

infraction for any “other individuals” (passengers) in the vehicle. Idaho Code § 23-505(2). Under Idaho law, Reyes could not have been *arrested* for an *infraction*. Idaho Code §18-111. If he could not have been arrested, his motion to suppress is well taken.

Even though Reyes was a passenger, the State of Idaho argues he has committed a misdemeanor, and thus, could be arrested. The State bases its argument not on Idaho Code § 23-505(2), but on local law. Coeur d’Alene City Ordinance 5.08.160 reads in pertinent part: “It is unlawful for any person to consume any beer, wine or intoxicating liquor, to have in his or her possession any opened or open containers or receptacles containing beer, wine or intoxicating liquor on any public park, property, grounds, thoroughfares, within the city or at any other place therein, including any motor vehicle moving or parked...” “Any person violating any of the provisions or failing to comply with any of the mandatory requirements of the ordinances of the city is guilty of a misdemeanor.” Coeur d’Alene City Ordinance 1.28.010. The officer could arrest Reyes for a “public offense” committed in his presence. Idaho Code § 19-603. *State v. Chambliss*, 116 Idaho 988, 783 P.2d 327 (Ct.App. 1989) indicates possession of paraphernalia is a public offense. If possession of an open container is not a “public offense”, then the officer could not arrest Reyes. “A police officer may engage in a warrantless arrest of a suspect when he or she has committed, or attempted to commit, a public offense, *including misdemeanor offenses*, in the officer's presence.” *State v. Schmitt*, --- P.3d ----, 2007 WL 1988963 (Ct.App. July 11, 2007) citing I.C. § 19-603; *State v. Bowman*, 124 Idaho 936, 940, 866 P.2d 193, 197 (Ct.App.1994). (emphasis added). Apparently, the Idaho Court of Appeals has determined *any* “misdemeanor” is a “public offense” under Idaho Code § 19-603. *Schmitt* also makes it clear that a violation of a local ordinance, which under that ordinance is a misdemeanor, satisfies the “misdemeanor” requirement of Idaho Code § 19-

603. In that case, the local ordinance made it a misdemeanor violation to have an open container of beer within the city of Idaho Falls, Idaho.

Reyes' argument is that since Coeur d'Alene City Ordinance 5.08.160 causes any person in a vehicle with an open container subject to a misdemeanor, and Idaho Code § 23-505(2) causes anyone in a vehicle (other than the driver) to be subject to an infraction, the state law and local ordinance contradict each other. Supplemental Memorandum, p. 1. Reyes argues in that situation, state law controls, citing Idaho Constitution, Article XII, § 2, "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations *as are not in conflict with* its charter or with *the general laws.*" *Id.* pp. 1-2. "A local ordinance that conflicts with a state law, or its preempted by state regulation of the subject matter, is void." *Arthur v. Shoshone County*, 133 Idaho 854, 861-62, 993 P.2d 617, 624-25 (Ct.App. 2000), citing *Envirosafe Serv. Of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). *Id.* p. 2.

The State cites *State v. Musser*, 67 Idaho 214, 176 P.2d 199 (1946), but only for the proposition that "Conflict may either be direct conflict, which is described as 'expressly allowing what the state disallows, or vice versa.'" State's Brief in Opposition, p. 3. Aside from the non-sequitur of this quote, the Court has read and re-read *Miller*, and is unable to find this quote contained anywhere therein. Had counsel for the State read *Miller*, not only would counsel notice the above quote is not contained within that decision, but more importantly, counsel for the State would have found *Miller* to be on point and dispositive of this issue in the State's favor.

In *Miller*, the Idaho Supreme Court noted Idaho's Constitution and the Idaho Liquor Control Act gave the State the right to control liquor traffic in the State, however, that Act and Idaho's Constitution did not vest exclusive jurisdiction in the legislature. 67 Idaho 214,

218. 176 P.2d 199, 201. Article 12, section 2 of the Idaho Constitution provides: “Any county, or incorporated city or town may make and enforce within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.” Continuing on, the Idaho Supreme Court held: “Under the above constitutional provision counties, cities and towns have full power in affairs of local government notwithstanding general laws of the state defining and punishing the same offense.” 67 Idaho 214, 219, 176 P.2d 202. (citations omitted). It is this portion which is dispositive of defendant’s motion to suppress. The Idaho Supreme Court in *Miller* continued:

In *Clark v. Alloway*, supra [67 Idaho 32, 42, 170 P.2d 425, 431 (Idaho 1946)], the following quotation appears:

In *Mann v. Scott*, 180 Cal. 550, 182 P. 281, 283, the court said: ‘Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable.’ 19 R.C.L. sec. 110, pp. 803-4; *State v. Quong*, 8 Idaho 191, 67 P. 491; *Ex parte Hoffman*, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75; *Society Theatre v. City of Seattle*, 118 Wash. 258, 203 P. 21; *Portnoy v. Superior Court [of Riverside County]*, Cal.App., 116 P.2d 804; *Natural Milk Producers Ass'n v. City and County of San Francisco*, 20 Cal.2d 101, 124 P.2d 25.

