

SB

221

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/10/94

FURTHER: Judiciary

Date of 5-Day Notice: 1/13/94
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 1/24/94

HES Committee considered SENATE BILL NO. 221

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

and recommends:

replace with _____ CS _____

- same title
- new title
- technical title change (HB only)

attaches amendment(s)

adopts _____ Letter of Intent

further referral to the _____

do pass

do not pass

no recommendation

individual recommendations

FISCAL NOTE INFORMATION

Department	Date	Zero	Fiscal
Dept of Law	1/18/94	0	
Public Safety	1/17/94	0	
Administration	1/24/94	0	
Administration	1/24/94	0	

Department	Date	Zero	Fiscal

Appropriation No Fiscal Note

Governor's Bill with Previous Fiscal Notes (enter information above)

DO PASS:

John W. Mans

Mike Miller

Loren D. Leman

OTHER RECOMMENDATIONS:

John Ellis no rec.

Judith E. Saly No REC

Alan A. Rain Do Pass
 Chair: Signature and Recommendation

Alaska State Legislature

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

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



State Capitol
Juneau, Alaska 99801-1182
(907) 465-3873
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.

District A:

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.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 221

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 Usora Date: 1/24/94
 Agency: Administration

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 221

Revision Date: _____ Dept. Affected: Administration
 Title: *An Act relating to arrest of a person for illegal BRU: Office of Public Advocacy
possession, consumption, or control of alcohol; and providing... 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
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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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 Usher Date: 1/24/94
 Agency: Administration

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 221

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						
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REVENUE						
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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, Director
Division: Administrative Services Division

Phone: 465-3672

Date: January 18, 1994

Approved by Commissioner: Bruce M. Botelho, 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.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO: SB 221

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-

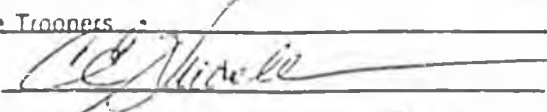
Estimate of current year (FY 94) impact: \$ _____

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: 269-5691
 Division: Alaska State Troopers Date: 01/12/94
 Approved by Commissioner:  Date: 01/17/94
 Agency: Richard L. Burton, Dept. of Public Safety

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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 12.61.140.

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 04.10.050. 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

1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA JUL 09 1992

FIRST JUDICIAL DISTRICT AT JUNEAU Clerk of Court

By ZM+ _____ Det

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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

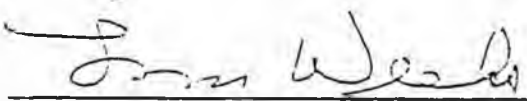
While there may be some issue as to whether an officer may

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

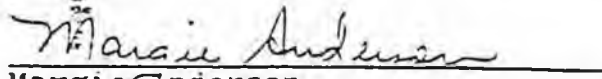
1 "seize" a person to preserve evidence of consumption, without a
2 warrant in exigent circumstances, that seizure, under Alaska law,
3 may not be for arrest to bring charges but only for obtaining
4 evidence. Neither the State nor the defendant raised the issue and
5 this court does not decide it.

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

Dated July 8, 1992

10 
11 Larry Weeks
12 Superior Court Judge

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

16 
17 Margie Anderson
18 Secretary to Judge Weeks

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

³ AS 12.25.180

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

3 STATE OF ALASKA,
4 Plaintiff,

5 v.

6 JOSEPH RANDALL JIM,
7 Defendant.

RECEIVED

Jun 26 1992

DEFENDER,
JUNEAU

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

JUN 26 1992

By _____ ¹⁶ Deput

8
9 No. 1JU-92-609 CR

10 MEMORANDUM AND ORDER

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

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

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

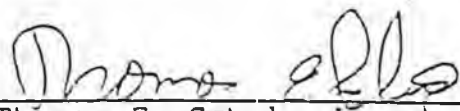
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defendant was arrested, and not in the presence of the arresting officer. AS 12.25.030 requires that the misdemeanor be committed in the officer's presence before he or she can arrest without a warrant.

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.~~

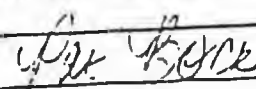
IT IS SO ORDERED.

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 McCREADY.



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 3 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

1 12.25.030 the police were only authorized to make such a
2 misdemeanor arrest of Mr. Sabon if the alleged crime of minor
3 consuming had been committed or attempted in the police officer's
4 presence. The common understanding of the term "consume" is "to
5 eat or drink up." Webster's New World Dictionary 305 (2ed. 1982).
6 The statutory definition of the word "possess" is "having physical
7 possession or the exercise of dominion or control over property."
8 AS 11.81.900 (45). There is sufficient grounds for a misdemeanor
9 arrest when the alcohol is in the minor's immediate dominion and
10 control. see, Miller v. State, 462 P.2d 421, 427 (Alaska 1969)
11 (open case of beer on the floor behind the driver's seat).
12 Additionally, the power of a person to control or possess an
13 alcoholic beverage ends once the person swallows the alcohol. see,
14 State v. Thronsen, 809 P.2d 941, 943 (Alaska App. 1991) (affirming
15 the trial court's rationale that "mere presence in the body cannot
16 support a criminal conviction for possession).

17 On the present facts, officer Steffel did not actually see Mr.
18 Sabon drink any alcohol. Additionally, the officer did not report
19 observing any alcoholic beverages in Mr. Sabon's presence. Mr.
20 Sabon was not witnessed as having any dominion or control over
21 alcoholic beverages. The odor of alcohol on Mr. Sabon was
22 circumstantial evidence that Mr. Sabon in the past may have
23 consumed, possessed, or controlled alcohol. The mere smell of
24 alcohol, however, did not give the police officer sufficient reason
25 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

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

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

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

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

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

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

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

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 fundamental 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:

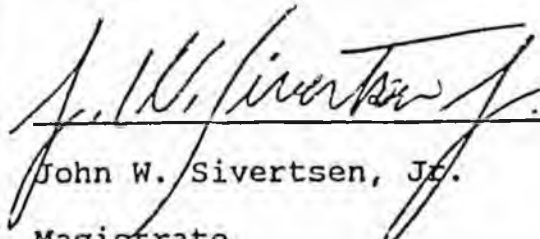
15 That any and all evidence seized following Mr. Sabon's arrest
16 shall be suppressed;

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. Dutcher, Esq. & David Boy
Wanda McNeely, Esq. & David Boy
By W. W. W. Secretary