ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5734 HOUSE JUDICIARY 138

or class of motor vehicle on a highway or vehicular way or area for a period not to exceed two years. The permittee must be accompanied by a person at least 19 years of age who has been licensed at least one year to drive the type or class of vehicle being used, who is capable of exercising control over the vehicle and who occupies a seat beside the driver, or who accompanies and immediately supervises the driver when the permittee drives a motorcycle. An instruction permit may be renewed.

(b) The department, upon receiving proper application, may issue a restricted instruction permit effective for a school year or for a more restricted period to an applicant who is at least 14 years of age and who is enrolled in a driver education program which includes practice driving and is approved by the department. The restricted instruction permit allows the permittee, when the permittee has the permit in the permittee's immediate possession, to drive a specified type or class of motor vehicle; however, an approved instructor must occupy a seat beside the permittee or, if the permittee is driving a motorcycle, the permittee must be accompanied by and under the immediate supervision of an approved instructor.

(c) The department may issue a temporary driver's license to an applicant for a driver's license permitting the applicant to drive a specified type or class of motor vehicle while the department is completing its investigation and determination of all facts relative to the applicant's eligibility to receive a driver's license. The temporary license must be in the applicant's immediate possession while the applicant is driving a motor vehicle. A temporary driver's license is invalid when the applicant's license has been issued or has been refused for good cause.

(d) The department may issue a special driver's permit to a person who is at least 14 years of age with the consent of the person's parents or guardians for the purpose of driving a motor-driven cycle. This permit may be issued upon application and successful completion of all prescribed tests and fees, and is valid for the same period of time as a driver's license. The permit is not valid in a municipality which by ordinance prohibits the driving of a motor-driven cycle by a person under the age of 16 years; a borough may adopt the ordinance on a nonareawide basis only, unless the power to adopt it on an areawide basis is acquired under AS 29.33.250 — 29.33.290.

(e) Notwithstanding other provisions of this chapter, the department may issue a special driver's license to a person who is under the age of 16 years because of the circumstances of hardship. Special licenses to be issued because of hardship shall be determined on an individual basis by the commissioner. (§ 19 ch 178 SLA 1978)

NOTES TO DECISIONS

Cited in Francis v. Municipality of Anchorage, Ct. App. Op. No. 7[illegible] (File No. 5659), 641 P.2d 226 (1982).

Collateral references. — 60 C.J.S., Motor Vehicles, § 166.

Validity, construction, and application of age requirements for licensing of motor vehicle operators, 86 A.L.R.3d 478.

Sec. 28.15.060. Applications of minors. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.061. Application for driver's license or instruction permit; notice of anatomical gift procedure. (a) Application for an instruction permit or for a driver's license must be made on a form furnished by the department and must be accompanied by the fee required under AS 28.15.271.

(b) An application under (a) of this section shall

(1) contain the applicant's full name, date and place of birth, sex, and mailing and residence addresses;

(2) state whether the applicant has been previously licensed as a driver and, if so, when and by what jurisdiction;

(3) state whether any previous driver's license issued to the applicant has ever been suspended or revoked or whether an application for a driver's license has ever been refused and, if so, the date of and reason for the suspension, revocation, or refusal; and

(4) contain other information which the department may reasonably require to determine the applicant's identity, competency, and eligibility.

(c) When an application is received from a person previously licensed in another jurisdiction, the department may request a copy of the applicant's driving record from the other jurisdiction. Upon receipt of that record by the department, it becomes a part of the driver's record in this state with the same effect as if the record originated in this state.

(d) The department shall, by placement of posters and brochures in the office where the application is taken, make known to the applicant the procedure necessary to complete a document of gift under the Uniform Anatomical Gifts Act (AS 13.50).

(e) At the time of application for a driver's license or an instruction permit, or renewal of a driver's license or an instruction permit, the department shall provide the applicant written information explaining the state's financial responsibility law, the mandatory automobile insurance requirement, and potential penalties for failure to comply with the law. (§ 19 ch 178 SLA 1978; am §§ 5, 17 ch 70 SLA 1984)

Effect of amendments. — The 1984 amendment, effective January 1, 1985, added subsection (e).

Postponed amendments. — Section 17, ch. 70, SLA 1984, effective January 1, 1989, repeals subsection (e).

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 99.

60 C.J.S., Motor Vehicles, § 166.

Sec. 28.15.070. Examination. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.071. Application of minors. (a) The application of a person under the age of 18 years for an instruction permit or driver's license must be signed by the father, mother or guardian, or if there is no parent or guardian then by another responsible adult who is willing to assume the obligation imposed under this section upon a person signing the application. The application must be signed and verified before a person authorized to administer oaths, or be signed in the presence of an authorized representative of the department.

(b) Any negligence or wilful misconduct of a person under the age of 18 years when driving a motor vehicle in this state is imputed to the person who signed the application of the person for a permit or license, and that person is jointly and severally liable for damage caused by the negligence or wilful misconduct of the person under the age of 18 years, except as provided in (c) of this section.

(c) If a minor deposits, or there is deposited on behalf of the minor, proof of financial responsibility for the minor's driving of a motor vehicle, in the form and amount required in AS 28.20, then the department may accept the application of the minor signed as required under (a) of this section, and, while proof of financial responsibility is maintained, the parent, guardian or other responsible adult is not subject to the liability imposed under (b) of this section.

(d) A person who signs the application of a minor for a driver's license may file with the department a verified written request that the license of the minor be canceled. When the license is canceled, the person who signed the application is relieved from liability under (b) of this section. (§ 19 ch 178 SLA 1978)

Collateral references. — Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or wilful misconduct, 26 ALR2d 1320.

Sec. 28.15.080. Issuance. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.081. Examination of applicants. (a) The department shall examine every applicant for a driver's license. The examination shall include a test of the applicant's (1) eyesight, (2) ability to read and understand official traffic control devices, (3) knowledge of safe driving practices, (4) knowledge of the effects of alcohol and drugs on drivers and the dangers of driving under the influence of alcohol or drugs, (5) knowledge of the laws on driving while intoxicated, (6) knowledge of the laws on financial responsibility and mandatory automobile liability insurance, and, (7) the traffic laws and regulations of this state. The examination may include a demonstration of ability to exercise ordinary and reasonable control in the driving of a motor vehicle of the type and general class of vehicles for which the applicant seeks a license. However, an applicant who has not been previously issued a driver's license by this or another jurisdiction must demonstrate ability, and must present medical information that the department reasonably requires to determine fitness to safely drive a motor vehicle of the type and general class of vehicles for which the applicant seeks a license.

(b) The commissioner shall adopt regulations under the procedures established by AS 44.62 necessary to implement this section and the department may obtain the services of, and consult with, medical authorities whose specialties relate to driving abilities for the purpose of making the medical determinations necessary under this section or AS 28.15.091 or 28.15.101. Regulations adopted under this section must be approved by a concurrent resolution adopted by majority vote of each house of the legislature before becoming effective. The requirements of the eyesight test under this section may also be satisfied by presenting the current certification of a licensed physician or optometrist that the applicant's vision meets or exceeds the standards established by the department. The commissioner shall request and receive assistance from the commissioner of health and social services in implementing this section.

(c) A requirement for a medical examination under this chapter is satisfied if the applicant is the holder of a current and valid first- or second-class medical certificate issued under federal aviation regulations and has satisfied any applicable requirement of the Department of Education relating to tests for tuberculosis if applicable.

(d) The department may enter into agreements with other state agencies, municipalities, or qualified persons for the purpose of conducting the examinations required under this chapter. (§ 19 ch 178 SLA 1978; am § 2 ch 77 SLA 1983; am §§ 6, 17 ch 70 SLA 1984)

Effect of amendments. — The 1983 amendment in the second sentence of subsection (a) added the (1), (2), and (3) designations to existing language, added ", (4) knowledge of the effects ... (4) driving while intoxicated," and created the present third sentence from the end of the former second sentence. The amendment also made minor word changes.

The 1984 amendment, effective January 1, 1985, substituted "(5) knowledge of the laws on driving while intoxicated, (6) knowledge of the laws on financial responsibility and mandatory automobile liability insurance, and, (7)" for "and (5) knowledge of the laws relating to driving while intoxicated and" in the second sentence in subsection (a).

Postponed amendments. — Section 17, ch. 70, SLA 1984, effective January 1, 1989, repeals (a)(6) of this section.

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 111.

60 C.J.S., Motor Vehicles, § 156.

Sec. 28.15.090. Access to license. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.091. Department may require re-examination. If the department has good cause to believe that a licensed driver is incompetent or otherwise not qualified to be licensed, it may upon written notice of at least 10 days to the licensee require the licensee to submit to an examination. Upon conclusion of the examination, the department shall take action as may be appropriate and may cancel the license of the person, or may issue a restricted license under AS 28.15.121, or restrict the type or class of vehicles that the person may drive. If the licensee refuses or neglects to submit to examination, the department may suspend the driver's license until the licensee complies with the requirements of re-examination. (§ 19 ch 178 SLA 1978)

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic, § 111

Sec. 28.15.100. Duplicates. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.101. Expiration and renewal of driver's license; re-examination. (a) Unless otherwise provided in this chapter, a driver's license expires on the licensee's date of birth in the fifth year following issuance of the license. A license is renewable within one year of its expiration upon proper application, successful completion of a test of the licensee's eyesight, and payment of the required fee.

(b) The department may defer the expiration of the driver's license of a person who is outside the state under terms and conditions which the department shall prescribe by regulation. (§ 19 ch 178 SLA 1978)

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic, §§ 102, 103.
60 C.J.S., Motor Vehicles, § 156.

Sec. 28.15.110. Restrictions. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.111. Licenses issued to drivers; anatomical gift document. (a) Upon successful completion of the application and all required examinations, and upon payment of the required fee, the department shall issue to every qualified applicant a driver's license indicating the type or general class of vehicles which the licensee may drive. The license shall display

(1) a distinguishing number assigned to the license;

(2) the licensee's full name, address, date of birth, brief physical description, and color photograph; and

(3) either a facsimile of the signature of the licensee or a space upon which the licensee must write the licensee's usual signature with pen and ink. A license is not valid until signed by the licensee. If facilities

are not available for the taking of the photograph required under this section, the department shall endorse on the license, the words "valid without photograph."

(b) The department shall provide, at the time that an operator's license is issued, a form for a document by which the owner of a license may make an anatomical gift under AS 13.50. The document (1) may not be larger than an operator's license, (2) shall contain sufficient space for the signature of two witnesses to the donor's act of execution of the document, and (3) shall provide a means by which the donor may cancel the gift. If the document making an anatomical gift is executed by the applicant, it shall be sealed in plastic and attached to the license. A symbol indicating the existence of the anatomical gift document shall be displayed in the lower right-hand corner on the face of the driver's license. (§ 19 ch 178 SLA 1978)

Sec. 28.15.120. Expiration. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.121. Restricted driver's license. (a) The department, upon issuing a driver's license, may for good cause impose restrictions suitable to the licensee's driving ability with respect to special mechanical control devices required on a motor vehicle which the licensee drives. The department may impose other restrictions applicable to the licensee that it determines to be appropriate to assure the safe operation of a motor vehicle by the licensee.

(b) The department may issue a special restricted license or may set out restrictions on the usual license form.

(c) The department may, upon receiving satisfactory evidence of a violation of the restrictions on a license restricted or issued under this section, suspend the restricted license for a period not to exceed 30 days.

(d) A person may not drive a motor vehicle in violation of the restrictions imposed on a restricted license. (§ 19 ch 178 SLA 1978)

Sec. 28.15.130. School bus drivers. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.131. License to be carried and exhibited or demand. A licensee shall have the licensee's driver's license in immediate possession at all times when driving a motor vehicle, and shall present the license for inspection upon the demand of a peace officer or other authorized representative of the department identified as such to the licensee by the officer or representative. However, a person charged with violating this section may not be convicted if the person produces in court or in the office of the arresting or citing officer, a driver's license previously issued to the person that was valid at the time of the person's arrest or citation. (§ 19 ch 178 SLA 1978)

NOTES TO DECISIONS

A licensing statute cannot be used as a means for obtaining information or evidence not related to the licensing requirement. Schraff v. State, Sup. Ct. Op. No. 1223 (File No. 2263), 544 P.2d 834 (1975), decided under former AS 28.15.090.

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 101, 147.

60 C.J.S., Motor Vehicles, § 157.

Validity, construction, and application of statute regarding failure or refusal of operator of motor vehicle to display license on demand, 143 ALR 1019, 6 ALR3d 506.

Effect of ulterior motive of official in exercising authority to require motorist to exhibit driver's license, 164 ALR 812.

Sec. 28.15.140. Change of name. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.141. Duplicate driver's license. If a valid driver's license issued under this chapter is lost or destroyed, the person to whom the license was issued may, upon payment of the required fee, obtain a duplicate license. A person who recovers an original license for which a duplicate has been issued shall immediately surrender the duplicate to the department. (§ 19 ch 178 SLA 1978)

Sec. 28.15.150. Records. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.151. Records to be kept by the department. (a) The department may maintain a file of

(1) every driver's license application, license or permit and duplicate driver's license issued by it;

(2) every license which has been suspended, revoked, canceled, limited, restricted, or denied, and the reasons for those actions; and

(3) all accident reports required to be forwarded to the department under this title.

(b) The department may also maintain a file of all accident reports, abstracts of court records of convictions of vehicle, driver and traffic offenses, and other information which the department considers necessary to carry out the purposes of this chapter.

(c) The department shall, upon request, subject to the applicable provisions of AS 12.62 and (f) of this section and without charging a fee, furnish a municipal, state or federal administrative or judicial agency with a certified abstract of the driving record of a driver. The abstract shall include a listing of accidents in which the driver has been determined by the department or a court of competent jurisdiction to have been liable, convictions of vehicle, driver and traffic offenses, any actions taken upon the driver's license, and information relating to financial responsibility.

(d) The department shall, upon request and payment of a fee determined by the commissioner, furnish a driver or a person designated by the driver with an abstract or the original copy of the computer printed record of the driver's record as provided in (c) of this section.

(e) *[Repealed, § 2 ch 144 SLA 1980.]*

(f) Except as provided otherwise in this section, information and records under this section are declared confidential and private. (§ 19 ch 178 SLA 1978; am §§ 1, 2 ch 144 SLA 1980)

Effect of amendments. — The 1980 amendment inserted, "or a person designated by the driver" and "or the original copy of the computer printed record" in subsection (d), and repealed subsection (e).

Collateral references. — Inspection of motor vehicle records, right as to, 84 ALR2d 1261.

Sec. 28.15.160. Court reports. [Repealed, § 19 ch 178 SLA 1978.]

