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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

AUSTIN KLEIN DAVIDSON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13341
Trial Court No. 3UN-16-00030 CR

MEMORANDUM OPINION

No. 7002 — May 4, 2022

Appeal from the District Court, Third Judicial District, Unalaska, Patricia P. Douglass and Una Gandbhir, Judges.

Appearances: George W.P. Madeira Jr., Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges.

Judge WOLLENBERG, writing for the Court.
Judge TERRELL, concurring.

Austin Klein Davidson was charged with driving under the influence and refusal to submit to a chemical test.[1] Prior to trial, Davidson filed a motion to suppress evidence of his refusal to provide a breath sample, arguing that the police violated his statutory right to contact an attorney.[2] The court denied Davidson's motion, and the case proceeded to trial. A jury found Davidson guilty of both counts.

On appeal, Davidson argues that the court erred in denying his motion to suppress and that this Court should reverse both of his convictions. The State concedes that the court erred in denying Davidson's motion, and agrees that this error requires reversal of his refusal conviction. But the State argues that the evidence of Davidson's refusal was harmless as to his driving under the influence conviction and urges us to affirm that conviction.

Having reviewed the record, we conclude that the State's concession of error is well-founded.[3] We further conclude that the district court's error in denying Davidson's motion to suppress requires reversal of both his conviction for refusal to submit to a chemical test and his conviction for driving under the influence. We therefore reverse the district court's judgment.

Underlying facts and proceedings

In February 2016, a bouncer reported seeing two intoxicated individuals leave a bar in Unalaska in a white pick-up truck. An officer with the Unalaska Department of Public Safety located the truck and followed it into the parking lot of a

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[1] AS 28.35.030(a)(1) and AS 28.35.032(a), respectively.

[2] *See* AS 12.25.150(b); *see also* Alaska R. Crim. P. 5(b).

[3] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess whether a concession of error in a criminal appeal "is supported by the record on appeal and has legal foundation").

second bar. When the officer approached the vehicle, he identified the driver as Austin Davidson. The officer detected an odor of alcohol and noticed that Davidson's speech was slurred. Davidson admitted to consuming three beers prior to driving. The officer then asked Davidson to perform standardized field sobriety tests and, after concluding that Davidson had failed the tests, the officer arrested him for driving under the influence and transported him to the police station for DataMaster processing.

At the station, the officer informed Davidson of the fifteen-minute observation period required before submission of a breath sample, and began to read him the implied consent warning as required by AS 28.35.032(a). However, the officer did not read the form verbatim, instead telling Davidson, "You're being asked to submit to a chemical test of your breath — blood to measure the alcohol content in your breath and blood — and/or blood — submit to a chemical test of your blood or urine to determine the presence of controlled substance in your blood and urine." The officer further stated that "basically, refusal to submit to a breath test is another crime. You'll — the type of test you'll be getting is a breath. You — if you want, you can pay for a blood test or we can pay for a blood test at a — at your request."

In response, Davidson, referring to the DataMaster machine, asked whether "that machine there [does] the blood test?" The officer responded, "[N]o, we get a qualified nurse to come in and do that."

At that point, Davidson asked to contact an attorney: "Is there any way I can talk to a lawyer before doing anything here on any of this?" The officer responded, "[T]here's fifteen minutes to sit here to — to do whatever you got to do. You got to call somebody, you can call and talk to somebody and ask."

When the officer asked if Davidson had his attorney's phone number, Davidson replied that it was on his cell phone, which the police had confiscated. Davidson asked to call that number, and the officer initially suggested that the cell phone

could be retrieved from the patrol car. However, a correctional officer intervened, and Davidson was ultimately told that he could only use the station phone.

The officers also told Davidson that, in order to use the station phone, he would need to either use a long-distance calling card or call a local number. Davidson said that he did not have a calling card, and he asked if there were any local lawyers in Unalaska whom he could call. The officer responded, "We don't have any — [I] can't think of anybody on the island."

At the end of the fifteen-minute observation period, Davidson refused to provide a breath sample. When Davidson complained that he had not been given an opportunity to contact an attorney, the officer responded that they that had given him "every opportunity to do [so]," but that he did not have a local phone number to contact.[4]

Davidson was subsequently charged with driving under the influence and refusal to submit to a chemical test.

