

OPPD Legal Bulletin
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BYOB and Open Containers

This past session, the legislature legalized the "bring your own booze," or BYOB concept, for unlicensed businesses that choose to allow it.¹ By unlicensed businesses, I mean businesses that are not licensed to serve alcohol or cereal malt beverages - for example, a restaurant that does not have a liquor license. Theoretically, if McDonald's were to allow it, you could bring in, mix and consume a rum and coke with your grey, alleged meat-patty burger and fries. But passage of this and other laws sometimes make it difficult to know what is legal and what is illegal in transporting containers of alcoholic beverages.

Generally, it is legal to transport any type of alcohol that is in its sealed, original container. But once the container is opened, it may be illegal to transport it depending on where and how it is transported.

Transporting Open Containers

K.S.A. 8-1599 (and OPMC 12.04.106) prohibits the transportation of opened containers of alcohol, with certain exceptions. The exceptions include:

1. if the opened container is in the locked rear trunk or rear compartment, or any locked outside compartment which is not accessible to any person in the vehicle while it is in motion; or
2. if there is no trunk (such as a Ford Escape), the opened container is behind the last upright seat or in an area not normally occupied by the driver or a passenger; or
3. if the vehicle is a recreational vehicle or a bus and the opened container is in the exclusive possession of a passenger in the vehicle who is not in the driving compartment of such vehicle or who is in a portion of such vehicle from which the driver is not directly accessible.

Additionally, it is an affirmative defense if an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic liquor. Although the statute does not appear to require any certain mental state, case law imposes a "knowing" requirement. See *State v. Bishop*, 14 Kan. App. 2d 223, 786 P.2d 1152 (1990), holding the State must prove the defendant knew or had reasonable cause to know that open containers of alcoholic liquor were present and being transported. Bishop also held that the open container provision also applied to passengers as well as the driver of the vehicle. Bishop further holds that the doctrine of constructive possession does not extend to unknowing passengers. So, in order to prove an open container violation, an officer must show that the person cited:

¹

. See K.S.A. 2015 Supp. 41-719(b)(6).

- (a) was in the exclusive possession of an opened container, that
- (b) was accessible to them, and that
- (c) the defendant knew or had reasonable cause to know that he or she was transporting an opened container of alcoholic beverage.

See P.I.K. Crim. 4th 66.050. See also State v. Stevenson, 299 Kan. 53, 66, 321 P.3d 754 (2014)(since not all transportation of open containers is illegal, mere odor of alcohol, a legal substance, coming from a car is not probable cause to search the car).

Doggie Bag Law

Another "exception" to the open container law, which does not actually appear in the open container law, is the "doggie bag law," K.S.A. 2014 Supp. 41-2653, passed in 2006. This statute authorizes, but does not require, clubs and drinking establishments to permit patrons to remove opened containers of alcohol from the licensed premises using "doggie bags." If the club or drinking establishment chooses to offer this service, they must somehow reseal the previously opened container and place it in a tamper-proof, transparent that is sealed in a manner that makes it visibly apparent if the bag is subsequently tampered with or opened. The patron must be also be provided with a dated sales receipt for the liquor. This law only applies to liquor in its original container that was purchased by patrons from the club or drinking establishment and that were opened and partially consumed at the club or drinking establishment. The law was originally intended to allow restaurant patrons to take home an unfinished bottle of wine purchased at a restaurant, but was expanded to include all types of liquor and to cover all clubs and drinking establishments.

Conclusion

Kansas alcohol laws have loosened up to the point of allowing BYOB at the discretion of unlicensed businesses. And, as noted above, not all transportation of open containers is illegal. The mere odor of alcohol coming from a vehicle may not give rise to probable cause to search the vehicle. In order to charge someone with illegally transporting an open container, officers must prove the person to be charged knew the container was there or had reasonable cause to know that open containers of alcoholic liquor were present and being transported. Charges are not appropriate if the open container is inaccessible from the passenger compartment, or if the alcohol is being transported pursuant to the "doggie bag" law. Please advise if you have any questions.

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