ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5724 HOUSE JUDICIARY 128

FORM NO. 8 (cont.)

DATED at _____, Alaska this _____ day of _____, 19___.

_____ Custodian

_____ Plaintiff

_____ Custodian Representative

_____ Interested Parties

FORM NO. 9

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

_____ JUDICIAL DISTRICT AT _____

State of Alaska,	)
	)
Plaintiff,	)
	)
vs.	)
	)
F/V MR. WONDERFUL, its paraphernalia and gear, the proceeds of 52,349 pounds of king crab delivered pursuant to ADF&G Fish Ticket No. E 534219, LARRY EDFINGER and PAUL TATUM,	)
	)
Defendants.	)
	)

No. 3AN __-___ CIV

STIPULATION FOR RELEASE OF VESSEL

I

This is an action for damages and forfeiture of the above-named defendant items.

II

The known parties with an interest, right, or title to the defendant items are:

1. State of Alaska _____
2. U.S. Government, NOAA _____
   a. Taxes (fed. state) _____
   b. Loans _____
   c. etc. _____
3. (Owner/Operator) _____
4. (Bank) _____

5. (Crewmember's wage claims) _____

6. (Materialmen and suppliers) _____

III

It is presently in the best interest of all parties that the defendant items named in Exhibit A to this agreement have an opportunity to engage in lawful activities until _____ __, 19__ (or such time as a [district or superior] court decision on forfeiture is rendered).

Therefore the parties agree as follows:

1. The defendant items named in Exhibit "A" are released to the control and custody of _____, hereinafter referred to as "Custodian".

2. Custodian shall meet all obligations on the defendant items without delay. The obligations and dates of payments include:

	Lender	Total	Monthly Payment	Due Date
a.	_____	_____	_____	_____
b.	_____	_____	_____	_____
c.	_____	_____	_____	_____

3. Each lender shall confirm receipt of each required payment in writing to the state within five days of the due date.

4. No additional obligation may encumber the vessel without written permission of the state.

5. Custodian agrees to hold the state harmless for any damages or obligations that may occur after delivery to custodian under this agreement.

6. Custodiar agrees to obtain insurance on the items being delivered in an amount equal to their full replacement value and to keep such a policy in force at all times.

7. The parties agree upon the following value of the defendant items listed in Exhibit A at the time of seizure.

Date of Seizure	Total Value
_____ __, 19__	$_____

8. Custodian posts a bond in the amount of $_____ to protect the interests of the state during the period of release.

9. Bond shall be increased whenever there is an increase in value of the defendant items equal to 20% of the value given in No. 7.

10. Upon a superior (district) court decision favorable to the plaintiff, the released items shall be immediately delivered to _____, Alaska within thirty (30) days of the date of the

10. court's decision. If the value of the released items exceeds the value given in paragraph 7, the bond less any penalty shall be exonerated upon delivery. If the value of the returned items is less than the value given in paragraph 7, the bond only in amount equal to the value of the returned items shall be exonerated.

11. Custodian shall be penalized as follows for delays in delivery:

	Delay (days)	Penalty
a.	0-3	None
b.	4-7	5% of the value of paragraph 7 or 5% of the value of the returned items at time of delivery, whichever is higher.
c.	7-14	10% of the value of paragraph 7 or 5% of the value of the returned items at time of delivery, whichever is higher.
d.	14-30	50% of the value of paragraph 7 or 5% of the value of the returned items at time of delivery, whichever is higher.
e.	More than 30	Forfeiture of bond in addition to defendant items.

12. Upon a judgment in favor of the defendant items, the bond shall be exonerated and any remaining defendant items returned to the custodian.

13. Custodian shall keep, maintain, and preserve the defendant items in accordance with applicable laws, regulations, and ordinances and generally accepted standards of the industry. The items shall be maintained in at least as good a condition as when seized. Improvements made with written approval of the state shall be credited to defendants and the agreed amount shall be paid or credited defendants upon a decision of forfeiture by the court.

14. In the event Custodian fails to maintain the vessel in as good a condition as when seized, the state shall repossess the vessel with or without notice. Custodian shall reimburse state for all repossession costs and maintenance, upkeep, or refurbishing costs.

15. Custodian shall keep the defendant items in the Third Judicial District unless otherwise authorized by order of this court or agreement of the parties.

16. On the first day of every month Custodian shall prepare a monthly summary, stating the location of the vessel and the activities of the defendant items, and deliver the summary to plaintiff and each interested party.

17. On the first day of every month Custodian shall prepare a proposed itinerary for that month and deliver the itinerary to plaintiff and each interested party.

18. The bond securing the release of the defendant items shall be forfeited to the plaintiff upon: 1) failure to deliver in accordance with paragraph 9; 2) loss or destruction or disability to use the defendant items for a period exceeding 30 days.

Forfeiture of bond is not cause for dismissal of the lawsuit.

1(a)_____
Custodian

1(b)_____
Custodian Representative

2._____
Plaintiff

3(a)_____
Interested Parties

3(b)_____

3(c)_____

3(d)_____

MEMORANDUM State of Alaska

TO: Susan S. McLean
Assistant District Attorney
Kodiak

DATE: April 26, 1983

FILE NO:

TELEPHONE NO:

FROM: Sarah Elizabeth McCracken SEM
Assistant Attorney General
Natural Resources-Anchorage

SUBJECT: Release of Crab Pots

This is a somewhat tardy response to your February 23, 1983 memo requesting a form for the release of crab pots.

It is difficult to develop a universal agreement for release of crab pots or other gear, because the circumstances of the seizure, the nature of the gear seized and other matters may differ from case to case and require special tailoring. However, the form that is enclosed should be a good general guideline for release of crab pots and other gear (including vessels) seized in connection with district court criminal matters. It could also be modified to address civil seizure and forfeiture actions. A few comments are in order:

1. In general, when we seize a fishing vessel we do not wish to enter into a stipulation "for value" whereby the stipulation would result in substitution of the bond or other security for the vessel itself. This is because the value of a fishing vessel is likely to increase during the pendency of the action. However, crab pots and other gear are likely to depreciate in value, particularly if released and subjected to use and deterioration from the elements. Therefore, we would probably wish to enter into a stipulation for value with respect to depreciating goods such as crab pots so that we would have the benefit of the value of the crab pots when seized, rather than be left with what might be virtually worthless equipment at the end of a criminal trial or appeal. Whether equipment for which you would like to use the stipulation appreciates or depreciates should determine whether to call it a stipulation for value and whether to use the language suggested in paragraph 11.

2. Depending on the nature of the goods, you may or may not need the language in paragraph 13 (that the items will be maintained in as good a condition as when seized.) If we intend to substitute the bond anyway, that language would not be necessary. I have attempted to cover both situations in paragraph 11 by allowing the state to have the option of either retaining the goods or accepting the bond or other security as a substitution.

3. Other paragraphs in this draft may or may not be applicable, given the particular facts of a specific case. For example, there may be no need for paragraph 5 relating to obligations if it is clear that none exist for the equipment. In other cases, there may be very complicated financing, particularly if you have seized expensive gear.

I hope this will be of some use to you, and I reiterate that we would be glad to assist you as necessary in implementing these kinds of release agreements.

You may also be interested to know that the Alaska Board of Fisheries (and also the Alaska Board of Game) adopted regulations during the last regulatory meeting in March and April specifying that fish and game regulations are intended to be strict liability offenses unless otherwise provided by the regulations or statute. The Board of Fisheries regulation should be sent to the Lt. Governor's office for filing sometime within the next week or two, and hence would be in effect 30 days thereafter. We are hopeful that this action by the boards will remedy some of the problems created by the Reynolds decision.

Best regards.

SEM/jmo

cc: John Gissberg
Kathleen McGuire
Larri Spengler

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

_____ JUDICIAL DISTRICT AT _____

STATE OF ALASKA)
)
v.)
)
)
)
)
)

Case No. _____

STIPULATION FOR VALUE AND AGREEMENT
FOR RELEASE OF [CRAB POTS]

The State of Alaska, through [DA/AG], and [claimant/defendant] hereby stipulate and agree as follows:

1. [Claimant/defendant] is the owner of the [vessel/gear/crabpots], ADF&G No. [_____].

2. On or about [_____, 19__], officers of the State of Alaska, Department of Public Safety, Division of Fish and Wildlife Protection, (hereinafter F&WP) observed [describe violation, location, storage depth], a violation of 5 AAC [____] and AS 16.05.920.

3. On or about [_____, 19__], officers of the F&WP seized the [crab pots/gear] referenced in paragraph 1 of this agreement [under authority of a seizure warrant issued on _____/ under authority of a warrantless search under AS 16.05.180]. The [crab pots/gear] are presently in the state's custody at [_____], Alaska.

4. For the mutual convenience of the parties to this agreement the parties desire to release [crab pots/gear, ADF&G No.] to the care and custody of [_____] (hereinafter "Custodian") upon the terms and conditions of

this agreement. This release agreement shall become effective when signed by the parties.

5. Custodian shall meet all obligations on the [crab pots/gear], which include:

	Lenders	Total	Monthly Payment	Due Date
a.	_____	____	_____	_____
b.	_____	____	_____	_____

6. Custodian may not further encumber the [crab pots/gear]

7. Custodian shall hold the State harmless for any damages or obligations that may occur after delivery to custodian under this agreement.

8. The stipulated value of the [crab pots/gear] at the date of seizure [_____, 19__], is [_____].

9. Custodian shall post [with the court], at the time this agreement is executed, a [cash bond/other security] in the amount of $[_____] to protect the State's interests during the period of release.

10. Upon a court judgment forfeiting the [crabpots/gear] to the State, custodian shall deliver the [crab pots/gear] as soon as possible, and in no event more than 30 days after forfeiture is ordered, to [_____], Alaska.

11. If the [crab pots/gear] are returned in substantially the same condition as when released, so that their value is equal to or exceeds that set in paragraph 8 of this agreement, the bond shall be exonerated. If the value of the [crab pots/gear] at the time forfeiture is ordered is

less than the amount set in paragraph 8 of this agreement, the State may, at its option, retain the bond and any interest as a substitution for the [crab pots/gear].

12. Upon judgment [of acquital/denying forfeiture of crabpots/gear], the bond will be exonerated and the [crab pots/gear] will be returned to custodian.

13. Custodian shall keep, maintain, and preserve the [crabpots/gear] in accordance with all applicable laws, regulations, and ordinances, and generally accepted fishing industry standards. The items shall be maintained in as good a condition as when seized.

14. Custodian shall keep the [crabpots/gear] within the [_____] Judicial District unless otherwise agreed by the State.

15. This agreement is for the purpose of release of [crab pots/gear] only, and does not constitute an admission of liability or wrongdoing by either party.

16. This agreement contains the entire agreement between the parties, and its terms are contractual and not a mere recital.

17. This agreement shall be construed under the laws of the State of Alaska.

18. If custodian breaches the terms of this agreement, the custodian must deliver the items to the State immediately;

[redacted] any failure to deliver within ten days after the breach of a[redacted]terms of this agreement will automatically forfeit the bond to the State.

Dated: _____.

_____
Assistant District Attorney

Dated: _____.

_____
[Claimant/owner]

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

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

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

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

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

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

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

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

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

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

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

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

(g) In this section,

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

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

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

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

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

The second 1980 amendment rewrote the section.

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

breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. Anchorage v. Erickson, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

See note to AS 28.35.030 under this catchline, Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. Whisenhunt v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

Use of search warrant.

Implied Consent Statutes in effect at the time of the arrests of defendants in 1980 and 1981 precluded the admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestees had refused to take such a test. Pena v. State, Sup. Ct. Op. No. 2851 (File Nos. 6174, 7052), 684 P.2d 864 (1984).

Chemical tests not conclusively presumed accurate. — Due process will not allow the results of a chemical test authorized under subsection (a) to be conclusively presumed accurate. Barcott v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3212 (File No. S-1692), 741 P.2d 226 (1987).

Applied in Lawrence v. State, Ct. App. Op. No. 603 (File No. A-799), 715 P.2d 1213 (1986).

Quoted in Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987); State, Dep't of Pub. Safety v. Conley, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Cited in Romo v. Municipality of Anchorage, Ct. App. Op. No. 457 (File No. A-462), 697 P.2d 1065 (1985).

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

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

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

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

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

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

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

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

(i) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a

municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

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

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

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction. (§ 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983; am § 17 ch 60 SLA 1986)

Effect of amendments. — The 1986 amendment substituted "may" for "shall" following "chemical test" near the end of subsection (a).

NOTES TO DECISIONS

Legislative intent. — In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged with driving while intoxicated; the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. Bass v. Municipality of Anchorage, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Imposition of criminal penalties held constitutional. — The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986).

Implied consent. — Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those drivers are treated no differently from other sorts of persons suspected of committing criminal acts. Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986).

"While" defined. — The word "while" in subsection (a) means "for." Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. Anchorage v. Erickson, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. Whisenhunt v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

See note to AS 28.35.030 under this catchline, Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

Right to contact counsel does not include a right to have counsel physically present while a breath test is administered. Annas v. State, Ct. App. Op. No. 647 (File No. A-954), 726 P.2d 552 (1986).

Admissibility of evidence of refusal.

Admission into evidence of defendant's refusal to submit to a breathalyzer test did not violate his fifth amendment right against self-incrimination, even though Alaska has made refusal to submit to a breathalyzer test a separate criminal offense. Deering v. Brown, 839 F.2d 539 (9th Cir. 1988).

Requirements for conviction. — The jury need not find that defendant operated a motor vehicle while under the influence of intoxicating liquor as a condition prerequisite to convicting him or her of refusal to provide a chemical breath test. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Probable cause to arrest is not an element of the offense of refusing a chemical test of breath. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

In order to convict a person of refusing to submit to a chemical test of his or her breath, the state must prove that the individual in question knew or perhaps should have known that the breath test was sought as evidence in connection with an investigation of his or her driving while intoxicated, and, second, that with that culpable mental state, he or she declined the test. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Admission of intoxication. — While a trial court might consider defendant's admission of intoxication in mitigation of punishment, it is not a defense to a refusal to provide a chemical breath test. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Conviction affirmed. — See McCracken v. State, Ct. App. Op. No. 399 (File No. A-214), 685 P.2d 1275 (1984).

Applied in Skuse v. State, Ct. App. Op. No. 582 (File No. A-885), 714 P.2d 368 (1986).

Cited in Witt v. State, Ct. App. Op. No. 433 (File No. A-482), 692 P.2d 976 (1984).

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

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

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

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

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters

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

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

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

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

NOTES TO DECISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) a description of the motor vehicle;

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

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

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

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

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

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

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

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

(d) Forfeiture of a motor vehicle under AS 28.35.036 is without prejudice to the rights, and does not extinguish the claims of a creditor with an interest in the motor vehicle. (§ 23 ch 77 SLA 1983)

Sec. 28.35.038. Municipal impoundment and forfeiture. Notwithstanding other provisions in this title, a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle involved in the commission of an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or AS 28.35.032. An ordinance adopted under this section is not required to be consistent with this title or regulations adopted under this title. (§ 23 ch 77 SLA 1983)

Article 3. Reckless and Negligent Driving.

Section

Sec. 28.35.040. Reckless driving. (a) A person who drives a motor vehicle in the state in a manner which creates a substantial and unjustifiable risk of harm to a person or to property is guilty of reckless driving. A substantial and unjustifiable risk is a risk of such a nature and degree that the conscious disregard of it or a failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

(b) A person convicted of reckless driving is guilty of a misdemeanor and is punishable by a fine of not more than $1,000 or by imprisonment for not more than one year or by both.

(c) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 50-5-4 ACLA 1949; am § 1 ch 182 SLA 1955; am § 1 ch 70 SLA 1961; am § 2 ch 121 SLA 1967; am § 1 ch 13 SLA 1971; am § 46 ch 32 SLA 1971; am § 6 ch 74 SLA 1974)

NOTES TO DECISIONS

Codification of common-law standard of care. — This section and AS 28.35.045, defining reckless and negligent driving, do not set forth precise standards of care, but merely codify the usual common-law standard of care. Bailey v. Lenord, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Specific conduct not proscribed. — This section and AS 28.35.045, defining reckless and negligent driving, do not proscribe specific conduct, but rather state that a person shall not drive a motor vehicle in a manner which creates an unjustifiable risk. Bailey v. Lenord, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Risks to safety of general public. — Reckless driving involves risks to the safety of the public at large. Calder v. State, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

A defendant was not placed in double jeopardy by his conviction of the lesser included offense of reckless driving on a felony charge of assault with a dangerous weapon even though a misdemeanor charge of reckless driving had already been adjudicated against him because, although the charges arose out of the same general incidents, they were based on different conduct during that incident. Calder v. State, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

Trooper arriving at accident scene cannot arrest for reckless driving without warrant. — The Alaska legislature has classified both reckless driving and operating or driving an automobile under the influence of intoxicating liquor as misdemeanors. Thus, a state trooper who arrived at an accident scene could not arrest a driver without a warrant for either reckless driving or drunk driving since neither of these offenses was committed or attempted in his presence. Layland v. State, Sup. Ct. Op. No. 1150 (File No. 2264), 535 P.2d 1043 (1975), aff'd, Sup. Ct. Op. No. 2739, 549 P.2d 1182 (1976), overruled on other grounds, City of Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1192 (1979).

Sentencing considerations. — Where it was undisputed at trial that there were three people in the rear of defendant's pickup who were extremely vulnerable in case of any accident, the judge could properly consider this fact at sentencing in evaluating the extent of defendant's recklessness, even though he could not properly consider the fact that they had died from defendant's recklessness. Huckaby v. State, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Considering uncounseled moving violations in sentencing held harmless error. — Any error which might have occurred by reason of the trial court's consideration of two uncounseled moving violations in determining the sentence for negligent driving was harmless where the court also considered three counseled moving violations and where it did not restrict or suspend defendant's license but imposed a fine of $100, which was only $25 above that suggested by defendant's counsel. McKenzie v. State, Sup. Ct. Op. No. 1029 (File No. 2012), 520 P.2d 791 (1974).

Sentence upheld. — Severity of defendant's offense within the crime of reckless driving and the need to deter him, to deter others, and to reaffirm societal norms justified a one-year sentence. Huckaby v. State, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Cited in Hood v. Smedley, Sup. Ct. Op. No. 800 (File No. 1406), 498 P.2d 120 (1972); Williford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983); Wilson v. State, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), P.2d (1984).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 312 to 320.

61A C.J.S., Motor Vehicles, §§ 609 to 624.

What amounts to gross or wanton negligence in driving an automobile precluding the defense of contributory negligence, 38 ALR 1424, 72 ALR 1357, 92 ALR 1367, 119 ALR 654.

What amounts to reckless driving within statute making reckless driving of automobile a criminal offense, 86 ALR 1273, 52 ALR2d 1337.

Definiteness and certainty of statutes prohibiting, 12 ALR2d 580.

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

Sec. 28.35.045. Negligent driving. (a) A person who drives a motor vehicle in the state in a manner which creates an unjustifiable risk of harm to a person or to property and who, as a result of the creation of the risk, actually endangers a person or property is guilty of negligent driving. An unjustifiable risk is a risk of such a nature and degree that a failure to avoid it constitutes a deviation from the standard of care that a reasonable person would observe in the situation. Proof that a defendant actually endangered a person or property is established by showing that, as a result of the defendant's driving,

1988 Supplemental

Chapter 35. Miscellaneous Provisions.

Article 2. Operating While Intoxicated; Implied Consent.

Sec. 28.35.029. Open container. (a) A person may not drive a motor vehicle on a highway or vehicular way or area, when there is an open bottle, can, or other receptacle containing an alcoholic beverage in the passenger compartment of the vehicle, except as provided in (b) of this section.

(b) A person may transport an open bottle, can, or other receptacle containing an alcoholic beverage

(1) in the trunk of a motor vehicle;

(2) on a motor driven cycle, or behind the last upright seat in a motor home, station wagon, hatchback, or similar trunkless vehicle, if the open bottle, can, or other receptacle is enclosed within another container;

(3) behind a solid partition that separates the vehicle driver from the area normally occupied by passengers; or

(4) if the open bottle, can, or other receptacle is in the possession of a passenger in a commercial motor vehicle.

(c) In this section

(1) "alcoholic beverage" has the meaning given in AS 04.21.080(b);

(2) "commercial motor vehicle" means a motor vehicle for which the owner receives direct monetary compensation and that has a capacity of 12 or more persons;

(3) "motor vehicle" means a vehicle for which a driver's license is required;

(4) "open" includes having a broken seal;

(5) "passenger compartment" means the area normally occupied by the driver and passengers and includes a utility or glove compartment accessible to the driver or a passenger while the motor vehicle is being operated.