Before trial, Davidson moved to suppress evidence of his refusal, arguing that he was denied his right under AS 12.25.150(b) and Alaska Criminal Rule 5(b) to contact an attorney prior to submitting to the breath test. The parties stipulated that the court could decide the motion based on the pleadings and exhibits alone.

Superior Court Judge Patricia P. Douglass denied Davidson's motion to suppress. The court found that Davidson had not explicitly invoked his right to contact an attorney and that, in any event, Davidson was afforded a reasonable opportunity to contact his attorney.

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[4] Davidson also asked the officers to call the bar where he had parked before being arrested — so that he could speak with his father, who was at the bar. But the officer expressed skepticism that a bar employee would look for his father, and his father himself had an Anchorage cell phone number. There is no indication in the record that the officer ever attempted to call the bar or contact Davidson's father.

The case proceeded to a jury trial before Superior Court Judge Una Gandbhir. At trial, the State played a video recording of the field sobriety tests and an audio recording of Davidson's interaction with the officer at the police station (where he refused the breath test). The State also introduced the implied consent form as an exhibit. Davidson's father, who was a passenger in the truck the night Davidson was arrested, testified for the defense. He explained that Davidson had suffered a head injury from a prior motorcycle accident that had impacted his balance, equilibrium, and speech.

After the State rested, Davidson moved for a judgment of acquittal on the refusal charge. He argued that the State had presented insufficient evidence that he knowingly refused the test because the officer had failed to adequately clarify his legal obligation to submit to it. The court reserved ruling on the motion until after the verdicts.

The jury found Davidson guilty of both driving under the influence and refusal to submit to a chemical test. The court ultimately denied Davidson's motion for a judgment of acquittal.

This appeal followed.

Why we conclude that the district court erred in denying Davidson's motion to suppress evidence of his refusal

As we have explained, the district court denied Davidson's motion to suppress on two grounds: (1) Davidson had not explicitly invoked his right to contact an attorney, and (2) Davidson was afforded a reasonable opportunity to contact his attorney despite his failure to invoke that right. On appeal, Davidson argues, and the State concedes, that both of these rulings were incorrect. We conclude that the State's concession is well-founded.

Under AS 12.25.150(b) and Alaska Criminal Rule 5(b), an arrestee has the right to call their attorney upon arrival at a place of detention.[5] In *Copelin v. State*, the Alaska Supreme Court held that, in the context of arrests for driving under the influence, an arrestee must be afforded a reasonable opportunity to communicate with an attorney before being required to decide whether or not to submit to a breath test.[6]

At the same time, the right to speak with counsel is "not an absolute one (which might involve a delay long enough to impair testing results), but, rather, a limited one of reasonable time and opportunity."[7] The police are therefore not required to tell arrestees that they have a right to speak with counsel prior to administration of the breath test, nor remind arrestees to use this right once it attaches.[8] But if an arrestee affirmatively requests the opportunity to contact an attorney after the right has attached, the police must provide the arrestee with a reasonable opportunity to do so before requiring the arrestee to decide whether or not to submit to a breath test.[9]

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[5] AS 12.25.150(b) ("Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with the prisoner's attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friend of the prisoner, have the right to immediately visit the person arrested."); Alaska R. Crim. P. 5(b) (setting out the same right); *see also Wardlow v. State*, 2 P.3d 1238, 1249-50 (Alaska App. 2000) (interpreting "immediately after arrest" as meaning upon arrival at a police station or other place of detention).

[6] *Copelin v. State*, 659 P.2d 1206, 1208 (Alaska 1983).

[7] *Id.* at 1211-12.

[8] *Huntington v. State*, 151 P.3d 523, 525-26 (Alaska App. 2007) (holding that the police did not have to remind an arrestee to call his attorney once at the station, even though the arrestee had asked to do so on the way to the station, before the right had attached).

[9] *Copelin*, 659 P.2d at 1211 ("Since a minimum of a 15 minute wait is necessary before administering the breathalyzer test, no additional delay is incurred by acceding to a

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We first address the district court's finding that Davidson did not explicitly ask to speak with an attorney prior to deciding whether or not to submit to a breath test. The record demonstrates that this finding is clearly erroneous. Davidson expressly asked the arresting officer, "Is there any way I can talk to a lawyer before doing anything here on any of this?" This was an affirmative request to speak with an attorney.

