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HOUSE COMMITTEE REPORT

(9)

Date Referred: February 14, 1994

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3/28/94

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered:

SB 221

SENATE BILL NO. 221

ARREST OF MINORS FOR CONSUMING ALCOHOL

"An Act relating to arrest of a person for illegal possession, consumption, or control of alcohol; and providing for an effective date."

RECOMMENDATIONS: |] the same title
 be replaced with _____ |] a new title

[] have attached amendments(s)

[] do pass

[] do not pass

[] no recommendations

[X] 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 _____

(6) [X] zero fiscal note(s) Public Safety, Law Court, H+SS, Admin (2) 2/9/94

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Car Brando</i>	✓	<i>[Signature]</i>			✓
<i>[Signature]</i>	✓	<i>[Signature]</i>			✓
<i>Auley Allberg</i>	✓	<i>[Signature]</i>		✓	
		<i>Bette Davis</i>			✓
		<i>[Signature]</i>		✓	
		<i>Tom Brice</i>		✓	

Car Brando
 CHAIRMAN'S SIGNATURE

FISCAL NOTE

6
 Version: SB 221
 Publish Date: 2-9-94

STATE OF ALASKA
 1994 LEGISLATIVE SESSION

BILL

Revision Date: _____ Dept. Affected: Alaska Court System
 Title: An Act relating to arrest of a person for BRU: Trial Courts
illegal possession, consumption or control of alcohol Components: _____
 Sponsor: Sen. Taylor
 Requestor: Judiciary COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 94) cost: \$ None

ANALYSIS: (Attach a separate page if necessary)
 No fiscal impact

Prepared by: C. S. Christensen III, Staff Counsel *CS* Phone: 264-8228
 Agency: Alaska Court System Date: 01/28/94

Approved by: Arthur H. Snowden, II, Administrative Director *AS* *CS*
 Agency: Alaska Court System Date: 01/28/94

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FISCAL NOTE

105
 Bill Version: SB 221
 (S) Publish Date: 2-9-94

STATE OF ALASKA
 1994 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Health and Social Services
 Title: An act relating to arrest of a person BRU: Alcohol & Drug Abuse
for illegal possession, consumption or control of alcohol Component: Administration
 Sponsor: Senator Taylor
 Requestor: Senate Judiciary COMPONENT SERIAL NO. 302

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 (FY94) cost \$ _____

ANALYSIS: (Attach a separate page if necessary)
 An Act relating to arrest of a person for illegal possession, consumption or control of alcohol; and providing for an effective date. This bill amends the list of crimes for which a person can be arrested without a warrant to specifically include minor consuming. SB 221 is necessary because of a Juneau court ruling that a minor could not be arrested for consuming alcohol unless the police officer actually witnessed the consumption. The ruling prohibited the juvenile from being arrested even though the juvenile might be quite intoxicated and in danger. This left the police officer with the ability to write a citation and then leave the minor. While this bill provides for arrest, in the case of minors who are consuming alcohol or other drugs, arrest may be a life saving action. Although this bill has no direct effect on the operations or responsibilities of the Dept. of Health & Social Services or the Div. of Alcoholism and Drug Abuse, it is consistent with the philosophy of the Div. regarding the promotion of no use alcohol and other drugs by minors.

Prepared by: Suzanne Perry
 Division: Alcohol & Drug Abuse
 Approved by Commissioner: Margaret R. Lowe
 Agency: Department of Health & Social Services

Phone: 465-2071
 Date: 01/24/94
 Date: 1-26-94

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FISCAL NOTE

No. 74
 Bill Version: SB 221
 (S) Publish Date: 1-26-94

STATE OF ALASKA
 1994 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Administration
 Title: "An Act relating to arrest of a person for illegal possession, consumption, or control of alcohol; and providing..." BRU: Office of Public Advocacy
 Component: Office of Public Advocacy
 Sponsor: Senator Taylor
 Requestor: (S) HES COMPONENT SERIAL NO. 43

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY94) cost: None

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME	0.0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page in necessary)

Prepared by: Brant McGee Phone: 274-1684
 Division: Office of Public Advocacy Date: _____
 Approved by Commissioner: Nancy Bear Usual Date: 1/26/94
 Agency: Administration

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FISCAL NOTE

No. 3
 Bill Version: SB 221
 (S) Publish Date: 1-26-94

STATE OF ALASKA
 1994 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Administration
 Title: *An Act relating to arrest of a person for illegal possession, consumption, or control of alcohol...* BRU: Public Defender Agency
 Component: Public Defender Agency
 Sponsor: Senator Taylor
 Requestor: (S) HES COMPONENT SERIAL NO. 1631

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY94) cost: none

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: John Salemi, Director Phone: 264-4400
 Division: Public Defender Agency Date: _____

Approved by Commissioner: Nancy Bear Usua Date: 1/24/94
 Agency: Administration

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(Rev. 10/93) PL 1/24/94

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Bill Version: SB 221
(S) Publish Date: 1-26-94

Revision Date: _____ Dept. Affected: Public Safety
 Title: "An Act relating to the arrest of a person
for illegal possession of alcohol" BRU: Alaska State Troopers
 Sponsor: Senator Taylor Component: Detachments
 Requestor: S. HES COMPONENT SERIAL NO. 799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ()	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 94) impact: \$ _____

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Francis C. Allan Phone: 269-5591
 Division: Alaska State Troopers Date: 01/17/94
 Approved by Commissioner: *[Signature]* Date: 01/17/94
 Agency: Richard J. Burton, Dept. of Public Safety

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

No. 1 *11*
Bill Version: SB 221
(S) Publish Date: 1-26-94

Revision Date: January 18, 1994
Title: "...relating to arrest of a person for illegal possession, consumption or control of alcohol..."
Sponsor: Senator Taylor
Requestor: Senator Taylor

Department Affected: Department of Law
BRU: Prosecution, Legal Services
Component: Prosecution - All
Legal Services - Operations
COMPONENT SERIAL NO. 0085 through 0090, 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Pegues *Richard I. Pegues*
 Division: Administrative Services Division
 Phone: 465-3672
 Date: January 18, 1994
 Approved by Commissioner: Bruce M. Botelho *Richard I. Pegues /FOR/*
 Attorney General
 Agency: Department of Law
 Date: January 18, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 221

ANALYSIS CONTINUATION:

SB 221 amends AS 12.25.030(b) to provide that a peace officer may arrest a person under the age of 21 without a warrant when the peace officer has reasonable cause to believe that the person unlawfully possessed, consumed, or controlled alcohol. This bill has the effect of overruling a recent superior court decision that held the person must be caught in the act unlawfully consuming alcohol before an arrest could be made. The bill will not have a fiscal impact because it returns the law to its former interpretation prior to the superior court's decision.



