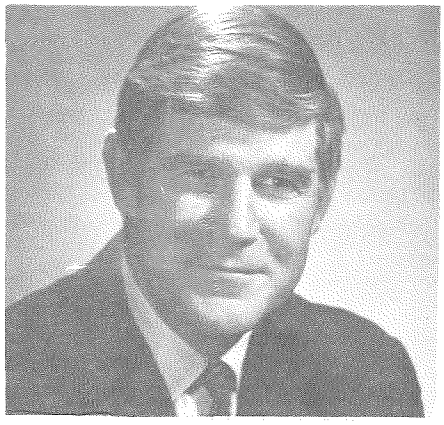
OCTOBER 1970

ALERT

CRIMINAL DIVISION

FROM THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF MAINE.



MESSAGE FROM ATTORNEY GENERAL JAMES S. ERWIN

I have felt the need for a long time for my Office to be more helpful to the law enforcement officer who is constantly under pressure to be instantly aware of court decisions and legislation that affect his daily duties.

There are criminal cases being lost in court every day because many law enforcement officers are not aware of changes in the criminal law. This lack of awareness is not only the fault of the officer, but also a failure on the part of State government to provide a continuing communication as to the changes that are taking place.

In this, the first issue of "Alert," the Criminal Division of this Office intends to provide a continuing communication with the law enforcement community as to recent court decisions that affect law enforcement personnel and also to highlight in each issue certain areas of the criminal law in depth which most hamper the law enforcement officer in the carrying out of his duties.

The information contained in "Alert" will be geared to aid the new as well as the veteran officer with the primary purpose of providing guidance and understanding in the rapidly changing criminal law. Law enforcement in Maine, as elsewhere across the country, is becomming more complex and sophisticated, and it is crucial that law enforcement personnel be aware of changes in the law brought about by both court decisions and legislation.

It is my sincere hope that this publication will be the first step in the creation by this Office of a detailed law enforcement manual which will provide a comprehensive and factual body of information on practically any subject directly affecting a law enforcement officer's professional duties.

James S. Erwin

JAMES S. ERWIN
Attorney General

SEARCH AND SEIZURE

The complications arising from recent court decisions in the area of search and seizure have indeed confused, if not completely frustrated, law enforcement officials as to the legal requirements to be followed in avoiding any infringement of constitutional rights in obtaining and exercising a warrant. The following is a brief synopsis of the current law governing search and seizure.

OBTAINING A SEARCH WARRANT

For the issuance of a search warrant, a District Court Judge or complaint justice must find "probable cause." Defined, this is cause based upon grounds which satisfy the mind of an ordinary, prudent and cautious person that a crime was, is being, or will be committed. Probable cause connotes evidence that is less than certain but more than suspicion.

The purpose of a search warrant is to seize the thing or person alleged to be, at the time of issuance, in the place to be searched to prevent removal or further concealment. *State v. Martelle*, 252 A. 2d 316 (Maine 1969).

In requesting a search warrant, the officer should be specific as to the article(s) to be seized and the premises to be searched. There is no need to be overly technical, but do not become hasty and omit vital items.

Example:

". . . being a wooden frame building in part consisting of two and one half-stories, being further described as being located on the easterly side of the so-called High Hill Road, in the Town of Sanford, therein being concealed, four Goodyear tires, size 8:25 x 14, serial number 38406V,"
is sufficient to establish the area to be searched and the item to be seized.

The test of "sufficiency of description" is that the officers are able to ascertain and identify the place intended to be searched with reasonable effort. *State v. Brochu*, 237 A. 2d 418 (Maine 1967).

CHECKLIST FOR OBTAINING A WARRANT

1. You must produce factual circumstances which are sufficient to indicate "probable cause" that the items to be seized are at the location stated.
2. The place or person to be searched or thing to be seized must be specifically designated and described.
3. Facts must be produced showing a crime was, is being, or will be committed.
4. The above must be supported by oath or affirmation.
5. Information from a secret informant must meet the requirements of *State v. Hawkins*, 261 A. 2d 255 (Maine 1970), discussed below.