In denying Davidson's motion to suppress, the court compared Davidson's question to the defendant's question in *Clark v. State*: "Do I get my one phone call?"[10] In *Clark*, we affirmed, as not clearly erroneous, the district court's finding that the defendant's statement was "a comment on her general right to make a phone call rather than a request to make a phone call prior to taking the breath test under *Copelin*."[11] We noted that, after the trooper responded in the affirmative about the defendant's right to make a phone call, the defendant said nothing else about making a phone call before taking the breath test.[12]

The situation in *Clark* is markedly distinct from this case. Here, as we noted, Davidson specifically asked to speak with a lawyer *before* providing a breath sample. He then inquired about how to contact an attorney, asking whether he could look up a number on his own phone and whether there were any local attorneys he could

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request to contact an attorney during that time.").

[10] *Clark v. State*, 2015 WL 1881581, at *2 (Alaska App. Apr. 22, 2015) (unpublished).

[11] *Id.*

[12] *Id.* (noting that the defendant "could have said any number of things" to indicate that she wanted to make a phone call prior to taking the breath test, including "saying that she wanted to make a call, identifying who she wanted to call, or asking if she could use her cell phone to make a call").

call. And he later exclaimed, "Well, but I still don't get no option on the lawyer. . . . What's really messed up is I don't get a — do that part[]" — reflecting his apparent frustration that his request to speak with an attorney was not being honored. Indeed, the officer himself understood Davidson to be asking to speak with an attorney, as the officer initially suggested that Davidson could access his cell phone to retrieve his attorney's phone number (though he later rescinded that offer).

When evaluating whether Davidson's inquiry amounted to a request to speak to an attorney under *Copelin*, the district court was required to evaluate the totality of the circumstances.[13] After reviewing the totality of the circumstances, we are left "with a definite and firm conviction . . . that a mistake has been made," and we conclude that the district court clearly erred in finding that Davidson did not ask to speak with a lawyer prior to making a decision whether or not to submit to the breath test.[14]

We next address the district court's determination that Davidson was provided a reasonable opportunity to contact an attorney. As we noted earlier, under *Copelin*, the police must provide an arrestee a reasonable opportunity to speak with an attorney before the arrestee is required to decide whether or not to submit to a breath test.[15] It is apparent from the record in this case that Davidson and the arresting officer engaged in a detailed conversation about Davidson's ability to contact counsel and that

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[13] *See Zsupnik v. State*, 789 P.2d 357, 362 (Alaska 1990) (applying a "totality of the circumstances" test in evaluating whether an arrestee has requested counsel and admonishing courts not to "place[] too high a premium on the sophistication" of the arrestee's request and the manner in which it is made).

[14] *Booth v. State*, 251 P.3d 369, 373 (Alaska App. 2011) (omission in original) (quoting *Geczy v. LaChappelle*, 636 P.2d 604, 606 n.6 (Alaska 1981)).

[15] *Copelin v. State*, 659 P.2d 1206, 1211-12 (Alaska 1983); *see also Wardlow v. State*, 2 P.3d 1238, 1250 (Alaska App. 2000) (noting that an unreasonable delay in bringing arrestees to a place of detention with phone access would violate AS 12.25.150(b)).

the officer told Davidson he could call and talk to someone during the fifteen-minute observation period. However, in response to his request to speak with counsel, Davidson was informed that he could not use his own cell phone to call his attorney, that without a long-distance calling card the station phone could only make local calls, and that there were no local attorneys in Unalaska.

This approach unreasonably deprived Davidson of an opportunity to speak with counsel prior to administration of the breath test. The State made no showing that Davidson requested an unreasonable amount of time to speak with an attorney or that accommodating his request would have interfered with the prompt investigation of the case.[16] To the contrary, Davidson made a standard request to speak with an attorney at the police station prior to the administration of the breath test.