(d) A person who violates (a) of this section is guilty of an infraction. (§ 1 ch 142 SLA 1988)

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated.

NOTES TO DECISIONS

Rebuttable presumption of intoxication. — This section does not establish a conclusion that blood tests become irrelevant if taken more than four hours after the alleged violation; rather, the statute simply reflects the legislative conclusion that a blood test taken within four hours of the alleged infraction is such definitive evidence of intoxication at the time of driving, that the blood test result is sufficient to establish a rebuttable presumption of intoxication. Williams v. State, Ct. App. Op. No. 709 (File No. A-1631), 737 P.2d 360 (1987).

Movability of vehicle. — This section on its face, contains no "movability" requirement, and the definition of "operate" adopted in Jacobson contains no such requirement; and a defendant could be found guilty of driving while intoxicated even though his automobile was stuck in a mudhole and was incapable of movement. Lathan v. State, Ct. App. Op. No. 542 (File No. A-901), 707 P.2d 941 (1985).

Defendant was "in actual physical control" of her vehicle, where she was seated in the driver's seat behind the steering wheel, had possession of the ignition key and was attempting to put the key in the ignition; given these factors of control, it is not necessary that the engine be running. State, Dep't of Pub. Safety v. Conley, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Police response to what is reasonably interpreted as request for assistance justified. — A trooper's action in engaging his emergency lights and contacting a defendant, following what he reasonably interpreted to be a request for assistance from the defendant's vehicle, is permissible under U.S. Const., Amend. 4 as well as Alaska Const., Art. I, § 14. When a police officer observes facts and circumstances which he actually and reasonably concludes to be a request for contact or assistance, the officer is justified in making that contact, which would not be analyzed as an investigatory stop requiring articulable suspicion. Crauthers v. State, Ct. App. Op. No. 652 (File No. A-1507), 727 P.2d 9 (1986).

Subsection (c) inapplicable to airboats. — A court may not revoke the driver's license of a person convicted of driving while intoxicated on public property in an airboat; an airboat is not a motor vehicle for which a driver's license is required. State v. Stagno, Ct. App. Op. No. 725 (File No. A-1585), P.2d (1987).

Cough medicines as intoxicating liquors. — Nyquil and terpin hydrate, two cough medicines, are intoxicating liquors within the common understanding of that phrase and can be the basis for a conviction of driving while intoxicated. Lambert v. State, Ct. App. Op. No. 441 (File No. A-403), 694 P.2d 791 (1985).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. Anchorage v. Erickson, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

It is only where the totality of the arrestee's words constitute a request, express or implied, for an opportunity to contract counsel for the purpose of discussing a breathalyzer examination that an opportunity to consult counsel must be provided prior to administration of the breathalyzer. Once the breathalyzer examination is completed or refused and videotaping finished, the suspect is entitled to the full use of the rights guaranteed by AS 12.25.150(b) and Criminal Rule 5(b). Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

Where the judge determined, based on the evidence, that the DWI defendant's statements regarding having somebody present did not relate to a desire to consult with counsel about breathalyzer examinations or field sobriety test, but rather related to having someone present

to observe the administration of the test, perhaps a technician, to insure its validity, the judge was not clearly erroneous in concluding that the defendant did not properly invoke his Copelin rights and that the results of the breathalyzer examination should not be suppressed. Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

When breathalyzer test results should be excluded. — The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. Whisenhunt v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

Parental presence at all court proceedings is a prerequisite to conviction of a minor for a traffic offense, including driving while intoxicated. Aiken v. State, Ct. App. Op. No. 672 (File No. A-1498), 730 P.2d 821 (1987).

Attempted retest may be prerequisite to a motion to suppress intoximeter result on the grounds of alleged inadequacy in the magnesium perchlorate tube (MPT) retention system where the trial court expressly finds that the MPT system is properly functioning, but leaves open the possibility that retained samples might be defective in individual cases. Ansay v. State, Ct. App. Op. No. 598 (File Nos. A-829, A-831), 715 P.2d 1194 (1986).

Cost-free retest not required. — Compliance with Serrano does not require that defendants be furnished a cost-free retest. Ansay v. State, Ct. App. Op. No. 598 (File Nos. A-829, A-831), 715 P.2d 1194 (1986).

Results of police officer's self-administered intoximeter test admissible. — Where a police officer, though not under arrest for driving while intoxicated, administered himself an intoximeter test, the results of that test were properly admitted at trial even though he was not read an implied consent warning and no sample was preserved. Lawrence v. State, Ct. App. Op. No. 603 (File No. A-799), 715 P.2d 1213 (1986).

Preserving breath samples.

In accord with main pamphlet. See Champion v. Department of Pub. Safety, Sup. Ct. Op. No. 3074 (File No. S-868), P.2d (1986).

Retroactive application of Serrano rule. — Where a new rule serves to ensure defendants a fair trial, it must be retroactively applied at least to any case which was not finally disposed of at the time the rule was announced, provided that the defendant raised the point in the trial court. Farleigh v. Municipality of Anchorage, Sup. Ct. Op. No. 3143 (File Nos. S-1162, S-1183), P.2d (1986).

Where defendant's reckless driving conviction was based on precisely the same conduct as his DWI, the offense of reckless driving must be deemed to have merged with the offense of DWI; and it is error to enter a separate judgment of conviction against the defendant on the reckless driving charge. Kalmakoff v. Municipality of Anchorage, Ct. App. Op. No. 588 (File No. A-920), 715 P.2d 261 (1986).

Defendant was a third DWI offender upon his 1987 conviction for driving while intoxicated, where he had been separately charged with DWI in September and November of 1985 and, pursuant to a plea agreement, was sentenced in both cases as if he were a first-time DWI offender. State v. Waalkes, Ct. App. Op. No. 782 (File No. A-2142), P.2d (1988).

Revocation of license for operating motor vehicle in parking lot. — See Caulkins v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3233 (File No. S-1586), 743 P.2d 366 (1987).

Enhanced sentences. — Before a prior conviction for an ostensibly non-criminal infraction, such as a "civil forfeiture," can properly be relied on as the sole basis for imposition of an enhanced mandatory minimum jail term, fundamental fairness under Alaska Const., art. I, § 7 requires the sentencing court to determine that the defendant was afforded the right to counsel in the prior case; an uncounseled conviction is simply too unreliable to be depended on for purposes of imposing a sentence of incarceration, whether that sentence is imposed directly or collaterally. Pananen v. State, Ct. App. Op. No. 551 (File Nos. A-943, A-948), 711 P.2d 528 (1985).

Conditions of probation. — Condition of probation prohibiting one who pled nolo contendere to driving while intoxicated from entering the town where he lived and worked for the term of his probation, one year, without prior written permission from the court was not a reasonable condition and was vacated. The condition was not reasonably related to the nature of the underlying offense, the condition was unnecessarily severe and restrictive, and the condition did not appear to be reasonably related to rehabilitation since there was no evidence to suggest that some endemic characteristic of the town

contributed to the probationer's criminal behavior and the condition was not reasonably related to the protection of the public. Edison v. State, Ct. App. Op. No. 546 (File No. A-940), 709 P.2d 510 (1985).

Applied in Meissner v. State, Ct. App. Op. No. 593 (File Nos. A-1083, A-1084), 715 P.2d 714 (1986); Annas v. State, Ct. App. Op. No. 647 (File No. A-954), 726 P.2d 552 (1986); Yancy v. State, Ct. App. Op. No. 687 (File Nos. A-1392, A-1413), P.2d (1987).

Quoted in Barcott v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3212 (File No. S-1692), 741 P.2d 226 (1987).

Stated in Kavorkian v. Tommy's Elbow Room, Inc., Sup. Ct. Op. No. 2906 (File Nos. S-62, S-79), 694 P.2d 160 (1985).

Cited in Effenbeck v. State, Ct. App. Op. No. 479 (File No. A-597), 700 P.2d 811 (1985); Anderson v. State, Ct. App. Op. No. 585 (File No. A-1028), 713 P.2d 1220 (1986); Morris v. State, Ct. App. Op. No. 694 (File No. A-1668), P.2d (1987); Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987); Clark v. State, Ct. App. Op. No. 716 (File No. A-1840), 738 P.2d 765 (1987); Selig v. State, Ct. App. Op. No. 785 (File No. A-2057), P.2d (1988).

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

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

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

(2) committed a moving traffic violation or unlawfully operated an aircraft or watercraft; in this paragraph, "unlawfully" means in violation of any federal, state, or municipal statute, regulation or ordinance, except for violations that do not provide reason to believe that the operator's ability to operate the aircraft or watercraft was impaired by the ingestion of alcoholic beverages; or

(3) was operating or driving a motor vehicle in violation of AS 28.35.029(a).

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used

against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

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

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

(f) If a driver or operator is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section. (§ 1 ch 83 SLA 1969; am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am § 16 ch 77 SLA 1983; am §§ 1 — 4 ch 76 SLA 1985; am § 2 ch 142 SLA 1988)

Revisor's notes. — The last clause of (b)(2) of this section was enacted as AS 28.35.031(g). Reorganized in 1985.

Effect of amendments. — The 1985 amendment in subsection (b) inserted "or who operates an aircraft or watercraft" in the first sentence, inserted "aircraft, or watercraft" in the second sentence, in paragraph (1) inserted "operating or" and "aircraft, or watercraft," and in paragraph (2) added the language beginning "or unlawfully operated"; and in subsections (d) and (f) inserted "or operator."

The 1988 amendment, in subsection (b), deleted "or" at the end of paragraph (1), added "or" at the end of paragraph (2), and added paragraph (3).

Opinions of attorney general. — The Intoximeter 3000, an infrared alcohol breath test apparatus, is a "chemical test" under this section. 1984 Op. Att'y Gen. No. 01.

NOTES TO DECISIONS

Section constitutional. — The portable breath test authorized by this section does not constitute an unreasonable search under the fourth amendment to the United States Constitution. Leslie v. State, Ct. App. Op. No. 570 (File No. A-866), 711 P.2d 575 (1986).

The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those drivers are treated no differently from other sorts of persons suspected of committing criminal acts. Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986).

Legislative intent. — In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to take blood alcohol tests forcibly from defendants charged with driving while intoxicated; the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. Bass v. Municipality of Anchorage, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Consent to breathalyzer test, etc.

Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the

breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. Anchorage v. Erickson, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

See note to AS 28.35.030 under this catchline, Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. Whisenhunt v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

Use of search warrant.

Implied Consent Statutes in effect at the time of the arrests of defendants in 1980 and 1981 precluded the admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestees had refused to take such a test. Pena v. State, Sup. Ct. Op. No. 2851 (File Nos. 6174, 7052), 684 P.2d 864 (1984).

Chemical tests not conclusively presumed accurate. — Due process will not allow the results of a chemical test authorized under subsection (a) to be conclusively presumed accurate. Barcott v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3212 (File No. S-1692), 741 P.2d 226 (1987).

Applied in Lawrence v. State, Ct. App. Op. No. 603 (File No. A-799), 715 P.2d 1213 (1986).

Quoted in Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987); State, Dep't of Pub. Safety v. Conley, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Cited in Romo v. Municipality of Anchorage, Ct. App. Op. No. 457 (File No. A-462), 697 P.2d 1065 (1985).

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

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

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

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

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

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

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 con-

secutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. If the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked under AS 28.15.181. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation that the court, after consideration of any information compiled under (h) of this section, finds appropriate. The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

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

(i) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a

municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

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

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

(j) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction. (§ 1 ch 83 SLA 1969; am § 28 ch 71 SLA 1972; am § 12 ch 129 SLA 1980; am § 17 ch 117 SLA 1982; am §§ 17 — 20, 25 ch 77 SLA 1983; am § 17 ch 60 SLA 1986)

Effect of amendments. — The 1986 amendment substituted "may" for "shall" following "chemical test" near the end of subsection (a).

NOTES TO DECISIONS

Legislative intent. — In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged with driving while intoxicated, the legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. Baas v. Municipality of Anchorage, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Imposition of criminal penalties held constitutional. — The imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test does not violate his right to equal protection under the law. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986).

Implied consent. — Just as a driver's failure to cooperate in the search conducted by means of a breathalyzer test is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986).

The implied consent statute clearly serves a legitimate state interest. All drivers lawfully stopped are treated equally, and, from the perspective of the fourth and fourteenth amendments, those drivers are treated no differently from other sorts of persons suspected of committing criminal acts. Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986).

"While" defined. — The word "while" in subsection (a) means "for." Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Request for counsel before breathalyzer test. — District court judge's finding that defendant, convicted of driving while intoxicated under municipal code, did not request counsel prior to taking the breathalyzer examination where he never asked to speak to an attorney but asked whether he might need an attorney, with testimony supporting the conclusion that he wondered if he needed an attorney in order to make bail, not because he wanted advice about submitting to a breathalyzer exam, was not clearly erroneous, and superior court judge should not have reversed the conviction. Anchorage v. Erickson, Ct. App. Op. No. 417 (File No. A-512), 690 P.2d 20 (1984).

Right to counsel before breathalyzer test.

The result of a breathalyzer test secured in violation of the right to counsel should be excluded in a civil license revocation proceeding. Whisenhunt v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3250 (File No. S-1467), P.2d (1987).

See note to AS 28.35.030 under this catchline, Van Wormer v. State, Ct. App. Op. No. 473 (File No. A-320), 699 P.2d 895 (1985).

Right to contact counsel does not include a right to have counsel physically present while a breath test is administered. Annas v. State, Ct. App. Op. No. 647 (File No. A-954), 726 P.2d 562 (1986).

Admissibility of evidence of refusal. Admission into evidence of defendant's refusal to submit to a breathalyzer test did not violate his fifth amendment right against self-incrimination, even though Alaska has made refusal to submit to a breathalyzer test a separate criminal offense. Deering v. Brown, 839 F.2d 539 (9th Cir. 1988).

Requirements for conviction. — The jury need not find that defendant operated a motor vehicle while under the influence of intoxicating liquor as a condition prerequisite to convicting him or her of refusal to provide a chemical breath test. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Probable cause to arrest is not an element of the offense of refusing a chemical test of breath. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

In order to convict a person of refusing to submit to a chemical test of his or her breath, the state must prove that the individual in question knew or perhaps should have known that the breath test was sought as evidence in connection with an investigation of his or her driving while intoxicated, and, second, that with that culpable mental state, he or she declined the test. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Admission of intoxication. — While a trial court might consider defendant's admission of intoxication in mitigation of punishment, it is not a defense to a refusal to provide a chemical breath test. Brown v. State, Ct. App. Op. No. 714 (File No. A-1715), 739 P.2d 182 (1987).

Conviction affirmed. — See McCracken v. State, Ct. App. Op. No. 399 (File No. A-214), 685 P.2d 1275 (1984).

Applied in Skuse v. State, Ct. App. Op. No. 582 (File No. A-885), 714 P.2d 368 (1986).

Cited in Witt v. State, Ct. App. Op. No. 433 (File No. A-482), 692 P.2d 976 (1984).

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

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

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

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

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters

of the person's blood, or 0.10 grams or more of alcohol per 210 liters of the person's breath, it shall be presumed that the person was under the influence of intoxicating liquor.

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

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

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

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

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or the person's attorney.

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

dence is unnecessary. (§ 1 ch 83 SLA 1969; am § 6 ch 104 SLA 1971; am § 13 ch 129 SLA 1980; am §§ 18 — 20 ch 117 SLA 1982; am E.O. No. 67, § 2 (1987))

Effect of amendments. — The 1987 amendment substituted "The Department of Public Safety" for "The Department of Health and Social Services" in three places in subsection (d).

NOTES TO DECISIONS

No evidentiary privilege established. — Subsection (a) does not expressly establish an evidentiary privilege, and the Court of Appeals of Alaska stated that it would be inappropriate for the courts to construe subsection (a) as establishing such a privilege by implication. Russell v. Municipality of Anchorage, Ct. App. Op. No. 514 (File No. A-145) 706 P.2d 687 (1985).

Police fully satisfied their obl[illegible] to preserve evidence by preserving a defendant's breath sample, even where police did not take defendant to the hospital he requested (because the state had no contract with that hospital for blood extraction), but offered to take defendant to one of two other hospitals which offer defendant refused. Ward v. State, Ct. App. Op. No. 685 (File No. A-1519), P.2d (1987).

Testing breathalyzer for radio frequency interference. — When a timely and appropriate challenge to admissibility of a breathalyzer test result is made, a municipality must, at a minimum, demonstrate that the breathalyzer instrument in question was tested successfully for radio frequency interference (RFI) at least once in a manner substantially complying with the manufacturer's recommendations, and that none of the conditions for retesting listed in the manufacturer's RFI advisory occurred between the time of the initial RFI test and the challenged breath test. Thayer v. Municipality of Anchorage, Ct. App. Op. No. 395 (File No. 7846), 686 P.2d 721 (1984).

Admission of breath test results where substantial compliance with regulations. — Even where defendant's breath test was administered by an uncertified officer on an intoximeter that was not recalibrated at 60-day intervals as required by 7 AAC 30.050, the test results were still admissible because only substantial compliance with the applicable regulations is required. Herter v. State, Ct. App. Op. No. 592 (File No. A-1134), 715 P.2d 274 (1986).

Suppression of breath test results. — A defendant has the burden of showing that by virtue of some action or inaction on the part of the prosecuting authority, he was not furnished a reasonable means of verifying an adverse breath test result. Once the defendant has sustained his burden of showing that he was not furnished a reasonable means of verification, he has established a prima facie case that the breath test results should be suppressed; and in order to avoid suppression, the governmental agency in question must then prove by a preponderance of the evidence that its failure to provide the defendant an independent means of verifying the result was free of fault. State v. Kerr, Ct. App. Op. No. 561 (File No. A-531), 712 P.2d 400 (1985).

Waiver of objection — In the absence of a specific reservation of the issue during the course of a trial, a party failing to object on foundational grounds to admission of blood- or breath-alcohol test results cannot later object to the application of the statutory presumption of intoxication. Macauly v. State, Ct. App. Op. No. 695 (File No. A-946), P.2d (1987).

Jury should be made aware of statutory presumption. — A jury considering drunk driving, assault (involving motor vehicles), manslaughter, and negligent homicide cases should be made aware of the statutory presumption concerning intoxication in subsection (a). Dresnek v. State, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985).

Jury instructions. — In prosecution for drunk driving manslaughter and second-degree assault, the trial court did not err in instructing the jury that if it found that there was .10% or more [illegible]cohol in defendant's blood at the tim[illegible]he accident, it could infer that he [illegible]r the influence of intoxicating[illegible]ek v. State, Ct. App. Op. [illegible] A-19), 697 P.2d 1059 (19[illegible]

Cited in Edgmon v. State, Ct. App. Op. No. 481 (File No. A-16), 702 P.2d 643 (1985).

Sec. 28.35.035. Administration of chemical tests without consent.

NOTES TO DECISIONS

Section should not be read broadly. — In light of the fact that the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood tests, this section should not be read broadly. Bass v. Municipality of Anchorage, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Effect of section. — The legislature has eliminated a driver's ability to refuse a chemical sobriety test when an arrestee is involved in an accident that results in the death of or injury to another person. Pena v. State, Sup. Ct. Op. No. 2851 (File Nos. 6174, 7052), 684 P.2d 864 (1984).

Application of subsection (b). — The fact that it was not practical to offer a defendant a breathalyzer test does not bring the case within subsection (b) of this section; what does seem to fall within subsection (b) is a narrow class of cases where the defendant is unconscious or otherwise incapable of manifesting his intent to refuse. Bass v. Municipality of Anchorage, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

The legislature's choice of language seems to be consistent with the theory that subsection (b) of this section was intended to apply only to situations where a blood-alcohol test could be conducted without any violence such as where an arrestee is unconscious. Bass v. Municipality of Anchorage, Ct. App. Op. No. 429 (File No. A-273), 692 P.2d 961 (1984).

Cited in Herter v. State, Ct. App. Op. No. 592 (File No. A-1134), 715 P.2d 274 (1986).

Sec. 28.35.036. Forfeiture of motor vehicle.

NOTES TO DECISIONS

Section inapplicable to airboats. — A court may not forfeit the vehicle of a person convicted of driving while intoxicated on public property in an airboat; an airboat is not "a motor vehicle of a type for which a driver's license is required." State v. Stagno, Ct. App. Op. No. 725 (File No. A-1585), P.2d (1987).

Article 3. Reckless and Negligent Driving.

Section
45. Negligent driving

Sec. 28.35.040. Reckless driving.

NOTES TO DECISIONS

Defendant was "in actual physical control" of her vehicle, where she was seated in the driver's seat behind the steering wheel, had possession of the ignition key and was attempting to put the key in the ignition; given these factors of control, it is not necessary that the engine be running. State, Dep't of Pub. Safety v. Conley, Sup. Ct. Op. No. 3297 (File No. S-1791), P.2d (1988).

