

OPINION NO. 77-005

Syllabus:

1. No one may bring into Ohio for personal use, resale or gift any "malt beverage" or "malt liquor" as defined in R.C. 4301.01(B)(3) if such person does not possess a permit pursuant to R.C. Chapter 4303 or have written consent of the Department of Liquor Control pursuant to regulation LCC-1-23, a regulation of the Liquor Control Commission.
2. Any officer of the law may seize illegal "malt beverage" or "malt liquor" as defined in R.C. 4301.01(B)(3), hold as evidence for trial of an accused, and then upon a conviction destroy such evidence pursuant to R.C. Sections 4301.52 and 4301.45.
3. Any person may transport "malt beverage" or "malt liquor" as defined in R.C. 4301.01(B)(3) through Ohio to a final destination outside Ohio, however the State of Ohio may impose restrictions on such transportation.

To: John A. Poppe, Auglaize County Pros. Atty., Wapakoneta, Ohio
By: William J. Brown, Attorney General, February 8, 1977

Your predecessor's request for my opinion states that many local residents of Auglaize County, while traveling to states in which certain beer is available, have seen fit to purchase large quantities of such beer with the intention of bringing it into Ohio. The brewery which manufactures this beer has not applied for a license to distribute and sell its product in Ohio, and these residents desire to bring it to Ohio, where it is not readily available, for purposes of consuming it themselves, giving it away to others, or selling it for the price they paid for the beer.

You have been advised by members of the Ohio Highway Patrol that they intend to seize this beer when it is found in motor vehicles traveling through Auglaize County. Therefore, you have requested my opinion as to the following:

1. May an Ohio resident bring into the State of Ohio unlimited quantities of a beer, containing more than 3.2% and less than 7% alcohol by weight, that is not licensed for sale in Ohio with the intention of using it for his own pleasure (consumption, giving it away, or selling it to a friend at the resident's cost?) (Such beer will hereinafter be referred to as "malt beverage" or "malt liquor" per R.C. 4301.01(3), which defines any beer containing more than 3.2% and less than 7% alcohol by weight as "malt liquor" or "malt beverage".)
2. May a law enforcement officer seize unlicensed "malt beverage" as contraband, and if so what is he to do with it?
3. May a private person transport unlicensed "malt beverage" through the State of Ohio to a final destination outside the State?

You refer in question number 1 to beer (malt beverage) that is not licensed for sale in Ohio and I understand that your reference is to malt beverage which is imported without a permit as required by R.C. 4303.25:

"No person by himself or by his clerk, agent, or employee shall manufacture, manufacture for sale, offer, keep, or possess for sale, furnish or sell, or solicit the purchase or sale of any beer or intoxicating liquor in this state, or transport, or import, or cause to be transported or imported any beer, intoxicating liquor, or alcohol in or into this state for delivery, use, or sale, unless such person has fully complied with Chapters 4301. and 4303. of the Revised Code or is the holder of a permit issued by the department of liquor control and in force at the time."

R.C. 4301.01(A)(1) defines "intoxicating liquors" to include all liquids and compounds containing more than 3.2% of alcohol by weight which are fit to use for beverage purposes and is applied to R.C. Chapter 4303 by R.C. 4303.01.

The state has a legitimate interest in regulating traffic in alcoholic beverages to secure the use of proper ingredients, methods in manufacture, transportation and uniformity in weight, volume, proof and labeling. At least one foreign beer is not pasteurized and must be kept refrigerated during transportation and storage. To bring this beer into Ohio without state regulation of the entire process is to create a potential health hazard for unwary recipients.

R.C. 4301.60 clearly proscribes the transportation of beer or malt beverage within the state, by persons not holding an appropriate permit:

"No person, who is not the holder of an H permit, shall transport beer, intoxicating liquor, or alcohol in this state. This section does not apply to the transportation and delivery of beer, alcohol, or intoxicating liquor purchased or to be purchased from the holder of a permit issued by the department of liquor control, in force at the time, and authorizing the sale and delivery of the beer, alcohol, or intoxicating liquor so transported, or to the transportation and delivery of beer, intoxicating liquor, or alcohol purchased from the department or the tax commissioner, or purchased by the holder of an A or B permit outside this state and transported within this state by them in their own trucks for the purpose of sale under their permits."

R.C. 4301.67 in regard to possession of beer or malt beverage states:

"No person shall have in his possession any spiritous liquor, in excess of one quart, in one or more containers, which was not purchased at wholesale or retail from the depart-

ment of liquor control or otherwise lawfully acquired pursuant to Chapters 4301. and 4303. of the Revised Code, or any other intoxicating liquor, in one or more containers, which was not lawfully acquired pursuant to Chapters 4301. and 4303. of the Revised Code." (Emphasis added.)

It is clear from the statutes that the State intends to control the importation, transportation, and sale of intoxicating liquors. It is equally clear that any importation must be officially sanctioned, or the mere possession of the malt beverage is a violation of R.C. 4301.67.

The Liquor Control Commission regulation LCC-1-23 states:

"No beer or malt liquor shall be imported into the State of Ohio except upon the written consent of the Department. Application for such consent shall be upon forms approved by the Board and provided by the Department."

