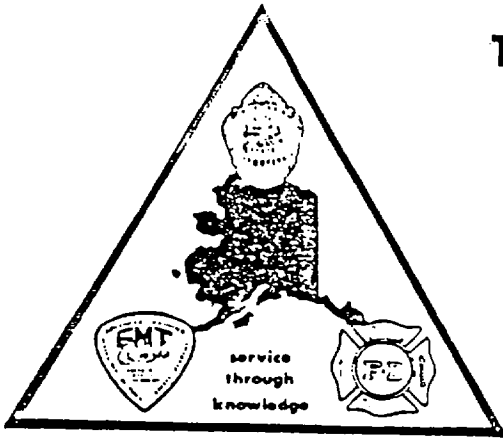


DEPARTMENT OF PUBLIC SAFETY

TRAINING ACADEMY



LEGAL BULLETIN NO. 84
July 7, 1984

RIGHT TO COUNSEL PRIOR TO DECIDING TO SUBMIT TO BREATHALYZER

Reference: Kevin FARRELL
v.
Municipality of Anchorage

Alaska Court of Appeals
Opinion No. 386
682 P.2d 1128
June 22, 1984

FACTS:

FARRELL was arrested for DWI at about 1:00 a.m. and brought to the police station for a breathalyzer test. At about 2:00 a.m., prior to any tests, he asked permission to call his attorney. He was allowed to make the call; however, during this conversation with his attorney, a police officer stood next to him taking notes. FARRELL asked the officer if he could speak privately with his attorney, but the officer refused. The attorney spoke with the officer and asked if he could speak privately with his client, but the officer still refused. The attorney said he would come to the police station. FARRELL requested to speak with the attorney prior to taking the breathalyzer. The officer refused his request. FARRELL was placed in front of a video camera and the officer attempted to have him perform sobriety tests. FARRELL repeatedly requested to talk with his attorney and his requests were repeatedly denied. Ultimately, he did perform some sobriety tests on video, but refused to take the breathalyzer without first seeing his attorney.

While FARRELL was being videotaped, his attorney arrived at the police station and asked to consult with FARRELL. Permission was denied.

FARRELL was charged with two counts--DWI and refusal to take the breathalyzer test. Prior to trial, the charge of refusing to take the breathalyzer was dismissed. FARRELL moved to suppress all evidence, including the video tape where he refused to take the breathalyzer, but the motion was denied.

ISSUE:

Because FARRELL was not afforded reasonable opportunity to consult privately with his attorney, should the evidence be suppressed?

HELD: Yes.

REASONING:

1. State Statute, AS 12.25.150(b), and Criminal Rule 5(b) provide for a "private" visit with an attorney immediately after arrest.

2. While the statutory right to contact and consult counsel requires reasonable efforts to assure that confidential communications will not be overheard, observation of the arrestee may be maintained, and physical segregation or visual isolation is not required. (emphasis added)

3. Despite specific requests by both FARRELL and his attorney, the police failed to make even minimal effort to accommodate FARRELL's right to communicate privately with his attorney.

NOTES:

You should review Copelin v. State, Legal Bulletin No. 64, where the state Supreme Court has already addressed this issue.

You should make it a habit to be as reasonable as circumstances dictate to allow a defendant to consult privately with his attorney. This does not mean the defendant should be out of your sight. Just try to be as fair as you can and instruct the attorney what not to do--such as allowing the defendant to smoke, chew gum, etc. If the attorney appears to be refusing to comply with your instructions, terminate his contact with the defendant and document your observations.