Alaska State Legislature
 House of Representatives
 COMMITTEE ON HEALTH, EDUCATION
 AND SOCIAL SERVICES

DATE: 5/25/94

PLACE: Capitol Room 106

SUBJECT OF MEETING:
 # HB 431: AFIX FOR CERTAIN TEENAGED PARENTS
 HB 378: REVISE OLDER ALASKANS COMMISSION
 SB 221: ARREST OF MINORS FOR CONSUMING ALCOHOL
 # INDICATES FIRST PUBLIC HEARING

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
						IF NEEDED	IF NEEDED	
JOE Ambrose	SEN TAYLOR					Y	N	SB 221
JAN HANSEN	DASS				X 2680	Y	N	HB 431
JEFF BUCH	AKCLU	175 S. Franklin St. Ste. 318 Juneau	99801		465-4150	Y	N	SB 221
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

ALASKA**CIVIL LIBERTIES UNION***An Affiliate of the American Civil Liberties Union*

P. O. Box 201944 - 419 Barrow Street - Anchorage, AK 99520-1844

Phone: 907-258-0044 Fax: 907-258-0288

March 28, 1994

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Randall P. Burns
Executive Director

The Honorable Cynthia Toohey and Con Bunde
Co-Chairs,
Health, Education and Social Services Committee
Alaska House of Representatives
State Capitol - Room 108
Juneau, AK 99801-1182

Dear Representatives Toohey and Bunde:

I am writing to you both on behalf of the Alaska Civil Liberties Union (AKCLU), an affiliate of the American Civil Liberties Union. The AKCLU is very concerned over proposed SB 221. We urge the House HESS Committee to not adopt this legislation in its present form.

As you know, the proposed legislation responds to controversial decisions by a Juneau magistrate and Superior Court Judge that made it unconstitutional to arrest or pickup a minor for minor consuming when a police officer had no actual evidence that a minor is consuming alcohol. We have read those opinions and believe that they accurately reflect the law in this country and this state regarding warrantless arrests and unlawful searches and seizures.

While the AKCLU appreciates the concerns of the Legislature for the health and safety of this state's adolescent children, we cannot condone a trampling of basic constitutional rights in order to settle on what amounts to a band-aid solution for the significantly complex underlying social problems surrounding teenage drinking in communities across Alaska.

While living in Juneau, for example, I was both a member and chair of the City and Borough of Juneau's Social Services Advisory Board (SSAB). I am certainly aware of the problems confronting Juneau, Anchorage, and other communities as they struggle to find the causes of - and solutions to - teen alcoholism and teen drinking and drug abuse. But every citizen should be similarly concerned when, in response to public cries for action, the government attempts to overcome sacred constitutional protections in order to award itself more police powers.

The AKCLU suggests that this law speaks volumes for the lack of understanding of the fundamentals of our constitution. How can you ask or expect an adolescent minor - an emerging adult - to respect a government that would treat so cavalierly his or her constitutional right to be free from the spectre of illegal searches and seizures and warrantless arrests? That teenagers attempt to hide illegal behavior from policeman should come as no surprise to adults. What should come as a surprise to adults everywhere is the willingness of its elected officials to so blithely curtail the civil liberties

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of a significant portion of its citizenry in the name of responding to the problem of teen drinking.

No matter the seriousness or complexity of our social problems, as a society we cannot decide to place another restriction on the Fourth Amendment's freedom from unlawful searches and seizures, a freedom for which our foreparents died, in order to attempt to resolve those social dilemmas.

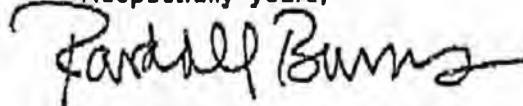
This legislation gives police the authority to detain a minor who the officer *has not seen* consume any alcohol, or who *is not carrying* an alcoholic beverage container, on the *presumption* because the minor, by his actions, has given the peace officer "reasonable cause" to believe the minor has consumed alcohol illegally. If nothing else, an argument can be made that this law creates a subjective standard that is impossible to defend against. A good civil protest against this law would be for groups of perfectly sober teens to regularly parade the streets of our communities staggering, speaking in slurred words, and stinking to high hell of the newest alcohol-based perfume, mouthwash, or cologne.

One issue of prime importance here, as has always been the case, is the clear lack of sufficient law enforcement officers to properly patrol and enforce the laws of our communities. While the AkCLU cannot be said to be the friend of overweening police authorities, we certainly support a well-funded, fully-staffed, well-trained and educated police force as one way to avoid the understandable escalation of community concern and fear that grows out of a reaction to rising crime rates and juvenile excess, and which often results in the enactment of laws that attack individual civil liberties.

The other health, safety, and social service concerns that we Alaskans must address in the face of teen drug and alcohol abuse must be addressed by all facets of our communities. Again, we cannot ask government to solve social dilemmas with increased police powers that erode our constitutionally-based individual civil liberties. We must surely know by now, coming up on the end of the 20th Century, that the easy way is almost never the best way.

The AkCLU is clearly concerned with the approach presented by SB 221 and we ask you and the other members of your committee not to adopt a law that runs so counter to basic liberty.