Pursuant to this regulation the Department of Liquor Control Form 5.3-62 may be obtained by a person to import a quantity of malt beverage for his personal use only and not for resale. The Department has chosen to permit "personal use" which allows conduct beyond "personal consumption", therefore it appears that personal use includes the non-commercial gift of the malt beverage to any recipient not otherwise prohibited by law. The resale of the malt beverage at any price is specifically not permitted by the Department's form.

All other intoxicating liquors not lawfully acquired pursuant to Chapters R.C. 4301 and 4303, or the exemptions within at R.C. 4301.20, may not be brought into the state or possessed for personal consumption, gift or sale.

If malt beverage is transported in violation of law, any officer of the law may seize it pursuant to R.C. 4301.45:

"When any agent or employee of the department of liquor control deputized for that purpose, or any other officer of the law, discovers any person in the act of transporting in violation of law, beer or intoxicating liquors in any wagon, buggy, automobile, watercraft, aircraft, or other vehicle, he shall seize all beer or intoxicating liquors found therein being transported contrary to law. Whenever beer or intoxicating liquors transported or possessed illegally are seized by such an officer, he shall take possession of the vehicle and team, or automobile, boat, watercraft, aircraft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under Chapter 4301. and 4303. of the Revised Code, in any court having jurisdiction of offenses under said chapters.
. . ."

See also R.C. 4301.53:

"The judge of a court of record may issue warrants to search a house, building, place, vehicle, watercraft, aircraft, or conveyance for beer, alcohol, or intoxicating liquor manufactured, possessed, stored, concealed, sold, furnished, given away, or transported in violation of Chapters 4301. and 4303. of the Revised Code, and the containers in which the same is found, or machinery, tools, implements, equipment, supplies, and materials used or kept for use in manufacturing beer or intoxicating liquor in violation of such chapters, and to seize any of such property and things found therein. . . .";

Furthermore Ohio Rules of Criminal Procedure 41(E) (2) provides:

"A warrant may be issued under this rule to search for and seize any: . . . contraband, the fruits of crime or things otherwise criminally possessed; . . .".

Concerning what to do with the seized property Rule 41(D) states:

"[P]roperty seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant."

R.C. 4301.53 states:

"[U]pon conviction of any violation of Chapters 4301. and 4303. of the Revised Code, any property found in the possession of the person convicted or his agent or employee shall be disposed of as provided in section 4301.45 of the Revised Code. If the accused is discharged by the judge or magistrate, such vehicle, watercraft, aircraft, or other conveyance shall be returned to its owner and any bond given pursuant to this section shall be canceled. If the accused is the holder of a permit issued under Chapters 4301. and 4303. of the Revised Code, any beer, intoxicating liquor, or alcohol seized shall be delivered to the department of liquor control and disposed of as provided in section 4301.20 of the Revised Code, and any other property seized shall be returned to its owner by the officer having the custody or possession of such property. If the accused is not the holder of such a permit in force at the time, any beer, intoxicating liquor, or alcohol, or other property is hereby declared to be a public nuisance."

R.C. 4301.45 provides that:

"[T]he court upon conviction of the person so arrested shall order the beer or intoxicating liquor destroyed . . .".

Therefore an officer may seize the unlicensed malt beverage, hold it as evidence for trial of the accused, and then destroy it as provided by statute.

As to a private person transporting "unlawful" malt beverage through the state to a final destination outside the state, the state can lawfully impose restrictions upon the interstate transportation of intoxicating liquors by requiring the designation of definite routes of travel, bonds, or permits. The U.S. Supreme Court in Carter, et al. v. Virginia, 321 U.S. 131, (1944) held:

"Regulations by a State of the transportation of intoxicating liquor through the State in interstate commerce, requiring (1) that the vehicle use the most direct route and carry a bill of lading describing the route; (2) that the carrier post a \$1,000 bond conditioned on lawful transportation; and (3) that the true consignee be named in the bill of lading and be one who has a legal right to receive the shipment at destination, held within the power of the State, independently of the Twenty-First Amendment, and not (absent conflicting federal regulation) in contravention of the Commerce Clause."

The court recognized a state's need to protect itself from illicit liquor traffic within its borders, but the Commerce Clause (U.S. Const. Art. 1 Section 8, Clause 3) will not allow a state statute to prohibit the transportation of intoxicating liquor through its borders in otherwise lawful transit.

Accordingly, in answer to your specific questions, my opinion is:

1. No one may bring into Ohio for personal use, resale or gift any "malt beverage" or "malt liquor" as defined in R.C. 4301.01 (B) (3) if such person does not possess a permit pursuant to R.C. Chapter 4303 or have written consent of the Department of Liquor Control pursuant to regulation LCC-1-34, a regulation of the Liquor Control Commission.

2. Any officer of the law may seize illegal "malt beverage" or "malt liquor" as defined in R.C. 4301.01(B)(3), hold as evidence for trial of an accused, and then upon a conviction destroy such evidence pursuant to R.C. Sections 4301.52 and 4301.45.

3. Any person may transport "malt beverage" or "malt liquor" as defined in R.C. 4301.01(B)(3) through the state of Ohio to a final destination outside the state of Ohio. The state of Ohio, however, may impose restrictions on such transportation.