Sec. 28.35.045. Negligent driving. (a) A person who drives a motor vehicle in the state in a manner which creates an unjustifiable risk of harm to a person or to property and who, as a result of the creation of the risk, actually endangers a person or property is guilty of negligent driving. An unjustifiable risk is a risk of such a nature and degree that a failure to avoid it constitutes a deviation from the standard of care that a reasonable person would observe in the situation. Proof that a defendant actually endangered a person or property is established by showing that, as a result of the defendant's driving,

(1) an accident occurred;

(2) a person, including the defendant, took evasive action to avoid an accident;

(3) a person, including the defendant, stopped or slowed down suddenly to avoid an accident; or

(4) a person or property, including the defendant or the defendant's property, was otherwise endangered.

(b) The offense of negligent driving is a lesser offense than, and included in, the offense of reckless driving, and a person charged with reckless driving may be convicted of the lesser offense of negligent driving.

(c) A person convicted of negligent driving is guilty of an infraction as provided under AS 28.40.050.

(d) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 7 ch 74 SLA 1974; am § 6 ch 241 SLA 1976; am § 19 ch 144 SLA 1977; am § 43 ch 21 SLA 1985)

Effect of amendments. — The 1985 amendment deleted "and in addition, the court may limit or suspend the person's driver's license under AS 28.15.220(b)" at the end of subsection (c).

Article 4. Duties Following Accidents.

Sec. 28.35.050. Action of operator immediately after accident.

NOTES TO DECISIONS

Effect of intoxication on knowledge. — Trial court did not err in instructing the jurors that they could not consider defendant's intoxication in deciding whether he acted knowingly with regard to the offenses of failing to remain at the scene of an accident and failing to render assistance to an injured person. Williams v. State, Ct. App. Op. No. 709 (File No. A-1631), 737 P.2d 360 (1987).

Applied in Winslow v. State, Ct. App. Op. No. 397 (File No. A-103), 685 P.2d 1273 (1984).

Stated in Dunlop v. State, Sup. Ct. Op. No. 3068 (File Nos. S-923, S-1163), 721 P.2d 604 (1986).

Sec. 28.35.060. Duty of operator to give information and render assistance.

NOTES TO DECISIONS

Ten-year sentence with five years suspended for failure to render assistance affirmed. — See Winslow v. State, Ct. App. Op. No. 397 (File No. A-103), 685 P.2d 1273 (1984).

Intoxication. — Trial court did not err in instructing the jurors that they could not consider defendant's intoxication in deciding whether he acted knowingly with regard to the offenses of failing to remain at the scene of an accident and failing to render assistance to an injured person. Williams v. State, Ct. App. Op. No. 709 (File No. A-1631), 737 P.2d 360 (1987).

Stated in Dunlop v. State, Sup. Ct. Op. No. 3068 (File Nos. S-923, S-1163), 721 P.2d 604 (1986).

Cited in Smith v. State, Ct. App. Op. No. 729 (File No. A-1861), 739 P.2d 1306 (1987).

Article 5. Miscellaneous Offenses.

Sec. 28.35.145. Overtaking and passing school bus. (a) The driver of a vehicle that approaches from any direction a school bus stopped on a highway or vehicular way or area shall stop not less than 30 feet from the school bus before reaching it when there are in operation on the school bus flashing red lights as required by regulation. The driver may not proceed until the school bus proceeds and the flashing lights are no longer illuminated.

(b) When a school bus is stopped on a highway or vehicular way or area, whether or not there are in operation on the school bus flashing red lights as required by regulation, the driver of a vehicle shall yield the right-of-way to a person crossing a highway, vehicular way, or area to embark on or disembark from the school bus, whether or not the person is crossing within a marked crosswalk.

(c) The driver of a vehicle on a highway with separate roadways is not required to stop when meeting or passing a school bus that is on a different roadway or, if upon a controlled access highway, when a school bus is stopped off the highway in a loading zone that is part of, or adjacent to, the controlled access highway, and pedestrians are not permitted to cross the highway.

(d) A driver convicted under this section is guilty of a class B misdemeanor and, in addition to other penalties as provided by law, is subject to a mandatory assessment of six demerit points under AS 28.15.221 — 28.15.261.

(e) A vehicle owner, or in the case of a leased vehicle a lessee, is guilty of an infraction as described in AS 28.40.050(d) and may be punished by a fine not to exceed $100, if the vehicle owned or leased

by the person is operated in violation of this section. The owner or lessee may not be penalized if the vehicle was stolen, or the driver of the vehicle is convicted under (d) of this section. This subsection does not apply to a lessor of a vehicle if the lessor keeps a record of the name and address of the lessee. A violation of this subsection may not result in the loss of a driver's license or privilege to drive and does not constitute grounds for assessment of demerit points under AS 28.15.221 — 28.15.261. This subsection does not prohibit or limit the prosecution of a vehicle driver for violating (a) or (b) of this section. (§ 1 ch 8 SLA 1986; am § 10 ch 76 SLA 1987)

Effect of amendments. — The 1987 amendment, effective January 1, 1988, in the first sentence of subsection (e) inserted "is guilty of an infraction as described in AS 28.40.050(d) and" and substituted "fine" for "civil penalty."

Sec. 28.35.225. Enforcement.

NOTES TO DECISIONS

"Law enforcement officers". — Any member of the police force of an incorporated city or borough is a "law enforcement officer" for purposes of this section. State v. Burke, Ct. App. Op. No. 583 (File No. A-908), 714 P.2d 374 (1986).

An airport police officer is a law enforcement officer for purposes of this section. Clark v. State, Ct. App. Op. No. 716 (File No. A-1840), 738 P.2d 765 (1987).

Enforcement authority. — This section authorizes all "law enforcement officers" to stop any vehicle whose driver has committed a statewide traffic offense in the officer's presence, regardless not only of whether the offense was committed within the territorial limits of the jurisdiction which employed the officer, but also of whether the vehicle is in the territorial limits at the time the officer decides to make the stop. State v. Burke, Ct. App. Op. No. 583 (File No. A-908), 714 P.2d 374 (1986).

Sec. 28.35.235. Unauthorized use of handicapped parking. (a) A person may not park a motor vehicle in a parking place reserved for disabled or medically handicapped persons unless

(1) the person has a special permit issued by the department under AS 28.10.495;

(2) the motor vehicle displays a special license plate issued to disabled or handicapped persons under AS 28.10.181(d); or

(3) the motor vehicle displays a special license plate or permit issued to disabled or handicapped persons by another state, province, territory, or country.

(b) A person who violates this section is guilty of an infraction. Upon conviction the court shall impose a fine of not less than $100. (§ 2 ch 11 SLA 1987)

Sec. 28.35.251. Contained or confined loads. (a) A person may not drive a motor vehicle loaded with sand, gravel, rock, or similar materials on a highway unless

(1) the load is contained or confined to prevent the load from dropping, shifting, leaking, or escaping, except that sand or other substances may be dropped, sprinkled, or sprayed for the purpose of cleaning or maintaining the highway or providing traction; and

(2) the load is subjected to treatment by methods, approved by the commissioner by regulation, designed to settle the load or remove loose material before the vehicle is driven on the highway.

(b) If a cover is used to contain or confine a load being driven on a highway, the cover shall be securely fastened to prevent the cover from becoming loose or detached, or from being a hazard to other users of the highway. (§ 1 ch 62 SLA 1986)

Sec. 28.35.253. Anti-spray devices required. A person may not drive a motor vehicle on a highway unless the vehicle is equipped with fenders, mud flaps, or other anti-spray devices adequate to prevent the vehicle from being a hazard to other users of the highway. (§ 1 ch 62 SLA 1986)

Sec. 28.35.255. Penalty. A person convicted of violating AS 28.35.251 or 28.35.253 is guilty of an infraction. (§ 1 ch 62 SLA 1986)

Chapter 37. Driver License Compact.

Article
1. General Provisions (§§ 28.37.010 — 28.37.040)
2. Compact Terms (§§ 28.37.110 — 28.37.190)

Article 1. General Provisions.

Section
10. Compact enacted
20. Licensing authority
30. Expenses of administrator
40. Executive head

Sec. 28.37.010. Compact enacted. The Driver License Compact is enacted into law and entered into with all other jurisdictions legally joining in it in the form substantially contained in AS 28.37.110 — 28.37.190. (§ 18 ch 60 SLA 1986)

Sec. 28.37.020. Licensing authority. In this chapter the term "licensing authority" with reference to this state means the division of motor vehicles in the Department of Public Safety. The department shall furnish to the appropriate authority of another party state the information or documents reasonably necessary to facilitate the administration of AS 28.37.130 — 28.37.150. (§ 18 ch 60 SLA 1986)

Sec. 28.37.030. Expenses of administrator. The compact administrator provided for in AS 28.37.170 is not entitled to additional compensation on account of service as the administrator, but is entitled to expenses incurred in connection with the duties and responsibilities as the administrator, in the same manner as for expenses incurred in connection with other duties or responsibilities of the office or employment. (§ 18 ch 60 SLA 1986)

Sec. 28.37.040. Executive head. In this chapter, with reference to this state, the term "executive head" means the governor. (§ 18 ch 60 SLA 1986)

Article 2. Compact Terms.

Section
110. Findings and policy statement
120. Compact definitions
130. Reports of convictions
140. Effect of conviction in party state
150. Grounds requiring refusal to issue license
160. Application of other state laws
170. Administrator of compact
180. Compact as law; withdrawal procedure
190. Construction and validity; severability

Sec. 28.37.110. Findings and policy statement. (a) The party states find that

(1) the safety of their streets and highways is materially affected by the degree of compliance with state laws and local ordinances relating to the operation of motor vehicles;

(2) violation of a law or ordinance is evidence that the violator engages in conduct that is likely to endanger the safety of persons and property;

(3) the continuance in force of a license to drive is predicated upon compliance with laws and ordinances relating to the operation of motor vehicles, in whichever jurisdiction the vehicle is operated.

(b) It is the policy of the party states to

(1) promote compliance with the laws, ordinances, and administrative regulations relating to the operation of motor vehicles by their drivers in each of the jurisdictions where those drivers operate motor vehicles;

(2) make the reciprocal recognition of licenses to drive and eligibility for them more just and equitable by considering the overall compliance with motor vehicle laws, ordinances, and administrative regulations as a condition precedent to the continuance or issuance of a license by reason of which the licensee is authorized or permitted to operate a motor vehicle in the party states. (§ 18 ch 60 SLA 1986)

Sec. 28.37.120. Compact definitions. In this chapter

(1) "conviction" means a conviction of an offense related to the use or operation of a motor vehicle that is prohibited by state law, municipal ordinance, or administrative regulation, or a forfeiture of bail, bond or other security deposited to secure appearance by a person charged with having committed an offense described in this paragraph, and that is required to be reported to the licensing authority under AS 28.37.130;

(2) "home state" means the state that has issued and has the power to suspend or revoke the use of the license or permit to operate a motor vehicle;

(3) "state" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. (§ 18 ch 60 SLA 1986)

Sec. 28.37.130. Reports of convictions. The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. The report shall clearly identify the person convicted; describe the violation specifying the section of the statute, code, or ordinance violated; identify the court in which action was taken; indicate whether a plea of guilty or not guilty was entered, or the conviction was a result of the forfeiture of bail, bond or other security; and shall include any special findings made in connection with the conviction. (§ 18 ch 60 SLA 1986)

Sec. 28.37.140. Effect of conviction in party state. (a) The licensing authority in the home state, for the purposes of suspending, revoking, or limiting the license to operate a motor vehicle, shall give the same effect to the conduct reported under AS 28.37.130 as it would if the conduct had occurred in the home state, in the case of a conviction for

(1) manslaughter or negligent homicide resulting from the operation of a motor vehicle;

(2) driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree that renders the driver incapable of safely driving a motor vehicle;

(3) any felony in the commission of which a motor vehicle is used;

(4) failure to stop and render aid in the event of a motor vehicle accident resulting in the death or personal injury of another.

(b) As to another conviction, reported under AS 28.37.130, the licensing authority in the home state shall give the effect to the conduct that is provided by the laws of the home state if the offense constituting the conduct report under AS 28.37.130 has elements similar to those of the home state as defined in the home state at the time the

offense constituting the conduct report under AS 28.37.130 was committed.

(c) If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in (a) of this section, the party state shall construe the denominations and descriptions appearing in (a) of this section as being applicable to and identifying the offenses or violations of a substantially similar nature, and the laws of the party state shall contain the provisions necessary to ensure that full force and effect is given to this section. (§ 18 ch 60 SLA 1986)

Sec. 28.37.150. Grounds requiring refusal to issue license. Upon application for a license to drive, the licensing authority in a party state shall ascertain whether the applicant has ever held, or is the holder of a license to drive issued by another party state. The licensing authority in the state where application is made may not issue a license to drive to the applicant if

(1) the applicant has held a license, but the license has been suspended by reason, in whole or in part, of a violation, and the suspension period has not terminated;

(2) the applicant has held a license, but the license has been revoked by reason, in whole or in part, of a violation, and the revocation has not terminated; except that after the expiration of one year from the date the license was revoked, the person may make application for a new license if permitted by law; the licensing authority may refuse to issue a license to an applicant if, after investigation, the licensing authority determines that it will not be safe to grant to the person the privilege of driving a motor vehicle on the public highways;

(3) the applicant is the holder of a license to drive issued by another party state and currently in force, unless the applicant surrenders the license. (§ 18 ch 60 SLA 1986)

Sec. 28.37.160. Application of other state laws. Except as expressly required by provisions of this chapter, nothing in this chapter shall be construed to affect the right of a party state to apply any of its other laws relating to licenses to drive to any person or circumstance, nor to invalidate or prevent any driver license agreement or other cooperative arrangement between a party state and a nonparty state. (§ 18 ch 60 SLA 1986)

Sec. 28.37.170. Administrator of compact. (a) The head of the licensing authority of each party state shall be the administrator of the compact for that state. The administrators of all party states, acting jointly, shall have the power to formulate all necessary and proper procedures for the exchange of information under this compact.

(b) The administrator of each party state shall furnish to the administrator of each other party state the information or documents reasonably necessary to facilitate the administration of the compact. (§ 18 ch 60 SLA 1986)

Sec. 28.37.180. Compact as law; withdrawal procedure. (a) The compact shall become effective as to any state in which the compact becomes effective as the law of that state.

(b) A party state may withdraw from the compact by enacting a statute repealing the compact as the law of the state, but a withdrawal may not take effect until six months after the executive head of the withdrawing state has given notice of the withdrawal to the executive heads of all other party states. Withdrawal does not affect the validity or applicability by the licensing authorities of states remaining party to the compact of any report of conviction occurring before the withdrawal. (§ 18 ch 60 SLA 1986)

Sec. 28.37.190. Construction and validity; severability. The compact shall be liberally construed so as to effectuate its purposes. The provisions of the compact are severable and if any phrase, clause, sentence, or provision of the compact is declared to be contrary to the constitution of any party state or of the United States or the applicability of it to a government, agency, person or circumstance is held invalid, the validity of the remainder of the compact and the applicability of it to any government, agency, person or circumstance shall not be affected by it. If the compact is held contrary to the constitution of any party state, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (§ 18 ch 60 SLA 1986)

Chapter 40. General Provisions.

Sec. 28.40.050. Penalty for violations of law, regulations, and municipal ordinances. (a) It is a misdemeanor for a person to violate a provision of this title unless the violation is by this title or other law declared to be a felony or an infraction.

(b) A person convicted of a misdemeanor for a violation of a provision of this title for which another penalty is not specifically provided is punishable by a fine of not more than $500, or by imprisonment for not more than 90 days, or by both. In addition, the privilege to drive or the registration of vehicles may be suspended or revoked.

(c) Unless otherwise specified by law a person convicted of a violation of a regulation adopted under this title, or a municipal ordinance regulating vehicles or traffic when the municipal ordinance does not correspond to a provision of this title, is guilty of an infraction and is punishable by a fine not to exceed $300.

(d) An infraction, as provided for in (c) of this section, is not considered a criminal offense and may not result in imprisonment, nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may the commission of a single infraction result in the lose of a driver's license or privilege to drive in this state except as may result from the accumulation of points under AS 28.15.221 — 28.15.261, or the registration of vehicles; nor does a person cited with an infraction have a right to trial by jury or to court-appointed counsel.

(e) *[Repealed, § 5 ch 85 SLA 1987.]* (§ 50-1-8 ACLA 1949; am § 12 ch 241 SLA 1976; am §§ 22, 23 ch 144 SLA 1977; am § 5 ch 85 SLA 1987)

Effect of amendments. — The 1987 amendment repealed subsection (e), concerning overweight penalties.

NOTES TO DECISIONS

Prerequisite to suspension of license or privilege to drive. — A driver's license or privilege to drive cannot properly be suspended unless the driver was in fact licensed or otherwise actually privileged to drive a motor vehicle within the state. Roberts v. State, Ct App. Op. No. 478 (File No. A-342), 700 P.2d 815 (1985).

Generic penalty provision. — Subsection (b) is not a penalty provision dealing specifically with the offense of driving while license suspended; rather it is a generic penalty provision, broadly applicable to violations of all Title 28 provisions for which the specific penalties are given. Roberts v. State, Ct. App. Op. No. 478 (File No. A-342), 700 P.2d 815 (1985).

Sec. 28.40.100. Definitions for title. (a) Unless otherwise specifically defined or unless the context otherwise requires, in this title and in regulations adopted under this title

(1) "cancel" means the annulment or termination by formal action of the department of a certification, registration, license, permit or privilege issued or allowed under this title or regulations adopted under this title, because of an error or defect in the document issued or the application for issuance or because the person holding the document is no longer entitled to it;

(2) "commissioner" means the commissioner of public safety;

(3) "department" means the Department of Public Safety;

(4) "driver" means a person who drives or is in actual physical control of a vehicle;

(5) "driver's license", or "license" when used in relation to driver licensing, means a license, permit, or privilege to obtain a driver's

license, whether or not a person holds a valid license issued in this or another jurisdiction, to drive a motor vehicle under the laws of this state;

(6) "highway" means the entire width between the boundary lines of every way that is publicly maintained when a part of it is open to the public for purposes of vehicular travel, including but not limited to every street and the Alaska state marine highway system but not vehicular ways or areas;

(7) "motor vehicle" means a vehicle which is self-propelled except a vehicle moved by human or animal power;

(8) "motorcycle" means a vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground; the term does not include a tractor;

(9) "motor-driven cycle" means a motorcycle, motor scooter, motorized bicycle, or similar conveyance with a motor attached and having an engine with 50 or less cubic centimeters of displacement;

(10) *[Repealed, § 88 ch 74 SLA 1985.]*

(11) "official traffic-control device" means a sign, signal, marking, or other device not inconsistent with this title, placed or erected by authority of a state or municipal agency or official having jurisdiction, for the purpose of traffic regulating, warning and guiding;

(12) "owner" means a person, other than a lienholder, having the property in or title to a vehicle, including but not limited to a person entitled to the use and possession of a vehicle subject to a security interest in another person, but exclusive of a lessee under a lease not intended as security;

(13) "revoke" means the termination by formal action of the department or a court of a certification, registration, license, permit or privilege issued or allowed under this title or regulations adopted under this title; the certification, registration, license, permit or privilege may not be reissued, renewed or restored during the time for which revoked; however, after that time, an application for a new certificate, registration, license, permit or privilege may be made;

(14) "roadway" means that portion of a highway designed or ordinarily used for vehicular travel, exclusive of the sidewalk, berm, or shoulder, even though the sidewalk, berm, or shoulder is used by persons riding bicycles or other human powered vehicles; and in the event that a highway includes two or more separate roadways, the term refers to each roadway separately but not to all such roadways collectively;

(15) "suspend" means the temporary withdrawal by formal action of the department or a court of a certificate, registration, license, permit or privilege issued or allowed under this title or regulations adopted under this title, effective for a period of time which must be specifically designated by the department or court;

(16) "traffic" means pedestrians, ridden or herded animals, vehicles and other conveyances either singly or together while using a highway or vehicular way or area which is open to public use for purposes of travel;

(17) "underinsured motor vehicle" means a motor vehicle licensed for highway use with respect to ownership, operation, maintenance, or use for which there is a bodily injury or property damage insurance policy or a bond applicable at the time of an accident and the amount of insurance or bond

(A) is less than the limit for uninsured and underinsured coverage of the insured's policy; or

(B) has been reduced by payments to persons other than an insured, injured in an accident, to less than the limit for uninsured and underinsured coverage of the insured's policy;

(18) "vehicle" means a device in, upon, or by which a person or property may be transported or drawn upon or immediately over a highway or vehicular way or area except devices used exclusively upon stationary rails or tracks; and

(19) "vehicular way or area" means a way, path or area, other than a highway or private property, which is designated by official traffic control devices or customary usage and which is open to the public for purposes of pedestrian or vehicular travel, and which way or area may be restricted in use to pedestrians, bicycles, or other specific types of vehicles as determined by the department or other agency having jurisdiction over the way, path or area.