Respectfully yours,



Randall P. Burns
Executive Director

cc: All members, AkCLU Board of Directors

P. S. Whenever this issue comes up, a related question is always asked of the AkCLU: what is the AkCLU's position on driving while intoxicated (DWI).

Our discussion above focused primarily on the problem of minor consuming in the context of a minor walking on public streets or in parks and neighborhoods and our concern that under SB 221 a child under age eighteen (18) would be subject to detainment simply because the police officer felt he or she had reasonable cause to detain the juvenile. The idea of detaining and then administering a breathalyzer to any minor simply because a police officer believed the

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minor was exhibiting some effect of alcohol flies in the face of that minor's constitutional guarantee to be free from unreasonable search and seizures and warrantless arrests.

The American Civil Liberties Union's (ACLU's) policy on alcoholism and public drunkenness, as well as its policy on chemical tests of drivers, are well known. Basically, the ACLU holds that public drunkenness is not itself a sufficient justification for the deprivation of personal liberty. This policy, however, does not preclude the punishment of behavior by intoxicated persons which is also prohibited for sober persons (for example, assaultive behavior). In addition, the ACLU believes - in some types of situations - that *narrowly drawn* laws may be enacted which single out the acts of drunken persons. One such example would be driving, an activity which is unusually dangerous when performed by a person under the influence of alcohol.

The ACLU's policy on the administration of breathalyzer tests makes it clear that such tests should be conducted only when the police have *probable cause* to believe a *particular* driver is driving while under the influence of an intoxicant. The requirement of a prior, judicially approved warrant is excused because the evanescent nature of blood alcohol presents an emergency circumstance which makes it, for all practical purposes, impossible to procure a warrant prior to the body's natural destruction of the evidence.

Therefore, if a police officer has probable cause to believe that a minor is driving while intoxicated, the officer may stop the minor without a warrant.

We do not generally address this issue because it was not our understanding that the police have ever felt its hands were tied with respect to stopping minors where the police had probable cause to believe that a minor was driving under the influence. The Juneau magistrate's decision that has been greeted with such opprobrium makes it clear that the minor charged with minor consuming in that case was approached by a police officer "on the sidewalk along S. Franklin Street."

Bottom line: the issue is one of probable cause. The magistrate held, because a minor walking down Franklin Street did not "consume, possess, or control alcoholic beverages" in the "presence" of the arresting officer [see AS 04.16.050 and AS 12.25.030(a)(1)], that the arrest was improper. On the other hand, an automobile, motorcycle, or truck that is swerving, speeding, or otherwise being driven erratically presents sufficient probable cause to justify stopping the car, given both the dangerous nature of the activity and the difficulty in retaining evidence without an immediate breathalyzer.

The ACLU appreciates the desire of the Alaska Legislature to take some action to assist in the battle against teen drinking. But we again caution that the proposed legislation tramples on individual civil liberties without really accomplishing its goal. Because the "reasonable cause" standard is so vague and easily abused, it should only be used in the most narrow of circumstances; stopping a minor without visible proof the minor is consuming is not sufficient grounds for arrest or detainment without a warrant.

Alaska State Legislature

Senate Minority Leader
Chair, Judiciary Committee
Vice Chair, Community &
Regional Affairs

Member, State Affairs Committee
Committee on Committees
Western States Legislative Forestry Task Force
Legislative Council



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Fax: (907) 465-3922

352 Front Street
Ketchikan, Alaska 99901
(907) 225-8088
Fax: (907) 225-0713

Senator Robin L. Taylor

SPONSOR STATEMENT

SENATE BILL 221

I introduced Senate Bill 221 at the request of concerned parents, law enforcement agencies in the First Judicial District and Alaskans for Drug-Free Youth.

In May of last year, State Troopers and municipal police departments were directed not to arrest minors under the minor consuming statute unless the arresting officer actually sees the minor consume alcohol. The directive was issued after two judicial officers ruled that merely being under the influence in the officer's presence is not reason enough to make an arrest.

The District Attorney's directive stated that "officers who encounter minors under the influence should issue citations, rather than make arrests".

The court ruling left law enforcement officers in the position of either leaving such a minor on the street or taking the minor into protective custody. Past practise had been to arrest the minor and turn the youth over to parents or legal guardians.

SB 211 would add minor consuming to the list of crimes that allow for warrantless arrest. While the court ruling currently impacts only the First Judicial District, it could be extended to other jurisdictions.

My goal in sponsoring this bill is not to increase the number of minor consuming arrests or convictions. I don't believe the Legislature ever intended for a police officer to simply write a ticket and walk away from a minor who is under the influence. This bill is more about protecting our young people than prosecuting them.

SPONSOR STATEMENT

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

DISTRICT ATTORNEY, STATE OF ALASKA
P.O. Box 110300
Juneau, AK 99811
Phone: (907) 465-3620

To: AST
Municipal Police Departments, First Judicial District

From: Richard A. Svobodny
District Attorney

Date: May 26, 1993

Subject: Citations rather than arrests for Minor Consuming cases.

With certain exceptions (felonies, DWI cases, cases arising under AS 11.41, 11.46.330, 11.56.740, 11.61.120), AS 12.25.030 does not authorize arrests for crimes not committed or attempted in the presence of the person making the arrest. The crime of Minor Consuming is defined as follows in AS 04.16.050:

A person under the age of 21 years may not knowingly consume, possess, or control alcoholic beverages except those furnished persons under AS 04.16.051(b).

Against arguments by our office that the word "possess", as it is used in that statute, should be interpreted to include possession by consumption, two judicial officers in the First Judicial District have now ruled that it does not, that an officer who contactss a minor under the influence of alcohol may not arrest the minor unless he or she actually sees the minor consume the alcohol, possess the alcohol outside of the minor's body, or control the alcohol. Merely being under the influence in the officer's presence is not enough.

