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February 10, 1987

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Code §§ 23-604 and 39-310

Dear Mr. Calhoun:

You have requested an opinion from our office regarding an apparent conflict between Idaho Code § 23-604, which prohibits public drunkenness, and Idaho Code § 39-310, which forbids prosecution of an offense where one of the elements of the offense involves drinking or being intoxicated. Specifically, you request our opinion as to whether Idaho Code § 39-310 overrules Idaho Code § 23-604, as well as other related statutes that include intoxication as an element of the offense (i.e., possession of a firearm while intoxicated, Idaho Code § 18-3302; acting as a physician while intoxicated, § 18-4202; etc.).

Conclusion

For reasons explained below, we conclude that there is an irreconcilable conflict between Idaho Code § 23-604 and the provisions of the Alcoholism and Intoxication Treatment Act as contained in chapter 37, title 18, and therefore the provisions of that Act are to be given effect over Idaho Code § 23-604, the prior "drunk in public" statute, and over the similar provisions of Idaho Code § 49-1115. Statutes dealing with intoxication by specific classes of people do not conflict with the Alcoholism and Intoxication Treatment Act and thus retain their effect.

Statutory Background

Idaho Code § 23-604, which was enacted in 1939, states:

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Drunkenness. - Any person who shall be drunk or intoxicated in any public or private road or street, or in any passenger coach, street car, or any public place or building, or at any public gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, shall be guilty of a misdemeanor.

Idaho Code § 39-310, which was enacted in 1975, states:

Criminal Law Limitations. - (1) With the exceptions of minors below the statutory age for consuming alcoholic beverages and of persons affected by the provisions of subsection (3) herein, no person shall be incarcerated or prosecuted criminally or civilly for the violation of any law, ordinance, resolution or rule that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to criminal or civil penalty or sanction.

Idaho Code § 39-310 does contain exceptions to the general legislative intent that intoxicated persons not be prosecuted but that they be offered rehabilitation. Idaho Code § 39-310(3) states:

Nothing in this act shall affect any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, or other equipment, or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons.

Analysis: The "Drunk-in-Public" Statute

Upon examination, it appears that the intent of the legislature in adopting the Alcoholism and Intoxication Treatment Act (Idaho Code §§ 39-300 - 39-312) was to preclude the prosecution of persons found to be drunk in public. This is in opposition to the earlier enacted statute, Idaho Code § 23-604, which provided statutory authority for prosecution of persons found drunk in public. For whatever reason, the legislature did not repeal Idaho Code § 23-604 when it enacted Idaho Code § 39-310.

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The enactment of the Alcoholism and Intoxication Treatment Act by the Idaho legislature in 1975 reflected an increasing awareness that efforts directed at control of public intoxication are best channeled through rehabilitation, not incarceration, of the alcohol abuser. In 1967, three authoritative commissions, the United States Crime Commission, the District of Columbia Crime Commission and the Cooperative Commission on the Study of Alcoholism, concluded that criminal law sanctions were an ineffective, inhumane, and costly method for the prevention and control of alcoholism and public drunkenness. All three commissions recommended that a public health and rehabilitation approach be substituted for the prevailing criminal law sanctions. In response to these recommendations, the American Bar Association, together with the American Medical Association, drew up a model statute called the Uniform Alcoholism and Intoxication Treatment Act (hereafter referred to as the "Act") which was subsequently adopted, in whole or in part, by twenty-two states, including Idaho.

With the widespread adoption of the Act, courts have expressed an increased unwillingness to enforce public drunkenness statutes when they conflict with the more recent provisions of the Act. The Alaska case of Peter v. State, 531 P.2d 1263 (1975), is a good example. The Alaska legislature adopted the Uniform Alcoholism and Intoxication Treatment Act in 1972 but, like Idaho, failed to repeal a prior statute making it a misdemeanor offense for a person to be upon or along a highway or street while under the influence of intoxicating liquor. In arguments before the Alaska Supreme Court, the state asserted that the Act and the prior "drunk along a highway or road" statute were not inconsistent because Alaska's Act, like Idaho's, exempted the use of alcoholic beverages at specified times and places (highway or street) or by a particular class of people (pedestrians).

The court held that the state's argument, if accepted, would have emasculated the statute:

Given the expansive definition of the word "highway". . . it is hard to imagine how a person could appear in public in an intoxicated condition without sooner or later violating [the drunk upon a street or highway statute]. . . [F]or all practical purposes [the statute] is little more than a law prohibiting public drunkenness in the guise of a traffic regulation.

531 P.2d at 1270-1271.

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The Alaska Supreme Court concluded that the comprehensive Act was in conflict with the prior "drunk in public" statute and that one statute must be given preference over the other. Two statutory guidelines are used in resolving such a conflict: First, when provisions of two acts are in irreconcilable conflict, the later act constitutes an implied repeal of the earlier. Second, when a later act comprehensively covers a whole subject area and is clearly intended to preempt the area, it operates as an implied repeal of any earlier, conflicting statutes. Sutherland, Statutes and Statutory Construction, § 23.10. As the Alaska court stated:

If enforcement of the prior statute is in irreconcilable conflict with such purpose [of the Alcoholism and Intoxication Treatment Act] it will be held to have been impliedly repealed.

