J., COATS, J., and ANDREWS, Superior Court Judge.*

COATS, Judge.

On November 8, 1989, the police served a search warrant on a house in Fairbanks

which was rented by Earl J. Thronsen's brother. The police described the residence as a "crack house"—a place where people regularly go to congregate and use cocaine. The warrant authorized the police to look for cocaine, cocaine paraphernalia, and the ingredients for making the "crack" form of cocaine.

Thronsen was in the house when the search warrant was executed. He was lying face down on a couch in the living room; his hands were beneath him. It appeared to the police officer conducting the search that Thronsen was hiding something underneath his hands. When the police searched the couch, they found a syringe underneath a cushion where Thronsen had been lying. Thronsen's hands had been at the place where the cushions were separated. The syringe was the type used for intravenous drug use; that type of syringe usually leaves track marks on a person's arms. Thronsen had track marks on his arms. Later tests indicated that the syringe contained a trace residue of cocaine.

A sample of Thronsen's blood and urine was taken on November 9, 1989 at 6:39 p.m. and was sent to Anchorage for testing. The urine sample screened positive for the presence of cocaine and/or its metabolites. Expert testing established that Thronsen must have consumed cocaine within the previous 72 hours from the time the urine specimen was collected.

A grand jury indicted on two counts of misconduct involving a controlled substance in the fourth degree. AS 11.71.040(a)(3)(A). In Count I, the grand jury charged Thronsen with knowingly and unlawfully possessing a syringe which contained cocaine. In Count II, the grand jury charged that Thronsen "unlawfully possessed in his body ... cocaine." Thronsen was tried by a jury on these charges.

Thronsen testified at trial. He stated that he had, on previous occasions, taken cocaine with his brother at his brother's house. Although he denied possessing the syringe found in the couch, he stated that in the past, he had shot up cocaine in his brother's house with the type of syringe which was discovered under the couch. He said he had not consumed cocaine at his brother's house on November 8. However, he had smoked a little cocaine at his own house "way earlier" than the time that the search warrant was executed on his brother's house.

At the end of the state's presentation of its case, Thronsen moved for a judgment of acquittal on Count II, which charged Thronsen with possession of cocaine "in his body." Thronsen argued that he could not be convicted of possession of cocaine in his body because he no longer had control over the cocaine once he ingested or injected it. Superior Court Judge Richard D. Savell denied this motion without prejudice.

The jury found Thronsen not guilty on Count I, possession of cocaine in the syringe, and guilty of Count II, possession of cocaine "in his body." Following trial, Judge Savell reconsidered Thronsen's motion for judgment of acquittal on Count II, and then set aside and vacated the judgment of conviction. He reasoned that, although the state could use the presence of cocaine in Thronsen's blood or urine as circumstantial evidence that Thronsen had earlier possessed or used cocaine, the indictment did not charge Thronsen with prior possession of cocaine. The indictment only charged Thronsen with possession of cocaine "in his body." Judge Savell relied on *State v. Downes*, 31 Or.App. 1183, 572 P.2d 1328, 1330 (1977) and *State v. Flinchpaugh*, 232 Kan. 831, 659 P.2d 208, 211 (1983). Judge Savell stated, "[t]hese cases hold that control is an essential element of possession and that because the host body cannot exercise control or dominion over a substance after it is ingested ... the mere presence in the body cannot support a criminal conviction for possession." Judge Savell went on to say:

> Plaintiff seeks to escape the effect of the cited cases by arguing that here "Mr. Thronsen clearly injected the cocaine into his own system...." This argument misses the mark. There was no evidence that defendant ingested the cocaine that was in his system. Nor may plaintiff rely upon defendant's presence in a

"crack house" or the presence of a cocaine soiled syringe nearby. Defendant was acquitted of knowing possession of the syringe. And, there was no evidence of when, where or how defendant possessed the cocaine that ended up in his system. Most importantly, defendant was not charged with possession of cocaine at the time and place of ingestion. Rather, he was only charged with possessing the drug in his body. This additional element, *i.e.*, possession *in the body*, is fatal to the state's case. (Emphasis in original.)

Judge Savell entered a judgment of acquittal on Count II. The state appeals from this order. We affirm.

We may not reverse a genuine verdict of acquittal on appeal without violating the constitutional provisions of the United States and the Alaska Constitutions which prohibit putting a defendant twice in jeopardy. *See United States v. Martin Linen Supply Company*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977); *State v. Kott*, 636 P.2d 622, 623 (Alaska App.1981), *aff'd* 678 P.2d 386 (Alaska 1984). In addition, AS 22.07.020(d)(2) states that "the state has no right of appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient." Since Judge Savell's order purported to be a judgment of acquittal, we ordered the parties to brief whether this court had jurisdiction. The parties submitted supplemental briefs.

Where, "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged," the ruling constitutes a judgment of acquittal. *Martin Linen Supply Company*, 430 U.S. at 571, 97 S.Ct. at 1354–55. However, courts are not bound by the fact that a judge refers to his ruling as a "judgment of acquittal." In some cases, the judge's ruling can be classified as a motion dismissing the indictment. *See Selman v. State*, 406 P.2d 181, 186 (Alaska 1965). In this case, we might be able to properly classify Judge Savell's order as essentially dismissing the indictment against Thronsen. On the other hand, Judge Savell's order does appear to weigh some of the evidence which the state presented against Thronsen. This part of his order would support a conclusion that it was a genuine judgment of acquittal.

We find it unnecessary to resolve this issue. We conclude that Judge Savell was correct in concluding that, on its face, the indictment charged Thronsen with possession of cocaine "in his body." All of the cases we have reviewed support the conclusion that a defendant cannot be convicted for possession of cocaine in his or her body. These cases conclude that a person who has cocaine in his or her body has no control over the cocaine and therefore does not have possession. *Flinchpaugh*, 659 P.2d at 208; *Downes*, 572 P.2d at 1328. The state has cited us to cases from Georgia which hold that a defendant may be convicted of possession of cocaine based upon positive blood and urine tests for cocaine. *Green v. State*, 194 Ga.App. 343, 390 S.E.2d 285 (1990), *aff'd* 260 Ga. 625, 398 S.E.2d 360 (1990). However, these cases only stand for the proposition that a defendant may be convicted of possession of cocaine based upon this evidence. They do not appear to stand for the proposition that a defendant may be convicted of possession of cocaine "in his body." We accordingly affirm Judge Savell's order dismissing Count II of the indictment.

AFFIRMED.

MANNHEIMER, J., not participating.