Indeed, an act may be a penal offense under the laws of the State, and further penalties, under proper legislature authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other.’ 1 *Cooley's Const.Lim.*, 8th Ed., p. 414. *State v. Hart*, supra.

In *Mayor, etc., of City of Mobile v. Allaire*, 14 Ala. 400, the validity of a municipal by-law, imposing a fine of \$50 for assault and battery committed within the city, was brought in question. Collier, C.J., says:

The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offence against the criminal justice of the country, but to provide a mere *police regulation*, for the enforcement of

good order and quiet within the limits of the corporation. So far as an offence has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the State tribunal has interfered and exercised its power in bringing the defendant before it to answer for the assault and battery; for whether he has there been punished or acquitted is alike unimportant. The offence against the corporation and the State are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis; the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view, the maintenance of the peace and dignity of the State.

See, also, cases cited in 1 Cooley's Const.Lim., 8th Ed., p. 415.

The legislature and municipality, independent of the constitutional provision, have power to regulate the traffic in intoxicating liquors, and by so doing would not violate any constitutional provision. The legislature may regulate and prohibit the traffic in intoxicating liquor under its plenary power, and a municipality may do likewise under its police power.

It is contended by appellant that sec. 102, chap. 222, Session Laws, 1939, is a superior statute with which the ordinance is in conflict on the subject of liquor control.

That section is, in effect, merely a preamble to the whole act, expressing the purpose, object and intent of the legislature in the enactment of the statute. It does not provide that a person may drink intoxicating liquor in a public place within the corporate limits of a municipality. The city ordinance prohibits drinking intoxicating liquor in a public place. It is, therefore, not in conflict with, nor repugnant to, the statute.

We have reached the conclusion that the ordinance is not in violation of Section 26, Article 3 of the Constitution, as amended, therefore not unconstitutional; that it is not an unconstitutional exercise of the police power of Boise City; neither is it in conflict with the Idaho Liquor Act, Session Laws, 1939, Chapter 222. Therefore, the court did not err in overruling the demurrer interposed to the complaint. The complaint stated a public offense under the ordinance, and the court committed no error in the admission of evidence in the course of the trial. *State v. Nelson*, 10 Idaho 522, 79 P. 79, 67 L.R.A. 808, 109 Am.St.Rep. 226, 3 Ann.Cas. 322.

67 Idaho 214, 219-222, 176 P.2d 199, 201-202. As the Idaho Supreme Court stated in *Miller*, which cited the earlier Idaho Supreme Court case of *Clark v. Alloway*, which in turn cited the California Supreme Court case of *Mann v. Scott*, 180 Cal. 550, 182 P. 281, 283 (Cal. 1919): 'Where the Legislature has assumed to regulate a given course of conduct by

prohibitory enactments, a municipality with subordinate power to act in the matter may make such *new and additional regulations* in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and *which are not in themselves unreasonable.*' 67 Idaho 214, 221, 176 P.2d 199, 201. (emphasis added). This Court finds the Coeur d'Alene Ordinance which makes it a misdemeanor for anyone in a motor vehicle to have an open container, is simply a *new and additional regulation* which is *not unreasonable* compared to the Idaho Statute which would only make the same offense an infraction as to passengers of a vehicle. The city ordinance provides an elevated criminal consequence for the same conduct as compared to the statute, but it in no way legalizes that which the statute prohibits. Thus, this Court finds there is no conflict between the City of Coeur d'Alene Ordinance and the Idaho Statute. An understanding of the *Mann v. Scott* case supports this conclusion. That case looked at a state law which requires that a motor vehicle be operated with due care and caution when it overtakes a street car which is stopping on a city street to receive or discharge passengers, and further provides that the vehicle be brought to a full stop if reasonably necessary for the safety of such passengers. The municipal ordinance required that the vehicle shall in all cases be stopped at a distance of 10 feet in the rear of the stopping street car. The California Supreme Court stated:

The ordinance certainly does not attempt to make lawful the performance of any act forbidden by the state law. It follows that a conflict, if any, can exist only upon the theory that the ordinance prohibits that which is affirmatively authorized by the Motor Vehicle Act. In short, the appellants are placed under the necessity of contending that that act affirmatively authorizes motor vehicles to pass a stopping street car in a city whenever the apparent risk involved in so doing would not deter an ordinarily prudent and careful driver. We do not so construe the statute. Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and

appropriate to the necessities of the particular locality, and which are not in themselves unreasonable. Mr. Justice Henshaw stated in the case of *In re Hoffman*, 155 Cal. 114, 118, 99 Pac. 517, 519 (132 Am. St. Rep. 75), that the correctness of this principle cannot be doubted. He continues:

If the state should pass a law declaring it unlawful to erect a chimney of a height exceeding 150 feet, would any one seriously contend that a city of the state within the earthquake zone might not by ordinance, in the clear exercise of police power, for the benefit of its citizens, still further restrict the height of chimneys? Such, in principle, is the present case. The Legislature has in effect declared that it shall be unlawful to sell milk containing less than 11.5 per centum solids, 3 per centum of which solids shall be milk fat. And ordinance of a municipality requiring of the milk vended therein a larger percentage of solids, if not in its exactions unreasonable, does no violence to the law of the state. The state's declaration merely is that milk shall not be sold containing less than 11.5 per centum of solids, 3 per centum of which shall be milk fat. If the city of Los Angeles had provided that milk might be vended which contained less per centum of milk fats than that exacted by the state law, there would be presented a plain case of conflict. The municipality would be endeavoring to legalize that which the state had declared to be unlawful. But what the city has in fact done has been to impose not fewer, but additional, qualifications upon the milk which may be vended to its consumers. The state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs), upon the people of the state, urban and rural, but it may often, and does often, happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements. Such is the nature of the legislation here questioned.

It is true that in the case of *In re Hoffman*, supra, the state statute therein considered was general in its terms, and made no distinction between regulations applicable in urban and those applicable in rural communities, whereas the Motor Vehicle Act makes express provision that certain rules shall apply in business districts, that other rules shall apply in territory which is closely built up, and that still different rules shall apply in country districts. But it does not follow that, because the Legislature has seen fit to distinguish in the operation of the act between urban and rural communities and to make certain general rules applicable in all of the cities of the state, it has thereby impliedly prohibited the enactment of additional local regulations by municipalities in keeping with the purpose of the general law. The question whether the Legislature has undertaken to

occupy exclusively a given field of legislation is, we think, to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate. Such was the analysis made in the case of *In re Hoffman*, supra. The opinion of this court in *Ex parte Hong Shen*, 98 Cal. 681, 684, 33 Pac. 799, 800, was based upon the same process of reasoning. There it was said:

Our Constitution provides that "any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Article 11, § 11. It is claimed by the petitioner that, inasmuch as the Legislature has regulated the sale of certain poisons, including opium, by the acts above referred to, it is not within the power of the board of supervisors of the city and county of San Francisco to make another regulation or to prohibit the sale of opium; that an ordinance is in conflict with the general laws when it makes another and different regulation for the sale of an article of commerce than that provided by a statute of the state.

The soundness of this contention we cannot admit. They may be different regulations without a conflict. * * * So, in the action at bar, the Legislature has simply prohibited the sale of opium, and certain other poisons, unless a certain record is kept. It has not directly authorized the sale of opium without the prescription of a physician; it has not legislated upon that subject at all, except in providing that where a physician's prescription is presented no other record need be kept. The city has gone further than the statute, and provided that no opium shall be sold without a prescription. While the regulation is different from that of the state there is no conflict, and therefore it is not in violation of the provision of the Constitution quoted above.

Upon a careful analysis of the Motor Vehicle Act of 1913 and of its purpose viewed in the light of the traffic conditions upon which it was intended to operate, we are of the opinion that the reasoning of the court in the case last quoted is decisive of the question now presented. In other words, we believe that by extending the operation of the act in terms to the traffic upon city streets the Legislature did no more than to prescribe obviously necessary safeguards for travel upon such streets viewed as part of the public highways of the state in which all of the people of the state are essentially interested, and that it did not thereby intend to prohibit the enactment of such new and additional police regulations in furtherance of the purpose of the act as might appear reasonable and proper in a given locality.

180 Cal. 550, 556-59, 182 P. 281, 283-85. As stated by the California Supreme Court, the Coeur d'Alene City Ordinance "certainly does not attempt to make lawful the performance

of any act forbidden by the state law.” 180 Cal. 550, 556, 182 P. 281, 283. There is no conflict. The doctrine of pre-emption does not apply.

III. ORDER.

IT IS ORDERED that Reyes's Motion to Suppress is **DENIED**.

Dated this 12th day of October, 2007.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 2007 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Dennis Reuter
Blake Swenson

By _____
Jeanne Clausen, Secretary