

May 24, 1994

Honorable Vaughn Killeen
Ada County Sheriff
7200 Barrister
Boise, ID 83704

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

Re: Illegal Consumption of Alcohol by Minors

Dear Sheriff Killeen:

You have asked for an opinion regarding the law that criminalizes illegal consumption of alcohol by persons under the age of 21. Idaho Code § 23-949. That section makes it a misdemeanor for such a person to possess beer, wine or other alcoholic liquor. The penalty for such a violation is set forth in Idaho Code § 18-1502. Currently, only a fine attaches for a first or second violation. A third offense carries a fine and a 30-day jail sentence. You have asked whether it is legal to arrest an individual for a misdemeanor that does not carry a jail sentence.

In July of this year, Senate Bill 1370 will take effect. This bill increases the monetary penalties for illegal consumption tenfold. In addition, jail penalties were created for second offenses and increased for third offenses. Because no jail penalty was created for a first offense, your question will still have application after July 1.

Idaho Code § 19-603 gives a peace officer discretion to arrest any person committing a misdemeanor in the officer's presence. The only limitation on this discretion is found in Idaho Code § 49-1407 pertaining to certain traffic misdemeanors. No other limitation pertaining to the power to arrest for a misdemeanor is found in the Idaho Code. From this, it appears that the legislature did not intend to limit arrests to those misdemeanants who face jail sentences.

It has been suggested that it is not proper to arrest someone who only faces a fine because that person, if found guilty, would never have to serve any jail time at all, never have to be booked and photographed, and never have to suffer the indignities associated with a jail sentence. This argument seems compelling until it is considered that the purpose of arrest and pretrial detention is not punishment. Rather, it is designed to ensure a person's presence at the proceeding where a person's guilt or innocence (and possible punishment) can be decided. Thus, additional considerations should be a part of the decision to cite or arrest, including:

1. whether a person has prior failures to appear;

2. whether a person has ties to the community reasonably sufficient to assure appearance;
3. whether a person fails to identify himself or herself satisfactorily;
4. whether a person refuses to sign a citation; and
5. whether an arrest will prevent imminent bodily harm to the accused or to another.

See generally LaFave, Criminal Procedure § 12.5.

Considering the liberal application of creative bail procedures, including the use of telephonic court orders regarding bail and recognizance as well as night and weekend court hearings, the actual time a person is held for illegal consumption should be quite limited. Further, because the taking of fingerprints and other identifying data is discretionary for most misdemeanors, a person arrested for illegal consumption need not suffer the indignity of a typical booking. *See* Idaho Code §§ 19-4812 and 19-4813.

In July, the maximum penalty for a first offense of illegal consumption will be a \$1,000 fine. This is clearly a punitive (as opposed to civil) sanction. State v. Bennion, 112 Idaho 32, 730 P.2d 952 (1986). In addition, the Idaho Legislature has expressly made illegal consumption a misdemeanor. Because the legislature did not attempt to limit a peace officer's discretion as to whether to arrest a person for illegal consumption, and because there are a number of reasons why an arrest would be sensible in a particular situation, this office does not believe that such an arrest would be illegal or improper. However, this office does recommend that arrests for illegal consumption be limited to those situations where a citation is not practical, such as when a person refuses to cooperate with the citation process or where a person does not seem likely to appear in court.

Yours very truly,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division