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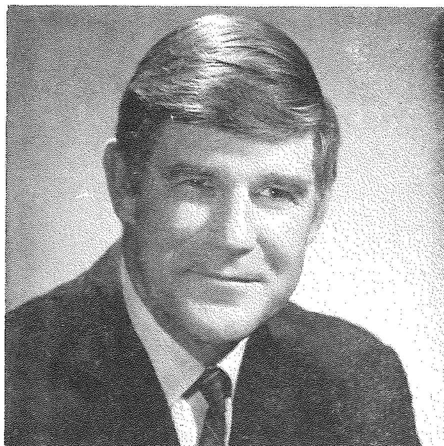
JANUARY 1972

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

As you may already have noticed, this month's issue of the ALERT Bulletin does not contain any main article but consists entirely of summaries of recent court decisions. The reasons for this are that we have gotton somewhat behind schedule because of the holiday season, and also there have been many interesting cases reported recently which we haven't had room for in recent issues.

We plan to continue with a main article in the February ALERT and in the months following. However, the extra time which will be required to put together the Law Enforcement Officer's Manual (announced in the December 1971 ALERT) may again necessitate an all-cases bulletin at some time in the future.

James S. Erwin
JAMES S. ERWIN
Attorney General

IMPORTANT RECENT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J-Judge, P-Prosecutor, L-Law Enforcement Officer.

Search and Seizure; Furtive Gesture L

Defendant was charged with possession of marijuana. His motion to suppress the evidence on the ground of illegal search and seizure was denied and he appealed. A police officer had spotted defendant's car parked illegally with defendant in it. The officer pulled up next to the vehicle in order to advise him it was illegally parked. As the officer alighted he noticed defendant lean forward in the driver's seat. The officer directed defendant to get out of the car, patted him down, and searched under the seat of the car. Marijuana was found and seized.

The Court held the search and seizure to be illegal. In order to constitute probable cause for a search, there must be something more than a mere furtive gesture such as a motorist bending over in the front seat. The gesture must have some guilty significance arising either from specific information known to the officer or from additional suspicious circumstances observed by him. Here there were no such additional factors and the search was not justified. *Gallik v. People*, 489 P. 2d 573 (Supreme Court of California, October 1971).

Search and Seizure; Automobile; Open View L

Defendant was convicted of possessing an unregistered firearm and appealed claiming among other things an illegal search and seizure. A police officer had stopped defendant's automobile to issue him a citation for speeding. Before the vehicle had stopped, the officer observed a passenger apparently placing something under the front seat. On looking into the vehicle, the officer observed a partially concealed butcher knife. While removing the knife from under the seat, the officer discovered a shotgun which he seized.

The Court held that the search was justified for two reasons:

(1) The officer, having made a traffic stop, was in a position in which he had a legal right to be. He could therefore seize a weapon which was in plain view.

(2) The officer could, for his own protection, seize the weapon, which he actually saw, and which was within the immediate control of the passenger. (Citing *Terry v. Ohio*). *Warren v. U. S.*, 447 F. 2d 259 (9th Circuit Court of Appeals, August, 1971).

COMMENT: This case provides the additional factor that was missing in the previous case involving a furtive gesture. Both cases involved an officer observing a person lean forward in the front seat of a car. However, in the second case, the officer also observed a partially concealed butcher knife in open view. This gave him the authority to seize the knife and the shotgun which was discovered near it. The officer in the previous case had nothing additional to go on except the furtive gesture and his search was therefore not justified.

Search and Seizure; Automobile; Traffic Violation L

Defendant was convicted of carrying a concealed weapon and appealed. An officer had stopped

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defendant's car because the tag light was out. Defendant got out of the car and approached the officer. He was arrested for improper motor vehicle equipment and was placed in the police car. The officer then proceeded to search defendant's car and found a gun in the glove compartment.

The Court held the search to be unlawful for two reasons:

(1) Ordinarily a minor traffic violation will not support a search and seizure. There must be a relation between the search and the offense for which the arrest was made.

(2) A search incidental to an arrest is limited to the area into which a person could reach to obtain a weapon or destroy evidence. Here the defendant was already in the police car when the officer searched his car. Furthermore, the officer did not pat down or search defendant first but went directly to the car. In regard to this, the Court said,

"To say that the officer who turns his back on the driver whom he has arrested, while he first searches the driver's automobile is conducting a reasonable search incident to the arrest and not conducting an exploratory search staggers the credulity of anyone who pauses to examine the reasoning." *Thompson v. State*, 488 P. 2d 944, 949 (Court of Criminal Appeals of Oklahoma, September, 1971).

