



DPS TRAINING BULLETIN

LEGAL BULLETIN NO. 150
December 26, 1990

RIGHT TO CONSULT PRIVATELY WITH ATTORNEY PRIOR TO BREATHALYZER TEST

Reference: Bruce G. Reekie
v.
Municipality of Anchorage

Alaska Court of Appeals
Opinion No. 1095
P.2d
November 30, 1990

FACTS:

Reekie was arrested for DWI, brought to the police station and placed in the intoximeter room where police tape recorded his processing. Reekie asked to call his attorney, George Freeman. Freeman was not available, but returned the call a few minutes later. Reekie took Freeman's call in the hallway next to the intoximeter room. A police officer stood about six feet from Reekie to "keep an eye on him," so he would not put anything in his mouth during the twenty-minute observation.

The tape recorder in the intoximeter room was left on and picked up parts of Reekie's conversation. The arresting officers also heard some of Reekie's conversation. A police officer told Reekie to "ask him (his lawyer) about the test because in about ten minutes.....you're going to be asked to take the test." Several minutes later, the officer asked to speak with Freeman, the lawyer. He explained the implied consent law and told Freeman that Reekie would soon be required to take the breathalyzer test. Several minutes later, while Reekie was talking to Freeman, Reekie was informed he would have to terminate the conversation.

Reekie declined to take the test without Freeman being present. The officer informed Reekie that he did not have a right to have his attorney present. Reekie was subsequently charged with refusal to take the breath test.

At a suppression hearing, both Reekie and Freeman testified that police were talking to Reekie about his conversation with his attorney. Freeman felt he could not freely discuss the case with Reekie, because he believed that someone was listening, or could listen, to the conversation. Reekie was aware that officers had a recorder running and felt that he could not speak openly to Freeman while officers stood right next to him.

ISSUE NO. 1:

Was Reekie afforded the opportunity to consult privately with his attorney?

HELD: No.

ISSUE NO. 2:

Should the evidence of his refusal to take the breath test be suppressed?

HELD: Yes.

REASONING:

1. The record reveals that officers in this case did virtually nothing to accommodate Reekie's right to consult privately with his attorney. (emphasis added)
2. The officers could easily have turned off the recorder in the intoximeter room while Reekie spoke on the hall telephone and they could have assured Reekie that none of the statements overheard could be used against him. (emphasis added)
3. The officers repeatedly engaged in conduct that affirmatively intruded on Reekie's attempt to communicate with his counsel.
4. A DWI arrestee is not entitled to complete privacy in communicating with counsel, but police have a duty to take affirmative steps to ensure a reasonable opportunity to converse privately.

NOTES:

The arrestee should be informed that none of his statements can be used against him.

Review of the following cases and a general review of Section P of the Alaska Legal Briefs manual is recommended:

Copelin & Miller v. State, Legal Bulletin No. 64--right to counsel prior to breathalyzer.

Farrell v. Anchorage, Legal Bulletin No. 84--right to counsel prior to breathalyzer.

Stephan & Harris v. State, Legal Bulletin No. 99--the mandatory recording of statements from persons in custody.

NOTE TO SUBSCRIBERS TO THE ALASKA LEGAL BRIEFS MANUAL:

Add this case to Section P of your Contents and Text. File Legal Bulletin No. 150 numerically under Section R of the manual.