Article 2. Cancellation, Suspension, Revocation or Limitation of Drivers' Licenses.

Section

161. Cancellation of driver's license
165. Administrative revocations resulting from chemical sobriety tests and refusals to submit to tests
166. Administrative review of revocation
171. Suspending privileges of a person licensed in another jurisdiction; reporting convictions, suspensions, and revocations
181. Court suspensions, revocations, and limitations
191. Court reports to department
201. Limitation of driver's license
211. Periods of limitation, suspension or revocation; opportunity for hearing and surrender of license

Sec. 28.15.161. Cancellation of driver's license. (a) The department shall cancel a driver's license upon determination that

(1) the licensee is not medically or otherwise entitled to the issuance or retention of the license, or has been adjudged incompetent to drive a motor vehicle;

(2) there is an error or defect in the license;

(3) the licensee failed to give the required or correct information in the licensee's application; or

(4) the license was obtained fraudulently.

(b) The licensee may apply for a new license at any time after cancellation upon removal of the cause for the cancellation. (§ 19 ch 178 SLA 1978)

NOTES TO DECISIONS

Intent of act. — This act plainly expresses the intent that all revocations and suspensions of operators' licenses be the act of the Department of Public Safety. Knudsen v. City of Anchorage, Sup. Ct. Op. Nos. 21, 58 (File No. 58), 358 P.2d 375 (1960), overruled on other points, Roberts v. State, Sup. Ct. Op. No. 574 (File No. 992), 458 P.2d 340 (1969), Glasgow v. State, Sup. Ct. Op. No. 616 (File No. 1049), 469 P.2d 682 (1970), and Baker v. City of Fairbanks, Sup. Ct. Op. No. 618 (File No. 1141), 471 P.2d 386 (1970). These cases were decided under former AS 28.15.170.

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 112 et seq.

60 C.J.S., Motor Vehicles, § 164.1 et seq.

Civil rights and liabilities as affected by failure to comply with regulations as to licensing of automobile operator, 16 ALR 1108, 35 ALR 62, 38 ALR 1038, 43 ALR 1153, 54 ALR 374, 58 ALR 532, 61 ALR 1190, 78 ALR 1028, 87 ALR 1469, 111 ALR 1258, 163 ALR 1375.

Validity of statute relating to granting or revocation of license or permit to operate automobile, 71 ALR 616, 108 ALR 1162, 125 ALR 1459.

Denial, suspension, or cancellation of driver's license because of physical disease or defect, 38 ALR3d 452.

Necessity of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 ALR3d 361.

Sufficiency of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 ALR3d 427.

Validity of statute or regulation authorizing revocation or suspension of driver's license for reason unrelated to use of or ability to operate motor vehicle, 86 ALR3d 1251.

Sec. 28.15.165. Administrative revocations resulting from chemical sobriety tests and refusals to submit to tests. (a) If a chemical test administered under AS 28.35.031(a) to a person driving a motor vehicle for which a driver's license is required produces a result described in AS 28.35.030(a)(2) or if a person under arrest for driving a motor vehicle for which a driver's license is required refuses to submit to a chemical test under AS 28.35.031(a), a law enforcement officer shall read a notice and deliver a copy to the person. The notice shall advise that

(1) the department intends to revoke the person's driver's license or nonresident privilege to drive, or refuse to issue an original license to the person;

(2) the person has the right to administrative review of the revocation or determination not to issue an original license;

(3) the notice itself is a temporary driver's license that expires seven days after it is delivered to the person;

(4) revocation of the person's driver's license or nonresident privilege to drive, or a determination not to issue an original license shall take effect upon expiration of the temporary driver's license unless the person within seven days requests an administrative review.

(b) After reading the notice under (a) of this section, the law enforcement officer shall seize the person's driver's license if it is in the person's possession and shall deliver it to the department with a sworn report describing the circumstances under which it was seized.

(c) Upon receipt of a sworn report of a law enforcement officer that a chemical test under AS 28.35.031(a) produced a result described in AS 28.35.030(a)(2) or that a person refused to submit to a chemical test under AS 28.35.031(a), that notice under (a) of this section was provided to the person, and that contains a statement of the circumstances surrounding the arrest and the grounds upon which the officer's belief that the person was driving while intoxicated a motor vehicle for which

a driver's license is required was based, the department shall revoke the person's license or nonresident privilege to drive a motor vehicle in the state, or refuse to issue an original license effective upon expiration of the temporary driver's license issued under (a) of this section.

(d) The period of revocation of a driver's license by the department under this section shall be for the appropriate minimum period for court revocations under AS 28.15.181(c). (§ 3 ch 77 SLA 1983)

Sec. 28.15.166. Administrative review of revocation. (a) A person who has received a notice under AS 28.15.165(a) may make a written request for administrative review of the department's action under AS 28.15.165(c). If the person's driver's license has not been previously surrendered to the department, it shall be surrendered to the department at the time the request for review is made.

(b) A request for review shall be made within seven days after receipt of the notice under AS 28.15.165 or the right to review is waived and the action of the department under AS 28.15.165(c) is final. If a written request for a review is made after expiration of the seven-day period, and if it is accompanied by the applicant's verified statement explaining the failure to make a timely request for a review, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request because of lack of actual notice of the revocation or because of factors of physical incapacity such as hospitalization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the review request.

(c) Upon receipt of a request for review, if it appears that the person holds a valid driver's license and that the driver's license has been surrendered, the department shall issue a temporary driver's permit that is valid until the scheduled date for the review. A person who has requested a review under this section may request, and the department may grant for good cause, a delay in the date of the hearing. If necessary, the department may issue additional temporary permits to stay the effective date of its action under AS 28.15.165(c) until the final order after the review is issued.

(d) A person who has requested a hearing under this section and who fails to appear at the hearing, for reasons other than lack of actual notice of the hearing or physical incapacity such as hospitalization or incarceration, waives the right to a hearing. The determination of the department that is based upon the enforcement officer's report becomes final.

(e) Notwithstanding AS 28.05.141(b), the hearing under this section shall be held at the office of the department nearest to the residence of the person requesting the hearing unless

(1) a district court judge or a magistrate has been designated as a hearing officer in the matter by the commissioner; or

(2) the department and the person agree that the hearing is to be held elsewhere.

(f) A review under this section shall be held before a hearing officer designated by the commissioner. Upon the consent of the administrative director of the state court system, the commissioner may designate a district court judge or a magistrate to serve as the hearing officer. The hearing officer shall have authority to

(1) administer oaths and affirmations;

(2) examine witnesses and take testimony;

(3) receive relevant evidence;

(4) issue subpoenas, take depositions, or cause depositions or interrogatories to be taken;

(5) regulate the course and conduct of the hearing;

(6) make a final ruling on the issue.

(g) The hearing under this section shall be limited to the issues of whether the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while intoxicated and whether

(1) the person refused to submit to a chemical test under AS 28.35.031(a) after being advised that refusal would result in the suspension, revocation, or denial of the person's license or nonresident privilege to drive and that the refusal is a misdemeanor; or

(2) the chemical test authorized under AS 28.35.031(a) and administered to the person produced a result described in AS 28.35.030(a)(2).

(h) The determination of the hearing officer may be based upon the sworn report of a law enforcement officer. The law enforcement officer need not be present at the hearing unless either the person requesting the hearing or the hearing officer requests in writing before the hearing that the officer be present. If in the course of the hearing it becomes apparent that the testimony of the law enforcement officer is necessary to enable the hearing officer to resolve disputed issues of fact, the hearing may be continued to allow the attendance of the law enforcement officer.

(i) Testimony given by the person at the hearing is not admissible against the person in a criminal trial unless the person's testimony at the trial is inconsistent with that given at the hearing.

(j) If the issues set out in (g) of this section are determined in the affirmative by a preponderance of the evidence, the hearing officer shall sustain the action of the department. If one or more of the issues is determined in the negative, the department's action shall be rescinded.

(k) If the action of the department in revoking a nonresident's privilege to drive a motor vehicle is not administratively contested by the nonresident driver or if the departmental action is sustained by the hearing officer, the department shall give written notice of action taken to the motor vehicle administrator of the state of the person's residence and to any state in which that person has a driver's license.

(l) A hearing officer revoking a driver's license because a chemical test administered to the person produced a result described in AS 28.35.030(a)(2) may grant limited license privileges if the person has not been previously convicted within the preceding 10 years of an offense (A) described in AS 28.15.181(a)(5) or (8); or (B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in AS 28.15.181(a)(5) or (8). The privileges may be granted for the final 60 days during which the license is revoked if the hearing officer determines that the person's ability to earn a livelihood would be severely impaired and a limitation under AS 28.15.201 can be placed on the license that will enable the person to earn a livelihood without excessive danger to the public. A hearing officer may not grant limited license privileges when revoking a driver's license because the person refused to submit to a chemical test.

(m) Notwithstanding AS 28.05.141(d), within 30 days of the issuance of the final determination of the department, a person aggrieved by the determination may file an appeal in superior court for judicial review of the hearing officer's determination. The judicial review shall be on the record, without taking additional testimony. The court may reverse the department's determination if the court finds that the department misinterpreted the law, acted in an arbitrary and capricious manner, or made a determination unsupported by the evidence in the record.

(n) The filing of an appeal under (m) of this section does not automatically stay the department's revocation order. The court may grant a stay of the order only upon a motion and hearing, and upon a finding that there is a reasonable probability that the petitioner will prevail on the merits and that the petitioner will suffer irreparable harm if the order is not stayed. (§ 3 ch 77 SLA 1983)

Sec. 28.15.170. Cancellation. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.171. Suspending privileges of a person licensed in another jurisdiction; reporting convictions, suspensions, and revocations. (a) The privilege of driving a motor vehicle on a highway or vehicular way or area of this state given to a person licensed in another jurisdiction is subject to suspension or revocation by the department in the same manner and for the same reasons as a driver's license issued under this chapter.

(b) The department may, upon receiving the record of a conviction of a person licensed in another jurisdiction for a vehicle, driver, or traffic offense in this state, or upon suspending or revoking the person's driving privilege, forward a copy of the record or suspension or revocation to the motor vehicle administrator for the jurisdiction in which the person convicted is licensed. (§ 19 ch 178 SLA 1978)

Sec. 28.15.180. Suspending privileges of nonresidents. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.181. Court suspensions, revocations, and limitations. (a) Conviction of any of the following offenses is grounds for the immediate revocation of a driver's license:

(1) manslaughter or negligent homicide resulting from driving a motor vehicle;

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

(3) failure to stop and give aid as required by law when a motor vehicle accident results in the death or personal injury of another;

(4) perjury or making a false affidavit or statement under oath to the department under a law relating to motor vehicles;

(5) driving a motor vehicle while intoxicated;

(6) reckless driving;

(7) using a motor vehicle in unlawful flight to avoid arrest by a peace officer;

(8) refusal to submit to a chemical test under AS 28.35.032;

(9) driving while license canceled, suspended, revoked or in violation of a limitation.

(b) A court convicting a person of an offense described in (a)(1) — (4), (6), or (7) of this section shall revoke that person's driver's license for not less than 30 days for the first conviction, unless the court determines that the person's ability to earn a livelihood would be severely impaired and a limitation under AS 28.15.201 can be placed on the license that will enable the person to earn a livelihood without excessive danger to the public. If a court limits a person's license under this subsection, it shall do so for not less than 60 days. Upon a subsequent conviction of a person for any offense described in (a)(1) — (4), (6), (7) of this section occurring within 10 years after a prior conviction, the court shall revoke the person's license and may not grant the person limited license privileges for the following periods:

(1) not less than one year for the second conviction; and

(2) not less than three years for a third or subsequent conviction.

(c) A court convicting a person of an offense described in (a)(5) or (8) of this section arising out of the operation of a motor vehicle for which a driver's license is required shall revoke that person's driver's license. The revocation may be concurrent with or consecutive to an administrative revocation under AS 28.15.165. The court may not, except as provided in (e) of this section, grant limited license privileges for the following periods:

(1) not less than 90 days if, within the preceding 10 years, the person has not previously been convicted of an offense

(A) described in (a)(5) or (8) of this section; or

(B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section;

(2) not less than one year if, within the preceding 10 years, the person has been previously convicted of one offense

(A) described in (a)(5) or (8) of this section; or

(B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section;

(3) not less than 10 years if, within the preceding 10 years, the person has been previously convicted of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(A) an offense described in (a)(5) or (8) of this section; or

(B) an offense under another law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section.

(d) A court convicting a person of an offense described in (a)(9) of this section shall revoke that person's driver's license for not less than the minimum period under AS 28.15.291(c).

(e) A court revoking a driver's license under (c) of this section, or sustaining the action of the department under AS 28.15.165(c), may grant limited license privileges for the final 60 days during which the license is revoked if the

(1) revocation was for driving while intoxicated but not if the revocation was for refusal to submit to a chemical test of breath under AS 28.35.032;

(2) person has not been previously convicted within the preceding 10 years of an offense

(A) described in (a)(5) or (8) of this section; or

(B) under a law or ordinance in another jurisdiction with elements substantially similar to an offense described in (a)(5) or (8) of this section;

(3) court determines that the person's ability to earn a livelihood would be severely impaired; and

(4) court determines that a limitation under AS 28.15.201 can be placed on the license that will enable the person to earn a livelihood without excessive danger to the public.

(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. (§ 19 ch 178 SLA 1978; am §§ 7 — 9 ch 117 SLA 1982; am §§ 4 — 7 ch 77 SLA 1983)

Effect of amendments. — The 1982 amendment substituted the present provisions of paragraph (a)(5) for the former provisions, which read "driving or operating a motor vehicle while under the influence of alcohol or another drug," substituted "under (a)(1) — (4), (6), or (7) of this section" for "under (a)(1) — (7) of this section" in the first sentence of subsection (b) and for "under (a) of this section" in the third sentence of subsection (b), and added subsection (c).

The 1983 amendment in subsection (a) rewrote the introductory language and added paragraphs (8) and (9), in subsection (b), in the second sentence substituted "60" for "30" and in the last sentence inserted "occurring within 10 years after a prior conviction", rewrote subsection (c), and added subsections (d), (e), and (f). The

amendment also made minor word changes throughout the section.

NOTES TO DECISIONS

The revocation provisions of former AS 28.15.210(c) were reenacted by the 1978 legislature in subsection (b) of this section. Danks v. State, Sup. Ct. Op. No. 2216 (File No. 4952), 619 P.2d 720 (1980).

For case construing former AS 28.15.210(c), which allowed the trial court no discretion to grant a limited license to drunk driving offenders upon their second and subsequent convictions, see State v. Guarderas, Sup. Ct. Op. No. 1782 (File No. 3738), 589 P.2d 870 (1979); Danks v. State, Sup. Ct. Op. No. 2216 (File No. 4952), 619 P.2d 720 (1980).