It is unnecessary for us to decide in this case what steps the police should have taken to assure Davidson an adequate opportunity to contact an attorney, as under the circumstances, the police effectively provided *no* opportunity for Davidson to contact counsel.[17] In the absence of case-specific concerns about unreasonable delay or officer safety, the police simply cannot seal off all options for an arrestee to contact counsel during the observation period.[18]

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[16] *See Copelin*, 659 P.2d at 1212 n.14 ("The burden of proof is on the government to show that an accused demanded an unreasonable amount of time and thereby interfered with the 'prompt and purposeful investigation' of the case." (quoting *Blue v. State*, 558 P.2d 636, 642 (Alaska 1977))).

[17] *See Farrell v. Anchorage*, 682 P.2d 1128, 1131 (Alaska App. 1984) (holding that it was unnecessary to decide what steps the police should have taken to afford the defendant a reasonable opportunity to speak with his attorney privately because "the police failed to make even a minimal effort" to accommodate that right).

[18] *See Copelin*, 659 P.2d at 1215 (noting that the statutory right to contact an attorney "is limited . . . to circumstances when it will not unreasonably hinder the police

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As a general matter, the easiest option for the police under these circumstances may be to allow an arrestee to use their cell phone. But as Judge Terrell points out in his concurrence, the police may have valid case-specific reasons to deny an arrestee access to their phone. Other options remain: the police could, for instance, allow the arrestee to use the station phone and charge the arrestee later for the cost of the call. But it is simply not realistic in today's day and age to expect that an arrestee will possess an outmoded method of payment like a long-distance calling card.

The police conduct in this case — refusing to allow Davidson to use his cell phone or make a long-distance call from the station phone — was particularly problematic given the apparent lack of local attorneys in Unalaska. It functionally left Davidson without any opportunity to speak with an attorney before being required to decide whether to submit to the breath test.

For these reasons, we conclude that the State's concession of error in this case is well-founded. Because Davidson was unreasonably denied access to an attorney before he made the decision whether to submit to a breath test, the district court should have granted Davidson's motion to suppress evidence of his refusal to submit to a chemical test.

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[18] (...continued)
investigation"); *Kameroff v. State*, 926 P.2d 1174, 1178 (Alaska App. 1996) (acknowledging that "[p]olice officers certainly need not jeopardize their own safety (or the safety of others) to allow a prisoner to make a telephone call" but explaining that the "police do not have the right to insist that an arrestee be calm before allowing him or her to use the phone" and placing the burden on the State to prove that there was good reason to deny an arrestee the opportunity to contact an attorney).

Why we conclude that both Davidson's conviction for refusal and his conviction for driving under the influence must be reversed

In *Copelin*, the Alaska Supreme Court concluded, "If [a] suspect is denied th[e] opportunity [to consult a lawyer], subsequent evidence, whether in the form of the test results or the refusal to submit to it, shall be inadmissible at a later criminal trial."[19] As the State concedes, the district court's error in denying Davidson's motion to suppress thus requires reversal of his conviction for refusal to submit to a chemical test. The State argues, however, that this error was harmless with respect to Davidson's driving under the influence conviction. Having closely reviewed the record, we disagree.

Under AS 28.35.032(e), evidence of a person's refusal to submit to a police-administered breath test is admissible to prove a charge of driving under the influence. Alaska courts have recognized that, while a person's refusal to provide evidence is often disfavored as evidence of guilt in other contexts, refusing to submit to a breath test in the face of a warning that doing so is a separate crime is uniquely probative of consciousness of guilt.[20] As this Court has explained, "By requiring that the arrestee be informed of the consequences of his refusal[,] the [supreme] court meant to ensure that the refusal would in fact support an inference of guilt [of driving under the influence]."[21] However, precisely because evidence of a person's refusal to submit to a

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[19] *Copelin*, 659 P.2d at 1215.

[20] *See Svedlund v. Anchorage*, 671 P.2d 378, 384 (Alaska App. 1983) (discussing how the supreme court's decision in *Copelin* to allow the prosecution to offer a person's refusal as circumstantial evidence of consciousness of guilt departed from precedent suggesting distrust of similar evidence (citing *Copelin*, 659 P.2d at 1212 n.15)).

