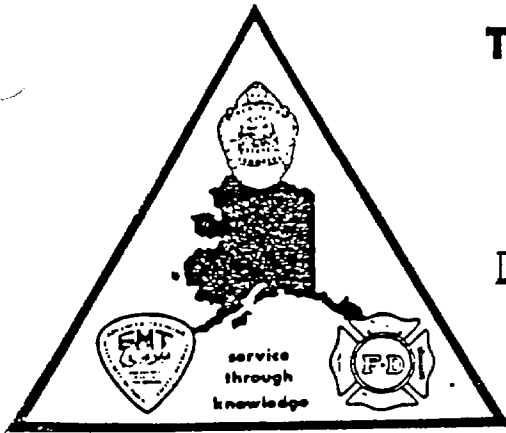


# DEPARTMENT OF PUBLIC SAFETY

## TRAINING ACADEMY

LEGAL BULLETIN NO. 64  
March 14, 1983



### RIGHT TO COUNSEL PRIOR TO DECIDING TO SUBMIT TO BREATHALYZER

Reference: Charles G. COPELIN

v.  
State of Alaska

Joe Ray MILLER

v.  
Anchorage

Alaska Supreme Court  
Opinion No. 2617  
659 P.2d 1206  
February 18, 1983

#### FACTS:

In separate cases, COPELIN and MILLER were arrested and convicted for drunk driving. After their arrests, both were asked to submit to breathalyzer examinations and both asked for the opportunity to contact attorneys first. Permission was denied. COPELIN and MILLER were told that they did not have the right to counsel until after they decided to take the test.

COPELIN did not take the test nor comply with requested field sobriety tests; he was videotaped throughout this refusal. MILLER did take the breathalyzer test. At trial, COPELIN moved to suppress the videotape of his actions and MILLER moved to suppress the results of his breathalyzer. Lower courts refused to suppress evidence and appeals were filed.

#### ISSUE:

When a person is arrested for operating a motor vehicle while under the influence, must he be afforded a reasonable opportunity to contact an attorney before being required to decide whether or not to submit to a breathalyzer test?

HELD: Yes.

#### REASONING:

1. Alaska Statute 12.25.50 sets forth the rights of a prisoner after arrest. Subsection (b) of that statute provides:

"Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with his attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relatives or friends of the prisoner, have the right to immediately visit the person arrested." (emphasis added)

2. The proper procedure by which breathalyzer examinations are to be given (7 Alaska Administrative Code 30.020) requires that the subject be observed for at least fifteen minutes immediately prior to testing to assure that the subject does not vomit or place anything in his mouth which might invalidate the test results.

3. Since a minimum of a fifteen-minute wait is necessary before administering the breathalyzer test, no additional delay is incurred by acceding to a request to contact an attorney during that time.  
(emphasis added)

4. The statutory right to contact and consult with counsel 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 statute.  
(emphasis added)

5. Reasonableness will depend on the circumstances of each case, such as the amount of time between stop and the transportation to the station, when the request is made and how much time is needed to set up the test.

6. Where the important chemical testing procedures are not unreasonably delayed, the driver should, upon request, have the benefit of the advice of his own counsel with whom he has a statutory right to communicate. (emphasis added)

NOTES:

If the defendant is not afforded an opportunity to contact an attorney, the fact that he refused to take a breathalyzer will be excluded at trial. It would appear that the best time to allow the defendant to communicate with his attorney would be during the fifteen-minute observation time prior to the test. If the defendant cannot make contact with an attorney, it will be up to you to document the steps and times allowed to make contact to establish the fact that any additional time would have been unreasonable and would have had an adverse effect on the test.