State v. Hawkins:

Information received through a secret informant concerning a future illegal activity can be used to obtain a search warrant providing that the officer includes in his affidavit:

1. Circumstance which will indicate to the complaint justice that the informant has been reliable in the past.

2. Facts pertaining to this particular illegal activity which indicate his (the informant's) information is not rumor, but is personal knowledge.

Example:

Informant tells you of a marijuana party to be held Saturday evening. To obtain a search warrant, the affidavit presented to the complaint justice must include evidence that the informant is a reliable person, i.e., that information he has provided you in the past has proven to be truthful. Also, that informant's information concerning the marijuana party is reliable, i.e., that it is not rumor, but personal knowledge that there will be drugs at this party.

NOTE:

1. The Officer requesting the warrant need not reveal informant's name

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SEARCH AND SEIZURE (Continued)

unless his information determines the issue of guilt or innocence. *McCray v. Illinois*, 386 U.S. 300 (1965). See also *Roviaro v. U.S.*, 353 U.S. 35 (7th Cir. 1957).

2. Information received from a confidential informant must be current. A warrant obtained on this information will be invalid if there is too great a time lapse between your obtaining the information and the request for the warrant.

GROUNDS FOR ISSUANCE OF A WARRANT

A warrant may be issued under this rule to search for and seize any:

1. Stolen or embezzled property.
2. Property designed or intended for use or which is or has been used as a means of committing a criminal offense.
3. Property, the possession of which is unlawful (contraband).
4. Property consisting of non-testimonial evidence which will aid in the particular apprehension or conviction.

CHECKLIST FOR EXECUTING A WARRANT

1. A warrant must be executed and returned within ten days after its date. After this period, it is void. Rule 41 (d) (Maine Rules of Criminal Procedure).
2. The Officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken, a copy of the warrant and a receipt for the property taken or shall leave a copy and receipt at the place from which the property was taken.
3. The warrant will designate the judge to whom it shall be returned. The officer should be certain that he returns the warrant to the proper judge.
4. The return of the warrant shall be accompanied with a written inventory of any property taken.
5. The inventory shall be made in the presence of the applicant for the warrant (policeman) and the person from whose possession or premises the property was taken, if they were present, or in the presence of at least one credible person, other than the officer who secured the warrant. The inventory must be verified by the officer executing the warrant.
6. If requested to do so, the District Court Judge or complaint justice must deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

In cases where an officer in the course of a legal search comes upon contraband in plain view, he may retain and use this material for prosecution in the crime to which it relates.

Example:

1. You are searching the house of John Smith for marijuana pursuant to a valid search warrant. While doing so, you discover contraband on the top of a desk. This material may be seized and will be admitted into evidence.

NOTE:

1. It is important to note that the area being searched must relate to the article(s) described in the search warrant. You cannot search for stolen tires in a desk drawer. The physical nature of the item will determine where you can validly search.
2. The warrant shall direct that it be served in the daytime. However, if the officer states in his affidavit that he is positive that the property is on the person or in the place to be searched, the warrant shall direct it to be served at any time. Rule 41 (c) (Maine Rules of Criminal Procedure).

SEARCH WITHOUT A WARRANT: EXCEPTIONS

1. Open fields and public places

There is no constitutional requirement of a warrant for a search of an open field or public place such as a park or a street. *McDowell v. United States*, 383 F. 2d 599 (8th Cir. 1967). The open field doctrine would, as an example, include searches in woods, caves, and parks. Open fields do not cover the open space of a yard close around a house. Privately owned premises which are open to the public, such as stores, hotel lobbies, and bus depots, may also be searched without a warrant, but such a search must be limited to those areas which are open to the public and cannot extend to private portions of the premises.

Example:

A warrant is necessary to search the curtilage of a dwelling house or place of business. This includes the open space immediately surrounding a dwelling which can easily be considered as part of the house or business establishment. Examples of curtilage would be:

1. The enclosed back yard of a residence.
2. A farmer's barn located close to his house.
3. A trash can near the back door of a house.