For the above reasons, officers who encounter minors under the influence should issue citations, rather than make arrests, unless they see the minors possess, consume, or control the alcohol involved. Of course, a person may be taken into protective custody under the procedures of Title 47 if the person appears to be incapacitated by alcohol in a public place.

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,
Plaintiff,

v.

IVAN SABON

Defendant.

Case No. 1JU-S92-386 Cr.

CERTIFICATION

() This document and its attachments do not contain information that is confidential under AS 12.61.110 or the name of a victim of a crime listed in AS 12.51.140.

OPPOSITION TO MOTION TO DISMISS

FACTS

Officer Worth responded to the Senate Building on March 14, 1992 in response to a report of a person passed out in the restroom. Upon arrival at 1706 hours Worth discovered the defendant (Sabon) sitting on a toilet in an unconscious condition with his pants down. Worth's attempts to awaken Sabon proved difficult. Sabon had an odor of alcohol about his person and had bloodshot watery eyes. Sabon would not identify himself. Worth and Sergeant Herrera arrested Sabon for minor consuming based on Herrera's knowledge of Sabon's identity and presumably his age, although the police report doesn't indicate they knew his age.

ARGUMENT

The defendant argues in his memorandum that because the officers didn't see Sabon consume the alcohol the arrest is unconstitutional and the case must be dismissed. This does not

in any way explain why the court should go beyond the requirements of the "exclusionary rule" of evidence illegally seized to the more drastic step of dismissing the case. Elson v. State, 659 P.2d 1195 (Alaska 1983) and State v. Sears, 553 P.2d 907 (Alaska 1976); Mapp v. Ohio, 367 U.S. 643; 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961).

An illegal arrest is not a valid basis for dismissal of the action or suppression of the evidence. McConnell v. State, 595 P2d 147, 156 (AK 1979) See also fn. 26 at 155. (question of whether probable cause existed for defendant's arrest for MICS 3d not addressed given above-cited law). The remedy lies with the civil courts. See Ingraham v. Wright, 430 U.S. 651, 680 n. 48, 97 S.Ct. 1401 (1977).

Nor is outrageous conduct involved in this matter. Vaden v. State, 768 P2d 1102 (Alaska 1989) discusses outrageous conduct. While the Alaska Supreme Court noted in Vaden that judicial intervention for outrageous conduct is not limited to entrapment cases, the court nowhere in the opinion set out a standard for outrageous conduct outside of the entrapment situation. The court did, however, include a footnote at page 1108 (No. 13) which discusses outrageousness outside of entrapment. The standard is the malum in se standard i.e. the conduct must be inherently evil, immoral in its nature, illegality founded on principles of natural, moral and public law.

In this case the officers arrested a drunken teenager who

had passed out in a restroom, there is nothing inherently evil or immoral about such conduct. From a philosophical perspective one would be hard pressed to say such actions violate moral or public law. The law of the land is that if an officer were to have deprived Lawrence of his liberty improperly he would have been able to bring a 1983 Civil Rights action. Furthermore, had the officers left Sabon in the building and he later wandered in front of a car, the court knows the likely outcome.

In this case the court should focus on whether suppressing evidence is applicable not dismissal. The purpose of the exclusionary rule is two-fold, the preservation of the integrity of the judicial system and to dissuade law enforcement from a lawless invasion of a citizen's constitutional rights. Terry v. Ohio, 392 U.S. 1; 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); Sears, 553 P.2d at 912. Assuming arguendo that there was an illegal arrest in this matter then the remedy is the exclusionary rule prohibiting the introduction of any evidence from the time of the arrest onward, not the dismissal of the case.¹

Not all contacts between police officers and citizens involve a seizure of a person. The difference between a permissible encounter and a seizure is explained in Florida v. Royer, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983), when the United States Supreme Court said:

¹ The defendant in citing the Minnesota case of State v. Abu-Shanab, 440 N.W.2d 557, relates to the sufficiency of evidence at trial rather than the exclusionary rule or dismissal.

Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions . . . Nor would the fact that an officer identifies himself as a police officer, without more convert the encounter into a seizure requiring some level of objective justification

Here, there is no seizure of a person when a police officer approaches him and asks him questions and as a result of those questions later arrests the person.

There is nothing illegal about this arrest. The defendant argues that the court of appeals decision in State v. Thronsen, 809 P.2d 941 (Alaska App. 1991), should be applicable here. This is a case where the defendant was specifically charged with "possession" of cocaine by having the cocaine in his bloodstream. The court said that "possession" in one's bloodstream was not the exercise of dominion or control over the cocaine required by AS 11.81.900(b)(42) and hence the state had not, when it specifically charged possession in the bloodstream, met its burden of proof at trial. The court went on to say that the possession of cocaine in the bloodstream was circumstantial evidence of the person's possession before it got to the bloodstream. But in this instance, that is not how the crime was charged. A violation of AS 11.71.040 of "possession" of a controlled substance is a substantially different crime than a violation of AS 04.16.050. The essential elements of a violation

of AS 11.71.040 are: (1) at the time and place charged; (2) the defendant knowingly possessed a substance; and (3) that substance was a schedule IIA controlled substance. The essential elements of a violation of AS 04.16.050 are: (1) at the time and place charged; (2) the defendant was under 21 years of age; (3) that he knowingly consumed or possessed, or controlled an alcoholic beverage. Hence in this instance the definition of "possess" found in AS 11.81.900(b)(42) is only applicable to one of three ways that one can commit this offense.² In this instance, the defendant had consumed an alcoholic beverage as distinct from possessed an alcoholic beverage. The argument is that because the statute is written in the present tense, it does not include "consumed." If this were so, none of the criminal statutes would be applicable unless the crime was committed in the officer's presence. Take for example AS 11.41.100, murder. "A person commits the crime of murder in the first degree if with the intent to cause the death of another person the person causes the death of any person." If the defendant's argument were applied to murder, no one could be charged with the commission of the offense unless it occurred directly in the officer's presence because the charge would be that the person caused the death of

² The definition found at AS 11.81.900(b)(42) reads: "'possess'" means having physical possession or the exercise of dominion or control over property. However, very specifically this definition is limited to Title 11. The preamble to the definition section says "for purposes of this Title," that is, Title 11. Therefore, possess may mean something substantially different for Title 4. However, the court need not reach this issue because possess is only one of three ways of committing this offense.

another person. The charge alleges something that occurred in the past. The very first legislature to compile Alaska laws in 1962 recognized that the absurd argument made here might arise and enacted AS 01.10.050 which says: "Words in the present tense include the past and future tenses and words in the future tense include the present tense." Consequently, no matter what creative use one puts Webster's New World Dictionary (2d edition, 1982), the Alaska State Legislature has indicated that the crime set forth in AS 04.16.050 includes the past tense of consuming an alcoholic beverage.

