LIQUOR: Liquor that has been consumed does not come within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

OPINION NO. 100
(541-1966)

February 7, 1967

FILED
100

Honorable Bob F. Griffin
Prosecuting Attorney
Clinton County
223 East Third Street
Cameron, Missouri

Dear Mr. Griffin:

This is in answer to your request for an opinion concerning the question whether liquor that has been consumed comes within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

Section 311.325, supra, reads as follows:

> "Any person under the age of twenty-one years, who purchases or attempts to purchase, or has in his possession, any intoxicating liquor as defined in section 311.020 is guilty of a misdemeanor."

Section 312.407, RSMo Supp. 1965, reads as follows:

> "Any person under the age of twenty-one years, who purchases or attempts to purchase, or has in his possession, any nonintoxicating beer as defined in section 312.010, is guilty of a misdemeanor."

We have not found any cases interpreting Sections 311.325 and 312.407, supra.

There are, however, cases defining "possession" as used in liquor laws during prohibition. These laws generally made liquor an illegal commodity and made it a crime to be in "possession" of such liquor.

In State v. Lane, 221 Mo.App. 148, 297 S.W. 708, the evidence against the defendant was that he had been seen holding a half-pint bottle of moonshine whisky and was drinking from the bottle. The evidence then showed that the defendant handed the bottle back to the owner. The court quoted from State v. Lunfrunk, Mo.App., 279 S.W. 733, 735, the following definition, l.c. S.W. 709:

> "'"To possess" means to have the actual control, care, and management of the liquor, and not a passing control, fleeting and shadowy in its nature. Neither ownership nor actual physical possession is essential. And possession through a co-principal or through an innocent agent would come within the purview of such statutes.'"

The court also quoted from Skidmore v. Commonwealth, 204 Ky. 451, 264 S.W. 1053, as follows, l.c. S.W. 709, 710:

> "The 'manual act of handling a bottle while taking a drink does not of itself constitute an unlawful possession, within the meaning of the statute where the one so handling the bottle does not claim ownership or control.'
>
> * * * * *
>
> "'"Possession" being the "having, holding, or detention of property in one's own power or command; ownership, whether rightful or wrongful; actual seizing or occupancy."'"

The court then held as follows, l.c. S.W. 710:

> "It is quite clear to us from this record that the defendant was not in actual possession or control of the bottle of whisky, but that it belonged to another and that other person had pleaded guilty to the possession thereof.* * *"

In State v. Mackey, Mo.App., 267 S.W. 5, the defendant was convicted of having whisky in his possession. The evidence consisted of the testimony of two witnesses who stated that in their opinion the defendant was intoxicated. The court said, l.c. 5:

> "Defendant was charged with having a gallon of whisky in his possession. The evidence wholly fails to establish that he had any whisky in his possession. If it be con-

> ceded that the evidence tending to show that defendant was intoxicated was competent, still such evidence would not tend to establish the charge of possession of whisky. It has long been ruled in this state that convictions cannot be based upon suspicion. The judgment should be reversed, and defendant discharged; and it is so ordered."

In State v. Gordineer, Ore., 366 P.2d 161, the Supreme Court of Oregon, en banc, had occasion to interpret ORS 471.430 which provides:

> "* * * No person under the age of 21 years shall purchase, acquire or have in his or her possession alcoholic liquor in a manner other than provided for in the Liquor Control Act."

The court said, l.c. 164:

> "In our opinion 'possession', as used in this statute, includes in addition to guilty knowledge the intent of the minor to possess full control over the liquor with the right to enjoy its consumption to the exclusion of others."

Finally, in Nethercutt v. Commonwealth, 241 Ky. 47, 43 S. W.2d 330, the court said this, l.c. S.W.2d 330:

> "The Attorney General very frankly admits that liquor in one's stomach does not constitute possession within the meaning of the law, and the court erred in overruling the motion for a directed verdict for defendant. In the light of the following cases, we agree with his conclusions: Brooks & Minton v. Commonwealth, 206 Ky. 720, 268 S.W. 339; Skidmore v. Commonwealth, 204 Ky. 451, 264 S.W. 1053; Sizemore v. Commonwealth, 202 Ky. 273, 259 S.W. 337."

In view of the foregoing, it is the opinion of this office that liquor that has been consumed does not come within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

Honorable Bob F. Griffin

CONCLUSION

It is the opinion of this office that liquor that has been consumed does not come within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

NORMAN H. ANDERSON
Attorney General