2. Abandonment

A search and seizure of abandoned property is not unlawful. *People v. Long*, 86 Cal. Rep. 227 (California 1970).

Example:

Defendant had been a tenant in room 20 in a hotel. While checking out, he told the landlord that he was leaving for Indianapolis. Police looked in the window of the room and saw an old suitcase. Officers entered the room and found incriminating evidence of theft in the suitcase. Decision: search and seizure of abandoned property is not illegal. In this case the property was abandoned and the police were allowed to introduce the suitcase as evidence in court. *People v. Long*, 86 Cal. Rep. 227 (California 1970).

3. Consent

There is no need for a warrant when consent (or waiver) to search the premises has been voluntarily, intelligently, and knowingly given. However, it is of utmost importance that consent be clear, convincing, and free from coercion in order to permit the material seized to be introduced in evidence in court. (*See Scott v. United States*, 228 A 2d 637). (District of Columbia 1967).

False pretense by an officer that he possesses a search warrant will not validate a subsequent consent by the occupant. Contraband or evidence seized under these circumstances will not be admissible in evidence.

In view of the recent trend in Court decisions, it would be wise in time of uncertainty to advise the oc-

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ALERT

James S. Erwin — Attorney General
Richard S. Cohen — Chief, Criminal Division

This bulletin is funded by a grant from the Maine Law Enforcement Planning and Assistance Agency.

FROM THE LEGISLATURE

SALE AND POSSESSION OF CANNABIS (MARIJUANA)

Public Laws, 1969 Chapter 558

TITLE 23 M.R.S.A.

§2383. POSSESSION

1. Manufactures or possesses. Whoever manufactures, cultivates, grows, possesses or has under his control, Cannabis or Peyote, except as authorized by this chapter, shall be punished, for the first offense, by a fine of not more than $1,000 and by imprisonment for not more than 11 months; and, for any subsequent offense, by a fine of not more than $2,000 and by imprisonment for not more than 2 years.

2. Present. Whoever, knowingly, is present where Cannabis or Peyote is kept or deposited, or whoever is in the company of a person, knowing that said person is in possession of Cannabis or Peyote, shall be punished by a fine of not more than $1,000 and by imprisonment for not more than 11 months.

§2384. SALE

1. To those 21 or over. Whoever, being 21 years of age or over, sells, exchanges, delivers, barters, gives or furnishes Cannabis or Peyote to any person 21 years of age or over, shall be punished by imprisonment for not less than one nor more than 5 years.

2. To those 18 to 20. Whoever, being 21 years of age or over, sells, exchanges, delivers, barters, gives or furnishes Cannabis or Peyote to any person 18 to 20 years old, inclusive, shall be punished by imprisonment for not less than 2 nor more than 6 years.

3. To those under 18. Whoever, being 21 years of age or over, sells, exchanges, delivers, barters, gives or furnishes Cannabis or Peyote to any person under the age of 18 years old, shall be punished by imprisonment for not less than 3 nor more than 8 years; and for any subsequent offense, by imprisonment for not less than 4 nor more than 10 years.

4. By those under 21. Whoever, being less than 21 years of age, sells, exchanges, delivers, barters, gives or furnishes Cannabis or Peyote to any person, shall be punished by imprisonment for not less than 1 nor more than 5 years.

§2385. PERSON EXEMPTED

The provisions of this chapter restricting the possession of Cannabis or Peyote shall not apply to public

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IMPORTANT RECENT DECISIONS

Admissions

Incriminating admissions which defendant made while leading police officers to hidden marijuana because of a promise from the authorities that the officers would discuss dismissal of the charges with the county attorney, resulted in a court ruling that held the admissions and marijuana inadmissible because they were obtained under duress or promise of benefit. *Anderson v. State,* 461 P. 2d 1,005 (Oklahoma 1969).