(b) The commissioner shall adopt regulations to define other terms which are used in this title and in regulations adopted under tl is title. (§ 50-1-1 ACLA 1949; am § 3 ch 81 SLA 1973; am §§ 13, 14 ch 241 SLA 1976; am § 1 ch 135 SLA 1977; am § 14 ch 70 SLA 1984; am § 1 ch 13 SLA 1985; am § 88 ch 74 SLA 1985; am § 2 ch 130 SLA 1988)

Effect of amendments. — The first 1985 amendment in paragraph (9) of subsection (a) substituted "50 or less" for "less than 150" and deleted "or with not to exceed five brake-horsepower" at the end of the paragraph.

The second 1985 amendment repealed paragraph (10) of subsection (a), which defined "municipality."

The 1988 amendment, effective September 1, 1988, substituted "permit, or privilege to obtain a driver's license" for "permit or privilege" in subsection (a)(5).

NOTES TO DECISIONS

Applied in Conner v. State, Ct. App. Op. No. 451 (File No. A-574), 696 P.2d 680 (1985); Caulkins v. State, Dep't of Pub. Safety, Sup. Ct. Op. No. 3233 (File No. S-1586), 743 P.2d 366 (1987).

Cited in State v. Robertson, Ct. App. Op. No. 778 (File No. A-2430), P.2d (1988).

Chapter 35. Miscellaneous Provisions.

Article 1. Offenses Involving Property Rights.

Sec. 28.35.010. Driving a vehicle without owner's consent. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.484.]

Sec. 28.35.015. Tampering with or damaging a vehicle. A person, without the right to do so, may not tamper with a vehicle, set or attempt to set a vehicle in motion, or damage a part or component of a vehicle. (§ 5 ch 241 SLA 1976)

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 354, 355.

61A C.J.S., Motor Vehicles, § 673.

What constitutes offense of "tampering" with "motor vehicle" or contents, 42 A.L.R.2d 624.

Validity and construction of statute making it a criminal offense to "tamper" with motor vehicle or contents, or to obscure registration plates, 57 A.L.R.2d 606.

Sec. 28.35.020. Conviction in larceny prosecution. [Repealed, § 21 ch 166 SLA 1978.]

Sec. 28.35.024. Renting a motor vehicle. (a) A person may not rent a motor vehicle to a person unless the person renting the vehicle is properly licensed under this title or, if a nonresident, the person is properly licensed under the laws of the jurisdiction of a person's residence.

(b) A person may not rent a motor vehicle until the person has inspected the license of the person to whom the vehicle is to be rented, and has verified the identification of the licensee.

(c) Every person renting a motor vehicle shall keep a record of the registration number of the vehicle rented, the name, address and license number of the person to whom the vehicle is rented, and the date and place when and where the license of the intended driver was issued. The record shall be open to inspection by a peace officer or employee of the department acting in an official capacity.

(d) Every person renting a motor vehicle shall comply with the financial responsibility requirements of this title.

(e) [Effective June 8, 1985.] A person who rents motor vehicles to others shall provide child safety devices in sufficient quantity that all persons to whom the vehicles are to be rented can comply with the requirements of AS 28.05.095. (§ 5 ch 241 SLA 1976; am § 2 ch 99 SLA 1984)

Effect of amendments. — The 1984 amendment, effective June 8, 1985, added subsection (e).

Collateral references. — 61A C.J.S., Motor Vehicles, §§ 760b, 768c.

Sec. 28.35.025. Obtaining rental vehicle with intent to defraud. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.026. Failure to return rental vehicle. (a) A person in possession of a motor vehicle under an agreement in writing which requires the person to return the vehicle to a particular place or at a particular time who refuses or wilfully neglects to return it to the place and at the time specified in the agreement in writing with the intent to deprive the owner of the vehicle or to convert it to the person's own use, or who secretes, converts, sells or attempts to sell the vehicle or any part of it is, upon conviction, punishable by imprisonment for not more than five years, or by a fine of not more than $1,000, or by both.

(b) In this section, "wilfully neglects" means omits, fails, or forbears, with a conscious purpose to injure, or without regard for the rights of the owner, or with indifference whether a wrong is done the owner or not. (§ 1 ch 37 SLA 1964; am § 18 ch 144 SLA 1977)

NOTES TO DECISIONS

This section is not vague. Speidel v. State, Sup Ct Op No 584 (File No 1014), 460 P 2d 77 (1969)

Concern of section. — All that this section is concerned with is the protection of one select group of persons in the business community — those who rent automobiles. Speidel v. State, Sup Ct Op No 584 (File No 1014), 460 P 2d 77 (1969)

This section does not represent what could be classified as a "public welfare offense." The health, safety and welfare of the public is not involved. Speidel v. State, Sup Ct Op No 584 (File No 1014), 460 P 2d 77 (1969)

The basic infirmity of this section prior to the 1977 amendment was apparent. — This section allowed a man to be convicted of a crime though he had acted entirely innocently, inadvertently or negligently. Alex v. State, Sup Ct Op No 689 (File No 1224), 484 P 2d 677 (1971)

Under the terminology of this section prior to the 1977 amendment it was possible to be guilty of the offense when there was an entire lack of any conscious deprivation of property or intentional injury. Alex v. State, Sup Ct Op No 689 (File No 1224), 484 P 2d 677 (1971)

Under this section prior to the 1977 amendment a person might suffer a felony conviction for a simple negligent failure to act. To make such an act a serious crime without regard to an awareness of wrongdoing or the intentional infliction of injury is inconsistent with the general law. To convict a person of a felony for such an act, without proving criminal intent, is to deprive such person of due process of law. Alex v. State, Sup Ct Op No 689 (File No 1224), 484 P 2d 677 (1971)

If one failed to return an automobile out of neglect, without any intention to deprive the owner of his property or to convert property to his own use, or of doing wrong to the owner, he was made guilty of a felony prior to the 1977 amendment of this section although he might have acted unwittingly or inadvertently or negligently. This was contrary to the general condition of criminal liability which required not only the doing of an act, but also the existence of a guilty mind during the commission of the act. Alex v. State, Sup Ct Op No 689 (File No 1224), 484 P 2d 677 (1971)

Extent to which section was valid. — This section prior to the 1977 amendment was valid and might be utilized to impose criminal responsibility on one to the extent that he failed to return a motor vehicle "with conscious purpose to injure" the owner of the vehicle. Speidel v. State, Sup Ct Op No 584 (File No. 1014), 460 P 2d 77 (1969).

Extent to which section was invalid. — Under the terms of this section prior to the 1977 amendment there was no escape from a felony conviction and a possible five-year prison term for simple neglectful negligent failure to return a rented automobile at the time specified in the rental agreement. To make such an act, without consciousness of wrongdoing or intention to inflict injury, a serious crime, and criminals of those who fall within its interdiction, is inconsistent with the general law. To convict a person of a felony for such an act, without proving criminal intent, is to deprive such person of due process of law. To the extent that this section permitted that to happen, it was invalid and of no effect. However, this section was invalid and ineffective only to the extent mentioned, and not in its entirety. It was severable by virtue of AS 01.10.030. Speidel v. State, Sup Ct Op No 584 (File No 1014), 460 P 2d 77 (1969)

In overturning this section, the supreme court adhered to the general rule of law and dictate of justice which requires that to constitute guilt there must be not only a wrongful act but a criminal intention. Alex v. State, Sup Ct Op No 689 (File No. 1224), 484 P 2d 677 (1971)

The essential purpose of Speidel v. State, Sup Ct Op No 584 (File No 1014), 460 P 2d 77 (1969), was to prevent criminal liability for a serious felony from being imposed in a manner akin to strict liability, that is, without regard to the accused's awareness of his conduct and intent to commit the proscribed act. Alex v. State, Sup Ct Op No 689 (File No 1224), 484 P 2d 677 (1971)

The gist of the offense under this section is failure to return an automobile with a conscious purpose to injure the owner and not mere failure to pay the rental price. Hence, the constitutional prohibition against imprisonment for debt has not been violated. Speidel v. State, Sup Ct Op No. 584 (File No 1014), 460 P 2d 77 (1969)

Felonious intent not inherent in offense. — By defining "wilfully neglects" as specifically, the legislature indicated that the ordinary criminal or felonious intent, as in the case of larceny, is not inherent in the offense of failing to return a rented automobile. Speidel v. State, Sup Ct Op No 584 (File No 1014), 460 P 2d 77 (1969)

Quoted in State v. Campbell, Sup Ct Op No 1149 (File No. 2290), 536 P 2d 105 (1975)

Cited in Kimoktoak v. State, Sup Ct Op No 1704 (File No 3177), 584 P 2d 25 (1978)

Collateral references. — Criminal offenses in connection with rental of motor vehicles, 38 A.L.R.3d 949.

Article 2. Operating While Intoxicated; Implied Consent.

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

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

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

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

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

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

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

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

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

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

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

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

(g) In this section,

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

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

Add (3)

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

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

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

The second 1980 amendment rewrote the section.

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

The second 1982 amendment added "or operates an aircraft or a watercraft" to the end of the introductory language of subsection (a), and in subsection (c), substituted "72 consecutive hours" for "three consecutive days" at the end of the first sentence, substituted "of driving while intoxicated in this or any other state or conviction of refusal to submit to a chemical test of breath under AS 28.35.032" for "under this section" in the second sentence, and added the language beginning "unless the subsequent conviction is within one year" to the end of the second sentence. The amendment also added subsections (e) and (g).

The 1983 amendment in paragraph (a)(2) inserted ", as determined ... offense was committed," rewrote subsection (c) and added subsection (f).

Editor's notes. — For declaration of legislative purpose, see § 1, ch. 45, SLA 1982 in the 1982 Temporary and Special Acts and Resolves.

Opinions of attorney general. — The term "public street or highway" is sufficiently broad to include subdivision streets dedicated to the public. 1965 Op. Att'y Gen., No. 10.

The Department of Public Safety may enforce this section and AS 28.35.040 on subdivision roads under public use. 1965 Op. Att'y Gen., No. 10.

NOTES TO DECISIONS

Legislative history. — See Van Brunt v. State, Ct. App. Op. No. 149 (File Nos. 6046, 6064, 6189), 653 P.2d 343 (1982).

This section was not enacted in violation of the one-subject rule. Van Brunt v. State, Ct. App. Op. No. 98 (File Nos. 6046, 6064, 6189), 646 P.2d 872 (1982).

The prohibition on driving while under the "combined influence of intoxicating liquor and another substance" is so vague that it fails to proscribe an activity apart from subsection (a)(1), and it cannot be given any construction that would correct this failure. Williford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

The meaning of "combined influence" is clear. Williford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

The term "another substance" is unconstitutionally vague because a person is given no notice as to what substances, when used in combination with alcohol, are prohibited. Williford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

The word "drug" cannot be substituted for "substance," which is not defined under the driving while intoxicated laws, since under the dictionary definitions, "substance" is not synonymous with "drug," but is a much broader term, encompassing all matter, not just medicinal substances. Williford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

Constitutionality of warrantless arrests for violations. — AS 12.25.033, which permits a police officer to arrest a defendant for violation of this section on probable cause but without a warrant, does not violate Alaska Const., art. I, § 14 prohibiting unreasonable searches and seizures and the corresponding provisions of the federal constitution because these constitutional provisions are not offended by warrantless searches or arrests based on exigent circumstances and the legislature has determined that exigent circumstances exist where there is probable cause to believe a suspect is driving while intoxicated. Proctor v. State, Ct. App. Op. No. 83 (File No. 5718), 643 P.2d 5 (1982).

1980 amendment enacted constitutionally. — The 1980 version of this section, which with three other amendments to the driving while intoxicated statute, was added to a bill changing various state liquor laws (Senate Bill 365; ch. 129, SLA 1980) by the free conference committee, was not enacted in violation of Alaska Const., art. II, § 14 since the constitutional requirement that bills be read three times does not extend to an amended bill when the amendments do not change the subject of the bill. Van Brunt v. State, Ct. App. Op. No. 149 (File Nos. 6046, 6064, 6189), 653 P.2d 343 (1982).

And in accordance with Uniform Rule 42(b). — The 1980 version of this section, which with three other amendments to the driving while intoxicated law was added to Senate Bill 365 (ch. 129, SLA 1980) by the free conference committee, was not enacted in violation of Rule 42(b) of the Uniform Rules of the Alaska State Legislature since the amendment was "germane" to the bill, which changed various state liquor laws. Van Brunt v. State, Ct. App. Op. No. 149 (File Nos. 6046, 6064, 6189), 653 P.2d 343 (1982).

This section prohibits a person who is under the influence of intoxicating liquor being in actual physical control of a vehicle with its motor running. Jacobson v. State, Sup. Ct. Op. No. 1282 (File No. 2478), 551 P.2d 935 (1976).

Reasonable suspicion of intoxication. — Police officer's suspicion that driver was possibly intoxicated and posed an imminent danger while driving was reasonable. Larson v. State, Ct. App. Op. No. 292 (File No. 7167), 669 P.2d 1334 (1983).

The words "operate" and "drive" have differing connotations and refer to different acts. Jacobson v. State, Sup. Ct. Op. No. 1282 (File No. 2478), 551 P.2d 935 (1976).

As a general proposition, it appears that "to operate" includes a larger class of activities than "to drive." While one who drives a vehicle must necessarily in that process operate it, the reverse is not necessarily so. Jacobson v. State, Sup. Ct. Op. No. 1282 (File No. 2478), 551 P.2d 935 (1976).

A conviction under subsection (a) of this section cannot be based on the use of a drug which had not been specifically designated by regulation as a drug which carried criminal sanctions for its use while driving. Crutchfield v. State, Sup. Ct. Op. No. 2207 (File No. 4474), 627 P.2d 196 (1980).

Right to counsel guaranteed. — When convicted for violating this section, a person may receive a fine of not more than $1,000 or a term of imprisonment for not more than one year, or both. Therefore, such case is one in which the right to counsel is guaranteed an accused by the Alaska Constitution. Gregory v. State, Sup. Ct. Op. No. 1269 (File No. 2467), 550 P.2d 374 (1976).

Right to counsel before breathalyzer test. — When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances, and requests to contact an attorney, the arrestee must be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test, and where arrestee is denied that opportunity, subsequently obtained evidence, whether in form of test results or of refusal to take test, must be suppressed. Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 659 P.2d 1206 (1983).

The statutory right to contact and consult with counsel prior to being required to decide whether or not to submit to a breathalyzer test is not an absolute one, which might involve a delay long enough to impair testing results, but, rather, a limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes. Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 659 P.2d 1206 (1983).

No right to counsel during video taping of field sobriety tests. — A person suspected of operating a motor vehicle while under the influence of intoxicating liquor [now driving while intoxicated] has no right to have counsel present during the video taping of field sobriety tests performed at the request of the arresting officer. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979); Copelin v. State, Ct. App. Op. No. 343 (File No. A-351), 676 P.2d 608 (1984).

Field sobriety tests distinguished from lineups or taking of handwriting exemplars. — See Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

Presumption in breathalyzer result. — Under the wording of AS 28.35.033, the breathalyzer result is clearly viewed as the presumptive equivalent of the amount of alcohol in the person's blood "at the time alleged", in other words, at the time the offense was committed, not just when the breathalyzer examination was administered. Doyle v. State, Ct. App. Op. No. 43 (File No. 5115), 633 P.2d 306 (1981).

To be charged under this section rather than city of Anchorage Municipal Code 9.28.020 when both provisions apply to the same general facts does not constitute an arbitrary application of the law violative of constitutional safeguards of equal protection. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

When blood-alcohol tests should be suppressed. — Blood-alcohol test findings should be suppressed where the blood was withdrawn from a conscious nonconsenting person without an arrest substantially contemporaneous with the taking. Layland v. State, Sup. Ct. Op. No. 1150 (File No. 2264), 535 P.2d 1043 (1975), aff'd, Sup. Ct. Op. No. 2739, 549 P.2d 1182 (1976), overruled on other grounds, City of Anchorage v. Geber, Sup. Ct. Op. Nos. 3827, 4016, 4037, 4046, 592 P.2d 1192 (1979).

In prosecuting a charge of operating a motor vehicle while under the influence of intoxicating liquor [now driving while intoxicated] law enforcement officials cannot utilize the results of a blood alcohol test, when the blood used in performing

the test was extracted from the accused against his or her will, after refusal to submit to a breathalyzer examination. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979). See notes to AS 28.35.031 — 28.35.033.

Trooper arriving at accident scene cannot arrest for drunk driving without warrant. — The Alaska legislature has classified both reckless driving and operating or driving an automobile under the influence of intoxicating liquor as misdemeanors. Thus, a state trooper who arrived at an accident scene could not arrest a driver without a warrant for either reckless driving or drunk driving since neither of these offenses was committed or attempted in his presence. Layland v. State, Sup. Ct. Op. No. 1150 (File No. 2264), 535 P.2d 1043 (1975), aff'd, Sup. Ct. Op. No. 2739, 549 P.2d 1182 (1976), overruled on other grounds, City of Anchorage v. Geber, Sup. Ct. Op. Nos. 3827, 4016, 4037, 4046, 592 P.2d 1192 (1979).

The fact that a man consumed from seven to ten ounces of whiskey during an 18-hour period was not shown by the evidence to necessarily cause him to be intoxicated. Bertram v. Harris, Sup. Ct. Op. No. 393 (File No. 677), 423 P.2d 909 (1967).

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

State need not show that defendants knew they were intoxicated. — The state need not show that defendants actually knew that they were under the influence of intoxicating liquor or that their blood or breath alcohol levels were in excess of 0.10. Van Brunt v. State, Ct. App. Op. No. 98 (File Nos. 6046, 6064, 6189), 646 P.2d 872 (1982).

Preserving breath samples. — Due process clause of the Alaska Constitution requires prosecution to make reasonable efforts to preserve breath sample or to take other steps to allow defendant to verify results of breathalyzer test. Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File Nos. 6447, 6724, 6725), 649 P.2d 258 (1982).

Preservation of blood sample. — Where blood sample was taken by and was in possession of hospital where defendant sought treatment following car accident, and where, on the facts of the case, both defendant and state had opportunity to preserve the sample, trial court did not err in ruling that the blood test results were admissible even though the state had not sought preservation of the blood sample. Bradley v. State, Ct. App. Op. No. 248 (File No. 7335), 662 P.2d 993 (1983).

Blood tests as business records. — Results of a hospital blood alcohol test are admissible as business records in driving while intoxicated prosecution upon proper foundation. Bradley v. State, Ct. App. Op. No. 248 (File No. 7335), 662 P.2d 993 (1983).

Evidence that defendant drove erratically and appeared intoxicated to arresting officers was properly admitted since such evidence would tend to corroborate a breathalyzer reading showing an elevated blood alcohol level. Byrne v. State, Ct. App. Op. No. 169 (File No. 6375), 654 P.2d 795 (1982).

Effect of charges for other violations. — Although defendant had been convicted of leaving the scene of an accident and acquitted of failing to exercise care to avoid colliding with another vehicle, collateral estoppel did not preclude defendant's subsequent prosecution for operating a motor vehicle under the influence of intoxicating liquor. Miller v. State, Ct. App. Op. No. 135 (File No. 5429), 652 P.2d 494 (1982).

Lesser included offenses. — Defendant's prior conviction for leaving the scene of an accident and his acquittal for failure to exercise care to avoid colliding with another vehicle did not bar his prosecution for operating a motor vehicle under the influence of intoxicating liquor under the state and federal constitutional provisions prohibiting placing a criminal defendant twice in jeopardy since the state could not have discovered the evidence necessary to convict defendant of operating a motor vehicle under the influence of intoxicating liquor prior to his trial for leaving the scene and failing to avoid the accident in the exercise of due diligence. Miller v. State, Ct. App. Op. No. 135 (File No. 5429), 652 P.2d 494 (1982).

Enhanced license revocation. — Conviction under another state's statute may be used for purposes of enhanced license revocation under AS 28.15.181(b). Carter v. State, Ct. App. Op. No. 010 (File No. 5144), 625 P.2d 313 (1981).