In order to invoke the mandatory one-year license revocation penalty of paragra[illegible](b)(1) of this section, the second conviction need not be for the same type of offense as the first conviction. Belarde v. Municipality of Anchorage, Ct. App. Op. No. 52 (File No. 5460), 634 P.2d 567 (1981).

The one-year license revocation penalty of paragraph (b)(1) of this section may follow as a result of a conviction for any of the seven offenses listed under subsection (a) of this section regardless of what offense the initial conviction was predicated upon. Belarde v. Municipality of Anchorage, Ct. App. Op. No. 52 (File No. 5460), 634 P.2d 567 (1981).

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

Application of paragraph (b)(2) held constitutional. — Application of three-year license revocation provision of subsection (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).

Stated in Manderson v. State, Ct. App. Op. No. 198 (File No. 6894), 655 P.2d 1320 (1983).

Cited in Swensen v. Municipality of Anchorage, Sup. Ct. Op. No. 2179 (File No. 4675), 616 P.2d 874 (1980); Anderson v. Municipality of Anchorage, Ct. App. Op. No. 89 (File No. 5318), 645 P.2d 205 (1982); Uhde v. State, Ct. App. Op. No. 167 (File No. 5916), 654 P.2d 1323 (1982).

Collateral references. — Validity of statute or ordinance relating to granting or revocation of license or permit to operate automobile, 71 ALR 616, 108 ALR 1162, 125 ALR 1459.

What amounts to conviction or adjudication of guilt for purposes of refusal, revocation, or suspension of automobile driver's license, 113 ALR 1179, 79 ALR2d 866.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Sec. 28.15.190. Forwarding surrendered license. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.191. Court reports to department. (a) A court which convicts a person of an offense under this title or a regulation adopted under this title, or another law or regulation of this state, or a municipal ordinance which regulates the driving of vehicles, shall forward a record of the conviction to the department. A conviction of a standing or parking offense need not be reported.

(b) A conviction on a plea of nolo contendere accepted by the court or a forfeiture of bail or collateral deposited to secure a defendant's

appearance in court which has not been vacated is equivalent to a conviction for purposes of this chapter.

(c) A court which suspends, revokes, or limits a driver's license shall require the surrender of the license, and shall immediately forward it to the department with the record of conviction and notification of the effective date of the suspension, revocation or limitation as determined under AS 28.15.211(b).

(d) A court which limits a driver's license, in addition to the actions required under (c) of this section, shall issue to the licensee a form specifying the court's limitations imposed upon a person's driver's license, and shall immediately forward to the department a copy of the limitations imposed upon the license.

(e) A court shall report to the department every change of name authorized by it, and the name, address, age, description, and driver's license number if available, of every person adjudged to be afflicted with or suffering from a mental disability or disease, or to be an habitual user of alcohol or another drug. The department shall prescribe and furnish the forms for making these reports. (§ 19 ch 178 SLA 1978)

NOTES TO DECISIONS

For case where magistrate recommended suspension of driver's license for three years, see Hanrahan v. City of Anchorage, Sup. Ct. Op. No. 121 (File No. 247), 377 P.2d 381 (1962), decided under former AS 28.15.190.

Stated in Anderson v. Municipality of Anchorage, Ct. App. Op. No. 89 (File No. 5318), 645 P.2d 205 (1982).

Sec. 28.15.200. Suspending license upon conviction in another jurisdiction. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.201. Limitation of driver's license. (a) A court of competent jurisdiction may, for good cause, impose limitations upon the driver's license of a person which will enable the person to earn a livelihood without excessive risk or danger to the public. However, no limitation may be placed upon a driver's license until after a review has been made of the person's driving record and other relevant information, nor may a limitation be imposed when a statute specifically prohibits the limitation of a license for a violation of its provisions.

(b) A court imposing a limitation under this section shall (1) require the surrender of the driver's license; and (2) issue to the licensee a certificate valid for the duration of the limitation.

(c) After the termination of a limitation as shown on the certificate issued under (b) of this section, the license of a person on whom a limitation was imposed is revoked until the person receives a new license in accordance with AS 28.20.230. (§ 19 ch 178 SLA 1978; am §§ 10, 11 ch 117 SLA 1982; am §§ 8, 9 ch 77 SLA 1983)

Effect of amendments. — The 1982 amendment, in subsection (b), inserted the item designations, inserted the language beginning "and, if the person is convicted" and ending "period of not less than 60 days" in item (1), and deleted "shall" preceding "issue" in item (2); and in subsection (c), added the language beginning "or, if otherwise eligible" to the end of the subsection.

The 1983 amendment in paragraph (b)(1) deleted language regarding revocation of license for a period not less than 60 days, and rewrote subsection (c).

NOTES TO DECISIONS

For construction with AS 28.15.291(a), which prohibits driving while license is suspended, see Uhde v. State, Ct. App. Op. No. 167 (File No. 5916), 654 P.2d 1323 (1982).

Sec. 28.15.210. Mandatory revocation. [Repealed, § 19 ch. 178 SLA 1978.]

Sec. 28.15.211. Periods of limitation, suspension or revocation; opportunity for hearing and surrender of license. (a) Except for a point system suspension or revocation under AS 28.15.221 — 28.15.241 and unless provided otherwise by law, and unless the suspension or revocation was for a cause that has been removed, a person whose driver's license or privilege to drive a motor vehicle in this state has been suspended or revoked may not apply for a new license nor may the person's driving privilege be restored until the expiration of

(1) one month from the date on which the license was suspended or revoked for a first conviction of the particular offense from which the suspension or revocation resulted;

(2) three months from the date on which the license was suspended or revoked for a second conviction within 12 consecutive months of the same offense from which the suspension or revocation resulted;

(3) one year from the date on which the license was suspended or revoked for a third or subsequent conviction within 12 consecutive months of the same offense from which the suspension or revocation resulted.

(b) A limitation, suspension, or revocation of a driver's license imposed by a court takes effect on the date of final judgment, except that if another limitation, suspension, or revocation of license is in effect on the date of final judgment, the effective date of the last imposed limitation, suspension, or revocation is at the end of the last day of the previous limitation, suspension, or revocation unless the court specifies otherwise.

(c) At the end of a period of suspension or limitation, when that limitation follows a suspension, the person whose license has been suspended or limited may apply to the department and, upon payment of the proper fees, including a reinstatement fee of $100, be issued a duplicate driver's license if the person is otherwise entitled to the license under this title.

(d) At the end of a period of revocation or limitation following a revocation, a person whose driver's license has been revoked may apply to the department for the issuance of a new license, but shall submit to reexamination and pay all required fees including a reinstatement fee of $100.

(e) At the end of a period of limitation, suspension, or revocation under this chapter, the department may not issue a driver's license or a duplicate driver's license to the licensee until the licensee has complied with AS 28.20 relating to proof of financial responsibility.

(f) Unless otherwise provided by law, periods of limitation shall be made at the discretion of the court. (§ 19 ch 178 SLA 1978; am § 12 ch 117 SLA 1982; am § 25 ch 77 SLA 1983; am § 7 ch 70 SLA 1984)

Effect of amendments. — The 1982 amendment, in paragraph (a)(4), deleted "within two years previous to his arrest" following "chemical test" and inserted "or of refusal to submit to a chemical test of breath under AS 28.35.032" and "not less than."

The 1983 amendment repealed paragraph (a)(4).

The 1984 amendment, effective January 1, 1985, in subsection (c), inserted "when that limitation follows a suspension" and substituted "fees, including a reinstatement fee of $100" for "fee"; in subsection (d), inserted "or limitation following a revocation" and added "including a reinstatement fee of $100" at the end; and made a series of technical changes throughout subsections (a), (c), (d), and (e).

NOTES TO DECISIONS

Applied in Uhde v. State, Ct. App. Op. No. 167 (File No. 5916), 654 P.2d 1323 (1982).

Sec. 28.15.220. Discretionary suspension, etc. [Repealed, § 19 ch 178 SLA 1978.]

Article 3. Point System.

Section

NOTES TO DECISIONS

Applied in McClain v. State, Ct. App. Op. No. 74 (File No. 5740), 641 P.2d 1265 (1982).

Sec. 28.15.221. Point system. (a) For the purpose of identifying habitually reckless or negligent drivers and habitual or frequent violators of traffic laws, the commissioner shall adopt regulations establishing a uniform system for the suspension, revocation, limitation or denial of a driver's license or driving privilege by assigning demerit points for convictions for violations of traffic laws which are required to be reported to the department under AS 28.15.191.

(b) The regulations adopted under (a) of this section shall include a designated level of point accumulation which identifies drivers who are habitually reckless or negligent or who are habitual or frequent violators of traffic laws, so as to show a disrespect for traffic laws and a disregard for the safety of other persons. In formulating the point system authorized by this section, the commissioner shall, in the interest of interstate uniformity, provide for suspension, revocation or denial of a driver's license or privilege for an accumulation of 12 or more points as a result of offenses committed during any consecutive 12-month period or 18 or more points as a result of offenses committed during any 24-month period. (§ 19 ch 178 SLA 1978)

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic, §§ 117, 118.

60 C.J.S., Motor Vehicles, §§ 164.11, 164.13.

Regulations establishing a "point system" as regards suspension or revocation of license of operator of motor vehicle, 5 ALR3d 690.

Validity and construction of legislation authorizing revocation or suspension of operator's license, for "habitual," "persistent," or "frequent" violations of traffic regulations, 9 ALR3d 756.

Sec. 28.15.225. Limited license. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.230. Right of appeal. [Repealed, § 13 ch 17 SLA 1964.]

Sec. 28.15.231. Assessment of points, driver improvement interview. (a) Notice of each assessment of points may be given, but notice shall be given when the point accumulation reaches 50 per cent of the number at which suspension, revocation or denial is required under AS 28.15.221(b), and a driver who has reached that level of point accumulation shall be identified as a problem driver. The department may require a problem driver to appear for a driver improvement interview. The purpose of that interview is to assist the person who is identified as a problem driver in overcoming substandard driving habits. An interview under this subsection is to be conducted in an informal manner. A driver must comply with any reasonable recommendations designed to improve the driver's driving abilities which are made to the driver during the interview.

(b) Points may not be assessed for violating a provision of a state law or regulation or a municipal ordinance regulating standing, parking, equipment, size or weight; nor may points be assessed for violations by

pedestrians, passengers or bicycle riders, or for violations of provisions relating to the preservation of the condition of traffic-control devices on the highways. Points shall be assessed for violations of oversize or overweight permits relating only to restrictions upon speed or hours of operation.

(c) If a licensee is convicted of two or more traffic violations committed on a single occasion, the licensee shall be assessed points for one offense only, and if the offenses involved have different point values, the licensee shall be assessed for the offense having the greater point value.

(d) The time periods provided for in this section for the accumulation of points shall be based upon the date of violation, but points may not be assessed until after conviction, either upon a plea of guilty, nolo contendere, or a forfeiture of bail, or as a result of a trial, for violation of the traffic laws.

(e) The points assessed and the application of them against the licensee by the department under this section are in addition to, and not in substitution for, other provisions of this chapter and are not a substitute for any penalty imposed by a court. (§ 19 ch 178 SLA 1978)

NOTES TO DECISIONS

Failure of the Department of Motor Vehicles to send a midpoint notice pursuant to subsection (a) of this section cannot be raised as a defense in a prosecution for driving with a suspended license under AS 28.15.291(a). McClain v. State, Ct. App. Op. No. 74 (File No. 5740), 641 P.2d 1265 (1982).

Sec. 28.15.240. Suspending licenses of juveniles. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.241. Reduction of points. (a) Two points shall be deducted from a licensee's assessed total if the licensee has not been convicted of a violation of traffic laws which occurred during the 12-month period after the date of the last violation of which the licensee was convicted.

(b) In addition to (a) of this section, two points shall be deducted from the assessed total upon the driver's furnishing to the department adequate proof of successful completion, within 12 months of the date of the driver's last violation, of a driver improvement course approved by the department. No more than one course may be used to obtain a reduction in points in any 12-month period.

(c) One point shall accumulate to the driver's benefit for each 12 consecutive months of licensed, violation-free driving within the five-year period preceding the point calculation. (§ 19 ch 178 SLA 1978; am § 1 ch 8 SLA 1981)

Effect of amendments. — The 1981 amendment deleted "from January 1, 1976" preceding "one point," substituted "twelve consecutive months" for "year" preceding "of licensed" and added "within the five year period preceding the point calculation" in subsection (c).

Sec. 28.15.250. Reexamination. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.251. Suspension, revocation, limitation, denial. (a) The department shall suspend, revoke, limit, deny, or initiate other remedial action against the driver's license of a person, upon the person's failure to

(1) appear for a driver improvement interview under AS 28.15.231(a); or

(2) comply with reasonable recommendations designed to improve the person's driving abilities which are made to the person during the driver improvement interview.

(b) The department shall suspend, revoke, or deny a driver's license of a person who has been identified through the person's point accumulation as an habitual or frequent violator under AS 28.15.221.

(c) A suspension, revocation, limitation, or denial of, or other action against, a driver's license under AS 28.15.221 — 28.15.261 may not be for more than one year.

(d) If a driver's license is suspended or revoked upon the accumulation of the number of points which require that action under AS 28.15.221 — 28.15.261 and regulations adopted under those sections, a limited license may not be issued to that person during the period of suspension or revocation.

(e) Except for immediate action under AS 28.15.181, when the department proposes to take action against a driver's license under (b) of this section, it shall notify the licensee that the proposed action shall become effective 30 days from the date of the notice, except that the licensee shall have the right, within the 30-day period, to make an oral or written answer or statement in which the licensee may controvert any point or issue and the licensee may present evidence and arguments for the consideration of the department pertinent to the action to be taken or the grounds for the action.

(f) Upon receipt of an oral or written answer or statement from the licensee, the department shall make findings on the matter under consideration and shall notify the person involved of its decision in writing by registered mail. If the department's decision is to sustain an action against the licensee's driver's license, the department shall notify the licensee of the opportunity for a hearing under AS 28.05.121 — 28.05.141. (§ 19 ch 178 SLA 1978)

NOTES TO DECISIONS

Cited in Jeffcoat v. State, Ct. App. Op. No. 63 (File No. 5274), 639 P.2d 308 (1982).

