

## "Alaska Court of Appeals Revisits Copelin in Grossman v Alaska"

In a written opinion released September 7, 2012, the Alaska Court of Appeals revisited and clarified an Alaska Supreme Court decision from 1983. In 1983, the Alaska Supreme Court held that a person arrested for driving under the influence (DUI) has the right to attempt to contact an attorney before deciding whether or not to submit to a breath test. Copelin v State, 659 P.2d 1206 (Alaska 1983). In Grossman, the Alaska Court of Appeals was presented with the question of whether or not a person arrested for DUI has the right, under Copelin, to interrupt and stop the administration of the breath test itself - not the 15 minute observation period prior to the actual test, but rather the actual testing process itself - to try and telephone or speak with an attorney. For the reasons explained below, the Alaska Court of Appeals held that a person's right to consult an attorney under Copelin does not include the right to interrupt the actual administration of the breath test.

### Facts:

The defendant, Richard Grossman, Jr., was arrested for DUI and taken to a police station for a breath test. The arresting officer informed Grossman at the outset of the 15 minute observation period that he was free to use the telephone if he would like, but Grossman made no attempt to either use the telephone or contact anyone. At the conclusion of the 15 minute observation period, the arresting officer began to actually administer the breath test to the defendant. Although he initially agreed to take the test, Grossman would not close his lips around the air tube and the machine indicated that it was not receiving an adequate sample of Grossman's breath to run the test. This sequence occurred twice. Next the officer apprised Grossman that he was legally required to take the breath test and that the officer was going to charge him with the additional crime of refusing to take the breath test unless Grossman provided an adequate sample for the machine to test on his next attempt. At this point Grossman announced that he wanted to consult with an attorney. The officer informed Grossman that while he would not allow him to consult with an attorney now (during the actual administration of the test), he would be given the opportunity to try and contact an attorney after the testing procedure had concluded. Grossman failed to provide an adequate breath sample on his third attempt, and was subsequently charged with both "DUI" and "refusal to provide a breath sample."

### Grossman's Argument on Appeal:

Grossman argues that the officer violated his rights under the Copelin opinion when the officer refused to interrupt the administration of the breath test to let him try and contact an attorney.

### Issue:

Under the Copelin opinion, did Grossman have the right to interrupt the administration of the breath test to try and telephone an attorney?

### Holding:

No, a person's right to consult an attorney under Copelin does not include the right to interrupt the actual administration of the breath test. The Copelin decision itself states that an arrestee's right to contact an attorney is "limited to a reasonable time and opportunity", and that the arresting officer is not required to allow the defendant to exercise this right in a manner that "would interfere with the prompt and purposeful investigation of the case." Copelin states that an arrestee's request to try to contact an attorney during the mandatory 15 minute observation period is reasonable, since "no additional delay is incurred by acceding to a request to contact an attorney during that time; but requests made after the observation period is complete must be evaluated under the particular facts of the case." Copelin goes on to define and explain that the reasonableness of such request "depends on

such circumstances... as the (1) amount of time between the stop and the defendant's transportation to the station, (2) when the request to contact an attorney is made, and (3) how much time is needed to set up the breath test...". "If an attorney cannot be contacted within a reasonable time, then the arrestee must decide without the advice of counsel as to whether or not they wish to take the breath test." We hold that a request to contact an attorney is "unreasonable", under the Copelin decision, if that request is made after the observation period is completed and the officer is in the middle of the actual testing process. Because Grossman was given the opportunity to contact an attorney throughout the 15 minute observation period that preceded the actual breath test, he did not have the right to wait until the observation period was concluded and then interrupt the actual administration of the breath test in order to try and contact an attorney. After the trooper began to actively administer the breath test to Grossman, he had no right under Copelin to interrupt the testing procedure. The trooper correctly informed Grossman that he would have to wait until after the testing procedure was concluded before trying to contact an attorney. Accordingly, the judgment of the district court was affirmed.