[21] *Id.*

breath test can be used to imply consciousness of guilt as to driving under the influence, its potential for prejudice is great.[22]

The State argues that, because the prosecutor did not explicitly ask the jury to use evidence of Davidson's refusal to find him guilty of driving under the influence and generally distinguished between the evidence supporting the two charges, the error in admitting evidence of the refusal was harmless as to Davidson's conviction for driving under the influence.

But Davidson's refusal still had the strong potential to serve as "a silent admission of guilt."[23] Over the course of Davidson's trial, the jury repeatedly heard — including on an audio recording — the officer's warning to Davidson that refusal to submit to the chemical test was a crime. The State also introduced the implied consent warning form, which contains this cautionary language, and relied on it during its closing argument — emphasizing that "neither your right to speak with an attorney nor your right to remain silent gives you the right to refuse to submit to a chemical test."

In other words, the jury knew that Davidson was warned that refusing to submit to a breath test would constitute an additional crime and that he refused to cooperate nonetheless. The jury therefore could reasonably use this evidence not only to find Davidson guilty of the crime of refusal but also to support an inference of his guilt with respect to driving under the influence.

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[22] *See Kameroff v. State*, 926 P.2d 1174, 1178 (Alaska App. 1996) (reversing defendant's conviction for driving under the influence where evidence of the defendant's refusal to take the breath test — which should have been suppressed due to denial of the defendant's right to contact counsel — was admitted to prove that the defendant was driving while intoxicated).

[23] *Bluel v. State*, 153 P.3d 982, 989 (Alaska 2007).

In addition, the potential for unfair prejudice stemming from evidence of Davidson's refusal was heightened because the State's other evidence of Davidson's level of intoxication was not overwhelming, and Davidson had a viable defense to the charge of driving under the influence.

While Davidson acknowledged that he had consumed three beers prior to driving, this did not amount to an admission of driving under the influence. The only testimony regarding Davidson's impaired driving was provided by the bar bouncer (as the arresting officer simply observed Davidson pull his vehicle into a parking lot and stop), and Davidson impeached the bouncer's testimony. The bouncer testified that Davidson and his father were "staggering" as they left the bar. But on cross-examination, Davidson impeached the bouncer with his prior statements to the police, in which he reported that he had not physically watched Davidson leave the bar and that Davidson's father had seemed sober. In addition, although the bouncer testified that he saw Davidson drive down the wrong side of the road, he acknowledged that it was a dirt road with no centerline and that Davidson came to a complete stop at a stop sign along the road.

Davidson also introduced evidence that he had previously suffered a severe brain injury — resulting in issues with his balance and speech — and argued that this injury could have affected his performance on the field sobriety tests and his communication with the arresting officer.

Given Davidson's defense, we cannot say that the introduction of evidence of Davidson's refusal to submit to a breath test had no appreciable effect on the jury's verdict for driving under the influence.[24]

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[24] *See Wyatt v. State*, 981 P.2d 109, 112 (Alaska 1999) (citing *Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969)); *see also Adams v. State*, 261 P.3d 758, 773 (Alaska 2011) (continued...)

We therefore conclude that the trial court's failure to suppress evidence of Davidson's refusal requires reversal of both Davidson's convictions for refusal and for driving under the influence.[25]

Conclusion

For the reasons provided in this opinion, we REVERSE the judgment of the district court.

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[24] (...continued)
(noting that "[a]n error that is not constitutional in nature will be prejudicial if the defendant proves that there is a reasonable probability that it affected the outcome of the proceeding").

[25] Davidson additionally argues that the evidence presented at trial was insufficient to support his refusal conviction. The State responds that it is unnecessary to decide this claim because the refusal charge must be reversed on different grounds.

Ordinarily, we would disagree. A successful challenge to a conviction based on insufficient evidence triggers double jeopardy protections, prohibiting the State from retrying the defendant on that charge. *See Howell v. State*, 115 P.3d 587, 592 (Alaska App. 2005). We must therefore generally reach any sufficiency claims, even when we reverse a conviction on alternative grounds, to determine whether the State may retry the defendant on remand.

Here, however, we agree with the State that it is unnecessary to reach Davidson's sufficiency claim because, without evidence of his refusal, the State has insufficient evidence to proceed to trial on the refusal charge, and that charge must therefore be dismissed. *See Spinka v. State*, 863 P.2d 251, 252-53 (Alaska App. 1993) (noting, and not taking issue with, a trial court's determination that resolving the question of whether evidence of refusal should have been suppressed would be dispositive of a refusal charge).