Sec. 28.15.253. Driver improvement course. Upon conviction of a violation of a traffic law that results in a driver accumulating six or more points from offenses committed during any consecutive 12-month period or nine or more points from offenses committed during any 24-month period, on request of the department the court may, in addition to any other penalty authorized by law, require the driver to successfully complete a driver improvement course approved by the department within a period of time prescribed by the court. The department may suspend, revoke, or deny the driver's license of a person who fails to successfully complete the driver improvement course required by the court under this section within the prescribed time period. (§ 1 ch 78 SLA 1982)

Sec. 28.15.255. Proof of financial responsibility. (a) The department may not reinstate a driver's license that has been revoked or suspended under AS 28.15.221 — 28.15.261 until the person whose license has been revoked or suspended provides proof of financial responsibility for the future.

(b) If a driver accumulates six or more points under AS 28.15.221 — 28.15.261 during a 12-month period, the department may require the driver to provide proof of financial responsibility for the future as a condition of retaining a driver's license, and may suspend the driver's license until proof of financial responsibility is provided.

(c) In this section, the term "proof of financial responsibility for the future" has the meaning given in AS 28.20.230(b) and may be established as provided in AS 28.20. (§ 2 ch 78 SLA 1982)

Sec. 28.15.260. Period of suspension. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.261. Definitions for AS 28.15.221 — 28.15.261. In AS 28.15.221 — 28.15.261

(1) "licensee" includes, but is not limited to an applicant for a new driver's license if the applicant's license was revoked under AS 28.15.221 — 28.15.261;

(2) "traffic laws" means statutes, regulations, and municipal ordinances governing the driving or movement of vehicles. (§ 19 ch 178 SLA 1978)

Revisor's notes. — The paragraphs were renumbered in 1984 to achieve alphabetical order.

NOTES TO DECISIONS

Quoted in Anderson v. Municipality of Anchorage, Ct. App. Op. No. 89 (File No. 5318), 645 P.2d 205 (1982).

Sec. 28.15.270. Surrender of license. [Repealed, § 19 ch 178 SLA 1978.]

Article 4. Fees.

Section
271. Fees

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 99.
60 C.J.S., Motor Vehicles, § 158.

Sec. 28.15.271. Fees. The fees for drivers' licenses and permits, including but not limited to renewals, are as follows:

(1) all classes of drivers' licenses . . . . . $ 5;
(2) motor-driven cycles . . . . . $ 2;
(3) instruction permit . . . . . $ 1;
(4) duplicate of driver's license or instruction permit . . . . $ 2;
(5) temporary license and renewal of permit . . . . . $ 1;
(6) school bus driver's permit . . . . . $ 2.

(§ 19 ch 178 SLA 1978)

Cross references. — For fee for reinstatement of suspended operator's license, see AS 28.20.585.

Article 5. Driver License Violations.

Section
281. Unlawful use of license; permitting unauthorized person to drive
291. Driving while license canceled, suspended, revoked or in violation of limitation

Sec. 28.15.280. Use of foreign license. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.281. Unlawful use of license; permitting unauthorized person to drive. (a) A person may not

(1) display, cause or permit to be displayed, or have in the person's possession a canceled, suspended, revoked, fictitious or unlawfully altered driver's license;

(2) display or represent as the person's own a driver's license not issued to the person;

(3) display or present a driver's license other than an Alaska driver's license to a peace officer or to the department when that person has been licensed under this chapter; or

(4) lend the person's driver's license to another person or knowingly permit the use of the license by another.

(b) A person may not authorize or knowingly permit a motor vehicle owned by the person or under the control of the person to be driven in this state by a person who is not validly licensed. (§ 19 ch 178 SLA 1978)

Collateral references. — Civil or criminal liability of one in charge of an automobile who permits an unlicensed person to operate it, 137 ALR 476.

Construction, application, and effect of legislation making it offense to permit unlicensed person to operate motor vehicle, 69 ALR2d 978.

Sec. 28.15.282. Point system. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.283. Suspension, revocation, limitation, denial. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.284. Personal interview. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.285. Conduct of personal interview; findings; hearing request. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.286. Hearing. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.287. Judicial review under point system. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.288. Stay of department action pending hearing or appeal. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.290. Unlawful use of license. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.291. Driving while license canceled, suspended, revoked or in violation of limitation. (a) A person may not drive a motor vehicle on a highway or vehicular way or area at a time when that person's driver's license, or privilege to drive has been canceled, suspended or revoked in this or another jurisdiction, or when driving in violation of a limitation placed upon that person's license or privilege to drive in this or another jurisdiction. Except as provided in (c) of this section, upon conviction of a violation of this section, the court shall impose a sentence of imprisonment of not less than 10 days. The

execution of sentence may not be suspended nor may probation or parole be granted until the minimum imprisonment provided in this section has been served; nor may imposition of sentence be suspended. In addition, the person's license or privilege to drive shall be revoked, and the person may not be issued a new license nor may the privilege to drive be restored for an additional period of not less than one year after the date that the person would have been entitled to restoration of driving privileges.

(b) When a person's license is canceled, limited, suspended or revoked, that person shall be informed by the department or the court that takes the action at the time of the action that, upon a conviction of driving on a highway or vehicular way or area in this state at a time when that person's driver's license or privilege to drive in this state has been canceled, suspended or revoked, or upon a conviction of driving in violation of a limitation of the license, that person will be subject to the mandatory minimum sentence of imprisonment under this section.

(c) The court shall impose a sentence of imprisonment of not less than 30 days and a fine of not less than $500 upon conviction of a violation of this section if the person's driver's license was revoked under circumstances described in AS 28.15.181(c)(1). The court shall impose a sentence of imprisonment of not less than 90 days and a fine of not less than $1,000 upon conviction of a violation of this section if the person's driver's license was revoked under circumstances described in AS 28.15.181(c)(2) or (3). The execution of sentence may not be suspended nor may probation or parole be granted until the minimum imprisonment provided in this subsection has been served. Imposition of sentence may not be suspended. In addition, the person's privilege to drive shall be revoked for an additional period of not less than one year after the date that the person would have been entitled to restoration of driving privileges if the person had not been convicted under this section.

(d) A person convicted of a violation of this section is guilty of a class A misdemeanor. (§ 19 ch 178 SLA 1978; am §§ 10, 11 ch 77 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote subsections (a) and (b) and added subsections (c) and (d).

NOTES TO DECISIONS

Knowledge or intent. — While subsection (a) is silent on its face as to the requirement of knowledge or intent as an element of the offense, an element of mens rea must be read into the statute by implication. Jeffcoat v. State, Ct. App. Op. No. 63 (File No. 5274), 639 P.2d 308 (1982).

Failure of the Department of Motor Vehicles to send a midpoint notice pursuant to AS 28.15.231(a) cannot be raised as a defense in a prosecution for driving with a suspended license under subsection (a) of this section. McClain v. State, Ct. App. Op. No. 74 (File No. 5740), 641 P.2d 1265 (1982).

Maximum penalties. — Although a violation of AS 28.15.011(b) carries no mandatory minimum sentence equivalent

to the 10-day jail sentence and one-year license revocation of subsection (a) of this section, the available maximum penalties under AS 28.35.230(a) and (b) are the same. Francis v. Municipality of Anchorage, Ct. App. Op. No. 70 (File No. 5659), 641 P.2d 226 (1982).

Issuance of limited licenses prohibited. — The language of subsection (a) of this section specifically prohibits issuance of limited licenses to persons convicted of driving while license is suspended. Uhde v. State, Ct. App. Op. No. 167 (File No. 5916), 654 P.2d 1323 (1982).

In light of the express prohibition against issuance of limited licenses contained in subsection (a) of this section, one cannot properly rely upon the provisions of AS 28.15.201(a) as an independent source of authority for issuance of limited licenses, since by its own terms, AS 28.15.201(a) does not apply where a statutory provision specifically prohibits issuance of limited licenses. Uhde v. State, Ct. App. Op. No. 167 (File No. 5916), 654 P.2d 1323 (1982).

Time limitation for revocation of license. — The one-year revocation period provided for in subsection (a) of this section is the maximum amount of time a license may be revoked for driving with a suspended license. Manderson v. State, Ct. App. Op. No. 198 (File No. 6894), 655 P.2d 1320 (1983).

The revocation of a vehicle registration for a conviction of driving with a suspended license should not continue beyond the period that the defendant's driver's license is revoked. Manderson v. State, Ct. App. Op. No. 198 (File No. 6894), 655 P.2d 1320 (1983).

Ordinance not in conflict with former AS 28.15.300(a). — Home rule ordinance which prohibited driving a motor vehicle while one's license is suspended or revoked as did former AS 28.15.300(a) but which was not limited to public highways as was former AS 28.15.300(a) was not in conflict with former AS 28.15.300(a) and, therefore, was not invalid. Cremer v. Anchorage, Sup. Ct. Op. No. 1579 (File No. 3597), 575 P.2d 306 (1978).

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, § 148.

61A C.J.S., Motor Vehicles, § 639(2).

Lack of proper operator's license as evidence of operator's negligence, 29 ALR2d 963.

Necessity or emergency as defense in prosecution for driving without operator's license or while license is suspended, 61 ALR3d 1041.

Sec. 28.15.300. Driving while license cancelled, suspended or revoked. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.305. Driving in violation of license limitation. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.310. Permitting unauthorized minor to drive. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.320. Permitting unauthorized person to drive. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.330. Making false statement. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.15.340. Fees. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.350. Disposition of operators' license fees. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.360. Definitions. [Repealed, § 19 ch 178 SLA 1978.]

1988 Supplement

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), 894 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. 3260 (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. 846 (File No. A-960), 709 P.2d 510 (1985).

Applied in Meisner 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-961), 726 P.2d 552 (1986); Yancy v. State, Ct. App. Op. No. 687 (File Nos. A-1392, A-1413), P.2d (1987).

Quoted in Barrett 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 Elfenbeck 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 §§ 3 — 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 228 (1987).

Applied in Lawrence v. State, Ct. App. Op. No. 603 (File No. A-799), 716 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(n), 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, these 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 29 (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. 3260 (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), 686 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. 0 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 prevent 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-146), 706 P.2d 687 (1986).

Police fully satisfied their obligation to preserve evidence by preserving 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. 65[illegible] (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. 396 (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. 661 (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. 696 (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-191), 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 alcohol in defendant's blood at the time of the accident, it could infer that he was under the influence of intoxicating liquor. Dresnek v. State, Ct. App. Op. No. 455 (File No. A-191), 697 P.2d 1059 (1985).

Cited in Edgmon v. State, Ct. App. Op. No. 481 (File No. A-161), 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 chap[illegible] term "licensing authority" with reference to this state mean[illegible]ion of motor vehicles in the Department of Public Safety [illegible]ent shall furnish to the appropriate authority of another pa[illegible]ty 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)

(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 loss 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 excluding 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 this 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)(6).

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-2330), ___ 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.3d 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, §§ 760e, 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" so 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. 2294), 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 5 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).

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-35), 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 1063 (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 989 (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 256 (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. Gunderson, 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. 3190), 568 P.2d 1 (1977); Ebona v. State, Sup. Ct. Op. No. 1606 (File No. 3495), 577 P.2d 698 (1978).

Stated in Godwin v. State, Sup. Ct. Op. No. 1276 (File No. 2793), 554 P.2d 453 (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 1033 (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. 7488), 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, § 29[illegible] 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 ALR 555.

What is a "motor vehicle" within statutes making it an offense to drive while intoxicated, 66 ALR2d 1146.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR3d 1373.

Driving under the influence, or when addicted to the use, of drugs as criminal offense, 17 ALR3d 816.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 29 ALR3d 938.

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 ALR3d 1138.

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 ALR3d 7.

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

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 ALR4th 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 83 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. 119 (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. Peare 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. Pears 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 provisos. 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. 3232), 574 P.2d 1285 (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. 6447, 6724, 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. 3661), 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. Pears 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. 67 (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. Geber, 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. Geber, 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. 7681), 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. 7681), 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. Geber, 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. 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).

"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. Geber, 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. 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).

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 provisos. 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 consequence 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. Svedlund 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 coerced by the officer, and thus is not protected by the state or federal privilege against self-incrimination. Svedlund 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. 2403 (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. 2403 (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. 6174), 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 ALR2d 1407.

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, 87 ALR2d 370, 26 ALR4th 1112.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 ALR3d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law, 98 ALR3d 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 (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. 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, 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. 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. 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. 3661), 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. 2003 (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. Ahsogack 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. Ahsogack 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, 5280), 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. 1598 (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, 6725), 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, 375 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, 169 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. 655.

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 328.

Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods, 90 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), 659 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

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. Geiger, 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 Williford 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 prescribing 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. 135 (File No. 5429), 652 P.2d 494 (1982).

Cited in Atchak v. State, Ct. App. Op. No. 636 (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

Applied in Lurro v. State, Sup. Ct. Op. No. 1960 (File No. 2987), 603 P.2d 468 (1979).

Collateral references. — 38 Am. Jur. 2d, Garages, and Parking and Filling Stations, §§ 140, 144 to 151.

6A 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); Kapa 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 906.

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 ALR2d 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. Kaps Transp., Inc. v. Henry, Sup. Ct. Op. No. 1527 (File No. 2926), 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. Kaps Transp., Inc. v. Henry, Sup. Ct. Op. No. 1527 (File No. 2926), 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. Adkins 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. 2091 (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 ALR 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 11.56.110; 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. 576 (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 ALR 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.]

AS 28.10.011
AS 28.22.200

EXEMPTION FROM MOTOR VEHICLE INSURANCE AND REGISTRATION CARRIES DUAL REQUIREMENT

In response to an inquiry from the Commissioner of Public Safety and Representative Adelheid Herrmann, the Attorney General stated that a motor vehicle that is used on a road connected by land to the state highway system or connected to another highway that averages 500 or more vehicles per day is not exempt from the insurance and registration requirements under AS 28.10.011 and AS 28.22.200. The statutes state that the owner or operator must be insured and the vehicle registered unless the road on which the vehicle is used is not connected to the state highway system or a heavily travelled road. The Attorney General concluded that the use of the word "or" in this context means that both requirements must be met for the exemption to apply. This interpretation is the one used by the Division of Motor Vehicles and is correct, the Attorney General said. The statutes were not well drafted, resulting in uncertainty about their meaning, the Attorney General said. Op. Atty. Gen. (Alaska, June 13, 1988)

Legislative review is recommended.

AS 28.15.166(g)
AS 28.40.100(a)(4)

THE MEANING OF "ACTUAL PHYSICAL CONTROL OF A VEHICLE" IS EXAMINED IN THE CONTEXT OF DRIVING WHILE INTOXICATED LAWS.

The Supreme Court of Alaska held that the circumstances of the case justified the conclusion that the defendant was in actual physical control of the vehicle. The defendant was sitting in the driver's seat, with the ignition keys in her hands and was attempting to put the keys in the ignition. She had told the arresting officer that she intended to drive the car. Given these conditions, the trial court should not have concluded that the engine must be running before "actual physical control" is found. State, Department of Public Safety v. Conley, 754 P.2d 232.