Application of three-year license revocation provision of AS 28.15.181(b) to defendant whose prior two OMVI (operating a motor vehicle while under the influence of intoxicating liquor or drugs) convictions were in 1974 and 1976 did not violate the constitutional prohibitions against ex post facto laws. Carter v. State, Ct. App. Op. No. 010 (File No. 5144), 625 P.2d 313 (1981).

Local ordinances. — Municipality's ordinance which sought to impose criminal sanctions against persons who drove after consuming alcohol on the sole basis of the quantity of alcohol consumed and without regard to the existence or lack of existence of any actual influence or impairment in driving related to alcohol consumption was inconsistent with the state's statutory framework for drunk driving, under which the crucial element for imposition of criminal penalties was the existence of actual influence or impairment and thus invalid. Simpson v. Municipality of Anchorage, Ct. App. Op. No. 57 (File Nos. 4945, 4946, 5288), 635 P.2d 1197 (1981).

For case construing this section and former AS 28.15.210(c). — See Danks v. State, Sup. Ct. Op. No. 2216 (File No. 4952), 619 P.2d 720 (1980).

Evidence held sufficient to support verdict of guilty. — See Beck v. State, Sup. Ct. Op. No. 310 (File No. 611), 408 P.2d 996 (1965).

Conviction under this section admissible as evidence in proving negligence in subsequent civil action. — See Scott v. Robertson, Sup. Ct. Op. No. 1678 (File No. 3436), 581 P.2d 669 (1978).

Sentence upheld. — Sentence of 120 days' incarceration, three years' license revocation, and a $1,000 fine was not excessive for offense of driving while intoxicated. Kennedy v. State, Ct. App. Op. No. 215 (File No. 6830), 657 P.2d 859 (1983).

Applied in Deere v. United States, 268 F.2d 912 (9th Cir. 1959); State v. Gibson, Sup. Ct. Op. No. 1215 (File No. 2415), 543 P.2d 406 (1975); Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978); Ledbetter v. State, Sup. Ct. Op. No. 1682 (File No. 3500), 581 P.2d 1129 (1978); State v. Guarderas, Sup. Ct. Op. No. 1782 (File No. 3738), 589 P.2d 870 (1979); Keel v. State, Sup. Ct. Op. No. 2063 (File No. 4408), 609 P.2d 555 (1980); Nelson v. State, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982); Ahsogeak v. State, Ct. App. Op. No. 147 (File No. 6601), 652 P.2d 505 (1982); Metzker v. State, Ct. App. Op. No. 208 (File No. 5919), 658 P.2d 147 (1983); Coleman v. State, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983); Wilson v. State, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), ___ P.2d ___ (1984).

Quoted in City of Fairbanks v. Schrock, Sup. Ct. Op. No. 567 (File No. 1032), 457 P.2d 242 (1969); Solberg v. State, Sup. Ct. Op. No. 1478 (File No. 1129), 568 P.2d 1 (1977); Ekuna v. State, Sup. Ct. Op. No. 1606 (File No. 3495), 577 P.2d 698 (1978).

Stated in Godwin v. State, Sup. Ct. Op. No. 1270 (File No. 2793), 554 P.2d 463 (1976); Williams v. State, Sup. Ct. Op. No. 2180 (File No. 4367), 616 P.2d 881 (1980); Pascua v. State, Ct. App. Op. No. 46 (File No. 5154), 633 P.2d 1013 (1981).

Cited in Gullarde v. State, Sup. Ct. Op. No. 794 (File No. 1606), 497 P.2d 93 (1972); State v. Nease, Superior Court, 1st Jud. Dist., Cr. No. 72-23 (1972); Ravin v. State, Sup. Ct. Op. No. 1156 (File No. 2135), 537 P.2d 494 (1975); Layland v. State, Sup. Ct. Op. No. 1263 (File No. 2739), 549 P.2d 1182 (1976); City of Kodiak v. Jackson, Sup. Ct. Op. No. 1741 (File No. 3480), 584 P.2d 1130 (1978); Westdahl v. State, Sup. Ct. Op. No. 1818 (File No. 3928), 592 P.2d 1214 (1979); Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981); Ketzler v. State, Ct. App. Op. No. 47 (File Nos. 5069, 5118), 634 P.2d 561 (1981); City of Anchorage v. Richards, Ct. App. Op. No. 173 (File Nos. 6387, 6459, 6504, 6540), 654 P.2d 797 (1982); Creary v. State, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983); Jensen v. State, Ct. App. Op. No. 271 (File No. 7480), 667 P.2d 188 (1983); State v. Moran, Ct. App. Op. No. 277 (File No. 7614), 667 P.2d 734 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 296 et seq.; 19 Am. Jur. Trials, pp. 123-229; 17 Am. Jur. POF 2d, pp. 1-50.

61A C.J.S., Motor Vehicles, §§ 37, 625 to 637.

Driving automobile while intoxicated as a substantive criminal offense, 42 A.L.R. 1498, 49 A.L.R. 1392, 68 A.L.R. 1356, 142 A.L.R. 555.

Effect of statute on civil liability of person driving automobile while under influence of liquor, 56 A.L.R. 327.

Degree or nature of intoxication for

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

What is a "motor vehicle" within statutes making it an offense to drive while intoxicated, 66 A.L.R.2d 1146.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Driving under the influence, or when addicted to the use, of drugs as criminal offense, 17 A.L.R.3d 816.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 29 A.L.R.3d 938.

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 A.L.R.3d 1138.

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 A.L.R.3d 7.

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 A.L.R.4th 1252.

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 A.L.R.4th 705.

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

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

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

(2) committed a moving traffic violation.

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

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

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

(f) If a driver is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section. (§ 1 ch 84 SLA 1969, am § 11 ch 129 SLA 1980; am § 16 ch 117 SLA 1982; am § 16 ch 77 SLA 1983)

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

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

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

NOTES TO DECISIONS

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

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

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

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

Application of case law. — Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File No. 6275), 649 P.2d 256 (1982), and Cooley v. Municipality of Anchorage, Ct. App. Op. No. 114 (File Nos. 5859, 6112, 6151), 649 P.2d 251 (1982), apply to only three categories of cases: (1) cases formally joined with those decided in Serrano and Cooley; (2) cases in which suppression had already been ordered on or before August 6, 1982, and (3) cases in which breathalyzer tests were administered after August 6, 1982. State v. Lamb, Ct. App. Op. No. 118 (File No. 7071), 649 P.2d 971 (1982).

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

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

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

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

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

advised that he does not have to take examination Peara v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983).

And the supreme court would not imply a requirement that an arrestee be advised that he has the right to refuse to take a breathalyzer test. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Given the absence of a specific requirement that arrestees be advised of a right to refuse to undergo the chemical test, it would be inappropriate for this court to engraft such a requirement onto this section. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Although several states have chosen to provide that the arrestee has a right to refuse to take a breathalyzer test and, further, that the arresting officer must inform him of such right, Alaska's legislature has not adopted such provision. Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Advice to arrestee confused about rights. — Where an arrested person refuses to submit to a breathalyzer test, the administering officer must inquire into the nature of the refusal and, if it appears that the refusal is based on a confusion about the person's rights, the officer must clearly advise that person that the rights contained in the Miranda warning do not apply to the breathalyzer examination. Graham v. State, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Warnings of consequences of refusal. — While evidence of the warnings given regarding the consequences of refusal to take a breathalyzer test may have been relevant to the issue of mens rea, the absence of more detailed warnings regarding penalties for refusal did not deprive defendant of due process or warrant a directed verdict of acquittal in his favor. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal ordinance.

This section and AS 28.35.032 do not contemplate an evidentiary use of the fact of refusal to submit to a breathalyzer test. Fuller v. Municipality of Anchorage, Sup. Ct. Op. No. 1575 (File No. 3212), 574 P.2d 1295 (1978).

Preservation of breath samples. — Due process clause of the Alaska Constitution requires prosecution to make reasonable efforts to preserve breath sample or to take other steps to allow defendant to verify results of breathalyzer test. Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File Nos. 6147, 6720, 6725), 649 P.2d 256 (1982).

Right to counsel before breathalyzer test. — When a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances, and requests to contact an attorney, the arrestee must be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test, and where arrestee is denied that opportunity, subsequently obtained evidence, whether in form of test results or of refusal to take test, must be suppressed. Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983).

The statutory right to contact and consult with counsel prior to being required to decide whether or not to submit to a breathalyzer test is not an absolute one, which might involve a delay long enough to impair testing results, but rather a limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes. Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983).

A person suspected of driving while intoxicated had a statutory right to contact an attorney before deciding whether or not to submit to a breathalyzer test if (1) he requested an opportunity to contact an attorney, and (2) granting the request would not involve a delay long enough to impair test results. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

A breathalyzer exam is not a "critical stage" at which the constitution requires counsel's presence. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

While a defendant has a statutory right to contact counsel, where he never requested an opportunity to contact counsel and there was nothing in the record to show that the police affirmatively interfered with any attempt by defendant to obtain counsel, he was not denied right to counsel. Svedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

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

Videotape recording of defendant while a breathalyzer examination was being administered to him and while he performed other sobriety tests, made at state trooper headquarters following defendant's arrest for operating a motor vehicle while under the influence of intoxicating liquor [now driving while intoxicated], did not violate defendant's right to privacy under Alaska Const., art. I, § 22. Palmer v. State, Sup. Ct. Op. No. 2002 (File No. 3651), 604 P.2d 1106 (1979).

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

No other chemical test allowed after breath test refused. — The express language of AS 28.35.032(a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

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

Use of search warrant. — The implied consent statute does not constitute an affirmative prohibition against the independent means of using a search warrant to obtain a sample of blood from a person who has refused to submit to a breathalyzer test after being arrested for an offense arising from an act committed by him while driving under the influence of intoxicating liquor. Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

Limitation for purposes other than DWI prosecutions. — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

This section does not apply just to the offense of driving while intoxicated but also to any offense which arose out of acts which were committed while a person was driving while intoxicated. Peara v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983).

"Chemical test" means any chemical test. — The language of AS 28.35.032(a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," means any chemical test be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 4016, 4037, 3827, 4046), 592 P.2d 1187 (1979).

Defendant should be permitted to check the specific ampoules used in his breathalyzer test. Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Since they could be evidence of propriety of test. — The test and reference ampoules could be probative evidence of the propriety or impropriety of the breathalyzer test. Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Denial of right to analyze components is reversible error. — Where defendant was charged with operating a motor vehicle while intoxicated, denial of the right to make an analysis of some of the components of the breathalyzer machine, that is to say, to "cross examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be a denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law. Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

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

District court was correct in suppressing results of breathalyzer test where state unable to produce ampoules used in test. — See Lauderdale

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

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

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

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

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

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

Duty of law enforcement officer to offer suspect chemical sobriety test under implied consent law, 95 A.L.R.3d 710.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Legislative history reports. — For report on ch. 71, SLA 1972 (HCSSB 383 am H), see 1972 House Journal, p. 898.

NOTES TO DECISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and requests to contact an attorney, the arrestee must be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test, and where arrestee is denied that opportunity, subsequently obtained evidence, whether in form of test results or of refusal to take test, must be suppressed Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983).

The statutory right to contact and consult with counsel prior to being required to decide whether or not to submit to a breathalyzer test is not an absolute one, which might involve a delay long enough to impair testing results, but rather a limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983).

A person suspected of driving while intoxicated had a statutory right to contact an attorney before deciding whether or not to submit to a breathalyzer test if (1) he requested an opportunity to contact an attorney, and (2) granting the request would not involve a delay long enough to impair test results Swedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

A breathalyzer exam is not a "critical stage" at which the constitution requires counsel's presence Swedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

While a defendant has a statutory right to contact counsel, where he never requested an opportunity to contact counsel and there was nothing in the record to show that the police affirmatively interfered with any attempt by defendant to obtain counsel, he was not denied right to counsel Swedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983).

Analysis of AS 28.35.031 and this section demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

As the supreme court analyzes the legislature's intent in enacting AS 28.35.031 and this section, the sections provide that the operator of a motor vehicle in Alaska has consented to chemical tests of his blood's alcohol content and that after the arrested operator refuses to take the chemical test, he must be advised of the consequences flowing from his contemplated refusal. The arrestee must be permitted to reconsider his refusal in light of that information Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Statutes do not explicitly grant right to refuse test. — Neither AS 28.35.031 nor subsection (a) of this section explicitly grants or recognizes a right on the part of an arrestee to refuse to take a breathalyzer test Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

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

Neither AS 28.35.031 nor this section requires that the arrested operator be advised he has the right to refuse to take a chemical test for the purpose of determining the alcohol content of his blood Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Although several states have chosen to provide that the arrestee has a right to refuse to take a breathalyzer test and, further, that the arresting officer must inform him of such right, Alaska's legislature has not adopted such provision Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

And the supreme court would not imply a requirement that an arrestee be advised that he has the right to refuse to take a breathalyzer test Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

Given the absence of a specific requirement that arrestees be advised of a right to refuse to undergo the chemical test, it would be inappropriate for this court to engraft such a requirement onto AS 28.35.031 Wirz v. State, Sup. Ct. Op. No. 1593 (File No. 3516), 577 P.2d 227 (1978).

This section seems to require that there at least be a reasonable attempt to communicate to a defendant the consequences of a failure to take the breathalyzer examination Williford v. State, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 339 (1982). Also, see now AS 28.35.031(c) requiring an officer to advise on consequences of refusal.

This section clearly contemplates a warning of the specified consequences attendant upon a refusal. — While evidence of the warnings given regarding the consequences of refusal to take a breathalyzer test may have been relevant to the issue of *mens rea*, the absence of more detailed warnings regarding penalties for refusal did not deprive defendant of due process or warrant a directed verdict of acquittal in his favor Swedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal ordinance.

No privilege against self-incrimination. — A refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act covered by the officer, and thus is not protected by the state or federal privilege against self incrimination Swedlund v. Municipality of Anchorage, Ct. App. Op. No. 301 (File No. 7581), 671 P.2d 378 (1983), construing municipal provision.

Purpose of subsection (e). — The purpose of the provision in subsection (e) of this section, that evidence of refusal to submit to a breathalyzer test is admissible at trial if the defendant was lawfully under arrest for driving while intoxicated at the time of his refusal, is to assure that individuals arrested for driving while intoxicated do not benefit from failure to comply with the requirements of Alaska's implied consent statute, AS 28.35.031 Coleman v. State, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Admissibility of evidence of refusal. — Even though this section makes the refusal to take the breathalyzer examination admissible, it does not make the refusal admissible without regard to the other evidence rules, and to be admissible, evidence of refusal is required to be relevant, and the probative value of the evidence should not be outweighed by its prejudicial impact Williford v. State, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 339 (1982).

Whether evidence of a refusal to take a breathalyzer examination is admissible is committed to the discretion of the trial court Williford v. State, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 339 (1982).

Defendant's refusal to take the breathalyzer test did not give rise to a constitutional claim of privilege since even assuming the breathalyzer refusal could have been deemed to have amounted to a testimonial statement, this statement could not properly have been considered privileged since defendant had no legal right to make it Coleman v. State, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

By its holding that admission of evidence of defendant's refusal to take a breathalyzer test did not violate defendant's constitutional right against self incrimination, the court did not mean to indicate that evidence of breathalyzer refusals is per se admissible in all cases as with other types of circumstantial evidence, admissibility of breathalyzer refusals should be determined pursuant to Evidence Rules 401-403, on a case by case basis, by weighing probative value against potential for unfair prejudice Coleman v. State, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Officer must advise arrestee confused about rights. — Where an arrested person refuses to submit to a breathalyzer test, the administering officer must inquire into the nature of the refusal and, if it appears that the refusal is based on a confusion about the person's rights, the officer must clearly advise that person that the rights contained in the Miranda warning do not apply to the breathalyzer examination Graham v. State, Sup. Ct. Op. No. 2401 (File No. 4092), 633 P.2d 211 (1981).

But burden on arrestee to show confusion in fact. — Where defendant motorist refused to submit to a breathalyzer test based on a confusion about her rights, the burden was on the defendant to show that she was in fact confused Graham v. State, Sup. Ct. Op. No. 2401 (File No. 4092), 633 P.2d 211 (1981).

Evidence of refusal to take the breathalyzer was not error where the evidence did have possible probative value Williford v. State, Ct. App. Op. No. 148 (File No. 5986), 653 P.2d 339 (1982).

Admissibility of chemical test taken for diagnostic purposes. — Where a blood test was administered for medical diagnostic purposes independent of the police, the blood test is admissible as evidence even though the defendant has previously refused to submit to a breathalyzer examination Nelson v. State, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982).

Use of search warrant. — The implied consent statute does not constitute an affirmative prohibition against the independent means of using a search warrant to obtain a sample of blood from a person who has refused to submit to a breathalyzer test after being arrested for an offense arising from an act committed by him while driving under the influence of intoxicating liquor Pena v. State, Ct. App. Op. No. 245 (File No. 6170), 664 P.2d 169 (1983).

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

Limitation for purposes other than DWI prosecutions. — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal, affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

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

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

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

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

Requiring submission to physical examination or test as violation of constitutional rights, 25 A.L.R.2d 1407.

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, 87 A.L.R.2d 370, 26 A.L.R.4th 1112.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 A.L.R.2d 1064.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 A.L.R.3d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law, 98 A.L.R.3d 572.

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

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

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

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

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

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

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

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

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

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

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

The 1982 amendment, in subsection (a), substituted "or operating an aircraft or a watercraft while intoxicated" for "under the influence of intoxicating liquor" in the introductory language and added paragraph (4), in subsection (b), substituted "this chapter" for "this section" and "100 milliliters" for "100 cubic centimeters", and in subsection (d), inserted "or blood" in the first and third sentences.

NOTES TO DECISIONS

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

The Implied Consent Statute was intended to provide an exclusive method for obtaining direct evidence of a suspect's blood alcohol content, absent his or her express consent to the use of some other form of testing. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (197[illegible]).

No other chemical test allowed after breath test refused. — The express language of AS 28.35.032(a), coupled with the legislative history of the Implied Consent Statute, leads to the conclusion that in enacting the Implied Consent Statute the legislature intended that once a breath test had been refused no other chemical test would be allowed. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (1979).

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

"Chemical test" means any chemical test. — The language of AS 28.35.032(a) stating that after refusal to submit to a test of the breath, "a chemical test shall not be given," means any chemical test, be it of the breath, blood, urine or otherwise, and not just a chemical test of the breath. Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1187 (1979).

Alaska legislature has specified the foundational facts necessary for the admissibility of a chemical analysis of breath in subsection (d). Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

This section does not specify the method of proof of the foundational facts, which is controlled by the applicable rules of evidence. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Rigid proof of such facts not required. — With the increasing acceptance and reliability of the breathalyzer has come a relaxation of any notion of rigid proof of foundational facts. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Effect of last sentence of subsection (d). — The last sentence of subsection (d) merely defines the elements that must be proved before breathalyzer test results may be admitted into evidence; it does not make those results unassailable. Indeed, the statute creates only a presumption of the test's validity. Keel v. State, Sup. Ct. Op. No. 2063 (File No. 4408), 609 P.2d 555 (1980).

Compliance with "Breathalyzer Operational Checklist" required. — The approved methods of administering the breathalyzer, established by the Department of Health and Social Services in accord with subsection (d) of this section, are set forth in 7 Alaska Administrative Code, § 30.020. Completion of the "Breathalyzer Operational Checklist" is the first of 13 procedures established for proper test administration. Completion of the checklist is required under subsection (d) of this section; however, absolute compliance in completing the checklist is not required in order to render the test results valid and admissible in evidence. Oveson v. Municipality of Anchorage, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Effect of compliance with "Breathalyzer Operational Checklist". — The "Breathalyzer Operational Checklist" is a simplified method of establishing the admissibility of the evidence. It furnished the court with a clear record that all the substantive test procedures were accomplished, thereby minimizing the possibilities of human error and failed memory. This then warrants the presumption under subsection (d) of this section that the results are valid without any additional showing of foundational facts. If the checklist is not complete, the presumption of validity is inapplicable. But it does not necessarily follow that the test results are, therefore, automatically inadmissible. Oveson v. Municipality of Anchorage, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Where there has been substantial compliance with the "Breathalyzer Operational Checklist" provision of 7 AAC § 30.020(1), and where the record demonstrates that the test was properly performed, the test results are admissible under subsection (d) of this section. Oveson v. Municipality of Anchorage, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Where the checklist for administering the breathalyzer test was complete but for one checkmark, all other pertinent data were filled in, and there was uncontroverted testimony that the step in question was performed despite the failure to check off the box representing that step, once the trier of fact believed the evidence that the step in question was performed, a proper foundation was laid to find the results valid under subsection (d) of this section. Oveson v. Municipality of Anchorage, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Compliance with the 15-minute observation period of 7 AAC § 30.020(2) prior to the administration of the breathalyzer test is a requirement for the admissibility of the test results. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Where substantial compliance with the 15-minute provision is established on the record, a prima facie showing of the foundational fact of the observation period necessary to establish admissibility is satisfied. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975); Oveson v. Municipality of Anchorage, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

A clerical error by the breathalyzer test operator ought not to render the results inadmissible without a showing that the validity of the results is tainted. Oveson v. Municipality of Anchorage, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Mere assertion that ingestion was hypothetically possible ought not to vitiate the observation period foundational fact so as to render the breathalyzer test results inadmissible. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

Personal testimony not necessary as to breathalyzer calibration or ampoule certification. — While it is required that a qualified witness explain the functional effect of the chemical testing, personal testimony is not required as to the calibration of the instrument or the accuracy of the ampoules. Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974), cert. denied, 423 U.S. 836, 96 S. Ct. 60, 46 L. Ed. 2d 54 (1975).