Sabon cites State v. Hornaday, 713 P.2d 71, 74 (1986) for the proposition that an arrest for minor consuming can't be made unless the officer sees the consuming. Hornaday is not an Alaska case. The proper citation is, State v. Hornaday, 713 P.2d 71 (Washington 1986), Under the revised code of Washington the Washington Supreme Court held that consume did not include the past tense. The RCW apparently does not include a provision such as AS 01.10.050. Because Alaska's statutory scheme is different, Hornaday does not apply.

The dissent of Hornaday is ,however, instructive. J. Brachtenbach suggested,

Common sense is not a bad precedent. To hold that an admittedly intoxicated person is not in possession of intoxicants is an exercise in sophistry beyond my comprehension unless we, like spiders, are content to spin fine but temporary webs.

J. Brachtenbach went on to quote from Francis Bacon's "Of Judicature" Essays from (1625),

Judges must beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws.

Sabon's citation to State v. Abu-Shanab, 448 N.W. 2d 557 (Minn. App. 1989) isn't applicable because the issue there was whether the state proved venue at trial in a border town incident.

Neither is State v. Sorensen, 758 P.2d 466 (Utah App. 1988) applicable, where the issue was no evidence of intoxication at trial other than defendant's breath smelling of alcohol.

CONCLUSION

The defendant argues that this case should be dismissed, citing no authority for the dismissal of a case assuming an illegal arrest. Assuming an illegal arrest under Alaska law, the proper remedy is the application of the "exclusionary rule" from the time of the arrest into the future. There is no prospective application of the exclusionary rule found in any case. The arrest in this case is permissible in that the defendant was committing a misdemeanor by having consumed alcohol. For the above-stated reason the defendant's motion should be denied.

DATED at Juneau, Alaska this _____ day of May 1992.

CHARLES E. COLE
ATTORNEY GENERAL

By: _____
J. Ron Sutcliffe
Assistant District Attorney

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA JUL 09 1992
FIRST JUDICIAL DISTRICT AT JUNEAU Clerk of Court

By _____ De:

STATE OF ALASKA,
Petitioner,

vs.

JOSEPH JIM,
Respondent.

Case No. 1JU-92-609CR

MEMORANDUM AND ORDER

The petition for review is denied.

The defendant in this case was charged with Minor Consuming Alcohol and moved in the district court to dismiss as the arrest for the offense took place after the offense was completed and the offense did not take place in the officer's presence. The State opposed dismissal and urged that suppression was all that should occur. The District court denied the motion to dismiss but suppressed evidence that was collected after the arrest.

The State petitions for review and the defendant opposes.

The State fails to address the critical issue in the District Court's order with respect to AS 12.25.030. The State's reading of AS 01.10.050 does not, ipso facto repeal the requirement that an arrest for a misdemeanor take place in the officer's presence.¹


While there may be some issue as to whether an officer may

¹ Except for noted amendments pertaining to domestic violence and driving while intoxicated.

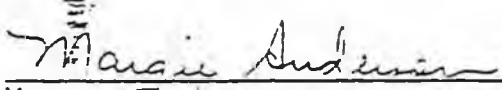
1 "seize" a person to preserve evidence of consumption, without a
2 warrant in exigent circumstances, that seizure, under Alaska law,
3 may not be for arrest to bring charges but only for obtaining
4 evidence. Neither the State nor the defendant raised the issue and
5 this court does not decide it.

6 Officers, of course, may be under a legal obligation to take
7 an alcohol-incapacitated minor into protective custody if the minor
8 is unable to care for his or her self.² The officer may also issue
9 a citation.³

10 Dated July 8, 1992

11 
12 Larry Weeks
13 Superior Court Judge

14 I certify that I served J. Ron Sutcliffe and David Seid the above
15 pleading on this 7th day of July 1992 by placing it in their
16 court box.

17 
18 Margie Anderson
19 Secretary to Judge Weeks

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25 ² Busey v. Anchorage, 741 P.2d 230 (Alaska 1987)

³ AS 12.25.180

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,
Plaintiff,
v.
JOSEPH RANDALL JIM,
Defendant.

RECEIVED

FILED IN THE TRIAL COURTS
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

Jun 26 1992

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DEFENDER,
JUNEAU

By _____ ^{FB} Deput

No. 1JU-92-609 CR

MEMORANDUM AND ORDER

This matter is before the court on defendant's motion to dismiss. Defendant filed no reply to the State's opposition and neither party has requested oral argument.

Defendant was arrested at 10:26 p.m. on June 2, 1992, for the offense of minor consuming alcohol, a misdemeanor. The factual record concerning the circumstances of the arrest is somewhat vague, but it is undisputed that the defendant was not consuming alcohol in the presence of the officer. At most, he had consumed it some time before he was contacted by the officer.