While the result reached by the Supreme Court seems reasonable, the court noted that no definition of "operate or drive" appears within the laws regulating license revocation for driving while intoxicated; the court found the definition it used within AS 28.40 ("General Provisions"). While that was adequate, review is recommended.

AS 28.15.181(c) MULTIPLE CONVICTIONS FOR DRIVING WHILE INTOXICATED, EVEN THOUGH ENTERED AT THE SAME TIME, ARE SEPARATE CONVICTIONS FOR SUBSEQUENT SENTENCING PURPOSES.

The Supreme Court of Alaska held that it was proper for the trial court to consider the initial two convictions for driving while intoxicated that were entered the same day as a single conviction; because they were entered simultaneously, neither was a "prior" conviction as to the other. But on a third conviction, it was proper to sentence on the basis of two prior convictions; each of the two convictions entered the same day was considered as a separate conviction. The court stated that it was guided in its interpretation of the section by the policy established by the legislature for presumptive sentencing. AS 12.55.145 explicitly provides that for presumptive sentencing purposes, multiple prior convictions are considered as a single conviction when they arise from a single criminal episode and further the same criminal objective. The court noted the language implies that in all other circumstances, multiple prior convictions must be counted separately. "Thus we conclude that all prior DWI convictions must be counted separately for purposes of driver's license revocation following a subsequent conviction, regardless of whether the prior convictions were entered simultaneously." Tulowetzke v. State, Department of Public Safety, 743 P.2d 368.

The Supreme Court of Alaska construed the law according to the apparent legislative intent. Legislative action is not recommended.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

AS 28.10.011
AS 28.22.200

EXEMPTION FROM MOTOR VEHICLE INSURANCE AND REGISTRATION CARRIES DUAL REQUIREMENT

In response to an inquiry from the Commissioner of Public Safety and Representative Adelheid Herrmann, the Attorney General stated that a motor vehicle that is used on a road connected by land to the state highway system or connected to another highway that averages 500 or more vehicles per day is not exempt from the insurance and registration requirements under AS 28.10.011 and AS 28.22.200. The statutes state that the owner or operator must be insured and the vehicle registered unless the road on which the vehicle is used is not connected to the state highway system or a heavily travelled road. The Attorney General concluded that the use of the word "or" in this context means that both requirements must be met for the exemption to apply. This interpretation is the one used by the Division of Motor Vehicles and is correct, the Attorney General said. The statutes were not well drafted, resulting in uncertainty about their meaning, the Attorney General said. Op. Atty. Gen. (Alaska, June 13, 1988)

Legislative review is recommended.

AS 28.15.011(b) REVOCATION OF DRIVER'S LICENSE FOR
AS 28.15.165(c) OPERATION OF ANOTHER VEHICLE WHILE
AS 28.40.100(a)(19) INTOXICATED

The Supreme Court of Alaska held that the Department of Public Safety may revoke a driver's license for the operation of a motor vehicle while intoxicated in a privately owned parking lot open to the public. The court noted that the requirement of a driver's license applies only to the operation of vehicles "on a highway, vehicular way or area, or other public property" but it also noted that a driver's license is required for the operation of certain vehicles, whether or not operated on public property. "It appears that the legislature did not intend to revoke the driver's license of persons who operate an unlicensed vehicle, such as an aircraft or motorboat, while intoxicated." In that context, it noted the recent decision of the Alaska Court of Appeals in State v. Stagno, 739 P.2d 198 (Alaska Appeals 1987); that decision is analyzed in this report. Caulkins v. State, Department of Public Safety, 743 P.2d 366.

Review is recommended.

AS 28.15.166(g)
AS 28.40.100(a)(4)

THE MEANING OF "ACTUAL PHYSICAL CONTROL OF A VEHICLE" IS EXAMINED IN THE CONTEXT OF DRIVING WHILE INTOXICATED LAWS.

The Supreme Court of Alaska held that the circumstances of the case justified the conclusion that the defendant was in actual physical control of the vehicle. The defendant was sitting in the driver's seat, with the ignition keys in her hands and was attempting to put the keys in the ignition. She had told the arresting officer that she intended to drive the car. Given these conditions, the trial court should not have concluded that the engine must be running before "actual physical control" is found. State, Department of Public Safety v. Conley, 754 P.2d 232.

While the result reached by the Supreme Court seems reasonable, the court noted that no definition of "operate or drive" appears within the laws regulating license revocation for driving while intoxicated; the court found the definition it used within AS 28.40 ("General Provisions"). While that was adequate, review is recommended.

AS 28.15.181(a)
AS 28.15.181(b)
AS 28.35.030(c)

THE REQUIREMENTS FOR THE REVOCATION OF A DRIVER'S LICENSE ARE REVIEWED.

The Court of Appeals of Alaska held that the state could not revoke a driver's license for the operation of an airboat on land while intoxicated because the law does not require a driver's license for the operation of an airboat. The revocation law is thus tied to the types of vehicles for which a license is required rather than to the location on which the vehicle is operated. While the trial court and the parties did not note AS 28.15.181 (which provides that the operation of a motor vehicle while intoxicated is grounds for the revocation of a driver's license), the court remanded the matter for further proceedings. State v. Stagno, 739 P.2d 198.

While this matter may have been resolved, the law nonetheless seems not to address the intoxicated operation of a boat on land--and apparently should. Review is recommended.

AS 28.15.181(c) MULTIPLE CONVICTIONS FOR DRIVING WHILE INTOXICATED, EVEN THOUGH ENTERED AT THE SAME TIME, ARE SEPARATE CONVICTIONS FOR SUBSEQUENT SENTENCING PURPOSES.

The Supreme Court of Alaska held that it was proper for the trial court to consider the initial two convictions for driving while intoxicated that were entered the same day as a single conviction; because they were entered simultaneously, neither was a "prior" conviction as to the other. But on a third conviction, it was proper to sentence on the basis of two prior convictions; each of the two convictions entered the same day was considered as a separate conviction. The court stated that it was guided in its interpretation of the section by the policy established by the legislature for presumptive sentencing. AS 12.55.145 explicitly provides that for presumptive sentencing purposes, multiple prior convictions are considered as a single conviction when they arise from a single criminal episode and further the same criminal objective. The court noted the language implies that in all other circumstances, multiple prior convictions must be counted separately. "Thus we conclude that all prior DWI convictions must be counted separately for purposes of driver's license revocation following a subsequent conviction, regardless of whether the prior convictions were entered simultaneously." Tulowetzke v. State, Department of Public Safety, 743 P.2d 368.

The Supreme Court of Alaska construed the law according to the apparent legislative intent. Legislative action is not recommended.

AS 28.15.181(c)(1) THE COURT REVIEWS THE APPROPRIATE
AS 28.15.181(e) SENTENCE FOR A PERSON WHO DRIVES IN
AS 28.15.291(a) VIOLATION OF A LIMITED DRIVER'S LICENSE
AS 28.15.291(c) AFTER A CONVICTION OF DRIVING WHILE INTOXICATED.

The Court of Appeals of Alaska held that the appropriate sentence for a person driving in violation of a limited driver's license following a driving while intoxicated conviction was the minimum ten-day sentence under AS 28.15.291(a) (driving in violation of the conditions of a limited driver's license under AS 28.15.181(e)). The state had argued that the appropriate sentence was 30 days under AS 28.15.291(c) (driving while license is revoked under AS 28.15.181(c)(1)). The court agreed with the driver. It noted that the express language of AS 28.15.291(a) differentiates between driving while a license is revoked and driving in violation of a limitation placed upon a license. The structure of the section as established by the legislature reflects an arguable indication by the legislature to exclude from the minimum 30-day jail sentence persons convicted of violating the conditions of a limited license, as distinguished from those convicted of driving with a revoked license. The court noted that the legislation is ambiguous; ambiguous penal statutes must be construed in favor of the accused. State v. Robertson, 749 P.2d 902.

Review is recommended.

AS 28.35.032(a) A PROSECUTION FOR REFUSAL TO TAKE A CHEMICAL TEST FOR INTOXICATION IS INDEPENDENT OF THE STATE'S ABILITY TO GET A CONVICTION FOR OPERATING THE VEHICLE WHILE INTOXICATED.

The Court of Appeals of Alaska held that the warnings required under the implied consent law and thus the penalties for heir violation are independent of the ability of the state to get a conviction for operating a vehicle while intoxicated. The court agreed that it was possible to violate the law by refusing the chemical test even if the person were acquitted at a subsequent trial of driving while intoxicated. "In any event, we doubt that a person will ever be arrested 'while operating or driving a motor vehicle' since the arrest will inevitably follow the driving. As we read the statute, the word 'while' means 'for' and it is undisputed that [the accused] was arrested for operating a motor vehicle while under the influence of an intoxicating liquor." Brown v. State, 739 P.2d 182.

The Court of Appeals of Alaska construed the law according to the apparent legislative intent. Legislative action is not recommended.

ly with the plaintiff's learning of the nature of the victim's injury.[3] Here, Mattingly was more than 150 miles away from the accident scene and had time to steel himself during his flight to Sitka. There was no sudden sensory observation of his injured son. We therefore affirm the superior court's decision that Mattingly does not state a cause of action for negligently inflicted emotional distress.

E. *Dismissal Against Non-moving Party*

[13] Mattingly's original complaint named the College, Arthur Dorland, Jim Gibb, and John Doe as defendants. The individuals were alleged to be employees or representatives of the College who were involved in excavating the trench. The College and Dorland (both represented by the same counsel) answered, however, their answer did not include Gibb's name. The College and Dorland then made a motion for judgment on the pleadings and for dismissal, but again, Gibb's name was not included. Several days later, Gibb filed his answer through the College's counsel. Oral argument was heard on the motion for judgment on the pleadings, at which all defendants were represented by the same counsel. Mattingly thereafter filed his amended complaint naming the same defendants. The court's order granting the motion for judgment on the pleadings and order dismissing the complaint only named the College and Arthur Dorland.

Mattingly argues as his final point on appeal that because the superior court's order dismissing the complaint only named the College and Dorland, but not Gibb, for reasons of procedural due process, the order should be set aside. One of Mattingly's theories is that because Gibb had not moved for judgment on the pleadings, Mattingly was not accorded fair notice that the claims against Gibb were to be considered part of the motion practice.

This argument is without merit. Mattingly alleges no facts which would place Gibb in a position different from that of the College or Dorland. Thus, to the extent that the superior court's decision is correct as to the College and Dorland, it is correct as to Gibb. Mattingly had to know from Gibb's answer that Gibb was being defended by the College's counsel, and it is difficult to understand how Mattingly would not be on notice that any decision on the motion concerning the College and Dorland would not be applicable to Gibb. We hold that the superior court's error in failing to include Gibb's name on the judgment on the pleadings was harmless.

III. CONCLUSION

Because Mattingly has set forth sufficient facts to allege a cause of action for negligently caused economic harm, the superior court's dismissal of Mattingly's complaint for failure to state a cause of action is reversed and remanded for further proceedings. The superior court's decision that Mattingly has not stated a cause of action for negligent and intentional interference with his contractual relations with his employees and with prospective economic advantage, for intentional and negligent infliction of emotional distress, and for punitive damages is affirmed.

AFFIRMED in part, REVERSED and REMANDED in part.

Donald L. CAULKINS, Appellant,

v.

STATE of Alaska, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF MOTOR VEHICLES, Appellee.

No. S-1586.

Supreme Court of Alaska.

Oct. 9, 1987.

Motorist appealed from order of the Superior Court, Third Judicial District, Ke-

3. *See Croft v. Wicker*, 737 P.2d 789 (Alaska 1987) (action for negligently inflicted emotional distress stated where sexual assault of minor child occurred in "close proximity" to parents, who observed child's extreme distress "just after the alleged assault occurred").

nai, Charles K. Cranston, J., upholding revocation of his driver's license. The Supreme Court, Matthews, J., held that Department of Public Safety may revoke driver's license of intoxicated person who operates motor vehicle in privately owned parking lot held open to public.

Affirmed.

1. Automobiles ⇐144.1(1)

Department of Public Safety may revoke driver's license of intoxicated person who operates motor vehicle in privately owned parking lot held open to public. AS 28.15.165(c).

2. Automobiles ⇐144.1(1)

Motorist who drove vehicle in private parking lot while intoxicated could have his driver's license revoked; motorist's truck was "a vehicle for which a driver's license was required" within meaning of revocation statute, regardless of whether it was driven on private or public property. AS 28.15.011(b), 28.15.165(c), 28.40.100(a)(19).

Allan Beiswenger, Soldotna, for appellant.

Paul S. Stahl, Asst. Atty. Gen., Anchorage, Grace Berg Schaible, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MATTHEWS, Justice.

[1] In this appeal the court is asked to determine whether the Department of Public Safety may revoke the driver's license of an intoxicated person who operates a motor vehicle in a privately owned parking lot held open to the public. We conclude that the Department has the authority to revoke the operator's license under AS 28.15.165(c).

While sitting in the center of the seat of a pickup truck parked in a supermarket parking lot, Donald Caulkins twisted the ignition key, intending to turn on the truck's radio. The truck lurched forward and struck the supermarket entrance. Caulkins then moved into the driver's seat and backed the truck away from the building. He was arrested for driving while intoxicated. A test revealed a 0.17% alcohol concentration in his blood.

Alaska Statute 28.15.165(c) requires the Department of Public Safety to revoke the license of any person who operates a motor vehicle for which a driver's license is required when his blood alcohol level is 0.10% or more.[1] Because Caulkins had been twice convicted of driving while intoxicated within the last ten years, his license was revoked for a ten year period, the minimum prescribed by AS 28.15.181(c)(3) for third offenders.

Caulkins' challenge to the Department's revocation of his license was rejected by a hearing officer and, subsequently, by the superior court. This appeal followed.

[2] Caulkins contends that a vehicle on private property is not "a vehicle for which a driver's license is required" within the meaning of AS 28.15.165(c). He points to AS 28.15.011(b), which provides that:

> Every person exercising the person's privilege to drive, or exercising any degree of physical control *of a motor vehicle upon a highway, vehicular way or area, or other public property in this state*, is required to have in the possession of the person a valid Alaska driver's license issued under the provisions of this chapter for the type or class of vehicle driven, unless expressly exempted by law from this requirement.

1. Alaska Statute 28.15.165(c) provides:

> (c) Upon receipt of a sworn report of a law enforcement officer that a chemical test under AS 28.35.031(a) produced a result described in AS 28.35.030(a)(2) ..., that notice under (a) of this section was provided to the person, and that contains a statement of the circumstances surrounding the arrest and the grounds upon which the officer's belief that the person was driving while intoxicated a motor vehicle for which a driver's license is required was based, the department shall revoke the person's license....

