

02-059

CRIMINAL PROCEDURE: ARREST

Police officer may not arrest without a warrant for violation of Virginia Code § 4.1-305 unless offense committed in his presence; offense defined by § 4.1-305 requires dominion and control over alcoholic beverage and is not committed in the officer's presence if beverage was ingested at an earlier time and place.

The Honorable Marsha L. Garst
Commonwealth's Attorney for the City of Harrisonburg and Rockingham County
July 24, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether law-enforcement personnel may arrest a minor person under the age of twenty-one ("underage person(s)") for possession of alcohol, in violation of § 4.1-305, if the minor person consumed the alcohol within the local court's jurisdiction, but outside the law-enforcement personnel's territorial jurisdiction.

Response

It is my opinion that a police officer may not arrest an underage person, without a warrant, for violating § 4.1-305, unless the offense is committed in the presence of the officer within his territorial jurisdiction.

Facts

You relate that town police officers and campus police officers of a local university may encounter underage persons under the age of twenty-one who have consumed alcohol, and that they desire to charge those persons with violating § 4.1-305, based on the alcohol presently being metabolized. You also relate that, in many instances, the suspected underage person will claim to have consumed the alcohol in the county surrounding the town or, in the case of university students, off campus.

Applicable Law and Discussion

Section 4.1-305(A) provides that "[n]o person to whom an alcoholic beverage may not lawfully be sold under § 4.1-304 shall purchase or possess, or attempt to purchase or possess, any alcoholic beverage." Virginia courts have not ruled whether a person possesses an alcoholic beverage he has recently ingested. In considering cases involving possession of narcotics, however, the Supreme Court of Virginia consistently has required the Commonwealth to prove the defendant exercised "dominion and control" over the drugs.¹

The question concerning whether a person who has consumed alcohol possesses that alcohol has been answered uniformly in the negative by other

state courts that have considered the issue.² These courts reason that, once a substance has been taken into the digestive system, a person no longer can control it.³ Thus, in the situation you present, although the officer has strong evidence that the underage person before him previously possessed alcohol, it cannot be said that the person *presently* possesses the alcoholic beverage.

In order to determine whether the town or campus police officers have authority to arrest the per-sons you describe, it also is necessary to consider the officers' general authority to arrest. Section 19.2-81 restates the common-law rule that police officers may only arrest, without a warrant, a "person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence." Section 19.2-81 further permits an officer to arrest without a warrant for an alleged misdemeanor not committed in the officer's presence involving certain enumerated offenses.⁴

Section 19.2-81 generally codifies the common-law rule that, except where the gravity of the offense appears to justify an immediate arrest without a warrant, or where a crime has been committed in the presence of the arresting officer, no arrest may lawfully be made until a warrant has been issued.⁵ By allowing a law-enforcement officer to make a warrantless arrest for certain misdemeanors not committed in the officer's presence, § 19.2-81 alters the common-law rule.⁶ The common-law rule, however, will not be considered as altered or changed by statute unless the legislative intent is plainly manifested.⁷ Thus, "[w]hen an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule."⁸

Since the offense proscribed by § 4.1-305 is punishable as a misdemeanor and is not among the offenses enumerated in § 19.2-81 that abrogate the common-law rule, the police officer may effect an arrest for this offense, without a warrant, only if the offense is committed in the officer's presence. Therefore, the police officer may not arrest, without a warrant, for a violation of § 4.1-305, an underage person who has consumed alcoholic beverages outside the officer's presence, regardless of whether it is inside or outside the officer's territorial jurisdiction.

Conclusion

Accordingly, it is my opinion that a police officer may not arrest an underage person, without a warrant, for violating § 4.1-305, unless the offense is committed in the presence of the officer within his territorial jurisdiction.

¹Drew v. Commonwealth, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986) (quoting Powers v. Commonwealth, 227 Va. 474, 476, 316 S.E.2d 739, 740 (1984)).

²See, e.g., Evans v. State, 24 Ala. App. 196, 197, 132 So. 601, 601 (1931) (alcohol is not possessed when it "is in the man" after consumption); Nethercutt v. Commonwealth, 241 Ky. 47, 47, 43 S.W.2d 330, 330 (1931) ("liquor in one's stomach does not constitute possession"); see also State v. Griffin, 584 N.W.2d 127, 131 & n.2 (Wis. Ct. App. 1998) (noting that courts in other jurisdictions have held that presence of controlled substance in one's urine or blood, without more, is insufficient evidence on which to base conviction for possession); People v. Spann, 232 Cal. Rptr. 31, 32 (Cal. Ct. App. 1986) (holding that after consumption, user no longer has dominion and control over substance consumed and therefore does not possess it).

³See Evans, 24 Ala. App. at 197, 132 So. At 601 (noting that possession of whisky within meaning of Alabama's prohibition law contemplates control over whisky; however, "when the whisky is in the man the whisky controls the man"); Griffin, 584 N.W.2d at 131 (following jurisdictions which have held that mere presence of drugs in person's system is insufficient to prove that drugs are within person's control); Spann,

232 Cal. Rptr. at 32 (holding that person is not in control of substance "that is en route through his digestive system").

⁴"[O]fficers may also arrest without a warrant for an alleged misdemeanor not committed in their presence involving (i) shoplifting in violation of § 18.2-96 or § 18.2-103 or a similar local ordinance, (ii) carrying a weapon on school property in violation of § 18.2-308.1, (iii) assault and battery, (iv) brandishing a firearm in violation of § 18.2-282, or (v) destruction of property in violation of § 18.2-137, when such property is located on premises used for business or commercial purposes, or a similar local ordinance, when any such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged offense. The arresting officer may issue a summons to any person arrested under this section for a misdemeanor violation involving shoplifting." Va. Code Ann. § 19.2-81 (Michie Repl. Vol. 2000).

⁵The arrest is to be "based on probable cause upon reasonable complaint of the person who observed the alleged offense." Section 19.2-81.

⁶1997 Op. Va. Att'y Gen. 99, 99 (concluding that authority allowing officer to arrest without warrant for alleged assault and battery not committed in his presence does not allow arrest for assault when there is no battery); see also 1973-1974 Op. Va. Att'y Gen. 273, 274 (concluding that county deputy sheriff has no statutory authority to arrest for misdemeanor committed in his presence within boundaries of independent city located outside county of his sheriff).

⁷See Va. Code Ann. § 1-10 (LexisNexis Repl. Vol. 2001); 1975-1976 Op. Va. Att'y Gen. 15 (concluding, prior to amendment of § 19.1-100, predecessor statute to § 19.2-81, that officer had no authority to arrest for shoplifting not committed in his presence).

⁸Boyd v. Commonwealth, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988), *quoted in* 1997 Op. Va. Att'y Gen., *supra*, at 99.

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