Obscene film

A warrant to seize an allegedly obscene film based on a viewing of the film by the police and the issuing complaint justice but unsupported by a prior adversary hearing was void. *Tyrone, Inc. v. Wilkinson,* 410 F. 2d 639 (4th Cir. 1969).

Detectives reviewed a portion of a certain film called "Female", decided that it was obscene and seized the film. The proprietor of a theater was prosecuted. There was no warrant. Decision: The seizure was illegal. The Constitution requires that an adversary judicial hearing and determination of obscenity be held before a warrant be issued to search for and seize the obscene materials. *Cambist Films, Inc. v. Duggan,* 420 F 2d 687 (3rd Cir. 1969).

Confession — intoxication

Breaking and entering. The defendant was arrested. He had been drinking. He had been given *Miranda* warning, but confessed. He claims intoxication makes the confession void. Decision: Intoxication does not exclude a confession from evidence. It is a fact of evidence for the jury in determining weight and credibility of the confession. *Fant v. Peyton,* 303 F. Supp. 457 (Virginia 1969).

Lineup

Robbery. Prior to the indictment, the defendant was placed in a lineup. He was not advised to right of counsel or right to have counsel present at the lineup. Decision: The lineup process is a crucial stage, and it is constitutional error to admit evidence of the lineup itself when it is conducted in violation of the Sixth Amendment. Counsel was not present and there was no waiver of counsel. *People v. Fowler,* 461 P. 2d 643 (California 1970). The constitutional right of accused to have counsel present at lineup, unless he has validly waived that right is not limited to lineups occurring after indictment and applies to formal pre-accusation lineups. *People v. Fowler,* 461 P. 2d 643 (California 1970).

NOTE:

Prior to lineup, defendant must be advised of his right to counsel and if indigent, must be informed that the State will provide him with an attorney if he so desires.

MAINE COURT DECISIONS

Miranda

Defendant was convicted of driving on a public highway after his license had been suspended. An officer was called upon the scene of an automobile accident between the defendant and another party. On the way to the hospital, the defendant's response to the officer's inquiry stated that he was the driver of the car. Defendant now claims that this admission was admitted in evidence in violation of his constitutional rights because he was not given his *Miranda* warning. Decision: *Miranda* has no application. Defendant was not in custody nor under arrest. The officer had no knowledge that any offense had been committed. There was no focus of suspicion upon the defendant. The officer was at most making a routine investigation of an automobile accident, and had no occasion for *Miranda* warnings. *State v. Petersen,* Law Docket No. 361 (Maine 1970).

Pre-Trial Identification

Defendant, who was being held in jail on a charge of robbery from a store, was presented to a hospitalized victim of a separate assault and robbery crime which was being investigated. There was some question as to whether defendant had retained a lawyer on the store robbery, but in any event, no lawyer was contacted for the separate assault and robbery crime. Defendant was transported to the hospital by a deputy sheriff. The victim,

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SEARCH AND SEIZURE (Continued)

cupant of his constitutional rights. The officer should state: (1) that he does not have a search warrant; (2) that the occupant has a constitutional right to refuse the search. In all probability, once the officer has given this warning and the occupant still consents to the search, any evidence seized will be admissible in court.

NOTE:

1. The search must be conducted immediately following the consent. A search several days after consent was given is not permissible. *State v. Brochu,* 237 A. 2d 418 (Maine 1967).

2. It has been recognized that a search is not unreasonable if it is made with the consent of a third party who is in joint control of the premises. However, there must be some objective evidence that the third party is in joint control. The principle of joint control would not apply to situations where there is a reasonable expectancy on the part of the defendant that his property will be preserved from the intensive scrutiny of others.

Example:

A hotel guest may reasonably anticipate a maid entering his room, but it is unreasonable for him to expect her to let the police in to search his room.

3. The area of third party consent is indeed very difficult to comprehend. Hence, it would be advisable, when uncertainty exists as to who may consent to search a particular area, that the officer secure a warrant.