Whether or not one construes AS 04.16.050 to cover both the past and present tense or not and whether or not one engages in the "exercise in sophistry" (see State v. Hornaday, 713 P.2d 71 (Washington 1986), Brachtenbach, J. dissenting) necessary to hold that one who has consumed is not in possession, it is clear that the act of consuming charged in the complaint was complete before

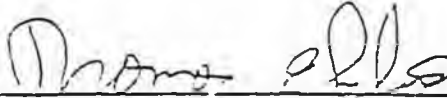
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defendant was arrested, and not in the presence of the arresting officer. AS 12.25.030 requires that the misdemeanor be committed in the officer's presence before he or she can arrest without a warrant.

Having determined that the arrest is illegal, the court must still deny the motion to dismiss. No persuasive argument is advanced by defendant in support of his request to dismiss, and the court is aware of none. The arrest clearly was not outrageous conduct. The officer had probable cause and, indeed, may have taken defendant to the Lemon Creek Jail at defendant's request. ~~In any event, suppression of any evidence seized as a result of the illegal arrest appears to be both the remedy supported by precedent and quite an adequate remedy in the circumstances of this case.~~

IT IS SO ORDERED.

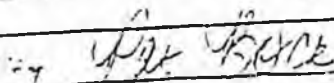
Dated at Ketchikan, Alaska, this 23rd day of June, 1992.



Thomas E. Schulz
Superior Court Judge

CERTIFICATION

The undersigned certifies that on the 26th day of June, 19 92, a true copy of this document was served on the following attorneys:
J. Ron Sutcliffe; Donna McCreedy.



IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,
Plaintiff,

Filed In the Trial Courts
State of Alaska, First District
At Juneau

vs.

FEB 1992

IVAN SABON,
Defendant.

By *EW* Deputy

Case No. 1JU-S92-00053 CR

MEMORANDUM DECISION/ORDER

ON MOTION TO DISMISS

I. FACTUAL AND PROCEDURAL BACKGROUND

On 10 January 1992 , the Defendant, Ivan Sabon, was charged with having violated AS 04.16.050 on or about the same date. The allegation are that "Sabon was found extremely intoxicated on S. Franklin St., hardly able to stand up." The Uniform Summons and Complaint Form filed by police officer Steffel states that Mr. Sabon was "incarcerated." (Complaint, JPD case no. 92000455).

On 11 February 1992, Mr. Sabon, filed a Motion To Dismiss. The Defendant's statement of facts include the following:

that police officer Steffel approached Mr. Sabon as he was walking on the sidewalk along S. Franklin Street;
that the officer alleges she smelled alcohol on Mr. Sabon's person and observed Mr. Sabon's eyes to be bloodshot;

that officer Steffel seized Mr. Sabon, charged him with minor consuming, and transported him to the Juneau Police Department; and

that police officers conducted a search of Mr. Sabon's pockets, and confiscated a bus pass which did not appear to belong to Mr. Sabon.

1 Mr. Sabon asserts that his arrest was unlawful as the alleged
2 illegal in violation of due process of law under Alaska
3 Constitution, Art. I, Sec. 14. Mr. Sabon submits that he did not
4 "consume, possess, or control alcoholic beverages" under AS
5 04.16.050 in the "presence" of the arresting officer. As such, Mr.
6 Sabon contends his arrest without a warrant was contrary to the
7 relevant arrest statute AS 12.25.030. (Motion, pp. 1-6).

8 On 13 February 1992, the State of Alaska filed its Opposition
9 To Motion To Dismiss. The State declares even if this were an
10 illegal arrest "(and it isn't in the state's view)", such is not
11 a valid basis for dismissal of the action or suppression of the
12 evidence. The defendant's remedy, contends the State, rests with
13 the civil courts. (Opposition, p. 1).

14 On 13 February 1992, Mr. Sabon filed an Amended Memorandum In
15 Support Of Motion To Dismiss. This amended pleading submits
16 additional authority for Mr. Sabon's position. (Supp. p. 6-7).

17 It is noteworthy that the State's has not provided a statement
18 of facts which, in any way contradicts the defendant's factual
19 statement. Also, the State has not explained their view that Mr.
20 Sabon's arrest was legal. The State merely states their belief
21 without support. In any event, the State seeks to minimize the
22 merits of Mr. Sabon's position by characterizing it to be a "waste
23 of time responding to the law school exam question posed by Sabon."
24 (Opposition, p. 1). Instead, the State declares it is "not opposed
25 to suppressing all evidence seized following Sabon's arrest."

(Opposition, p. 1-2).

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II. POINTS AND AUTHORITIES

The Alaska Constitution, Art. I, Sec. 14 provides:

[t]he right of the people to be secure in their person, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The offense with which Mr. Sabon stands charged in violation of AS 04.16.050 declares:

A person under the age of 21 years may not knowingly consume, possess, or control alcoholic beverages....

The relevant arrest statute, AS 12.25.030, provides in pertinent part as follows:

(a) A private person or a peace officer without a warrant may arrest a person

(1) for a crime committed or attempted in the presence of the person making the arrest;....

"An arrest for a misdemeanor made by an officer without a warrant is valid if the offense is committed in his presence." Miller v. State, 462 P.2d 421, 425 (Alaska 1969). When a person is arrested on a misdemeanor, "the lawfulness of the arrest depends on whether the arresting officer was present at the commission of the offense." Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969). The Alaska Supreme Court has recognized "that the grounds for arresting a person without a warrant for a misdemeanor committed in the presence of an officer are considerably more

1 restricted than those which would constitute probable cause for a
2 felony arrest without a warrant." Miller v. State, 462 P.2d at 426,
3 fn.3.

4 Whether a seizure has occurred is a question of fact. In
5 Waring v. State, 670 P.2d 357, 364 (Alaska 1976), the test for
6 determining whether a seizure occurred was explained:

7 [W]e will employ an objective standard to determine
8 whether or not a seizure has occurred, i.e., whether or
9 not a reasonable person would believe that he or she was
10 free to go....Such a confrontation, therefore, will
11 amount to a seizure 'only if the officer added to those
12 inherent pressures by engaging in conduct which a
13 reasonable man would view as threatening or offensive
14 even if coming from another private citizen.' 3
15 W.LaFave, "Search and Seizure: A Treatise on the Fourth
16 Amendment," Sec.9.2, at 53, 54 (1978). The critical
17 inquiry would be whether the policeman, although perhaps
18 making inquiries which a private citizen would not be
19 expected to make, has otherwise conducted himself in a
20 manner consistent with what would be viewed as a
21 offensive contact if it occurred between two ordinary
22 citizens.