(Emphasis added). Relying on the italicized language, Caulkins contends that a license is required only when a vehicle is operated upon a highway, vehicular way or area. Because a vehicular way is a place "other than a highway or private property," AS 28.40.100(a)(19), Caulkins argues that a driver's license is not required for a vehicle on private property. He therefore contends that the state has no authority to revoke his driver's license for intoxicated driving occurring on private property.

When viewed in context, the phrase "a motor vehicle for which a driver's license is required" refers to a type of motor vehicle, rather than to the vehicle's location. Driver's licenses are issued for particular types or classes of vehicles. AS 28.15.011(b). Similarly, the Commissioner of Public Safety provides by regulation for the licensing of a limited class of motor vehicles, including motor-driven cycles, cars, buses, trucks, and towed vehicles. 13 AAC 08.150.

There are no licensing provisions for a number of other types of motorized conveyances which operate on public property, including motor boats operating on public waterways, and airplanes operating in public airspace. *Id.* The distinction is important in the context of AS 28.35.030, which prohibits the operation of "a vehicle, aircraft or watercraft while intoxicated." It appears that the legislature did not intend to revoke the driver's license of persons who operate an unlicensed vehicle, such as an aircraft or motorboat, while intoxicated. *See State v. Stagno*, 739 P.2d 198 (Alaska App.1987) (driver's license cannot be revoked for the operation of an airboat while intoxicated). Because the type of motor vehicle which the appellant drove—a pickup truck—was the type of vehicle for "which a driver's license is required" under 13 AAC 08.150, the Department was required to revoke the appellant's license.

Our conclusion is supported by the drunk driving statute. Former section 50-5-3, ACLA 1949, provided that: "[a]ny person who, while under the influence of intoxicating liquor or narcotic drugs, operates or drives any automobile, motorcycle, or other motor vehicle *upon any public street or highway in Alaska*, shall, upon conviction thereof, be punished...." (emphasis added). The italicized language was eliminated in 1967. Ch. 121, § 1, SLA 1967. The House Judiciary Committee explained that:

> Under present law a person can be convicted of reckless driving or of driving under the influence of intoxicating liquor only if he is driving "upon a public street or highway." *This bill removes that condition, so that driving in a parking lot or other place likely to endanger the public would be covered.*

2 House Journal 537 (1967) (emphasis added). Thus for the last two decades it has been unlawful for an intoxicated person to operate a motor vehicle in any area of this state, whether the area is publicly or privately owned. *Accord, Conner v. State*, 696 P.2d 680, 683 (Alaska App.1985). *See* AS 28.35.030.

The legislature perceived that there is a significant threat of injury to others and to property when an intoxicated driver operates his vehicle on private lands. *Compare State v. Magner*, 151 N.J.Super. 451, 376 A.2d 1333, 1334 (1977) and *State v. Frank*, 2 Ohio App.3d 392, 442 N.E.2d 469 (1981), which found similar legislative purposes underlying similar statutes. The legislature evidently intended to impose the same sanctions for intoxicated driving on private as on public property. One such sanction is license revocation.

The judgment of the superior court is AFFIRMED.

Daryl L. TULOWETZKE, Appellant,

v.

STATE of Alaska, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF MOTOR VEHICLES, Appellee.

No. S-1754.

Supreme Court of Alaska.

Oct. 9, 1987.

Driver who had pled guilty and been convicted on same day of two charges of

STATE of Alaska, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF MOTOR VEHICLES, Appellant,

v.

Michele L. CONLEY, Appellee.

No. S-1791.

Supreme Court of Alaska.

April 15, 1988.

Revocation of driver's license for driving while intoxicated was reversed by the Superior Court, Third Judicial District, Anchorage, Roy H. Madsen, J., and the State appealed. The Supreme Court, Compton, J., held that: (1) motorist could be found in actual physical control of automobile though engine was not running, and (2) Department of Public Safety was entitled to infer operability of the vehicle in the absence of evidence to the contrary.

Reversed and remanded with instructions.

1. Automobiles ⇐144.2(3)

On appeal from superior court decision reversing revocation of driver's license, Supreme Court reviews determination of Department of Public Safety independently of the superior court, and may substitute its judgment on question of statutory construction. AS 28.15.166(a, g).

2. Automobiles ⇐144.1(1.10)

Person was in "actual physical control" of her vehicle such that license could be revoked for driving while intoxicated, though engine was not running, where she was seated in driver's seat, had possession of ignition key and was attempting to put key in ignition, and was in such condition that she was physically capable of starting the engine and causing the vehicle to move. AS 28.15.165, 28.15.165(a), 28.15.181(a)(5), 28.35.030(a)(2), 28.35.031(a).

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

3. Automobiles ⇐144.1(1.10)

Finding that car was reasonably capable of being rendered operable is required in civil driver's license revocation proceedings for driving while intoxicated. AS 28.15.165.

4. Automobiles ⇐144.2(9)

For purposes of revocation of driver's license for driving while intoxicated, the Department of Public Safety was entitled to infer operability of the vehicle in absence of evidence to the contrary, where motorist assumed that the car was operable, sat down behind the steering wheel, moved the keys to the ignition, and told police officer that she was going to drive home. AS 28.15.165, 28.15.166(j).

Teresa Williams, Asst. Atty. Gen., Anchorage, Grace Berg Schaible, Atty. Gen., Juneau, for appellant.

Bruce F. Sherman, Jr., Anchorage, for appellee.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

The state appeals from a superior court decision reversing revocation of a driver's license. The primary issue is whether, in order to find that a driver was in "actual physical control of a vehicle" while intoxicated, the hearing officer must find that the engine of the car was running.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of July 3, 1985, Lt. Kevin O'Leary of the Anchorage Police Department, while on foot patrol, entered a tavern named Darwin's Theory. There he encountered Michele Conley, who had been involved in a disturbance and had been asked to leave. O'Leary advised Conley that she was too intoxicated to drive. He tried to get her to take a cab home or call a friend for a ride.

O'Leary accompanied Conley outside the bar, advised her to take a taxi home and warned her that if she was observed driving she would be arrested for driving while intoxicated (DWI). Although O'Leary hailed several cabs for Conley, she declined to take a cab home and indicated that she would call friends to drive her home. O'Leary returned to foot patrol after asking another officer to watch Conley to ensure that she did not drive her vehicle.

Shortly thereafter, Conley walked by O'Leary, who was standing at the entrance to an alley. With keys in her hand, she approached a blue car parked in the alley, unlocked the door and sat down in the driver's seat. O'Leary opened Conley's car door and positioned himself to make it impossible for her to shut the door. He asked her what she was doing and she responded that she was driving home. He told her she could not drive home, and she responded, "I will call you when I get home and let you know that I am safe."

O'Leary observed that Conley had her hands on the steering wheel and that she moved the hand holding her keys to place them in the ignition. O'Leary then advised Conley that she was under arrest and removed her from the vehicle. He did not allow her to start the vehicle or even to put the keys in the ignition. Her subsequent Intoximeter 3000 test gave a reading of .208. Based on this result, Conley was given notice of an administrative revocation of her license, pursuant to AS 28.15.165.[1]

A hearing was held before the Department of Public Safety (DOPS) on August 28, 1985. Conley moved to dismiss the revocation on the basis that there was no evidence that she had been in physical control of the car. The hearing officer reviewed the case law defining "actual physical control" and sustained the DOPS's revocation action stating:

> Ms. Conley had the potential and the intent and she had the keys in hand, she was seated behind the wheel and the vehicle was operable.

The DOPS revoked Conley's license for 90 days, but granted limited driving privileges for 60 days of that period.

Conley appealed the DOPS's decision and the superior court reversed. The court found *inter alia* that: (1) Conley had not been in actual physical control of her vehicle because the motor was not "running," and (2) in order to find that a person is an "operator" or has actual physical control of a vehicle a finding that the vehicle is "operable" is necessary. The state appealed the issue of whether Conley was "in actual physical control of a vehicle."

II. DISCUSSION

[1] We directly review the determination of the DOPS, independently of the superior court, because the superior court was acting as an intermediate court of appeals. *Barcott v. State, Dep't of Public Safety*, 741 P.2d 226 (Alaska 1987); *Jager v. State*, 537 P.2d 1100, 1106 (Alaska 1975). Whether the engine must be running to find actual physical control is a question of statutory construction on which this court may substitute its judgment. *Earth Resources Co. v. State, Dep't of Revenue*, 665 P.2d 960, 965 (Alaska 1983).

The relevant statutory scheme is as follows: Under AS 28.35.031(a) "[a] person who *operates or drives* a motor vehicle in this state ... shall be considered to have given consent to a chemical test or tests of the person's breath...." (Emphasis added.) If the results of the chemical test indicate that there is 0.10 percent or more

1. AS 28.15.165(a) provides:

> If a chemical test administered under AS 28.35.031(a) to a person driving a motor vehicle for which a driver's license is required produces a result described in AS 28.35.030(a)(2) ... a law enforcement officer shall read a notice and deliver a copy to the person. The notice shall advise that
>
> (1) the department intends to revoke the person's driver's license ...;
>
> (2) the person has the right to administrative review of the revocation ...;
>
> (3) the notice itself is a temporary driver's license that expires seven days after it is delivered to the person;
>
> (4) revocation of the person's driver's license ... shall take effect upon expiration of the temporary driver's license unless the person within seven days requests an administrative review.

by weight of alcohol in the person's blood and that person "operates or drives" a motor vehicle in such condition, that person commits the crime of "driving while intoxicated." AS 28.35.030(a)(2).

One of the penalties for DWI is revocation of the person's driver's license. AS 28.15.181(a)(6). Revocation is accomplished through a civil proceeding separate from the criminal proceeding. AS 28.15.165.[2] A person who receives notice of revocation may make a written request for administrative review of the DOPS's revocation. AS 28.15.166(a). The issues on review are limited. AS 28.15.166(g).[3] The only issue in Conley's case was whether the arresting officer had reasonable grounds to believe that Conley was driving a motor vehicle while intoxicated.

No statute defines "operate or drive" as the term appears in these sections. However, AS 28.40.100(a)(4) defines "driver" as "a person who drives or is in actual physical control of a vehicle." Similarly, in *Jacobson v. State*, 551 P.2d 935, 938 (Alaska 1976), we interpreted former AS 28.35.030 (which made operating or driving under the influence a crime) as prohibiting "a person who is under the influence of intoxicating liquor [from] being in actual physical control of a vehicle with its motor running." Thus the issue is what may a person do before being considered in "actual physical control of a vehicle."

Conley argues that no Alaska case has upheld a DWI conviction or license revocation where the engine was not running. Thus Conley concludes the engine must be running before one is considered in actual physical control of a vehicle. The state argues that although having the motor running is a strong indicia of control, it is not the only indicia of control used by other states' courts.

The Alaska Court of Appeals has determined that actual physical control does not contain a "movability" requirement. *See Lathan v. State*, 707 P.2d 941, 943 (Alaska App.1985) (upheld the conviction of a driver found asleep behind the wheel in a car stuck in the mud, incapable of movement, where the engine was running). The court of appeals decision is consistent with our decision in *Jacobson* where we observed that AS 28.35.030 falls within "that class of statutes where mere exclusive control of a stationary vehicle while intoxicated is a crime." 551 P.2d at 937.

In *Jacobson* we relied on *State v. Webb*, 78 Ariz. 8, 274 P.2d 338 (1954) where the driver, while intoxicated, was found asleep in his truck, which was idling in a traffic lane with its lights on. We cited the following policy:

> An intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist. While at the precise moment defendant was apprehended he may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that the defendant had of its own choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run. He therefore had the "actual physical control" of that vehicle, even though the manner in which such control was exercised resulted in the vehicle's remaining motionless at the time of his apprehension.

551 P.2d at 938 (quoting *Webb*, 274 P.2d at 340). In *Jacobson*, we also adopted the description of actual physical control set out by the Montana Supreme Court: "[A]s

2. *See supra* note 1.

3. AS 28.15.166(g) provides:

> (g) The hearing under this section shall be limited to the issues of whether the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while intoxicated and whether
>
> (1) the person refused to submit to a chemical test under AS 28.35.031(a) after being advised that refusal would result in the suspension, revocation, or denial of the person's license or nonresident privilege to drive and that the refusal is a misdemeanor; or
>
> (2) the chemical test authorized under AS 28.35.031(a) and administered to the person produced a result described in AS 28.35.030(a)(2).

long as one were physically or bodily able to assert dominion, in the sense of movement, then he has as much control over [the vehicle] as he would if he were actually driving." 551 P.2d at 938 (quoting *State v. Ruona*, 133 Mont. 243, 321 P.2d 615, 618 (1958)).[4] In *Ruona*, the defendant was found sleeping in the driver's seat, the motor was running and the car was parked in the traffic lane of a public street. Nevertheless, the court held that the defendant was in actual physical control of his car. The *Ruona* definition recognizes the potential ability to drive; that is, a person's dominion over the car.

Subsequent decisions have delineated a number of factors used in determining whether a person was in actual physical control of a motor vehicle: (1) whether the person is asleep or awake, (2) whether the motor is running, and (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location.[5] Conley argues that even though some jurisdictions find that the driver is in actual physical control of a car even when the engine is not running, the case law reveals that the car is usually in some sort of predicament indicating the drunk driver drove for at least some period of time before stopping.[6]

However, we are aware of other jurisdictions that find the driver in actual physical control even when it is not apparent the driver had recently been driving. For example, in *Cincinnati v. Kelley*, 47 Ohio St.2d 94, 351 N.E.2d 85 (1976), Kelley drove downtown sober, parked his car, went to a bar and started drinking. After drinking for a while he realized he was in no condition to drive so he went to his car to sleep. Sometime later he called his wife to pick him up then went back to his car to wait for her. Shortly thereafter the police arrested him while he was sitting in the car. The court stated actual physical control requires that

> [a] person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physically capable of starting the engine and causing the vehicle to move.

351 N.E.2d at 87–88.[7] The court selected these factors reasoning that the purpose of

4. The Montana Supreme Court further explained:

> Using the term in "actual physical control" in its composite sense, it means "existing" or "present bodily restraint, directing influence, domination or regulation." Thus, if a person has existing or present bodily restraint, directing influence, domination, or regulation, of an automobile, while under the influence of intoxicating liquor he commits a misdemeanor within the provisions of [the statute].