4. Incident to a lawful arrest

A limited search may be conducted without a warrant, of any person lawfully arrested and the area within his immediate reach from which he might obtain a weapon or destroy evidence. *Chimel v. California,* 395 U.S. 752 (California 1969).

Example:

You have just placed John Doe under arrest at his office. The only area which may be searched without a warrant is his person and the area within his reach. You may NOT legally search his entire office nor an adjacent room. The law limits the search to the area in which John Doe is in when arrested.

NOTE:

1. The search must be made at the time of his arrest. An officer cannot return the following day and conduct a search incidental to the arrest. *James v. Louisiana,* 382 U.S. 37 (Louisiana 1965).

2. An officer cannot arrest Joe Smith on the street, then take him to his home in order to search it. The search is limited to the immediate area in which Joe was arrested. *United States v. Barton,* 382 F. Supp. 795 (Massachusetts 1967).

5. Probable cause — urgent circumstances

An officer may conduct a search based upon probable cause without a warrant only where there is a strong possibility that certain evidence or contraband will be concealed or moved if the search is not conducted immediately. This type of situation arises usually in cases of (1) movable vehicles, (2) fleeing suspects or (3) contraband or evidence in imminent danger of destruction, removal, or concealment. *Johnson v. United States,* 333 U.S. 10 (9th Cir. 1948).

It must be remembered that inconvenience or slight delay does not constitute emergency. A court will not tolerate search and seizures without a warrant merely because an officer would be put to some inconvenience in obtaining one. Inconvenience must always give way to constitutional rights.

WHENEVER THERE IS A DOUBT AS TO OBTAINING A SEARCH WARRANT, AND IF IT IS POSSIBLE, GET ONE.

Search and seizure of vehicles without a warrant will be covered in a future issue of ALERT.

MAINE COURT DECISIONS (Continued)

with no preliminary statements or questioning by anyone, clearly identified the defendant as his assailant. Defendant claims that he should have been represented by his lawyer at this pre-trail confrontation with the victim.

The Court decided the case on procedural grounds but set out guidelines. A claimed violation of constitutional rights in the conduct of a confrontation with a witness depends on the totality of the circumstances surrounding it. The protection of a lawyer is required in these cases because the circumstances surrounding a pretrial confrontation between witness and accused are often such as to suggest his guilt and lead to a mistaken identification. In this case, there were no such circumstances lending to mistaken identification: (1) No preliminary statements were made to the victim; (2) The victim's words of identification were spontaneous and certain; (3) The defendant said nothing in the presence of the victim; (4) The case was merely in the investigatory stage;. (5) The critically injured victim (thought to be dying) was about to be moved to a distant hospital. Under these conditions, the fact the defendant's lawyer was not present did not void the identification. *Trask v. State,* 247 A. 2d 114 (Maine 1968), 1st Cir. No. 7443 (1970).

FROM THE LEGISLATURE (Continued)

officers or their employees in the performance of their official duties requiring possession or control of Cannabis or Peyote; nor to temporary, incidental possession by persons who are aiding public officers in performing their official duties.

§2386. CANNABIS AND PEYOTE: CONTRABAND

Cannabis and Peyote unlawfully in the possession or under the control of any person and which are kept and deposited in the State or intended for unlawful sale or sold in the State, and the vessels in which they are contained, are contraband and forfeited to the State of Maine at the time when they are seized.

RECENT AMENDMENT TO SECTION 2383 ADDING NEW SUB-SECTION 3

Section 2383. Sub-section 3

3. Enforcement. Any sheriff, deputy sheriff, municipal or state police officer, if he has probable cause to believe that a violation of this section has taken place or is taking place, may arrest without a warrant, any person for violation of this section whether or not that violation was committed in his presence.

The importance of sub-section 3 is that an arrest based on probable cause, but made without a warrant for violation of Section 2383, a misdemeanor, is valid. Prior to this enactment, arrest for a misdemeanor could only be made if the offense was committed in the presence of an officer.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.