Judge TERRELL, concurring.

I agree with the majority's resolution of this case. I write separately to note two issues that law enforcement agencies and the legislature may wish to consider regarding the statutory right of arrestees to make a phone call set out in AS 12.25.150(b). The first is whether law enforcement agencies should be required to permit an arrestee to make a long-distance call on an agency telephone when the arrestee wishes to telephone an attorney outside the local calling area. The second is whether arrestees should be permitted to use their own cell phones to make such calls, or be restricted to using a police-provided phone. These issues are important because technological changes have consequently changed the available methods for making phone calls and the costs of doing so, and the law should take those realities into account.

The statutory right of an arrestee to telephone an attorney, family member, or friend set out in AS 12.25.150(b) traces back to a statute enacted by the territorial legislature in 1957.[1] Telephone calls could then only be made using landlines, and long-distance calls were rare and prohibitively expensive. Understood in its historic and basic sense — and, in cities and towns that have practicing attorneys — the right to make a phone call has been deemed satisfied by relatively minimal efforts to assist an arrestee, such as by providing a local phone book and the use of a telephone to place a local call.[2]

Nonetheless, Alaska's jurisprudence has always required that the police make "reasonable" efforts to facilitate an arrestee's exercise of their right to make a

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[1] *See* ACLA § 66-5-34 (Supp. 1958), *as amended by* Laws of 1957, ch. 128, § 1.

[2] *See, e.g.*, *Saltz v. State, Dep't of Pub. Safety*, 942 P.2d 1151, 1153-54 (Alaska 1997); *Rollefson v. Anchorage*, 782 P.2d 305, 307 (Alaska App. 1989).

phone call.[3] If an arrestee asks to place a long-distance call because his preferred attorney is not local or there are no local attorneys, the requirement to make reasonable efforts may obligate police agencies to take steps to facilitate the call. We do not specify the exact nature such efforts must take, though they could be as simple as allowing the arrestee to place the call from a police agency phone and billing them later for the long-distance charge. But offering illusory or outmoded options — such as allowing long-distance calls only if arrestees use personal calling cards — does not constitute making reasonable efforts to facilitate the exercise of the right to telephone an attorney, family member, or friend.

One option that the facts of this case call to mind would be allowing an arrestee to use their own cell phone. This would eliminate any issue about the police agency being required to pay for the cost of the call. But there are countervailing considerations weighing against requiring police in all cases to permit an arrestee to use their own cell phone to make their statutorily authorized phone call. For example, in the case of a gang- or drug-related arrest, the arrestee might quickly text or call persons to facilitate the destruction of evidence or thwart the arrest of accomplices. And in many cases, including homicides, drug, and sexual assault cases, the defendant's cell phone may be seized as evidence, and the police would not want the arrestee to get back onto it and delete incriminating text messages or phone numbers. Absent specific security concerns, however, allowing an arrestee to use their own cell phone is one valid option for complying with an arrestee's right to make a phone call.

Alaska was an early leader in creating the statutory right to make a phone call — essentially a provision ensuring that a person will not be held incommunicado in a prison or jail, without the ability to contact an attorney to seek legal advice, arrange for

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[3] *Wing v. State*, 268 P.3d 1105, 1108 (Alaska App. 2012).

bail, and otherwise simply let family and friends know where they are and what their situation is. In light of changing technologies and a significant decrease in the cost of long-distance telephone calls, law enforcement agencies should revisit their policies and procedures regarding the right to make a phone call to ensure that the right is not illusory and that reasonable efforts will be made to facilitate it. The legislature likewise may wish to weigh in on the varying modes of communication that should be available to arrestees to contact an attorney, family member, or friend and to delineate the scope of the right in a manner that takes account of changing technologies and circumstances.

Nonetheless, and without consideration of what future actions that law enforcement agencies and the legislature may take in this area, I fully concur with my colleagues that in light of the current version of the statute, the arresting officers in this case did not make reasonable efforts to ensure that Davidson could exercise his right under AS 12.25.150(b) to telephone an attorney.