23 III. APPLICATION AND ANALYSIS

24 In the instant case, there seems to be little dispute over
25 the fact that Mr. Sabon was arrested. He was transported to the
Juneau Police Department. His pockets were searched by police
officers. He was incarcerated at Lemon Creek Correctional Center.
His arraignment was the next day. It is clear that a reasonable
man in Mr. Sabon's situation would view as threatening or offensive
the police conduct in this case. As such, the police had "seized"
Mr. Sabon who had been placed under "arrest."

The significance of Mr. Sabon's arrest is that under AS

12.25.030 the police were only authorized to make such a misdemeanor arrest of Mr. Sabon if the alleged crime of minor consuming had been committed or attempted in the police officer's presence. The common understanding of the term "consume" is "to eat or drink up." Webster's New World Dictionary 305 (2ed. 1982). The statutory definition of the word "possess" is "having physical possession or the exercise of dominion or control over property." AS 11.81.900 (45). There is sufficient grounds for a misdemeanor arrest when the alcohol is in the minor's immediate dominion and control. see, Miller v. State, 462 P.2d 421, 427 (Alaska 1969) (open case of beer on the floor behind the driver's seat). Additionally, the power of a person to control or possess an alcoholic beverage ends once the person swallows the alcohol. see, State v. Thronsen, 809 P.2d 941, 943 (Alaska App. 1991) (affirming the trial court's rationale that "mere presence in the body cannot support a criminal conviction for possession).

On the present facts, officer Steffel did not actually see Mr. Sabon drink any alcohol. Additionally, the officer did not report observing any alcoholic beverages in Mr. Sabon's presence. Mr. Sabon was not witnessed as having any dominion or control over alcoholic beverages. The odor of alcohol on Mr. Sabon was circumstantial evidence that Mr. Sabon in the past may have consumed, possessed, or controlled alcohol. The mere smell of alcohol, however, did not give the police officer sufficient reason to believe that the crime of AS 04.16.050 was being committed in

1 the officer's presence. As such, Mr. Sabon's arrest was not in
2 compliance with the limitations of AS 12.25.030, and was a
3 violation of Mr. Sabon's constitutional rights under Art.1, Sec.
4 14 to be secure against unwarranted searches and seizures. Cf.,
5 A.B.A., Standards for Criminal Justice, vol.II, (2ed. 1986), sec.
6 10-2.2 (mandatory issuance of citation).

7 The conclusion reached above is not precluded by AS 01.10.050
8 which states: "Words in the present tense include the past and
9 future tenses and words in the future tense include the present
10 tense." This statute may have some application in whether charges
11 can be filed against an accused. This statute, however, does not
12 apply to whether a misdemeanor arrest can lawfully be made under
13 AS 12.25.030. The purpose for the limitations of misdemeanor
14 arrest are clear. The statutory intent would be rendered null and
15 void if a police officer was able to arrest a person for a
16 misdemeanor crime previously committed. Any such use of AS
17 12.25.030 would be contrary to reason, policy, and precedent.

18 Beyond the above-referenced rationale construing Alaska's
19 right against unwarranted search and seizure, several other
20 decisions dealing with related rights under the Alaska Constitution
21 compel a strict application of article I, section 14. In Breese
22 v. Smith, 501 P.2d 159 (Alaska 1972), the supreme court interpreted
23 article I, section 1 of the Alaska Constitution, which includes the
24 guarantee "that all persons have a natural right to life, liberty,
25 the pursuit of happiness, and the enjoyment of the rewards of their

1 own industry." Relying on this provision's affirmative grant of
2 the right to "liberty," the supreme court held:

3 [T]he term "liberty" is an elusive concept, incapable of
4 definitive, comprehensive explication. Yetr at the core
of this concept is the notion of total personal immunity
from government control: the right "to be let alone."

5 Bresse vs. State, 501 P.2d at 168.

6 The court normally will use the exclusionary remedy as the
7 primary means of effectuating certain basic constitutional rights.
8 The rationale for the exclusionary rule is deterrence of
9 unconstitutional methods of law enforcement; and the imperative of
10 judicial integrity which requires that the courts not be made
11 "party to lawless invasions of the constitutional rights of
12 citizens by permitting unhindered governmental use of the fruits
13 of such invasions." see, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684
14 (1961); and Terry v. Ohio, 392 U.S. 1, 13, 88 S.Ct. 1868, 1875
15 (1968). The court.

16 In short, police misconduct which shocks the conscience,
17 or is of a nature that calls for the judiciary, as a
18 matter of judicial integrity, to disassociate itself from
benefits derivable therefrom, would lead us to invoke the
exclusionary rule.

19 State v. Sears, 553 P.2d 907, 914 (Alaska 1976).

20 However, the court is not limited to the remedy of the
21 exclusionary rule. The court may on its own motion "and in
22 furtherance of justice," order an action be dismissed. see, Cr.R.
23 43 (c); see also, Cr.R. 1 and 2. Because of the small number of
24 criminal cases which actually go to trial, the deterrent effect of
25

1 the exclusionary rule is severely limited if the remedy for lawless
2 conduct of the police is restricted to the exclusionary rule.
3 Furthermore, the aggravated facts and circumstances of a particular
4 case may lead the court to the conclusion that dismissal is
5 warranted in the furtherance of justice, judicial integrity, and
6 deterrence. The admittedly extreme measure of dismissal is
7 appropriate when the government's outrageous conduct has
8 egregiously violated fundamenatal constitutional rights.