Search Incident to Arrest L

Defendant was convicted of bank robbery and appealed claiming an illegal search and seizure. Officers with arrest warrants had come to defendant's home to arrest him and his wife. The arrest took place in the living room. Defendant's wife moved to the doorway between the kitchen and the living room. One of the officers, while in the kitchen, noticed a folder partially hidden in a cabinet in the kitchen, four to six feet from defendant's wife. He seized it and found damaging evidence to defendant.

The Appeals Court held that this was a valid search incident to an arrest, citing *Chimel*. The Court felt that the kitchen was an area into which defendant's wife might reach in order to grab a weapon or destroy evidence. The officer therefore had a right to enter the kitchen for the protection of himself and fellow officers. The folder was then seized as an object falling in the plain view of an officer who has a right to be in the position to have that view. *U. S. v. Patterson*, 447 F.2d 424 (10th Circuit Court of Appeals, August, 1971)

Search and Seizure; Consent J P L

Defendant was convicted of income tax evasion and appealed claiming an illegal search and seizure. Two federal narcotics agents, armed with an arrest warrant, had arrested defendant in his car on a narcotics charge. Defendant insisted he was not involved in narcotics and invited the officers to search his home. The officers searched defendant's home for 45 minutes and found no narcotics. They did however find currency exchange receipts and other personal papers. These were seized and after further investigation led to defendant's tax evasion conviction.

The Court of Appeals held that defendant had consented to a search of his home but that the consent was limited to a search for narcotics. The agents used this limited consent to get into defendant's home and conduct a general exploratory search. The Court therefore found the search to be unreasonable because it went beyond the scope of defendant's consent.

"This was a greater intrusion into defendant's privacy than he had authorized and the fourth amendment requires that evidence resulting from this invasion be suppressed."
(445 F. 2d at 130)

It is worthy of note that if the narcotics agents, while searching for drugs, had come upon contraband, fruits or instrumentalities of crime, or clear evidence of criminal behavior lying in *plain view*, they could have seized those items. Here, however, the items seized had to be opened and read before their criminal character was apparent. Defendant's limited consent did not authorize the agents' opening and reading the items. Therefore, the receipts and papers could not be said to be in plain view and were not subject to seizure. *U. S. v. Dichiarinte*, 445 F. 2d 126 (7th Circuit Court of Appeals, June, 1971)

COMMENT:

A defendant's consent to search limits the scope of the search in much the same way as a search warrant does. A search under a warrant is limited in scope to the items specified in the warrant. In the same way, a consent by a defendant to search for certain items limits the scope of the search to those items.

Search and Seizure; Consent J P L

Defendant was found guilty of bank robbery and appealed claiming an illegal search and seizure. After the arrest of defendant for the robbery, his girlfriend cooperated with law enforcement authorities and took them to defendant's apartment where she had been living with him. She told the Sheriff that she believed a gun used in the robbery was in the apartment and she consented to a search of the apartment which led to the discovery of the gun.

The Appeals Court found a valid consent to search. It said that a person with the rights to use and occupation of premises may authorize a search of the premises, and evidence discovered can be used against a cohabitant. Here the girlfriend was "living together" with defendant, had unrestricted accessibility to the apartment, and even kept her "things" at the apartment. Because of the nature of her rights in the apartment, she could consent to the search and the search was therefore legal. *U. S. v. Wilson*, 447 F.2d 1 (9th Circuit Court of Appeals, August, 1971)

Search and Seizure; Consent JPL

Defendant was arrested at his apartment on a charge of passing and possessing counterfeit money. The defendant was asked for identification, at which time he pointed to a jacket on a rack nearby, stating "It is in my jacket." Reaching into the jacket pocket, the officer first discovered counterfeit bills, then found the identification in another pocket.

After trial, the defendant appealed, claiming that the search which turned up the two bills was unauthorized, since there was no warrant. The appeal court disagreed, holding that the defendant

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consented to the search—in informing the officer that the identification could be found in his jacket. The court also added that the defendant "need not have had a positive desire that the search be conducted in order for his consent to have been voluntary and effective." (Citing *U.S. v. Thompson*, 356 F.2d 216 (2d Cir. 1956)) *U.S. v. Gaines* 441 F.2d 1122 (2nd Circuit Court of Appeals, April, 1971).

