

DEPARTMENT OF JUSTICE

ROBERT M. SPIRE
Attorney General

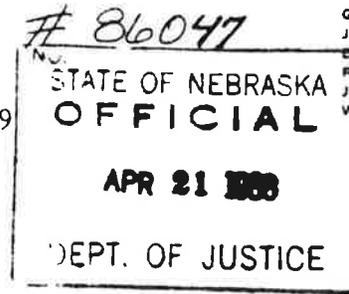
STATE OF NEBRASKA

ASSISTANT ATTORNEYS
GENERAL

A. EUGENE CRUMP
Deputy Attorney General

WARREN D. LICHTY, JR.
Assistant Attorney General
Chief Counsel
Department of Roads

State Highway Building
P.O. Box 94759
Lincoln, Nebraska 68509-4759
Telephone (402) 479-4611



GARY R. WELCH
JOHN P. REGAN
DALE L. BASCOCK, JR.
ROBERT G. AVEY
JOHN E. BROWN
WILLIAM J. ORESTER

DATE: April 16, 1986

SUBJECT: Possession of alcoholic liquor by minors
in Nebraska.

REQUESTED BY: Robert Kerrey
Governor

WRITTEN BY: Robert M. Spire, Attorney General
Warren D. Lichty, Jr., Assistant Attorney
General

This opinion has been requested in connection with Nebraska's compliance with Public Law 98-363.

The general prohibition of manufacturing, bottling, blending, selling, bartering, transporting, delivering, furnishing or possessing any alcoholic liquor for beverage purposes except as specifically provided in the act, now Neb.Rev.Stat. §53-102 (Reissue 1984), has existed since 1935, as has the proviso contained therein which states:

* * * Provided, nothing herein contained shall prevent the possession and transportation of alcoholic liquor for the personal use of the possessor, his or her family and guests....

This section was specifically interpreted in 1954 in State v. Kubik, 159 Neb. 509, 67 N.W.2d 775 (1954). The Nebraska Supreme Court said on page 512:

The authority to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors is vested exclusively in the Liquor Control Commission except as otherwise specifically delegated by the Liquor Control Act. (Citations omitted.) A limitation on the power of the commission

Governor Robert Kerrey
April 16, 1986
Page Two

is the following provision in the Liquor Control Act: "* * * nothing herein contained shall prevent the possession and transportation of alcoholic liquor for the personal use of the possessor, his family and guests; * * *." §53-102, R.R.S. 1943. This authorizes any person who can lawfully acquire intoxicating liquor to possess transport, have, and keep it on premises owned, occupied, or controlled by him subject to the restriction that it must be for the personal use of the possessor, his family, and guests. (Emphasis added.)

With this general statement of when liquor could be manufactured, bottled, blended, sold, bartered, transported, delivered, furnished, or possessed within the State of Nebraska, thus ending prohibition, the legislature obviously wanted to make sure that individuals could possess and transport liquor for their own use. Thus, the court's conclusion that the proviso allowing possession and transportation applied only to those who legally could do so, is entirely consistent with the whole act, and with setting up a legal procedure for handling liquor at the end of prohibition.

In Nebraska, minors may not legally possess or transport alcoholic liquor. Neb.Rev.Stat. §53-180.02 (Reissue 1984) provides:

Except as provided in section 53-102, no minor may sell or dispense or have in his or her possession or physical control any alcoholic liquor in any tavern or in any other place including public streets, alleys, roads, highways, upon property owned by the State of Nebraska or any subdivision thereof, or inside any vehicle while in or on any other place including but not limited to the public streets, alleys, roads, highways, or upon property owned by the State of Nebraska or any subdivision thereof,

The language "except as provided in section 53-102" was added by LB 124 passed in the First Session of the 87th Nebraska Legislature in 1981. The legislative history of this bill very clearly shows the legislative intent. This was a committee bill of the Committee on Miscellaneous Subjects and at the public hearing held on February 6, 1981, the committee research analyst stated:

Governor Robert Kerrey
April 16, 1986
Page Three

It is the intent of section 4 of LB 124 to correct an oversight dealing with minors working in restaurants. It would allow them to handle and serve alcoholic beverages. I might add that the bill is a result of an interim study of the Miscellaneous Subjects Committee.

This testimony was then clarified, to indicate that minors would be able to clean up tables, etc., and thus be able to handle alcoholic liquor, but not to serve it.