321 P.2d at 618. *Accord State v. Ghylin*, 250 N.W.2d 252, 253 (N.D.1977) (car in ditch, driver getting out of car, keys in hand, held actual physical control); *Hughes v. State*, 535 P.2d 1023, 1024 (Okla.Crim.App.1975) (car at 90° angle to road, defendant behind wheel, head at passenger seat, key in ignition, engine off, held actual physical control); *Commonwealth v. Kloch*, 230 Pa.Super. 563, 327 A.2d 375 (1975) (defendant asleep, car parked mostly on highway, engine running, held in actual physical control); *State v. Smelter*, 36 Wash.App. 439, 674 P.2d 690 (1984) (engine off, car partly on left shoulder, vehicle out of gas, held actual physical control); *Adams v. State*, 697 P.2d 622 (Wyo.1985) (vehicle off highway, engine off, no lights on, keys in ignition, driver unconscious behind steering wheel, held in actual physical control).

5. *See generally* Annotation, *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 (1979). The annotation observes that there are three key terms in DWI statutes: "driving," "operating" and "being in actual physical control." Alaska statutes use all three terms. Actual physical control is the broadest term.

6. *See, e.g., Ghylin*, 250 N.W.2d at 253 (car in ditch); *State v. Trucott*, 145 Vt. 274, 487 A.2d 149, 151 (1984) (truck parked in "pull-off"); *Smelter*, 674 P.2d at 691 (car partly off shoulder of interstate); *Adams*, 697 P.2d at 623 (car off highway about 20 feet).

7. *See also Garcia v. Schwendiman*, 645 P.2d 651 (Utah 1982) (defendant was found seated behind the steering wheel in the "process of starting his motor vehicle" by attempting to turn on the ignition, held that a motorist behind the steering wheel with possession of the ignition key and apparent ability to start and move the vehicle satisfies actual physical control). *Cf. Palme v. Commissioner of Public Safety*, 366 N.W.2d 343, 345 (Minn.App.1985) (under a slightly broader statute, driver found asleep in parked truck with engine turned off was in physical control because "if left alone, the driv-

the DWI ordinance is "to deter persons from being found under circumstances in which they can directly commence operating a vehicle while they are under the influence of alcohol. . . ." *Id.* at 87.

We have similarly determined that the general purpose of our drunk driving laws is to deter persons from driving while under the influence of alcohol or drugs. In *Jacobson* we adopted the language of *Webb* to the effect that an intoxicated person merely sitting behind the steering wheel is a threat. *Jacobson*, 551 P.2d at 938 (quoting *Webb*, 274 P.2d at 340). Two years later in *Ebona v. State*, 577 P.2d 698, 701 (Alaska 1978), we observed that drivers impaired by intoxication present a substantial risk to the driving public. *See also Caulkins v. State, Dep't of Public Safety*, 743 P.2d 366 (Alaska 1987) (state may revoke license of intoxicated person who operated motor vehicle in private parking lot). Recently, in *Tulowetzke v. State, Dep't of Public Safety*, 743 P.2d 368 (Alaska 1987), we decided that treating multiple convictions separately for purposes of sentencing promotes public safety by extending the amount of time a driver's license is revoked.[8]

[2] We conclude that the circumstances of this case establish that Conley was in actual physical control of her vehicle. She was seated in the driver's seat behind the steering wheel. She had possession of the ignition key and was attempting to put the key in the ignition. She was in such condition that she was physically capable of starting the engine and causing the vehicle to move. We conclude that given these factors of control it is not necessary that the engine be running.

[3] Conley argues that the state did not introduce evidence at the hearing to show Conley's car was operable at the time of her arrest. The state responds that in this case no showing has been made that the car was not operable and that the DOPS is entitled to presume that the car was operable. We agree that a finding that the car is "reasonably capable of being rendered operable" is required in civil driver's license revocation proceedings. *See State v. Smelter*, 36 Wash.App. 439, 674 P.2d 690, 693 (1984).

[4] Although no evidence was offered specifically on the issue of operability, the record supports the hearing officer's finding that Conley's car was operable. The state need only prove its case by a preponderance of the evidence. AS 28.15.166(j). Conley sat down behind the steering wheel, moved the keys to the ignition and told O'Leary she was going to drive home. Clearly Conley assumed the car was operable and the DOPS is entitled to infer operability in the absence of evidence to the contrary.

III. CONCLUSION

The decision of the superior court is REVERSED and the case is REMANDED with instructions to affirm the administrative decision revoking Conley's license.

Wade TRUESDELL, Plaintiff.

v.

The HALLIBURTON COMPANY, INC., Defendant.

No. S-2259.

Supreme Court of Alaska.

April 15, 1988.

On certified questions for the United States District Court for the District of

er might indeed start the truck and attempt to drive home.")

8. *Lundquist v. Dep't of Public Safety*, 674 P.2d 780, 783 (Alaska 1983), is inapposite. There we stated that the policy underlying AS 28.35.032, refusal to subject to a chemical test, is not to remove drunk drivers from the road but rather a sanction to encourage preservation of evidence. In contrast, AS 28.15.165 is clearly a penalty designed to deter drunk driving.

possible probation revocation. In order to better determine if Shewey's probation should be revoked, the trial court requested an updated psychological report. Shewey was then examined by Dr. Anthony M. Mander, a licensed clinical psychologist. Dr. Mander's conclusions were:

> The results of the present evaluation suggest that Mr. Shewey suffers from a severe Personality Disorder. There is no evidence of major affective disorder, organic brain dysfunction or psychotic illness. The personality structure of this man is basically Anti-Social with Narcissistic Tendencies. He is aggressive and impulsive and presents, I believe, a significant risk of danger to the community. At the present time he appears to be under a greater stress than ordinarily might be true, which makes him even more likely to act out in an impulsive manner. Comparison of present test findings to past evaluations suggest that little progress has been made in the difficulties which brought him into the correctional setting in the first place.

Superior Court Judge Thomas E. Schulz revoked Shewey's probation and directed that he serve the remaining five years on his sentence.

[1] Shewey first argues that Judge Schulz prejudged the probation revocation because he felt that Shewey had initially received too lenient a sentence on the second-degree murder charge. The record does not bear out this claim. The hearing on the probation revocation was held on August 1, 1986. At that time, Judge Schulz indicated that he was thoroughly familiar with the case, having reviewed the updated presentence report, heard the parties' arguments and given Shewey his right to allocution. The court elected to reserve judgment, however, until an updated psychological report could be obtained. The matter was therefore continued until December 15, 1986, to permit Dr. Mander to interview Shewey. While Judge Schulz did indicate that Shewey had initially received a lenient sentence, he did not rush to judgment, but in fact delayed ruling on the revocation until the psychological report was prepared. We find no error in Judge Schulz's handling of the probation revocation.

[2] Shewey next argues that it is unreasonable to revoke his probation and require that he serve five additional years solely on the basis of a criminal mischief conviction in Oregon, particularly for conduct which would have been a misdemeanor had it occurred in Alaska. In Judge Schulz's view however, the incident in Oregon served to validate the psychological report which indicated that Shewey was still extremely dangerous and that his years of incarceration, despite consistent good conduct reports, had not served to ameliorate this dangerousness.

Given Shewey's background, the seriousness of his initial offense, the significance of the Oregon incident as a predictor of future dangerousness, and the trial court's consideration of other relevant sentencing factors, we conclude that Judge Schulz did not err in revoking Shewey's probation and requiring him to serve the previously suspended five years.[4] The sentence imposed was not clearly mistaken. *McClain v. State*, 519 P.2d 811, 813–14 (Alaska 1974).

The judgment of the superior court is AFFIRMED.

STATE of Alaska, Petitioner,

v.

Frank STAGNO, Respondent.

No. A-1585.

Court of Appeals of Alaska.

July 17, 1987.

Rehearing Denied Sept. 23, 1987.

The Superior Court, Fourth Judicial District, Fairbanks, H.E. Crutchfield, J.,

4. *See, e.g., State v. Chaney*, 477 P.2d 441, 443–44 (Alaska 1970).

during sentencing for DWI conviction concluded it lacked authority to revoke driver's license or require forfeiture of airboat. State petitioned for review. The Court of Appeals, Coats, J., held that: (1) airboat is not motor vehicle of type for which driver's license is required; (2) driver's license is not required for operation of airboat on land; (3) statute requiring revocation of driver's license of person convicted of DWI for operation of motor vehicle for which driver's license is required does not apply; and (4) statute authorizing forfeiture of motor vehicle of type for which driver's license is required does not apply.

Affirmed and remanded.

1. Automobiles ⇐137

Person who drove airboat over land on public property was not required to have a driver's license. AS 28.15.011.

2. Automobiles ⇐144.1(1)

Statute requiring revocation of driver's license if person is convicted of DWI for operating motor vehicle for which driver's license is required does not apply to person driving airboat over land. AS 28.15.181(c), 28.35.030.

3. Forfeitures ⇐3

Statute authorizing forfeiture, following DWI conviction, of motor vehicle of type for which driver's license is required does not apply to airboat operated on land. AS 28.35.030.

Jeffrey O'Bryant, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, Grace Berg Schaible, Atty. Gen., Juneau, for appellant.

Dick L. Madson, Fairbanks, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

The issue presented in this case is whether a court may revoke the driver's license and forfeit the vehicle of a person convicted of driving while intoxicated on public property in an airboat. The trial judge, Judge H.E. Crutchfield, ruled that he had no authority to revoke a driver's license or forfeit the vehicle under these circumstances.

Frank Stagno spent the evening of August 23, 1985, airboating on the Chena and Tanana rivers with two friends. Stagno was operating a fifteen-foot 1985 Air Gator airboat, powered by a 455 cubic inch Buick engine. The three men headed back to Fairbanks around midnight or 1:00 a.m. on August 24, 1985. They beached their airboats and went to a local bar where they drank alcoholic beverages. Stagno's friends each bet him $200 that he could not take them, via airboat, from their present location to a nearby topless bar. The destination was about three-quarters of a mile away, over land. Stagno apparently accepted the bet, because the three men boarded Stagno's airboat, and headed for the next bar.

Herbert Sobey, who had driven from Anchorage to Fairbanks on business, caught sight of the "vehicle" in his rearview mirror. Sobey thought that it was an airplane about to crash into the bed of his truck and kill him. Sobey eventually realized that it was an airboat moving on land. He reported the incident to the night personnel at his motel, who then called the Alaska State Troopers.

Meanwhile, Stagno was contacted by airport security police. They told him to return the boat to the water since it was a traffic hazzard. As Stagno was complying, he was stopped by a state trooper who ultimately arrested him for driving while intoxicated (DWI). Stagno's Intoximeter reading was .197. Following a jury trial, Stagno was convicted of DWI. It was his third such conviction in ten years.

At sentencing on May 30, 1986, the state pointed out that Stagno was subject to the mandatory minimum penalties for DWI: thirty days in jail, a $1,000 fine, and alcohol rehabilitation counseling. Stagno did not challenge this assertion, and the court imposed sentence accordingly. The state also argued that Judge Crutchfield was re-

quired to revoke Stagno's driver's license and was authorized to forfeit the airboat. Judge Crutchfield concluded that he did not have the authority to take either of those actions. The state petitioned for review. Stagno also urged us to resolve this question in order to help clarify the status of his driver's license with the division of motor vehicles. We accepted review.

The relevant statutes which authorize the revocation of a driver's license and forfeiture of a motor vehicle are AS 28.15.181, AS 28.35.030, and AS 28.35.036. They provide, in pertinent part:

AS 28.15.181. Court suspensions, revocations, and limitations. (a) Conviction of any of the following offenses is grounds for the immediate revocation of a driver's license:

....

(5) driving a motor vehicle while intoxicated;

....

(b)(2)(c) A court convicting a person of an offense described in (a)(5) or (8) of this section *arising out of the operation of a motor vehicle for which a driver's license is required* shall revoke that person's driver's license.... The court may not ... grant limited license privileges for the following periods:

....

(3) not less than ten years if, within the preceding ten years, the person has been previously convicted of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(A) an offense described in (a)(5) or (8) of this section. [Emphasis added.]

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

....

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

(c) ... 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. [Emphasis added.]

AS 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.... [Emphasis added.]

In arguing that Judge Crutchfield had the authority to revoke Stagno's driver's license, the state points to AS 28.15.011 which provides, in pertinent part:

Drivers must be licensed. (a) A person may not be denied the privilege to drive a motor vehicle upon a highway in the state, except as prescribed by law.

(b) Every person exercising the person's privilege to drive, or exercising any degree of physical control of a motor vehicle *upon a highway, vehicular way or area, or other public property in this state*, is required to have in the possession of the person a valid Alaska driver's *license issued under the provisions of this chapter for the type or class of vehicle driven*, unless expressly exempted by law from this requirement. [Emphasis added.]

[1] The state argues that this statute requires everyone who drives a motor vehicle on public property to have a driver's license. In deciding that this statute did not require a person who drove an airboat on public property to have a driver's license, Judge Crutchfield pointed out that a former version of this statute seemed to require a person to have an operator's license to operate any motor vehicle on a highway. Former AS 28.15.010 provided:

Operators must be licensed. No person, except those hereinafter expressly exempted, may drive a motor vehicle upon a highway in this state unless the person is licensed as an operator under this chapter.

Judge Crutchfield concluded that current AS 28.15.010 seemed to emphasize that a person had to have a license "for the type and class of vehicle driven" rather than

requiring every person who drove a motor vehicle on a highway to have a driver's license. Judge Crutchfield also pointed out that AS 28.15.041 authorizes the Commissioner of Public Safety to "provide by regulation for the classification of drivers' licenses." The regulations established by the Commissioner do not provide for a driver's license for an airboat.[1] In other words, there are driver's license provisions for certain types of vehicles, and no such provisions for other types of vehicles, such as airboats. This supports Judge Crutchfield's conclusion.

[2, 3] We are even more persuaded to uphold Judge Crutchfield's ruling by the language of the forfeiture statute, passed in 1983. Alaska Statute 28.35.036 provides, in pertinent part:

> *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.... [Emphasis added.]

It seems reasonable that this statute must be read in conjunction with the other statutes providing for penalties for DWI. Alaska Statute 28.35.036 states directly that it is concerned with the types of vehicles for which a license is required, rather than dealing with the location in which a vehicle is operated (*i.e.*, on public property). Reading all the statutes in context, we conclude that an airboat is not "a motor vehicle of a type for which a driver's license is required" and that the present offense does not arise "out of the operation of a motor vehicle for which a driver's license is required." It follows that AS 28.15.181(c) and AS 28.35.030, which provide for mandatory revocation of a driver's license if the person is convicted of DWI for operating a motor vehicle for which a driver's license is required, do not apply to Stagno. Neither does AS 28.35.036, which authorizes forfeiture of a motor vehicle "of a type for which a driver's license is required."[2]

However, we note that there is an argument that AS 28.15.181(a)(5) authorizes the court to revoke Stagno's driver's license, even if the mandatory revocation provisions of AS 28.15.181(c) and AS 28.35.030 would not apply to him. The state has not argued this position. In deciding this case, we found Judge Crutchfield's analysis of the interplay among the various statutes and their predecessors to be distinctly helpful in deciding the issues which were presented to us. Consequently, we are re-

1. *13 AAC 08.150. CLASSES OF LICENSES.* (a) An applicant for a classified license, or for an endorsement to a classified license must submit to an examination appropriate to the class of license or endorsement for which the person is applying.