A defendant can guarantee the reliability of the results of a breathalyzer test by retesting the ampoules. The ampoules are preserved and the amount of fluid and the chemical composition of the control ampoule are not significantly altered by performance of the test. Oveson v. Municipality of Anchorage, Sup. Ct. Op. No. 1554 (File No. 3434), 574 P.2d 801 (1978).

Defendant should be permitted to check the specific ampoules used in his breathalyzer test by retesting the ampoules. Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Since they could be evidence of propriety of test. — The test and reference ampoules could be probative evidence of the propriety or impropriety of the breathalyzer test. Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Denial of right to analyze components is reversible error. — Where defendant was charged with operating a motor vehicle while intoxicated, denial of the right to make an analysis of some of the components of the breathalyzer machine, that is to say, to "cross-examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be a denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law. Lauderdale v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

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

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

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

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

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

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

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

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

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

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

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

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

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

Stated in Wren v. State, Sup. Ct. Op. No. 1698 (File No. 3156), 577 P.2d 235 (1978); Lyle v. State, Sup. Ct. Op. No. 1944 (File No. 3162), 600 P.2d 1357 (1979); O'Leary v. State, Sup. Ct. Op. No. 2003 (File No. 3466), 604 P.2d 1099 (1979); Municipality of Anchorage v. Serrano, Ct. App. Op. No. 115 (File Nos. 6447, 6724, 6726), 649 P.2d 256 (1982).

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

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 361, 376 to 380.

61A C.J.S., Motor Vehicles, § 633(2).

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

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

Validity, construction, and application of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 A.L.R.2d 1176, 16 A.L.R.3d 748.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 A.L.R.2d 971.

Constitutional right of one charged with intoxication to summon a physician at accused's own expense to make test for alcohol in system, 78 A.L.R.2d 905.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 A.L.R.3d 325.

Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods, 96 A.L.R.3d 745.

Admissibility in criminal case of blood alcohol test where blood was taken despite defendant's objection or refusal to submit to test, 14 A.L.R.4th 690.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 A.L.R.4th 509.

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

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

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

NOTES TO DECISIONS

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

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

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

60 C.J.S., Motor Vehicles, § 164.24.

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

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

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

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

NOTES TO DECISIONS

Stated in Copelin v. State, Sup. Ct. Op. No. 2617 (File Nos. 5453, 5708), 259 P.2d 1206 (1983); Pena v. State, Ct. App. Op. No. 245 (File No. 6174), 661 P.2d 160 (1983).

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) a description of the motor vehicle;

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

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

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

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

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

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

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

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

(d) Forfeiture of a motor vehicle under AS 28.35.036 is without prejudice to the rights, and does not extinguish the claims of a creditor with an interest in the motor vehicle. (§ 23 ch 77 SLA 1983)

Sec. 28.35.038. Municipal impoundment and forfeiture. Notwithstanding other provisions in this title, a municipality may adopt an ordinance providing for the impoundment or forfeiture of a motor vehicle involved in the commission of an offense under AS 28.35.030, 28.35.032, or an ordinance with elements substantially similar to AS 28.35.030 or AS 28.35.032. An ordinance adopted under this section is not required to be consistent with this title or regulations adopted under this title. (§ 23 ch 77 SLA 1983)

Article 3. Reckless and Negligent Driving.

Section
40. Reckless driving
45. Negligent driving

Sec. 28.35.040. Reckless driving. (a) A person who drives a motor vehicle in the state in a manner which creates a substantial and unjustifiable risk of harm to a person or to property is guilty of reckless driving. A substantial and unjustifiable risk is a risk of such a nature and degree that the conscious disregard of it or a failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

(b) A person convicted of reckless driving is guilty of a misdemeanor and is punishable by a fine of not more than $1,000 or by imprisonment for not more than one year or by both.

(c) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 50-5-4 ACLA 1949; am § 1 ch 182 SLA 1955; am § 1 ch 70 SLA 1961; am § 2 ch 121 SLA 1967; am § 1 ch 13 SLA 1971; am § 46 ch 32 SLA 1971; am § 6 ch 74 SLA 1974)

NOTES TO DECISIONS

Codification of common-law standard of care. — This section and AS 28.35.045, defining reckless and negligent driving, do not set forth precise standards of care, but merely codify the usual common-law standard of care. Bailey v. Lenord, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Specific conduct not proscribed. — This section and AS 28.35.045, defining reckless and negligent driving, do not proscribe specific conduct, but rather state that a person shall not drive a motor vehicle in a manner which creates an unjustifiable risk. Bailey v. Lenord, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Risks to safety of general public. — Reckless driving involves risks to the safety of the public at large. Calder v. State, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

A defendant was not placed in double jeopardy by his conviction of the lesser included offense of reckless driving on a felony charge of assault with a dangerous weapon even though a misdemeanor charge of reckless driving had already been adjudicated against him because, although the charges arose out of the same general incidents, they were based on different conduct during that incident. Calder v. State, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

Trooper arriving at accident scene cannot arrest for reckless driving without warrant. — The Alaska legislature has classified both reckless driving and operating or driving an automobile under the influence of intoxicating liquor as misdemeanors. Thus, a state trooper who arrived at an accident scene could not arrest a driver without a warrant for either reckless driving or drunk driving since neither of these offenses was committed or attempted in his presence. Layland v. State, Sup. Ct. Op. No. 1150 (File No. 2264), 535 P.2d 1043 (1975), aff'd, Sup. Ct. Op. No. 2739, 549 P.2d 1182 (1976), overruled on other grounds, City of Anchorage v. Geber, Sup. Ct. Op. No. 1824 (File Nos. 3827, 4016, 4037, 4046), 592 P.2d 1192 (1979).

Sentencing considerations. — Where it was undisputed at trial that there were three people in the rear of defendant's pickup who were extremely vulnerable in case of any accident, the judge could properly consider this fact at sentencing in evaluating the extent of defendant's recklessness, even though he could not properly consider the fact that they had died from defendant's recklessness. Huckaby v. State, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Considering uncounseled moving violations in sentencing held harmless error. — Any error which might have occurred by reason of the trial court's consideration of two uncounseled moving violations in determining the sentence for negligent driving was harmless where the court also considered three counseled moving violations and where it did not restrict or suspend defendant's license but imposed a fine of $100, which was only $25 above that suggested by defendant's counsel. McKenzie v. State, Sup. Ct. Op. No. 1029 (File No. 2012), 520 P.2d 791 (1974).

Sentence upheld. — Severity of defendant's offense within the crime of reckless driving and the need to deter him, to deter others, and to reaffirm societal norms justified a one-year sentence. Huckaby v. State, Ct. App. Op. No. 39 (File No. 5197), 632 P.2d 975 (1981).

Cited in Hood v. Smedley, Sup. Ct. Op. No. 800 (File No. 1406), 498 P.2d 120 (1972); Williford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983); Wilson v. State, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), ___ P.2d ___ (1984).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 312 to 320.

61A C.J.S., Motor Vehicles, §§ 609 to 624.

What amounts to gross or wanton negligence in driving an automobile precluding the defense of contributory negligence, 38 ALR 1424, 72 ALR 1357, 92 ALR 1367, 119 ALR 654.

What amounts to reckless driving within statute making reckless driving of automobile a criminal offense, 86 ALR 1273, 52 ALR2d 1337.

Definiteness and certainty of statutes prohibiting, 12 ALR2d 580.

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

Sec. 28.35.045. Negligent driving. (a) A person who drives a motor vehicle in the state in a manner which creates an unjustifiable risk of harm to a person or to property and who, as a result of the creation of the risk, actually endangers a person or property is guilty of negligent driving. An unjustifiable risk is a risk of such a nature and degree that a failure to avoid it constitutes a deviation from the standard of care that a reasonable person would observe in the situation. Proof that a defendant actually endangered a person or property is established by showing that, as a result of the defendant's driving,

(1) an accident occurred;

(2) a person, including the defendant, took evasive action to avoid an accident;

(3) a person, including the defendant, stopped or slowed down suddenly to avoid an accident; or

(4) a person or property, including the defendant or the defendant's property, was otherwise endangered.

(b) The offense of negligent driving is a lesser offense than, and included in, the offense of reckless driving, and a person charged with reckless driving may be convicted of the lesser offense of negligent driving.

(c) A person convicted of negligent driving is guilty of an infraction as provided under AS 28.40.050, and in addition, the court may limit or suspend the person's driver's license under AS 28.15.220(b).

(d) Lawfully conducted automobile, snowmobile, motorcycle or other motor vehicle racing or exhibition events are not subject to the provisions of this section. (§ 7 ch 74 SLA 1974; am § 6 ch 241 SLA 1976; am § 19 ch 144 SLA 1977)

Revisor's notes. — AS 28.15.220, referred to in (c) of this section, was repealed in 1978. The present provisions for discretionary court limitation of licenses are found in AS 28.15.201. The present provisions for mandatory suspension of licenses for certain violations (AS 28.15.181) do not include a violation of this section in the grounds for suspension.

NOTES TO DECISIONS

Codification of common-law standard of care. — This section and AS 28.35.040, defining reckless and negligent driving, do not set forth precise standards of care, but merely codify the usual common-law standard of care. Bailey v. Lenord, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Specific conduct not proscribed. — This section and AS 28.35.040, defining reckless and negligent driving, do not proscribe specific conduct, but rather state that a person shall not drive a motor vehicle in a manner which creates an unjustifiable risk. Bailey v. Lenord, Sup. Ct. Op. No. 2308 (File No. 4696), 625 P.2d 849 (1981).

Negligent driving is an infraction, not an offense for double jeopardy purposes, and pleading no contest to negligent driving does not preclude a subsequent prosecution for the offense of second-degree assault. Carlson v. State, Ct. App. Op. No. 339 (File No. 7338), 676 P.2d 603 (1984).

Cited in Westford v. State, Sup. Ct. Op. No. 2751 (File No. 5986), 674 P.2d 1329 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 321, 322.

61A C.J.S., Motor Vehicles, § 612.

Article 4. Duties Following Accidents.

Sec. 28.35.050. Action of operator immediately after accident. (a) An operator of a vehicle involved in an accident resulting in injury to or death of a person shall immediately stop the vehicle at the scene of the accident or as close to it as possible and return to, and remain at, the scene until the operator has fulfilled the requirements of AS 28.35.060.

(b) The operator of a vehicle involved in an accident resulting only in damage to a vehicle driven or attended by a person shall immediately stop the vehicle at the scene of the accident or as close to it as possible and return to, and remain at, the scene of the accident until the operator has fulfilled the requirements of AS 28.35.060.

(c) The operator of a vehicle involved in an accident resulting only in damage to a vehicle which is unattended shall immediately stop at the scene of the accident and undertake reasonable means and efforts to locate and notify the operator or owner of the damaged unattended vehicle of the name and address of the operator and owner of the vehicle striking the unattended vehicle. If the operator or owner of the unattended vehicle cannot be located then the operator shall leave in a conspicuous place in or upon the unattended vehicle, a writing stating the name and address of the operator and of the owner of the vehicle which struck the unattended vehicle and setting forth a statement of the circumstances of the accident. (§ 50-5-5 a, b ACLA 1949; am § 1 ch 69 SLA 1960)

NOTES TO DECISIONS

Both this section and AS 28.35.060 define the duties of drivers of motor vehicles "involved in an accident." Drahosh v. State, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

And constitute an interlocking statutory scheme. — It is apparent from a reading of AS 28.35.050(a) and AS 28.35.060(a) that together they constitute an interlocking statutory scheme proscribing conduct commonly known as "hit and run" driving. Drahosh v. State, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

Separate offenses. — Leaving the scene of an accident is a separate and distinct offense from the crime of failure to render assistance. Drahosh v. State, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

Violations of subsection (a) are punishable under AS 28.35.230. Drahosh v. State, Sup. Ct. Op. No. 485 (File No. 849), 442 P.2d 44 (1968).

Quoted in Miller v. State, Ct. App. Op. No. 235 (File No. 5429), 652 P.2d 494 (1982).

Cited in Atchak v. State, Ct. App. Op. No. 036 (File No. 4435), 640 P.2d 135 (1981).

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic, §§ 289 to 295.

61A C.J.S., Motor Vehicles, §§ 674 to 683.

Constitutionality, construction, and effect of statute in relation to conduct of driver of automobile after happening of an accident, 16 ALR 1425, 66 ALR 1228, 101 ALR 911.

Failure to stop or other conduct after automobile accident as supporting claim for exemplary damages, 156 ALR 1115.

Applicability of criminal "hit-and-run" statute to accidents occurring on private property, 77 ALR2d 1171.

Necessity and sufficiency of showing in a criminal prosecution under a "hit-and-run" statute accused's knowledge of accident, injury, or damage, 23 ALR3d 497.

Sec. 28.35.060. Duty of operator to give information and render assistance. (a) The operator of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle which is driven or attended by a person shall give the operator's name, address, and vehicle license number to the person struck or injured, or the operator or occupant, or the person attending, and the vehicle collided with and shall render to any person injured reasonable assistance, including making of arrangements for attendance upon the person by a physician and transportation, in a manner which will not cause further injury, to a hospital for medical treatment if it is apparent that treatment is desirable. Under no circumstances is the giving of assistance or other compliance with the provisions of this paragraph evidence of the liability of an operator for the accident.

(b) Except as provided in (c) of this section, a person who fails to comply with any of the requirements of this section is, upon conviction, punishable by imprisonment for not more than one year, or by a fine of not more than $500, or by both. This provision does not apply to a person incapacitated by the accident to the extent that the person is physically incapable of complying with the requirement.

(c) A person who fails to comply with a requirement of this section regarding assisting an injured person is, upon conviction, punishable by imprisonment for not more than 10 years, or by a fine of not more than $10,000, or by both. This provision does not apply to a person incapacitated by the accident to the extent that the person is physically incapable of complying with the requirement. (§ 50-5-5 c, d ACLA 1949; am §§ 1, 2 ch 85 SLA 1968)

NOTES TO DECISIONS

This section does not codify a common-law crime but rather creates a new statutory offense. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

On its face, this section appears constitutionally defective for its failure to require criminal intent, or more particularly, for its failure to require that a person knowingly fails to render assistance. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

On its face this section does not require that a person have knowledge of the accident or of the fact that injuries have resulted to be guilty of a serious crime. Thus the statute appears to hold a person strictly liable for failure to render assistance even if he is unaware of any wrongdoing, i.e., unaware of the circumstances giving rise to the duty and thus unaware that he is in fact failing to do the required act. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

But the requisite intent may be read into the statute by implication. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

The legislature intended that criminal liability under this section attach only where the operator of a motor vehicle knowingly fails to stop and render assistance. The statute requires an affirmative course of action to be taken by the driver and it necessarily follows that one must be aware of the facts giving rise to this affirmative duty in order to perform such a duty. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

When criminal liability under subsection (c) attaches. — Criminal liability under subsection (c) of this section attaches to a driver who leaves the scene of an accident where the state can prove by direct or circumstantial evidence that the driver actually knew of the injury or that he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

Intoxication. — Where one is charged with failure to render assistance under this section, and where there is evidence of intoxication, the jury may consider the fact that the accused was intoxicated in determining whether he had the requisite knowledge. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

No error in manner in which state permitted to argue element of knowledge to jury. — See Atchak v. State, Ct. App. Op. No. 036 (File No. 4435), 640 P.2d 135 (1981).

Instruction that the jury could find knowledge of injury "where the circumstances were such that they would lead a reasonably prudent person to assume that an accident resulting in injury" must have occurred was erroneous, since it is not the reasonable person who is on trial but the defendant and it is the defendant's knowledge which must be proved and not that of a hypothetical reasonable person. Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978).

Where the trial court's first instruction on the elements of the offense of failure to render aid adequately apprised the jury of all necessary elements with the exception of the element of knowledge, but two additional instructions specifically addressing the element of knowledge conformed precisely to the requirements of Kimoktoak v. State, Sup. Ct. Op. No. 1704 (File No. 3177), 584 P.2d 25 (1978), no error was committed by the court in instructing the jury. Atchak v. State, Ct. App. Op. No. 036 (File No. 4435), 640 P.2d 135 (1981).

The crime of leaving the scene of an accident is not amenable to civil compromise. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

The act constituting the crime of leaving the scene of an accident is the failure to stop and make the necessary exchanges of information or assistance after the accident has occurred. This omission is not one which causes injury to the private citizen within the meaning of the civil compromise statutes. Settlement of the claim for injuries resulting from the accident cannot settle the state's claim for a violation of its laws. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

Ten-year sentence for failure to render assistance affirmed. — See Rosendahl v. State, Sup. Ct. Op. No. 1807 (File No. 4087), 591 P.2d 538 (1979).

Applied in Lupro v. State, Sup. Ct. Op. No. 1960 (File No. 2987), 603 P.2d 468 (1979).

Quoted in Thibedeau v. State, Sup. Ct. Op. No. 2182 (File No. 4325), 617 P.2d 759 (1980); Miller v. State, Ct. App. Op. No. 135 (File No. 5429), 652 P.2d 494 (1982).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 289 to 295.

61A C.J.S., Motor Vehicles, §§ 674 to 683.

Violation of statute requiring one

involved in an accident to stop and render aid as affecting civil liability, 80 ALR2d 299.

Sufficiency of compliance with requirement of criminal "hit and run" statute that motorist identify himself, 48 ALR3d 685.

Sec. 28.35.070. Examination or impounding before repair. A person may not make or have made repairs to damage or injury to a motor vehicle which could have been caused by collision with a person or property without first notifying the Department of Public Safety, chief of police, or in the absence of these, the nearest policeman or other peace officer, who shall immediately examine the vehicle and make a full report subscribed by the person in whose custody the vehicle then is. A copy of the report shall be mailed or delivered to the Department of Public Safety. If no official is within 10 miles of the place where the vehicle is brought for repair, then no notice or examination is required. If there is ground for suspecting that the vehicle was involved in a collision with a person, the vehicle shall be impounded at the expense of the owner, for which the custodian shall have a lien, and shall be accessible only to officers detailed to the investigation of the case until released. If, however, there is no reason to suspect that the damage to the motor vehicle was caused by collision with a person or property, the repair of the vehicle may be authorized by the officer in charge of the investigation at any time after the expiration of 24 hours thereafter. (§ 50-5-5 f ACLA 1949; am § 2 ch 123 SLA 1959)

NOTES TO DECISIONS

Appeal in Lupro v. State, Sup. Ct. Op. No. [illegible] (File No. 2987), 603 P.2d 468 (1979).

Collateral references. — 38 Am. Jur. 2d, Garages, and Parking and Filling Stations, §§ 140, 144 to 151.

61A C.J.S., Motor Vehicles, §§ 725, 748(d), (e).

Lien for storage of automobile, 31 ALR 834, 48 ALR2d 894.

Lien for towing or storage, ordered by public officer, of motor vehicle, 85 ALR3d 199.

Sec. 28.35.080. Immediate notice of accident. (a) The driver of a vehicle involved in an accident resulting in bodily injury to or death of a person or total property damage to an apparent extent of $500 or more shall immediately by the quickest means of communication give notice of the accident to the local police department if the accident occurs within a municipality, otherwise to the Department of Public Safety.

(b) The driver of a vehicle involved in an accident resulting in bodily injury to or death of a person or total property damage to an apparent extent of $500 or more shall, within 10 days after the accident, forward

a written report of the accident to the Department of Public Safety and to the local police department if the accident occurs within a municipality. A report is not required under this subsection if the accident is investigated by a peace officer.

(c) The form of accident report required under (b) of this section can be obtained from any local police department or the Department of Public Safety.

(d) The Department of Public Safety may require the driver of a vehicle involved in an accident of which a report must be made to file supplemental reports whenever the original report is insufficient in the opinion of the department.