9 The authors of the constitution did not believe that any one
10 branch of government could be relied upon to honor or make
11 effective the fundamental guarantees contained in the Constitution
12 and the Bill of Rights. The prohibition against unlawful search
13 and seizure is a positive expression of restraint against the abuse
14 of governmental power. The role of the judicial system is vital
15 to the preservation of the fundamental rights. James Madison, in
16 an address to Congress, stated:

17 [I]ndependent tribunals of justice will consider
18 themselves in a peculiar manner the guardians of those
19 rights; they will be an impenetrable bulwark against
20 every assumption of power in the Legislative or
21 Executive; they will be naturally led to resist every
22 encroachment upon rights expressly stipulated for in the
23 Constitution by the declaration of rights. 1 Annals of
24 Congress 439 (1789).

25 Courts can not direct the daily operations of government and
law enforcement. The judiciary can respond only to those issues
brought before it in a case-by-case procedure. Indeed, the
protection of fundamental constitutional rights frequently has been

1 achieved by refusing to validate unlawful police conduct. see,
2 Fresneda v. State, 458 P.2d 134, 139-40 (Alaska 1969).

3 If courts allow unlawful action by other branches of the
4 government in the enforcement of law, then the judiciary becomes
5 party to the wrong. When courts condone the unlawful and
6 unconstitutional arrests, they render the statutory and
7 constitutional guarantees a nullity.

8 As Mr. Justice Brandeis observed in his historic dissent in
9 Olmstead v. United States, 277 U.S. 438, 48 S.Ct.564, 575 (1928):

10 In a government of laws, existence of the government will
11 be imperilled if it fails to observe the law
12 scrupulously. Our government is the potent, the omni-
13 present teacher. For good or for ill, it teaches the
14 whole people by its example. Crime is contagious. If
15 the government becomes a lawbreaker, it breeds contempt
16 for law; it invites every man to become a law unto
17 himself; it invites anarchy.

18 In the same case, Mr. Justice Holmes declared:

19 [W]e must consider the two objects of desire both of
20 which we cannot have and make up our minds which to
21 choose....We have to choose, and for my part I think it
22 is less evil that some criminals should escape than that
23 the government should play an ignoble part.
24If the existing code does not permit district
25 attorneys to have a hand in such dirty business it does
not permit the judge to allow such iniquities to succeed.

Unless actions are subject to dismissal in the furtherance of
justice for flagrant violations of constitutional rights, we engage
in governmental hypocrisy in a significant fashion. We are not
dealing with "law school exams" (see, State Opposition, p.1).
Rather, we are addressing important constitutional principles.
Freedom from unlawful search and seizures (and warrantless arrest)

1 goes to the very heart of our constitutional history. The right
2 of privacy and to "be let alone" is at issue. Protection from the
3 government's unlawful search and seizure is at stake. Our
4 discussion is not a "waste of time" (see State Opposition, p.1).
5 The values and rights in question are basic to our governmental
6 structure.

7 Constitutional rights become simply words without content
8 unless there is a meaningful consequence for their violation. The
9 judiciary fails to support and defend the constitution (as we are
10 sworn to do) if we permit official lawlessness.

11 In the instant case, Mr. Sabon was not only unlawfully
12 arrested without a warrant, but also he was incarcerated and his
13 pockets were searched. The indignity resulting from the arrest of
14 Mr. Sabon was compounded by his subsequent incarceration and
15 search. The government's action was an affront both to Mr. Sabon
16 and the constitution. The aggravated nature of this lawless police
17 conduct in violation of fundamental statutory and constitutional
18 rights mandates a remedial response. Mr. Sabon's right to be let
19 alone was violated. Further, the State's conduct amounted to a
20 illegal search and seizure of Mr. Sabon. It is the opinion of this
21 court in the interest: (1) of deterring such police conduct in the
22 future, (2) of preserving the integrity of the judiciary, (3) of
23 protecting fundamental constitutional rights, and (4) of furthering
24 justice, that the present action is subject to the exclusionary
25 rule and also to dismissal.

1 In summary, Mr. Sabon was arrested without a warrant for the
2 misdemeanor offense of minor consuming. The arresting officer did
3 not observe Mr. Sabon consume or possess alcohol. Mr. Sabon's
4 arrest was not in accord with AS 12.25.030 and violated Alaska
5 Constitution, art. I, section 14. The exclusionary rule leads to
6 the suppression of evidence obtained following Mr. Sabon's arrest.
7 The interests of police deterrence, judicial integrity,
8 constitutional rights and furtherance of justice together with
9 insufficient evidence, as a matter of law, call for dismissal of
10 the present charges.

11 IV. CONCLUSION

12 Therefore, based on all of the above, and for good cause
13 having been shown,

14 It Is Hereby Ordered, Adjudged, and Decreed:

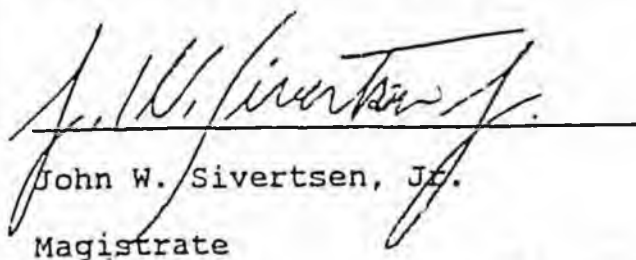
15 That any and all evidence seized following Mr. Sabon's arrest
16 shall be suppressed;

17 That Defendant's Motion To Dismiss is Granted; and

18 That the present case is Dismissed with prejudice.

19 Dated this 2 March 1992.

20 In The District Court At Juneau

21 
22 _____
23 John W. Sivertsen, Jr.
24 Magistrate

25 **CERTIFICATION**

The undersigned certifies that on the 2 day of
March, 1992, a true copy of this
document was served on the following attorneys:
Ron. Sutcliffe (Co) Court box
Anna McNeely (Co) Court box
By J. W. Sivertsen, Magistrate