Expanding on this further, during the hearing, the Executive Director of the Nebraska Liquor Control Commission testified that in addition to dealing with manufacturers and shippers of alcoholic liquors, one purpose of the legislative bill was to amend chapter 53, section 180.02. He further stated:

* * * I can respond in this area to your question which is to the point and purpose of this amendment in LB 124. This is, yes, a 19 year old can sell, can serve, can distribute alcoholic beverages if he is employed by a licensee in the State of Nebraska. Even though the 19 year old cannot consume, he could still sell and serve. You said, well, what about bussing tables? Sixteen, seventeen and eighteen year olds are allowed to bus, pick up empties, clean the glasses from alcoholic beverage containers. This is already in the statute. When the age was lifted from 19 to 20 last year there was an amendment put on LB 221, which would still allow the 19 year old to work in a premise. * * * So while they could not consume the beverage, it was determined that they could still be employed by a licensee.

Further testimony by Mr. Micek, the Executive Director of the Liquor Control Commission, at said hearing, sheds further light on the purpose of the amendment:

It is section 102 of the Liquor Control Act which allows 16, 17 and 18 year olds to bus, and actually to work in grocery stores as well. It also, then, in LB 221, when the age went up to 20, it provided protection for the 19 year olds and continued a protection for the 19 year olds to work in the actual sales and distribution. However, when

Governor Robert Kerrey
April 16, 1986
Page Four

221 went through, and you amended section 102, what escaped the legislative review was section 180.02, which is being amended here. Because 180.02 defined the age of a minor. It said no minors could have any alcohol in their possession. Thus, 102 allowed the 19 year old to sell and to work in that licensed premises and handle the actual alcohol, but section 180.02 said that they were a minor in possession even though they weren't consuming. So what we needed to do was carry the exception that was provided in LB 221 so that it would be consistent with 180.02. That is what is being done here.

In floor discussion in the legislature regarding LB 124, on February 18, 1981, Senator Heffner, the Chairman of the Miscellaneous Subjects Committee, again stated the purpose:

And then section 4 allows minors working in restaurants and lounges to handle and serve alcoholic beverages. If you will remember last year when we passed LB 221, we missed this part and so what this section does is allow minors 16 years and older to be able to pick up containers when they are working in lounges or restaurants that serve liquor.

The fact that this legislative history and statement of legislative intent is consistent with the law as enforced in this state is made evident by enforcement cases. The fact of the matter is that in this state, minors are not allowed to possess alcoholic liquors for personal use, family and guests.

In prosecutions of minors for possession of liquor, the only burden on the prosecution is, as in all criminal cases, that the offense was knowingly and intentionally committed. In State v. Beverly J. Harris, 218 Neb. 75, 352 N.W.2d 591 (1984), defendant's conviction for being a minor in possession was reversed. The court said:

Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a

conviction in the absence of any other reasonable explanation for its presence. (Citations omitted.)

However, in this case, the defendant was not the owner of the vehicle, but a passenger riding in it. As a general rule, the mere presence of the minor passenger in a vehicle where alcohol is found is not sufficient by itself to convict the minor of possession. (Citations omitted.) In the case before us, there is insufficient circumstantial evidence present to infer knowledge and conscious possession. The alcohol was not within the reach or view of the defendant, and no evidence is present to indicate the defendant had been drinking. In no way did the circumstances prove and relate directly to the guilt of the accused beyond a reasonable doubt.

Perhaps, because this is a reversal of a conviction, it makes more clear than most cases exactly what is required to obtain a conviction of a minor in possession. The case makes clear that either direct or circumstantial evidence may be sufficient, and that possession may be based not only on actual physical possession, but such things as having been found to have been drinking while alcohol is available. It should be self-evident that in no jurisdiction of the United States may a conviction of a crime be obtained, without the proving of intent to commit it.

In State v. Torrence, 192 Neb. 720, 224 N.W.2d 177 (1974), where defendant's conviction was affirmed, the court put it just a little bit differently:

Ordinarily, when liquor, narcotics or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence.

* * * To prove unlawful possession of a narcotic drug, the evidence must show that the accused has physical or constructive possession with knowledge of the presence of the drug and its character as a

Governor Robert Kerrey
April 16, 1986
Page Six

narcotic. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found.

We believe the foregoing should make it perfectly clear that in Nebraska there is no exemption from the prohibition against public possession of alcohol by minors for personal use, family and guests. Certainly, minors found to be in actual or constructive possession of alcoholic liquors in a public place are regularly tried and convicted.

Sincerely,

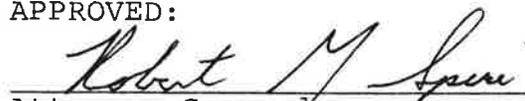
ROBERT M. SPIRE
Attorney General



Warren D. Lichty, Jr.
Assistant Attorney General

WDL/ta

APPROVED:


Attorney General