Search and Seizure: Second Search JL

A motel maid, while cleaning a room, discovered what she knew was marijuana. This was reported to the police who subsequently entered the room without a warrant and observed the marijuana. That day the investigating officer obtained a search warrant based on an affidavit which recited only the maid's observation, not his own. He returned to the motel, seized the marijuana and arrested the defendant. At trial the defendant insisted that the marijuana be excluded from evidence as the product of an illegal search.

The Court disagreed. It noted that a motel guest impliedly consents to the entrance of motel employees in performing their duties, but not the permitting of police officers to search his room for contraband. Thus the initial entry and search by the policeman was illegal. However the first search was not used as a basis to obtain the search warrant, nor was any evidence seized on the initial visit. Therefore, the Court upheld the use of the seized marijuana as evidence in defendant's trial since it was the product of a second legal search authorized by an untainted warrant. *Krauss v. People* (487 P.2d 1023, California Supreme Court, August, 1971).

Miranda; Custody; Interrogation J L

Defendant was convicted of mail fraud and appealed on the basis that evidence of certain conversations should not have been admitted in court because he had not been given *Miranda* warnings. The conversations came about when a postal inspector visited defendant to discuss complaints that defendant had not been delivering goods ordered from his mail-order business. The postal inspector also informed defendant that the manufacturer of the goods had severed connections with him and was cooperating with the post office. These conversations were important at trial because they showed that defendant knew he could not deliver on his orders.

The Appeals Court held that no *Miranda* warnings were required because defendant was not in custody when he spoke with the inspector. He was free to talk with the inspector or not as he chose and was not coerced in any way. Furthermore, the postal inspector's conversations with defendant did not constitute an interrogation. The inspector was merely trying to get defendant to mend his ways and not seeking to get admissions to be used against him. *U. S. v. Bradley*, 447 F.2d Circuit Court of Appeals, July 1971)

Probable Cause; Plain View L

Defendant was convicted of bank robbery and appealed claiming an illegal arrest and seizure. Police officers had a report from a reliable informant identifying defendant as the bank robber; a tentative identification of defendant's photograph by a bank teller; and a co-defendant's positive statement identifying defendant as one of the robbers. The officers went to defendant's girl friend's apartment and found defendant crouched in a corner, nude, with a shotgun. They arrested him, disarmed him, and went to get him some clothes. In doing so, one of the officers discovered clothing used in the robbery and some of the stolen currency. These were seized.

The Court of Appeals held that the information the police had was sufficient to give them probable cause to arrest.

As to the seizure of the currency and clothing, the Court applied the plain view doctrine because the officers were in a place where they had a right to be.

> "Since they were bound to find some clothing for Titus rather than take him nude to FBI headquarters on a December night, the fatigue jackets were properly seized under the 'plain view' doctrine."
> *U. S. v. Titus*, 445 F.2d 577, 579 (2nd Circuit Court of Appeals, July 1971)

Stop and Frisk; Automobile L

Defendant was charged with possession of marijuana. His motion to suppress evidence was granted and the State appealed. Two police officers in a cruiser had spotted defendant lawfully driving his car which had a large portion of its windwing broken. Thinking the car might be stolen, the officers checked the license with headquarters and received a negative reply. They investigated the car anyway and, upon approaching it, observed phonograph parts and tools in the car. Suspecting that defendant might be a burglar, the officers asked him to get out of his car and they patted him down for weapons. A screwdriver was found in a pocket and as it was withdrawn, a marijuana cigarette was revealed and seized.

The Court held that the seizure of the marijuana was illegal because the officer was not justified in making the initial "stop" of the car. Before a stop may be undertaken, there must be "an objectively reasonable suspicion that the activity is related to a crime, and that defendant is connected to the activity." (97 Cal. Rptr. at 368). Here the only suspicious circumstance was the broken windwing. This was not necessarily an indication of criminal activity and did not provide grounds for the stop. *People v. Griffith*, 97 Cal. Rptr. 367 (California Court of Appeal, September, 1971).

Official Immunity; Prosecutors P

Plaintiffs brought an action for damages against the State Attorney (i.e. Attorney General) for malicious prosecution. The plaintiffs had previously been arrested for child abuse but the case against them had been set for trial twice and twice continued on motion of the State Attorney. It was subsequently dismissed for lack of prosecution and this civil suit followed.