(e) Every law enforcement officer who, in the regular course of duty, investigates a motor vehicle accident for which a report must be made, either at the time of and at the scene of the accident or thereafter by interviewing the participants or witnesses, shall, within 24 hours after completing the investigation, forward a written report of the accident to the Department of Public Safety.

(f) An accident report is not required under this section from a person who is physically incapable of making the report during the period of incapacity. (§§ 50-5-5 f, g ACLA 1949; added by § 3 ch 123 SLA 1959; am §§ 2, 3 ch 69 SLA 1960; §§ 50-5-5 h, i, j ACLA 1949; added by § 3 ch 123 SLA 1959; am § 20 ch 144 SLA 1977)

NOTES TO DECISIONS

Self-incrimination. — Appellant's admission that he was driving vehicle in question at time of accident was not inadmissible under the fifth amendment to the United States Constitution and Alaska Const., art. I, § 9 as being compelled by this section, since this section does not require any incriminating information, but merely requires a person who is involved in an accident covered by the statute to give notice of the accident to the appropriate police department. Creary v. State, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Investigating officer's written report of an accident is not admissible in evidence under this section. Menard v. Acevedo, Sup. Ct. Op. No. 364 (File No. 636), 418 P.2d 766 (1966).

Admissibility of investigating officer's observations. — Although under AS 28.35.120 a written report itself is generally inadmissible, the police officer who investigates the accident may testify to the observations which he made in preparing the report, and his observations would include any statements which were made to him in the course of the investigation that were otherwise admissible, including the statement of a defendant that he was the driver of the vehicle in question. Creary v. State, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Applied in Adkins v. Lester, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974); Kupa Transp., Inc. v. Henry, Sup. Ct. Op. No. 1527 (File No. 2926), 572 P.2d 72 (1977); Rutherford v. State, Sup. Ct. Op. No. 2001 (File No. 3453), 605 P.2d 16 (1979).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 160.

61A C.J.S., Motor Vehicles, § 674.

Admissibility of report of operator filed pursuant to law, respecting automobile accident, 69 ALR 905.

Failure to comply with statute requiring one involved in automobile accident to stop or report, as affecting question as to suspension or tolling of statute of limitation, 10 AL.R2d 564

Sec. 28.35.090. Rendering of report by others. (a) Whenever the driver of a vehicle is physically incapable of giving an immediate notice of an accident as required in AS 28.35.080 and there was another occupant in the vehicle at the time of the accident capable of doing so, the occupant shall make or give the notice not given by the driver.

(b) Whenever the driver is physically incapable of making a written report of an accident as required in AS 28.35.080 and the driver is not the owner of the vehicle, then the owner of the vehicle involved in the accident shall within five days after learning of the accident make the report not made by the driver. (§ 50-5-5 j ACLA 1949; am § 3 ch 123 SLA 1959)

Sec. 28.35.100. Form of reports. (a) The Department of Public Safety shall prepare and upon request supply to police departments, coroners, local peace officers, garages and other suitable agencies or individuals, forms for accident reports. The written reports by persons involved in accidents and by investigating officers shall require sufficiently detailed information to disclose the cause of the accident, conditions existing at the time of the accident, and the persons and vehicles involved.

(b) Every accident report required to be made in writing shall be made on the appropriate form approved by the department and shall contain all of the information required unless not available. (§ 50-5-5 k ACLA 1949; added by § 3 ch 123 SLA 1959)

NOTES TO DECISIONS

Quoted in Creary v. State, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Sec. 28.35.110. Penalty for giving false information in report or failing to report. (a) A person who gives information in reports as required in AS 28.35.080 knowing or having reason to believe that the information is false is punishable by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both.

(b) The department shall suspend the license or permit to drive and the nonresident operating privileges of a person failing to report an accident as provided in AS 28.35.080 until the report is filed. The department may extend the suspension by not more than 30 days. A person failing to make a report as required in AS 28.35.080 is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $200, or by imprisonment for not more than 90 days, or by both. (§ 50-5-5 l, m ACLA 1949; added by § 3 ch 123 SLA 1959)

NOTES TO DECISIONS

Cited in Creary v. State, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 160.
61A C.J.S., Motor Vehicles, § 674.

Sec. 28.35.120. Use of accident reports in evidence. A report made in accordance with this chapter may not be used in evidence in a criminal or civil action arising out of the accident that is the subject of the report. (§ 4 ch 123 SLA 1959)

NOTES TO DECISIONS

Investigating officer's written report of an accident is not admissible in evidence under this section. Menard v. Acevedo, Sup. Ct. Op. No. 364 (File No. 636), 418 P.2d 766 (1966).

This section bars admission into evidence of an investigating police officer's report made in connection with a traffic accident. Adkins v. Lester, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974).

Policies underlying statutes barring the use of accident reports as evidence. — See Adkins v. Lester, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974).

This section by its specific terms bars only the report's use in evidence. Adkins v. Lester, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974).

This section does not prohibit the oral testimony or expert opinions of an investigator which are also contained in an automobile accident report. Adkins v. Lester, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974).

In view of Alaska's established rule favoring admission of expert opinion testimony, it would seem wise not to exclude such expert testimony simply because the witness prepared the written report which is barred by the statute. Adkins v. Lester, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974).

Although under this section a written report itself is generally inadmissible, the police officer who investigates the accident may testify to the observations which he made in preparing the report, and his observations would include any statements which were made to him in the course of the investigation that were otherwise admissible, including the statement of a defendant that he was the driver of the vehicle in question. Creary v. State, Ct. App. Op. No. 252 (File Nos. 6777, 6778), 663 P.2d 226 (1983).

Although a state trooper had little independent recollection of the accident, he could rely upon his report as a proper basis for his testimony in a negligence action. It was still his testimony and not the report itself which was placed in evidence. Kapa Transp., Inc. v. Henry, Sup. Ct. Op. No. 1527 (File No. 2928), 572 P.2d 72 (1977).

Where a state trooper was permitted to refer to his accident report in order to recreate for the jury a diagram of the scene of the accident which he had prepared as part of his investigation and he was also permitted to read from his report the statement he took from one of the two witnesses to the accident, this testimony was properly admitted. Kapa Transp., Inc. v. Henry, Sup. Ct. Op. No. 1527 (File No. 2928), 572 P.2d 72 (1977).

Testimony of witnesses named in report. — The holding that this section does not bar oral testimony or expert opinions of an investigator which are also contained in an automobile accident report clearly overrules any implication in Mace v. Jung, Sup. Ct. Op. No. 170 (File No.

306), 386 P 2d 579 (1963) that witnesses named in the report would not be able to testify before the court. The doctrine of "fruit of the poisonous tree" is simply not applicable to this type of a situation. Aakins v. Lester, Sup. Ct. Op. No. 1107 (File No. 2078), 530 P.2d 11 (1974).

Memoranda prepared by state trooper investigating another trooper's involvement in an accident were not inadmissible police investigatory reports in terms of this section's language and purpose. Rutherford v. State, Sup. Ct. Op. No. 2001 (File No. 3453), 605 P.2d 16 (1979).

Quoted in Wester v. State, Sup. Ct. Op. No. 1106 (File No. 2159), 528 P.2d 1179 (1974).

Collateral references. — 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 1046.

61A C.J.S., Motor Vehicles, § 516(19).

Admissibility of report of operator filed pursuant to law, respecting automobile accident, 69 A.L.R. 905.

Sec. 28.35.130. False report or destruction of evidence. An officer or person who knowingly makes or subscribes a false report concerning an investigation of a vehicle or damage or injury caused by a vehicle, as provided in this chapter, is guilty of perjury. A person who destroys, obliterates, conceals or removes, or who aids, abets, or assists in the destruction, obliteration, concealment, or removal from a vehicle, of evidence showing or tending to show that the vehicle collided with a person or property, is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both. (§ 50-5-6 ACLA 1949)

Article 5. Miscellaneous Offenses.

Sec. 28.35.135. Unlawful to knowingly make false statement, application, or certification. (a) A person may not knowingly make a false affidavit, statement, or representation, or affirm falsely with respect to a matter or fact required to be set out under this title, nor may the person use a name other than the person's true name. A person convicted of violating this section is guilty of unsworn falsification and is punishable as prescribed by law.

(b) A person who has a certification, registration, title, license, or other form issued under this title, or who has applied for a certification, registration, license, or other form, and who changes the person's name or moves from the address shown on the department's records or forms, shall notify the department in writing of the change in name or address within 30 days. (§ 7 ch 241 SLA 1976; am § 43 ch 102 SLA 1980)

Cross references. — For crime of unsworn falsification, see AS 11.56.210, for penalties, see AS 12.55.035(b)(3) and 12.55.135(a).

Effect of amendments. — The 1980 amendment substituted "unsworn falsification" for "perjury" following "is guilty of" near the middle of the second sentence in subsection (a).

Sec. 28.35.140. Unlawful obstruction or blocking of traffic. A person may not purposely obstruct or block traffic on any roadway by any means. However, a service vehicle such as a bus, garbage truck, tow truck or ambulance may make brief stops on a roadway, which stops on the roadway are necessary in the performance of its services. (§ 50-5-7 ACLA 1949; am § 1 ch 174 SLA 1970)

NOTES TO DECISIONS

This law pertains to roads of sufficient width and condition to permit vehicles to pass, without injury to their tires or other parts, and without danger of collision. Vogler v. Greimann, 12 Alaska 19, 78 F. Supp. 575 (D. Alaska 1948).

On a two lane highway, even a one foot obstruction could easily cause a following car to swerve into the opposite lane to clear a parked vehicle. This would interfere with the normal flow of traffic and amount to a violation under this section. Beaumaster v. Crandall, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

This section is not an exclusive list of service vehicles. Beaumaster v. Crandall, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

A driver, while not operating a professional service vehicle, may be engaged in the same activity as a service vehicle would have been. Beaumaster v. Crandall, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

Such as pulling over to aid occupants of overturned car. — This section describes service vehicles as buses, garbage trucks, tow trucks or ambulances, but a reasonable construction of the statute would hold that one who pulled his car over to the side of the road in an emergency situation in order to aid the occupants of an overturned car, was acting in a service capacity. Beaumaster v. Crandall, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

A person who pulled over to the side of the road in an emergency situation in order to aid the occupants of an overturned car, apparently parking as far over on the right as he could given the snow conditions and the presence of a ditch on the side of the road, and who also turned his emergency flasher lights on, was entitled to make a brief stop on the roadway as necessary in the performance of samaritan efforts. Beaumaster v. Crandall, Sup. Ct. Op. No. 1589 (File No. 2845), 576 P.2d 988 (1978).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 277.

61A C.J.S., Motor Vehicles, § 684.

Stopping vehicle on traveled portion of highway as affecting responsibility for collision between vehicles, 131 A.L.R. 562.

Sec. 28.35.150. Unlawful to interfere with or destroy official traffic control device or highway construction; action by state for damages. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.155. Operation of vehicle with certain tires prohibited. (a) It is unlawful to operate a motor vehicle with studded

tires or tires with chains attached on a paved highway or road from May 1 through September 15, inclusive, north of 60° North Latitude and from April 15 through September 30, inclusive, south of 60° North Latitude. The commissioner of public safety shall by emergency order provide for additional lawful operating periods based on unusual seasonal or weather conditions. An emergency order adopted under this section is not subject to the Administrative Procedure Act (AS 44.62). Upon application a special individual traction permit may be issued allowing the operation of a motor vehicle with studded tires or chains at any time at the discretion of the vehicle owner. The fee for the special individual permit is one-third of the annual registration fee applicable to that class of vehicle under AS 28.10.421. The department may provide an appropriate sticker or other device identifying the vehicle to which the permit applies.

(b) In this section "studded tire" means a tire with metal studs or spikes imbedded in the periphery of the tire surface, and protruding not more than one-fourth inch from the tire surface. (§ 9 ch 241 SLA 1976; am § 29 ch 94 SLA 1980)

Effect of amendments. — The 1980 amendment substituted "registration fee" for "license tax" near the middle of the next to last sentence of subsection (a), and substituted "AS 28.10.421" for "AS 28.10.200" at the end of the next to last sentence of subsection (a).

Sec. 28.35.160. Unlawful injury to or destruction of traffic regulations or guidance device. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.170. Operation with more than three persons in driver's seat. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.180. Disobedience to signals of officer regulating traffic unlawful. A driver of a vehicle may not refuse to obey a lawful order or direction of a peace officer, fireman, or authorized flagman regulating and directing traffic. A peace officer or fireman regulating or directing traffic shall, upon request of a driver, produce evidence of authorization unless the officer or fireman is wearing in view the badge or uniform of office. (§ 50-5-11 ACLA 1949; am § 10 ch 241 SLA 1976)

Sec. 28.35.182. Stopping at direction of peace officer. (a) A person driving or operating a vehicle or motor vehicle, or operating an aircraft or watercraft, shall stop as soon as practical and in a reasonably safe manner under the circumstances, if requested or signalled to do so for a lawful purpose by a peace officer.

(b) If the peace officer is driving or operating a vehicle or motor vehicle or is operating an aircraft or watercraft when making the request or giving the signal to stop, the peace officer's vehicle, motor vehicle, aircraft or watercraft must be marked appropriately so that a reasonable person would recognize it as one related to law enforcement,

or it must meet lighting and audible signalling requirements of law for law enforcement vehicles. If the peace officer is not driving or operating a vehicle or motor vehicle, or operating an aircraft or watercraft, the officer shall wear the uniform of office or display a badge or other symbol of authority so as to be reasonably identifiable as a peace officer.

(c) A person who knowingly fails to stop in violation of (a) of this section is guilty of a class B misdemeanor.

(d) In this section

(1) "lawful purpose" includes making an arrest or issuing a citation, preventing personal injury or property damage in an emergency, and investigating a situation when the peace officer has a reasonable suspicion that imminent public danger exists or that serious harm has recently occurred;

(2) "signal" means a hand motion, audible mechanical or electronic noise device, visual light device, or combination of them, used in a manner that a reasonable person would understand to mean that the peace officer intends that the person stop. (§ 1 ch 66 SLA 1984)

Sec. 28.35.190. Penalty for violation of certain sections. [Repealed, § 47 ch 32 SLA 1971.]

Sec. 28.35.200. Unlawful operation of vehicles. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.210. Seizure of unsafe or defectively equipped vehicles. [Repealed by implication by AS 28.05.091, enacted by § 6 ch 178 SLA 1978.]

Sec. 28.35.220. Action by state for damages. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.225. Enforcement. All law enforcement officers in this state and employees of the department designated by the commissioner shall enforce this title and regulations adopted under this title. The state troopers shall advise and instruct all other law enforcement officers in the state concerning the requirements of this title and regulations adopted under this title. (§ 11 ch 241 SLA 1976; am § 7 ch 54 SLA 1979)

Sec. 28.35.230. [Renumbered as AS 28.40.050.]

Sec. 28.35.240. Duty to obey school patrol. [Repealed, § 3 ch 68 SLA 1964.]

Sec. 28.35.245. Motorcycle helmet. (a) After January 1, 1978, motorcycle helmets may not be manufactured or sold in Alaska that do not conform to standards established by regulation by the commissioner of public safety. The regulations shall provide for helmets that allow normal peripheral vision and hearing and minimize neck injuries

to the wearer potentially caused by the helmet. The adoption of these regulations shall be under the provisions of the Administrative Procedure Act (AS 44.62).

(b) A person who has reached the age of majority as defined by AS 25.20.010 may not be required to wear a helmet while operating a motorcycle if the person is the holder of a license which, under regulations adopted under AS 28.15.041, is classified singly as a license to operate a motorcycle. (§ 1 ch 230 SLA 1976)

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 210.

Sec. 28.35.250. Application of law. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.260. [Renumbered as AS 28.40.100.]

Sec. 28.35.270. [Renumbered as AS 28.40.110.]

P O S I T I O N P A P E R

HB 26 - "AN ACT RELATING TO MOTOR VEHICLE FORFEITURE"

Alaska ranks third highest per capita nationwide in alcohol-related accident fatalities. After HB 6 was signed into law in September 1983, the prosecution was given the option to request the confiscation of a vehicle for second time DWI offenders. In Fairbanks, during a recent three year period, only one person has been ordered to forfeit their car. Alaska statistics show that in 1985, there were 365 drunk driving accidents involving third time offenders. During the first 11 months of 1986, this figure increased to 412 drunk driving accidents. These alarming statistics led me to introduce this legislation.

The purpose of HB 26 is to strengthen the original legislative intent of AS 28.35.036 by stating that "... the state shall [may] move the court to order the forfeiture of the motor vehicle..." The primary intent of HB 26 is to limit drunk driving fatalities. This legislation may also act as a deterrent by convincing first time DWI offenders that they will no longer have their vehicle if they are convicted of a second time DWI offense.

Under the proposal in AS 28.35.037 (Remission of Forfeitures) an offender can go to court in order to retrieve his or her car, thereby protecting third party interests in the motor vehicle. The offender must follow the statutory guidelines and present relevant arguments to the judge. Sec. 28.35.037(c) states that if the person satisfies these requirements, the court shall order that the motor vehicle and title be released. Otherwise, the vehicle will be auctioned or turned over to Public Safety for police use.

It is routine practice of Alaska game wardens to immediately confiscate cars, trucks and guns when a hunting violation is charged, prior to completion of the violator's due process proceedings. It is my opinion that the protection of human life should be considered at least as important in state law as a hunting or parking violation.

COMPARISON OF PROPOSED PENALTIES FOR DWI OFFENDERS

	Current law	C/S HB 53 (Trans)	HB 26	HB 2
1st DWI	3 days in jail 90 day loss/license $250 fine	3 days in jail 90 day loss/license Earn back last 60 $250 fine		ILS court option
2nd DWI	20 days in jail 1 year loss/license $500 fine	20 days in jail 1 year loss license Earn back last 60 days $500 fine		ILS court option
3rd DWI	30 days in jail 10 yr loss/license $1000 fine	60 days in jail 10 yr loss/license Earn back last 5 years $1000 fine	forfeiture of vehicle	ILS court option
4th	30 days in jail 10 yr loss/license $1000 fine	120 days in jail 10 yr loss license $2000 fine		ILS court option
5th	30 days in jail 10 yr loss/license $1000 fine	Class C felony		ILS court option
6th DWI	30 days in jail 10 yr loss/license $1000 fine	Class C felony		ILS court option

TANANA CHIEFS CONFERENCE, INC.
Board of Directors
Resolution No. 89-114

DRIVING WHILE INTOXICATED

WHEREAS, there are several bills before the Alaska legislature to stiffen penalties for driving while intoxicated (DWI); and

WHEREAS, stiffer penalties for driving when intoxicated contribute to the region's efforts in the fight against alcohol.

NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors support the following proposed legislation:

HB 53 - Making the 4th DWI offense a felony rather than the 5th and relaxing penalties for the 2nd and 3rd offenses if the person gets treatment for alcohol abuse.

HB 26 - Requiring the forfeiture of a vehicle when convicted of a third DWI within 10 years, but giving the Court some discretion if the vehicle is owned or owned in part by another person.

HB 2 - Allowing Courts to order as a condition of probation, that a person convicted of an offense involving alcohol may not operate a vehicle unless equipped with an ignition interlock "device".

NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors recommend that language be included in the bill limiting the application of this bill to areas with facilities in place for installation and maintenance of the devices.

CERTIFICATION

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 16, 1989 at Fairbanks, Alaska and a quorum was duly established.

Daisy Northway
Secretary-Treasurer
Tanana Chiefs Conference, Inc

Submitted by: Alcohol Workshop

389-222.115

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 26 (Trans)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to motor vehicle forfeiture
Sponsor: Representative Koponen
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Component: Detachments

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

OPERATING	*FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	137.9	137.9	137.9	137.9	137.9	137.9
TRAVEL	4.0	4.0	4.0	4.0	4.0	4.0
CONTRACTUAL	193.0	193.0	193.0	193.0	193.0	193.0
SUPPLIES	6.0	6.0	6.0	6.0	6.0	6.0
EQUIPMENT	46.4	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	387.3	340.9	340.9	340.9	340.9	340.9
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	387.3	340.9	340.9	340.9	340.9	340.9
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	387.3	340.9	340.9	340.9	340.9	340.9

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME	1	1	1	1	1	1
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

See attached.

*If this legislation is passed during late FY 90, the earliest that AST could begin operations would be at the beginning of FY 91.

