

# ANCHORAGE POLICE DEPARTMENT



LEGAL BULLETIN NO. 21

## BUREAU BULLETIN



April 3, 1979

### INVOLUNTARY CHEMICAL TEST FOR BLOOD ALCOHOL---O.M.V.I.

Reference: Anchorage, a Municipal  
Corporation  
v.  
Jerry Dean BUFFINGTON

Alaska Supreme Court  
File Nos. 4016, 4037,  
3827 and 4046  
592 P2d 1184  
Opinion No. 1824  
March 30, 1979

#### FACTS:

This opinion consolidates four cases (Anchorage v. Arthur GEBER-File No. 4016, David EARLEY v. State of Alaska-File No. 4037, Jennie L. WILLIS v. Anchorage-File No. 3827, and the above-referenced case which is File No. 4046. Each of these cases raised similar legal issues to the other cases. Both the Anchorage Ordinance Section 9.28.020, which prohibits O.M.V.I., and the State Statute AS 28.35.030 are affected. After the defendants were arrested, they refused to submit to a breathalyzer examination. Defendants were taken to a medical facility where blood was extracted, over their objections, for the purpose of testing for presence of alcohol. Field-sobriety tests had also been given and a video tape made of them. The defendants in these cases either appealed or petitioned the Supreme Court "for review".

#### ISSUE NO. 1:

Can the results of a chemical test for the presence of alcohol be used against the defendant if the blood was extracted against his or her will?

HELD: No.

#### ISSUE NO. 2:

Does the defendant have a right to have counsel present during the video taping of field-sobriety tests performed at the request of the arresting officer?

HELD: No.

#### REASONING:

1. AS 28.35.032(a), Refusal to Submit to Chemical Test, states that a chemical test shall not be given if there is refusal to submit to a breathalyzer test. This means any chemical test, be it of the breath, blood, urine, or otherwise. The court reasoned that the legislature had expressly prohibited other forms of testing by its enactment of AS 28.35.032(a). "If a person under arrest refuses the request of a law-enforcement officer to submit to a chemical test of his breath as provided in sec. 31 of this chapter, after being advised by the officer that his refusal will result in a suspension, denial or revocation of his

license, a chemical test shall not be given."

2. There is no right to have counsel present during the video taping of a field-sobriety test. It is common knowledge that the ability to perform sobriety tests is influenced by the percentage of alcohol in his or her blood and that percentage diminished with the passage of time. If the tests are to provide any real indicator of the degree of impairment, they must be performed as soon as possible. Thus, the court reasoned that it would be both impractical and unreasonable to require the presence of counsel.

NOTES:

The court did not hold that the extraction of blood, under the circumstances, violated any constitutional right of the accused. It held only that such action was prohibited by the existing statute.

This opinion simply states that it is against the law (not constitution) to extract blood from a defendant arrested for O.M.V.I. absent his consent. If there is a remedy, it is in the State Legislature's capability to change the law. Anchorage's District Attorneys seem to interpret this opinion as precluding the obtaining of a search warrant to seize blood from a defendant who is under arrest.

It also appears that if a defendant is arrested for homicide as a result of O.M.V.I., the holding in this case will still apply. Remember---you can still try to get his consent! What still seems to be an "open question" is the medical records of the defendant if blood was drawn by medical people pursuant to treatment, say as a result of an accident. If the doctor ordered the test (not acting as an agent of the police), perhaps this information may be subpoenaed or reached by a search warrant.

Remember---this opinion only holds to O.M.V.I. arrests. It is still permissible to seize evidence incident to arrest in all other cases; for example, the rape case where we seize clothing or perhaps hairs from the defendant; or a shooting case where we can still swab the hands of the suspect, over his objections, without a warrant as long as the seizure is made pursuant to a lawful arrest. Similarly, the forceable extraction of blood in such cases, remains an open question under state law.