Peter v. State, 531 P.2d 1263, at 1268.

Based on the above analysis, it is our opinion that Idaho Code § 23-604, drunk in public, is in irreconcilable conflict with the provisions of the Alcoholism and Intoxication Treatment Act, which Act was enacted later in time and was intended to comprehensively deal with the subject of intoxication, including public drunkenness. We conclude that the provisions of the Act repealed, by implication, the prior "drunk in public" statute. (Idaho Code § 23-604.)

Other Statutes Addressing Intoxication

As previously noted, there are several statutes listed in the Idaho Code that make intoxication an element of an offense. For example, Idaho Code § 18-3302 makes it an offense for a person to carry a concealed weapon when intoxicated or under the influence of intoxicating drinks. Likewise, Idaho Code § 18-4202 makes it a crime for a physician to act as such while in a state of intoxication and thereby endanger the life of another person.

It is our opinion that Idaho Code § 39-310 does not preclude the continued prosecution of such offenses. As noted above, Idaho Code § 39-310(3) contains various exceptions to the general rule that persons are not to be prosecuted for criminal offenses that include intoxication, as an element of the offense. Idaho Code § 39-310(3) specifically excludes D.U.I. offenses, as well as "similar offenses involving the operation of a vehicle, aircraft, boat, machinery, or other equipment." It also excludes the "use of alcoholic beverages at stated times and places or by a particular class of persons."

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In our view, the prosecution of a person acting as a physician while intoxicated continues to be a viable offense because it involves the "use of alcoholic beverages by a particular class of persons," in this case, physicians. Similarly, the prosecution of persons who are in possession of a firearm while intoxicated is not precluded as the possession of a firearm, together with the condition of intoxication, would be at stated times and places by a particular class of persons and hence be excepted from Idaho Code § 39-310(3).

Pedestrians Intoxicated Upon a Highway

In connection with your inquiry, a final question exists regarding the validity of Idaho Code § 49-1135, a statute dealing with pedestrians under the influence of alcohol or drugs. That statute states:

A pedestrian who is under the influence of alcohol or any drug to a degree which renders himself a hazard shall not walk or be upon a highway except on a sidewalk.

This statute was enacted in 1982 and is a slimmed down version of Idaho Code § 23-604. Because Idaho Code § 49-1135 is a misdemeanor offense, its enforcement would be inconsistent with the spirit and intent of the Alcoholism and Intoxication Treatment Act.

As noted above, the general rule of statutory construction states that in the case of a conflict between two statutes, normally the one enacted later in time takes precedence. In this case, Idaho Code § 49-1135 was enacted later in time than the provisions of the Alcoholism and Intoxication Treatment Act. However, in our opinion the comprehensive nature of that Act, wherein the legislature adopted the policy that public drunkenness will be dealt with through rehabilitation and not criminal punishment, should be given preference over a single statute contained within the comprehensive revision of the Traffic on Highways Act.

Our conclusion that the Alcoholism and Intoxication Treatment Act must take precedence over the drunk-on-highway provisions of Idaho Code § 49-1135 does not signify a lack of awareness of the important policies embodied in that statute. However, as the Alaska Supreme Court has stated in similar circumstances:

This is not to make light of the state's justifiable interest in protecting the drunk from stumbling off the sidewalk in the path of an automobile and in protecting the

driver from injury resulting from any attempt to avoid such an individual. However, it seems the legislature has previously found this interest to be subordinate to the desire to provide some treatment other than a jail cell for those addicted to alcohol, the ones most likely to violate any law prohibiting public drunkenness.

Nor is our conclusion designed to hamper law enforcement personnel in dealing with persons who are found along a highway in an intoxicated state. Idaho Code § 39-307 gives officers the authority to place intoxicated persons found to be in need of help or protection in protective custody and transport them to a nearby treatment facility:

- (a) A person who appears to be intoxicated in a public place and to be in need of help, if he consents to the proffered help, may be assisted to his home, an approved public treatment facility, an approved private treatment facility, or other health facility, by a law enforcement officer.
- (b) A person who appears to be incapacitated by alcohol shall be taken into protective custody by a law enforcement officer and forthwith brought to an approved treatment facility for emergency treatment. If no approved treatment facility is readily available, he may be taken to a city or county jail where he may be held until he can be transported to an approved treatment facility, but in no event shall such confinement extend more than twenty-four (24) hours. A law enforcement officer, in detaining the person and in taking him to an approved treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate

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that the person has been arrested or
charged with a crime.

Thus, in dealing with persons found to be intoxicated in public, whether they are near or aside a public street or highway, the preferable course of action is to see that they are assisted away from danger and taken to a facility that would aid in their recovery and rehabilitation. Such action would carry out the goals of Idaho Code § 49-1135 in a method consistent with the provisions of the Alcohol Intoxication and Treatment Act.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

I hope that this opinion has fully answered your inquiry. Please contact our office if you have any further questions involving this or any other questions that may require our assistance.

Sincerely yours,

David R. Minert

David R. Minert
Deputy Attorney General
Criminal Law Division

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