(b) The classifications of driver [sic] licenses, and the vehicles which a holder of each class or subclass of license may operate, are as follows:

(1) Class A License—motor-driven cycles, cars, buses, trucks, and towed vehicles.

(2) Class B License—Motorized cycles. A person holding a Class "B" driver's license may only operate the vehicles designated in one of the following subclassifications as indicated upon the person's license:

(A) B-1: motorcycles, motor-driven cycles, and motorized bicycles, singly or in combination with trailers or sidecars designed to be used with these vehicles;

(B) B-2: motor-driven cycles and motorized bicycles.

(c) To operate a school bus transporting school children, a person is required to have a valid Class A license, and a valid school bus driver permit as prescribed in AS 28.15.041(b) and 13 AAC 08.005—13 AAC 08.060. This permit is the "license" referred to in AS 28.15.041(b).

(d) A holder of a classified license who wishes to change the classification on the license, or to obtain an additional endorsement for another class of license must make an application for a change or endorsement, and must submit to an appropriate examination for the change or endorsement for which the licensee is applying. An applicant for a change in classification or an endorsement must pay the appropriate fee set out in AS 28.15.271.

2. The principle of statutory construction that ambiguities in criminal statutes must be narrowly read and construed strictly against the government also supports our decision. *State v. Andrews*, 707 P.2d 900, 907 (Alaska App.1985), *aff'd*, 723 P.2d 85 (Alaska 1986); 3 C. Sands, *Sutherland Statutory Construction*, § 59.03 (4th ed. 1986).

luctant to decide this unbriefed issue without giving the district court an opportunity to rule on this issue first.

We therefore decline to decide, at this time, whether AS 28.15.181(a)(5) gives the court discretionary authority to revoke Stagno's driver's license. We remand this case to the district court for further proceedings consistent with this opinion.

The judgment of the district court is AFFIRMED and the case is REMANDED to the district court for further proceedings.

received for testifying against Stumpf. Stumpf does not cite any point in the record where the state argued that Monteiro's plea was evidence of Stumpf's guilt. Defense counsel argued during his closing, that Monteiro's testimony was not credible because of the state's agreement to drop the perjury charges. Against this background, it does not appear that the trial court was required to give the jury any instruction concerning Monteiro's plea of guilty. We accordingly find no error.

[72] Stumpf next argues that the trial court's failure to specifically instruct the jury not to consider Stumpf's custodial status as evidence of his guilt was error. The jury was instructed not to be biased against Stumpf because he had been arrested, charged, and brought to trial. Defense counsel, however, had specifically requested language concerning Stumpf's custodial status to be added to the instruction which was given. Judge Ripley agreed to instruct the jury to disregard Stumpf's being in custody. The state also agreed to the inclusion of language addressing the custody issue. Apparently, an oversight prevented the language from being added to the court's instruction before it was given.

It seems clear that the court would have cured this omission had it been brought to its attention by Stumpf. Apparently, however, none of the parties noticed this omission. Therefore, under these circumstances, we conclude that the instruction which the trial court gave was adequate. We find no reversible error.

CUMULATIVE ERROR

[73] We have formerly recognized that the cumulative effect of erroneous admissions of evidence may result in reversal. *Pletnikoff v. State*, 719 P.2d 1039, 1045 (Alaska App.1986). In several parts of this opinion we have found error, but concluded the error was harmless. We have also considered the cumulative effect of the erroneous admissions of evidence in this case. We find no grounds for reversal.

The conviction is AFFIRMED.

SINGLETON, Judge, concurring.

I concur in the judgment in this case. I am troubled that a number of legal errors occurred during this protracted trial. I am particularly concerned by the trial court's handling of the co-conspirator exception to the hearsay rule, both in the rulings on testimony before the grand jury and rulings regarding testimony at trial. Many of Arnold's casual statements to bystanders were admitted on the theory that they were made in furtherance of a conspiracy to collect money from T.S. for the murder of Hui Yi. This theory is not persuasive. After careful review of the record, however, and an evaluation of the arguments made in the parties' briefs, I am satisfied that the errors which occurred were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). I reach this conclusion both with regard to the errors viewed in isolation and their possible cumulative impact. I am satisfied beyond a reasonable doubt that the jury verdict against Stumpf was not influenced by the errors that occurred, but resulted from the overwhelming admissible evidence against him.[1]

STATE of Alaska, Petitioner,

v.

Steve G. ROBERTSON, Respondent.

No. A-2330.

Court of Appeals of Alaska.

Feb. 5, 1988.

Defendant was convicted in the Third Judicial District Court, Anchorage, Natalie

1. The majority has elected to publish an opinion in this case despite the rather cursory treatment it gives to many of the issues. I fear that readers of the majority opinion may misinterpret it, causing significant errors in other cases.

K. Finn, J., of driving in violation of limited license, and State petitioned for review of sentence. The Court of Appeals, Bryner, C.J., held that defendant, whose license was revoked for 90 days following his DWI conviction, but who was issued limited license for final 60 days of revocation, was subject only to 10-day minimum term upon his conviction for driving in violation of conditions of limited license.

Affirmed.

Automobiles ⇐359

Defendant, whose license was revoked for 90 days following his DWI conviction, but who was issued limited license for final 60 days of revocation, was subject only to 10-day minimum jail term upon his conviction for driving in violation of conditions of limited license. AS 28.15.181(c)(1), (e), 28.15.291(a, c).

Brent Cole, Asst. Dist. Atty., Dwayne W. McConnell, Dist. Atty., Anchorage, and Grace Berg Schaible, Atty. Gen., Juneau, for petitioner.

Jeffrey D. Mahlen, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for respondent.

Before BRYNER, C.J., and SINGLETON, J.

OPINION

BRYNER, Chief Judge.

The issue presented in this petition for review is whether a person who drives in violation of a limited license that is issued following a conviction for driving while intoxicated (DWI) is subject to a minimum jail term of ten days or thirty days. We have decided to grant the state's petition because we believe that it involves an important question of law upon which there is substantial ground for difference of opinion, and that an immediate decision will advance the public interest. Alaska R.App.P. 402(b)(2). We affirm the district court's ruling that the ten-day minimum sentence is applicable.

Steve G. Robertson was convicted of DWI, and his driver's license was revoked for a period of ninety days, as required for a first DWI offender under AS 28.15.181(c)(1).[1] In accordance with the provi-

1. AS 28.15.181 provides, in relevant part:

Court suspensions, revocations, and limitations. (a) Conviction of any of the following offenses is grounds for the immediate revocation of a driver's license:

....

(5) driving a motor vehicle while intoxicated;

....

(c) A court convicting a person of an offense described in (a)(5) ... of this section arising out of the operation of a motor vehicle for which a driver's license is required shall revoke that person's driver's license.... The court may not, except as provided in (e) of this section, grant limited license privileges for the following periods:

(1) not less than 90 days if, within the preceding 10 years, the person has not previously been convicted of an offense

(A) described in (a)(5) .. of this section....

(2) not less than one year if, within the preceding 10 years, the person has been previously convicted of one offense

(A) described in (a)(5) ... of this section....

(3) not less than 10 years if, within the preceding 10 years, the person has been previously convicted of more than one of the following offenses or has more than once been previously convicted of one of the following offenses:

(A) an offense described in (a)(5) ... of this section....

....

(e) A court revoking a driver's license under (c) of this section, or sustaining the action of the department under AS 28.15.165(c), may grant limited license privileges for the final 60 days during which the license is revoked if the

(1) revocation was for driving while intoxicated but not if the revocation was for refusal to submit to a chemical test of breath under AS 28.35.032;

(2) person has not been previously convicted within the preceding 10 years of an offense

(A) described in (a)(5) ... of this section....

(3) court determines that the person's ability to earn a livelihood would be severely impaired; and

(4) court determines that a limitation under AS 28.15.201 can be placed on the license that will enable the person to earn a livelihood without excessive danger to the public.

sions of AS 28.15.181(e),[2] the sentencing court issued Robertson a limited license for the final sixty days of the period of revocation. The license allowed him to drive during his hours of employment.

Robertson was thereafter convicted, under AS 28.15.291, of driving in violation of his limited license. Upon conviction, he contended that he was subject to the ten-day minimum jail sentence specified in subsection (a) of that statute; the state contended that Robertson was subject to the thirty-day minimum term specified in subsection (c). Alaska Statute 28.15.291 provides, in relevant part:

> *Driving while license cancelled, suspended, revoked or in violation of limitation.* (a) A person may not drive a motor vehicle on a highway or vehicular way or area at a time when that person's driver's license, or privilege to drive has been canceled, suspended or revoked in this or another jurisdiction or when driving in violation of a limitation placed upon that person's license or privilege to drive in this or another jurisdiction. Except as provided in (c) of this section, upon conviction of a violation of this section, the court shall impose a sentence of imprisonment of not less than ten days.
>
> ....
>
> (c) The court shall impose a sentence of imprisonment of not less than 30 days ... upon conviction of a violation of this section if the person's driver's license was revoked under circumstances described in AS 28.15.181(c)(1) [requiring a license suspension of 90 days upon a first conviction of DWI]. The court shall impose a sentence of imprisonment of not less than 90 days ... upon conviction of a violation of this section if the person's driver's license was revoked under circumstances described in AS 28.15.181(c)(2) or (3) [requiring one-year and ten-year revocations upon conviction for second and subsequent DWI offenses]....

District Court Judge Natalie K. Finn apparently concluded that, because Robertson was driving in violation of a limited license issued under AS 28.15.181(e), he was subject to the ten-day minimum jail term prescribed in subsection (a) of AS 28.15.291, rather than to the thirty-day minimum term prescribed in subsection (c). Judge Finn sentenced Roberterson to a term of ninety days with seventy-five days suspended. The state then filed this petition for review.

The issue on review is whether, at the time of his offense, Robertson's "driver's license was revoked under circumstances described in AS 28.15.181(c)(1)." *See* AS 28.15.291(c). The state contends that Robertson was subject to the thirty-day minimum term because his license was revoked for ninety days under AS 28.15.181(c)(1) following his DWI conviction. Robertson contends that he was subject only to the ten-day minimum term. He points out that, while his license was initially revoked for ninety days under AS 28.15.181(c)(1), a limited license was issued to him for the final sixty days of the revocation, in accordance with AS 28.15.181(e). Robertson thus reasons that his conviction in this case was for driving in violation of the conditions of a limited license issued under AS 28.15.181(e), rather than for driving while his license was revoked under AS 28.15.181(c)(1).

Robertson's argument is supported by the express language of AS 28.15.291(a), under which the legislature has expressly differentiated between driving while a license is revoked and driving "in violation of a limitation placed upon" a license. The omission in AS 28.15.291(c) of any parallel reference to driving in violation of a limited license is arguably an indication of the legislature's intent to exclude from the minimum thirty-day jail sentence persons convicted of violating the conditions of a limited license, as distinguished from those convicted of driving with a license that is altogether revoked.

2. AS 28.15.181(e) authorizes issuance of a limited license for the final sixty days of a first DWI offender's mandatory driver's license revocation. Relevant portions of the statutory language are set out in footnote 1, above.

For the legislature to draw such a distinction would not have been wholly irrational. As Robertson correctly notes, under AS 28.15.181(e) a limited license can only be issued following a first DWI conviction, and then only if the court is able to determine that the defendant is capable of driving "without excessive danger to the public." There is, accordingly, a rational basis upon which the legislature might have relied in deciding to subject persons convicted of driving in violation of a limited license to a lesser mandatory minimum penalty than those convicted of driving while their licenses were altogether revoked.

In opposition to Robertson, the state relies on AS 28.40.100(13), which defines "revoke" to mean "termination by formal action" and provides that a revoked license "may not be reissued, renewed, or restored during the time for which [it is] revoked."[3]

While this argument may have considerable merit, it is not wholly persuasive. For when literally construed, the legislative definition of "revoked" seems flatly inconsistent with the issuance of any limited license following a license revocation. Yet, as we have seen, when a person's license is revoked under AS 28.15.181(c)(1) for a first DWI offense, AS 28.15.181(e) expressly provides the court with authority to grant "limited license privileges for the final 60 days during which the license is revoked...."

We are aware of no specific legislative history to shed light on the issue presented in this case. We believe that the reference in AS 28.15.291(c) to a driver's license that has been "revoked under circumstances described in AS 28.15.181(c)(1)" is, at best, ambiguous. As we have observed on other occasions, ambiguous penal statutes must be construed in favor of the accused. *See, e.g., Thomas v. State*, 694 P.2d 789, 791 (Alaska App.1985); *State v. Rastopsoff*, 659 P.2d 630, 640 (Alaska App.1983). Accordingly, we conclude that AS 28.15.291(c) must, in the context of this case, be read to exclude any person who is convicted under AS 28.15.291(a) for driving in violation of "a limitation placed upon the person's license" under AS 28.15.181(e).[4]

The judgment of the district court is AFFIRMED.

COATS, J., not participating.

3. Similarly, the state cites to AS 28.15.211(d), which imposes on a person whose license has been revoked the burden of applying for a new license. The state points out that similar provisions have been construed to mean that, once revoked, a driver's license remains revoked until the driver whose license has been revoked applies for and obtains a valid license. *See, e.g., State v. Foster*, 54 Or.App. 405, 635 P.2d 11, 12 (1981).

4. Nothing in our opinion is meant to suggest that a trial court could not, as a matter of discretion and where warranted by the facts of the individual case, impose a jail sentence more stringent than the applicable mandatory minimum sentence.

STATE of Alaska, Appellant,

v.

James H. NOLLNER, Appellee.

No. A-1937.

Court of Appeals of Alaska.

Feb. 11, 1988.

Defendant was indicted on two counts of sexual abuse of minor in first degree, and defendant filed motion to dismiss indictment. The Superior Court, Fourth District, Jay Hodges, J., granted defendant's motion, and State appealed. The Court of Appeals, Coats, J., held that statements made by three-year-old sexually abused child during her medical treatment identifying defendant presented sufficient evidence for grand jury to indict.

Reversed.