The Court dismissed the complaint, noting it had little difficulty in doing so since the case fell within the official immunity doctrine. The Court decided that the State Attorney and his Assistants (i.e. Assistant Attorneys General) may enjoy official immunity, but only for acts committed within the scope of their jurisdiction. The official immunity doctrine was explained to be in the public's interest, since it is in their interest that quasi-judicial officers should be at liberty to exercise their functions with independence and without fear of consequences (e.g. "the threat of

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litigation which may affect the integrity of a prosecutor's decision-making"). *Madison v. Gerstein*, 440 F. 2d 338 (5th Circuit Court of Appeals, March 1971).

MAINE COURT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J-Judge, P-Prosecutor, L-Law Enforcement Officer.

Double Jeopardy; Prison Escape J P

Defendant escaped from County Jail, but was caught the next day. Upon his return to the jail, he was placed in solitary confinement. The Sheriff had told defendant he was being put in solitary as a punishment and as an example to the other prisoners. Subsequently the prisoner was indicted for escape. He moved to dismiss the indictment, however, on the grounds that he had already been punished for escape and a later trial would violate his privilege against double jeopardy. The motion was denied, defendant was found guilty, and he appealed.

The Supreme Judicial Court affirmed, citing numerous cases from other jurisdictions which hold that administrative punishment for escape is not a bar to further prosecution for that offense. The distinction between this situation and other double jeopardy cases is that where double jeopardy has been found, the prior punishment was given by a court of competent jurisdiction acting upon a valid indictment. The Court thereby rejected the defendant's argument that the State must elect between administrative and judicial procedures for punishment.

Furthermore, the Court said that the authority to impose "reasonable disciplinary sanctions . . . is inherent in the powers and duties of those who have the responsibility for administrating our penal and correctional institutions" in order to maintain order. *State v. Tise*, 283 A. 2d 666 (Supreme Judicial Court of Maine, November, 1971).

Defendant's Failure to Testify; Instructions J

The defendant was convicted of selling amphetamines. At his trial, defendant did not testify in his own behalf, and the trial court did not instruct the jury that the defendant was not required to testify and that no inference should be drawn from the fact that he did not testify. On appeal, the defendant claimed that the trial court's failure to instruct on his not testifying was prejudicial.

The Supreme Judicial Court disagreed. Rule 30(b) of Maine Rules of Criminal Procedure requires that if a party wishes to object to instructions, he must do so before the jury retires and give the reason for the objection. The record showed that defendant's counsel did discuss the instructions with the judge, but made no specific objection to them, accepting the instructions as they stood.

The Court noted that if the defendant had requested specific instructions to the effect that his failure of his guilt, the trial judge must give that instruction, citing *State v. Landry*, 85 Me. 95, 26 A. 998 (1892). *State v. Girard*, 283 A. 2d 462 (Supreme Judicial Court of Maine, November, 1971).

Assault and Battery; Prison Guard J P

The petitioner had been committed to a correctional facility as the result of a juvenile proceeding. He was charged with high and aggravated assault (17 M.R.S.A. 201) while an inmate, his victim being a guard. The petitioner pleaded guilty to this charge, but appealed. He argued that he had been committed to South Windham in violation of his rights as established by *Gault* and he therefore had a right to escape.

The Court rejected this argument since the sentence he was serving was voidable only, and not void so that he had a right to leave. The petitioner should have resorted to proper adjudicatory procedures if he believed he was illegally imprisoned. Self-help is not the proper means to free oneself from prison, irregardless of the validity of his commitment.

The petitioner also claimed that he should have been charged under 34 M.R.S.A. § 807 which is specifically concerned with the criminality of an assault upon a guard. The Court reasoned that since there was no legislative design by the enactment of 34 M.R.S.A. § 807 to repeal in part 17 M.R.S.A. § 201, that therefore the two sections are co-effective. "It is well and long established that, in the abstract, the law permits one matrix of facts to generate, in terms of legal consequences, more than one criminal offense." Just because one of these statutorily defined offenses is limited to narrow circumstances, does not mean that the Legislature intended those operative circumstances to be "mandatorily exclusive" rather than optional. Even if the petitioner had been charged under 34 M.R.S.A. § 807, the indictment could also validly charge an offense under 17 M.R.S.A. § 201.

The Court also decided that the failure of the judgement to state that a finding of "aggravation" had been made does not nullify the determination, if in fact it had been made, nor does it serve as proof that the finding had been omitted. *Fuller v. State*, (282 A. 2d 848, Supreme Judicial Court of Maine, October, 1971).

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.

ALERT

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

Any change in personnel or change in address of present personnel should be reported to this office immediately.

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