Prepared by: Francis C. Allan
Phone: 269-5691
Division: Alaska State Troopers
Date: 12/19/89

Approved by Commissioner: Arthur English
Date: 12-19-89
Agency: Department of Public Safety

Department of Public Safety

Summary of Fiscal Impact - CSHB 26 (Trans)

Forfeiture of the motor vehicle of a repeat DWI offender is allowed under existing law (AS 28.35.030(c)). This bill makes forfeiture of the motor vehicle mandatory upon a third DWI conviction within 10 years. The Department of Law has developed guidelines for the preliminary investigation necessary to allow successful forfeiture of a motor vehicle. Among the additional tasks a law enforcement officer must perform are:

1) check the criminal and driving record of each DWI arrestee to determine if the present offense would be his or her third conviction; the written record must be attached to the police report and forwarded to the prosecutor's office;

2) Division of Motor Vehicles (DMV) title records must be checked to determine the owner of the subject vehicle, and a certified copy of the title record obtained; and

3) if the vehicle is jointly owned, the officer must investigate the circumstances surrounding the offender's possession of the vehicle at the time of the offense, as this information will be required at the "remission" hearing under AS 28.35.037; this information must be added to the police report.

The Department of Law estimates that 250-300 vehicles per year will be subject to forfeiture under the provisions of this bill. This fiscal note is based upon the conservative estimate of 250 vehicles. The Department of Public Safety estimates that enforcement of this new law will require a substantial amount of staff time. This additional time will fall into three general areas: (1) locating and impounding the vehicle in question, (2) investigating the extent to which co-owners were aware of, or involved in, the offense and, (3) processing the vehicle administratively.

Locating and Impounding Vehicles

Troopers will likely spend up to seven hours performing this task. This estimate is based upon the Trooper having to travel to the location where the vehicle is most likely to be found, traveling from point to point to track down the vehicle, and time spent waiting for tow trucks and completing the impound procedures. This does not include those instances where the convicted owner may be attempting to conceal the location of the vehicle from authorities or transfer the vehicle to someone else.

Investigation of Co-Owners' Knowledge

This bill allows co-owners of a forfeited vehicle to have a hearing before the court. At this "remission" hearing the forfeited vehicle can be awarded to a person claiming an interest in it, if the interest was acquired in good faith and the person did not know or have reasonable cause to believe that the offender would use the vehicle to commit the offense (AS 28.35.037(b)). This means the investigating officers must go to the offender's home and interview the spouse/parent/roommate whose name also appears on the vehicle title to determine the circumstances surrounding the offender's use of the vehicle at the time of the offense. To guard against attempts to fraudulently transfer ownership of the vehicle after the offense, the title status at the time of the offense must also be investigated.

Administrative Processing

This time will include completion of the necessary documents and other records needed to keep track of the seizure and disposal of each vehicle. This procedure will most likely take two or more hours per vehicle.

As under existing law, forfeited vehicles are to be disposed of at the discretion of the Department of Public Safety. After discussion with the Department of Administration, it has been decided that (except for a very small number of vehicles that could be used in undercover investigations) these vehicles will be turned over to the Department of Administration for disposal under AS 44.71.010. Therefore, the costs associated with ultimate disposal of the vehicles (auction, salvage, etc.) are not addressed in this fiscal note.

Additional Costs

The bill provides a 90-day period during which persons who claim to have a financial interest in the vehicle may seek remission of forfeiture. An additional 30 days is anticipated before a hearing will likely be held. During this 120-day time period the Department of Public Safety would be responsible for daily storage charges of approximately five dollars per day. Over the course of one year this could total $150,000. (120 X 250 X $5.00).

An average charge for towing a vehicle in the Anchorage area is approximately $75.00. 250 vehicles would result in towing fees estimated at $18,750.

Department of Public Safety
Summary of Fiscal Impact - CSHB 26 (Trans)

Estimated Additional Personnel

PERSONAL SERVICES COSTS

		Personal Services	Total Position Costs
State Trooper	12 mos.	$ 59.9	$ 99.1
State Trooper	12 mos.	$ 59.9	$ 99.1
Admin. Asst. I	6 mos.	$ 18.1	$ 20.3
TOTAL		$137.9	$218.5

An average number of hours worked during a 12 month period equals approximately 1,988. Estimated additional personnel resources required to manage this function were based upon these numbers.

Equipment

Equipment is needed in the first year only.

Department of Public Safety
Division of Alaska State Troopers
CSHB 26 (Trans)
Fiscal Note Summary
FY 91

	State Trooper 12 mos.	State Trooper 12 mos.	Admin. Asst. 6 mos	Other Costs	Total
Personal Services	59.9	59.9	18.1	-	137.9
Travel	2.0	2.0	-	-	4.0
Contractual	11.5	11.5	1.2	168.8*	193.0
Supplies	2.5	2.5	1.0	-	6.0
Equipment	23.2	23.2	-	-	46.4
Total	99.1	99.1	20.3	168.8	387.3

*$18.8 for towing and 150.0 for storage.

Position Title	No. of Positions	Range/Step	Barg. Unit
State Trooper	1	76/A	PSEA

Time Status	Staff Months	Location	Election District
PFT	12	Statewide	

Type of Expenditure		Amount
1	2	3
Salary*	42,495	
Benefits*	17,367	
Premium Pay (Included in Above)		
Other		
Total Personal Services		59.9
Travel		2.0
Contractual		11.5
Commodities		2.5
Equipment		23.2
Other		
Total Cost		99.1

Funding Source for Total Cost		
Federal Receipts	1002	
G.F. Match	1003	
General Fund	1004	99.1
Program Receipts/GF	1005	
I-A Receipts	1007	
CIP Receipts	1061	
Other		

* Personal Services Salary and Benefits Costs are from the FY91 PACS.

Justification

The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of AST is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1990. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 91 only.

REQUEST FOR NEW POSITION

AGENCY Department of Public Safety

BRU Alaska State Troopers

COMPONENT Detachments

Position Title	No. of Positions	Range/Step	Barg. Unit
State Trooper	1	76/A	PSEA

Time Status	Staff Months	Location	Election District
PFT	12	Statewide	

Type of Expenditure		Amount
1	2	3
Salary*	42,495	
Benefits*	17,367	
Premium Pay (Included in Above)		
Other		
Total Personal Services		59.9
Travel		2.0
Contractual		11.5
Commodities		2.5
Equipment		23.2
Other		
Total Cost		99.1

Funding Source for Total Cost		
Federal Receipts	1002	
G.F. Match	1003	
General Fund	1004	99.1
Program Receipts/GF	1005	
I-A Receipts	1007	
CIP Receipts	1061	
Other		

* Personal Services Salary and Benefits Costs are from the FY91 PACS.

Justification

The Department estimates that approximately thirteen hours of time will be needed on each of approximately 250 impounds. The current staff of AST is unable to absorb this increased workload without additional staffing. This new position is a commissioned State Trooper assigned to road patrol, which would include DWI enforcement. The location of this position is not yet determined, but its addition to AST will offset the workload increase throughout the state. The position would become active on July 1, 1990. Equipment, consisting primarily of a patrol vehicle, would be needed in FY 91 only.

REQUEST FOR NEW POSITION

AGENCY Department of Public Safety

BRU Alaska State Troopers

COMPONENT Detachments

Position Title	No. of Positions	Range/Step	Barg. Unit
Administrative Assistant I	1	12/A	ASEA

Time Status	Staff Months	Location	Election District
PPT	6	Anchorage	6-16

Type of Expenditure		Amount
1	2	3
Salary*	12,432	
Benefits*	5,695	
Premium Pay (Included in Above)		
Other		
Total Personal Services		18.1
Travel		—
Contractual		1.2
Commodities		1.0
Equipment		
Other		
Total Cost		20.3

Funding Source for Total Cost		
Federal Receipts	1002	
G.F. Match	1003	
General Fund	1004	20.3
Program Receipts/GF	1005	
I-A Receipts	1007	
CIP Receipts	1061	
Other		

* Personal Services Salary and Benefits Costs are from the FY91 PACS.

Justification

This position will prepare records involving seized vehicles and their later disposition. The Department is estimating that it will take approximately two hours of administrative effort per seizure. Because the legal responsibilities may require a working knowledge above that found in a typical clerical employee, an Administrative Assistant I is requested. Because the workload is insufficient in this program alone to warrant a fully-funded position, only six months funding is requested.

REQUEST FOR NEW POSITION

AGENCY Department of Public Safety

BRU Alaska State Troopers

COMPONENT Detachments

Revised Date

FY 91

STATE OF ALASKA
1990 LEGISLATIVE SESSION

Bill Version: CS HB 26 (TRANSP)
Publish Date:

FISCAL NOTE

REQUEST:

Revision Date: January 17, 1990
Title: An Act relating to motor vehicle forfeiture.
Sponsor: House Transportation
Requestor: House Judiciary

Agency Affected: Department of Administration
BRU: General Services and Supply
Components: Property Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	*	*	*	*	*	*
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	*	*	*	*	*	*
FEDERAL FUNDS	0	0	0	0	0	0
OTHER 1034	0	0	0	0	0	0
TOTAL	*	*	*	*	*	*

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)

* The fiscal impact in FY 90 would be the same as other years.
If the Surplus Property Section of Department of Administration disposed of the forfeited vehicles, we estimate disposal costs to be approximately $100.00 per vehicle with proceeds from sales deposited into the general fund.

Prepared by: Robert J. Link, Director
Division: General Services and Supply
Phone: 465-2250
Date: 1/17/90

Approved by Commissioner: Frank S. Baxter
Agency: Department of Administration
Date: 1/23/90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

e/11KS/011801-0

Rev: 11/89

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 26
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to motor vehicle forfeiture"
Sponsor: Koponen
Requestor: Transportation Committee

Agency Affected: Dept. of Administration
BRU: Public Defender Agency
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary) FY 90 impact is zero.

Vehicle forfeiture is a mandatory sanction under the provisions of this bill; therefore, clients of the Public Defender Agency convicted of said offense will not be entitled to litigate the issue. Any litigation regarding vehicle forfeiture will occur between the Department of Law and any person or entity other than the defendant who claims an ownership

Prepared by: John B. Salemi, Public Defender Phone: 279-7541
Division: Public Defender Agency Date:

Approved by Commissioner: Frank Baxter Date: 1/23/90
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 26

interest in the vehicle. Under these circumstances there will be no fiscal impact with respect to the Public Defender Agency.

As an aside, the Public Defender Agency feels this is an inappropriate sanction. While condoning harsh penalties for DWI offenders, this sanction will often serve to punish members of the family or social unit who have not been involved in wrongdoing. An extreme example might be a family unit with three or four children where both spouses work and rely on the family vehicle for transportation. Forfeiture of the vehicle not only punishes the criminal defendant, but the spouse and children of the family unit. This form of transportation is an essential facet of everyday life for most families. It affects employment, social life, children's participation in extracuricular activities at school, etc. It seems a better approach to increase the mandatory minimum jail sentence for a third time DWI offender rather than forfeit the vehicle. The enhanced minimum jail sentence is a direct sanction on the offender with less impact on the family unit.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : CSHB 26 (Trans.
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date:
Title : "An Act relating to motor vehicle forfeiture."
Sponsor : Koponen
Requestor : House Judiciary

Agency Affected : Administration
BRU : Office of Public Advocacy
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0.
CAPITAL	0	0	0	0	0	0.
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

FY90 impact is zero.

Prepared by : Brant McGee, Public Advocate
Division : Office of Public Advocacy
Phone : 274-1684
Date : 1/22/90

Approved by Commissioner : Frank Baxter
Agency : Department of Administration
Date : 1/23/90

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : CSHB 26 (Trans)
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date: January 17, 1990
Title : "An Act relating to motor vehicle forfeiture."
Sponsor : House Transportation
Requestor : House Judiciary

Agency Affected : Department of Law
BRU : Prosecution
Components : Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	106.1	109.2	112.5	115.9	119.4	123.0
TRAVEL	3.6	3.7	3.8	3.9	4.0	4.1
CONTRACTUAL	37.6	38.7	39.9	41.1	42.4	43.7
SUPPLIES	11.7	7.4	7.6	7.8	8.0	8.2
EQUIPMENT	11.0	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	169.9	159.0	163.8	168.7	173.8	179.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	169.9	159.0	163.8	168.7	173.8	179.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME	1	1	1	1	1	1
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director — Phone : 465-3672
Division : Administrative Services — Date : January 17, 1990

Richard L. Pegues for

Approved by Commissioner : Douglas B. Baily, Attorney General — Date : January 17, 1990
Agency : Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 26 (Trans)

The committee substitute for HB 26 makes three revisions to the original bill.

First, Section 3 is revised to prescribe the manner in which the Department of Public Safety may dispose of forfeited vehicles. These include: selling the motor vehicle and depositing the proceeds into the general fund; taking custody of the property and authorizing its use by the state or another political subdivision of the state; or destroying property that is harmful to the public.

Second, Section 4 is revised to require, upon forfeiture of a motor vehicle, that the state shall provide written notice within 30 days to each person with an ascertainable ownership or security interest in the motor vehicle, other than the person convicted of the offense resulting in forfeiture. The 30 day notification limit was not included in the original bill.

Third, Section 5 is revised to require that when a person with an ownership or security interest requests remission, the court shall schedule a hearing "in a timely manner" to determine if remission of forfeiture shall be ordered. The phrase "in a timely manner" was not included in the original bill.

None of these revisions change the impact the bill will have on the Department of Law. The amount of revenue that might be earned is unknown. It is possible that forfeiture revenues will offset or be greater than the cost of the mandatory forfeiture program. It is just as possible, however, that these revenues will be substantially less than the cost of such a program. To the extent that revisions contained in the committee substitute hasten the entire forfeiture and remission process, the workload demands on the department's legal staff will likely increase. The department's original fiscal analysis follows below.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill Resolution No. CSHB 26 (Trans)

This bill amends AS 28.35 to provide that the court shall order the forfeiture of the motor vehicle involved when a person is convicted for a third, or subsequent time, for driving while intoxicated or refusal to submit to a chemical test. Under existing law, the state has the option of seeking forfeiture, but it is not currently mandated to do so.

The bill also provides that the state shall provide written notice to each person with an ascertainable ownership or security interest in the motor vehicle, other than the person convicted of the offense resulting in the forfeiture, advising of the forfeiture and advising of the person's right to intervene to protect an interest in the motor vehicle. The state must, in the same written notice, also advise that failure to seek remission of forfeiture within 90 days will extinguish the rights of the person to the vehicle. The bill further provides that the court shall schedule a hearing to determine if remission of forfeiture shall be ordered, if a person with an ownership or security interest in the forfeiture vehicle, other than the person convicted, makes a request for a hearing within the 90-day notification period.

During 1988, 528 drivers had their drivers' licenses revoked for ten years, indicating that nearly this number of persons had been convicted of driving while intoxicated three or more times. The number of ten year license revocations increased by nearly 10% in 1988. About 60% of all DWI prosecutions are handled by the state, and the remainder are handled by municipal prosecutors in Anchorage, Fairbanks, Juneau, and Ketchikan. Moreover, the Department of Law prosecutes 96% of all state DWI arrests, and the department's DWI conviction rate is over 80%. Consequently, the department believes that it will be involved in about 250 to 300 motor vehicle forfeitures, if this bill is enacted.

In the event of a forfeiture, the state must give actual written notice to a person with an ascertainable interest in the motor vehicle. Basic due process considerations will also require publication of legal notices, because many persons hold security interests in motor vehicles that are not readily ascertainable from title documents. As a consequence, the department will be substantially involved with the division of motor vehicles and persons with ownership or security interests, in determining the extent ownership and security interests, notifying those with such interests, and preparing for and attending remission hearings. This high volume of work cannot be absorbed with our present staff. The department believes that the addition of one part-time attorney, one full-time paralegal assistant, and one full-time clerk typist will be necessary to carry-out the bill's forfeiture provisions.

Motor vehicle forfeiture will undoubtedly result in some revenue to the state. However, it should be pointed out that forfeited vehicles with the highest value are those that are most likely to involve a third-party ownership or security interest. Conversely, vehicles having the least value are those that are most likely not to have a third-party interest. In this latter event, the actual cost of forfeiture, storage, and disposal may be substantially greater than the value of the forfeited vehicle.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill Resolution No. CSHB 26 (Trans)

CSHB 26 Fiscal Analysis

Funding Summary

	Atty III	P/A II	Clerk Typist III	Total
71000	32.4	44.3	29.3	106.0
72000	1.8	1.8	-0-	3.6
73000	28.6	4.8	4.2	37.6
74000	3.9	4.5	3.3	11.7
75000	1.5	1.5	8.0	11.0
Total	68.2	56.9	44.8	169.9

Costs beyond FY91 include a 3% annual inflation factor.

	POSITION TITLE				RANGE/STEP	BARG. UNIT	PAGE/LINE	GOV.	APPROV.	DISAPP
1.	Attorney III				22A	PX				
	TYPE OF POSITION	STAFF MONTHS	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION	ELECTION DISTRICT	LEG.		
2.	PPT	12				EBA-Anchorage	8			

3.	CONTINUATION LEVEL		ADDITION

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	24,570	
6.	Benefits	3,889	
7.	Supplemental Benefits	1,590	
8.	Fixed Benefits	2,322	
9.	TOTAL PERSONAL SERVICES	01	32,371
10.	Travel	02	1,800
11.	Contractual	03	28,600
12.	Commodities	04	3,900
13.	Equipment	05	1,500
14.	Other		
15.	TOTAL COST		68,171

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	68,171
19.		I-A Receipts 1005	
20.		Program Receipts 1020	
21.		Other	

FOR O&M USE ONLY
KEY NUMBER - - - - -

JUSTIFICATION:

This position is needed in Anchorage, and other southcentral locations, to handle the 250 to 300 forfeiture and remission actions mandated by CSHB 26. Court hearings involve third party ownership or security interests. This bill will generate a large volume of new legal transactions requiring the part-time services of at least one attorney. Although these transactions are often complicated, they rarely involve complex legal issues. Allocation of the position to the sub-journey level of Attorney III is therefore recommended. Position support costs include 25.0 to publish forfeiture legal notices.

REQUEST FOR
NEW POSITION

AGENCY Department of Law

BRU Prosecution

COMPONENT Third Judicial District

Page 1 of 3

Revised Date

FY 91

	POSITION TITLE				RANGE/STEP	BARG. UNIT	PAGE/LINE	GOV.	APPROV.	DISAPP
1.	Paralegal Assistant II				16A	1 GGU				
	TYPE OF POSITION	STAFF MONTHS	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION	ELECTION DISTRICT	LEG.		
2.	PFT	12				EBA-Anchorage	8			

3.	CONTINUATION LEVEL		ADDITION
4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	32,424	
6.	Benefits	5,133	
7.	Supplemental Benefits	2,098	
8.	Fixed Benefits	4,644	
9.	TOTAL PERSONAL SERVICES	01	44,299
10.	Travel	02	1,800
11.	Contractual	03	4,800
12.	Commodities	04	4,500
13.	Equipment	05	1,500
14.	Other		
15.	TOTAL COST		56,899

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.		General Funds	1004	56,899
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR B&M USE ONLY
FY NUMBER - - - - -

JUSTIFICATION:

This position is needed in Anchorage, and other southcentral locations, to assist with the 250 to 300 vehicle forfeiture actions mandated by CSHB 26. Title and records searches to verify any ownership or security interest, legal notification, and preparation of all necessary documentation will be required. This level of work is most appropriately allocated to the Paralegal Assistant II class.

REQUEST FOR
NEW POSITION

AGENCY Department of Law

BRU Prosecution

COMPONENT Third Judicial District

FY 91

Revised Date

01-1137(7/88)-13

	POSITION TITLE				RANGE/STEP	BARG. UNIT	PAGE/LINE	GOV.	APPROV.	DISAPP
1.	Clerk Typist III				8B	CCU				
	TYPE OF POSITION	STAFF MONTHS	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION	ELECTION DISTRICT	LEG.		
2.	PFT	12				EBA-Anchorage	8			
3.	CONTINUATION LEVEL		ADDITION							

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	20,136	
6.	Benefits	3,188	
7.	Supplemental Benefits	1,303	
8.	Fixed Benefits	4,644	
9.	TOTAL PERSONAL SERVICES 01		29,271
10.	Travel 02		-0-
11.	Contractual 03		4,200
12.	Commodities 04		3,300
13.	Equipment 05		8,000
14.	Other		
15.	TOTAL COST		44,771

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	44,771
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR O&M USE ONLY
KEY NUMBER - - - - -

JUSTIFICATION:

This clerical position is needed to assist the attorney and the paralegal to handle the 250 to 300 vehicle forfeiture actions mandated by CSHB 26. A very large volume of routine documents will be generated by this work, including motions, notices to persons with ownership or security interest, or correspondence between the parties. Because this work will not usually involve higher level legal instruments, such as briefs, allocation to the Clerk Typist III level is recommended.

REQUEST FOR NEW POSITION

AGENCY Department of Law

BRU Prosecution

COMPONENT Third Judicial District

FY 91

Revised Date