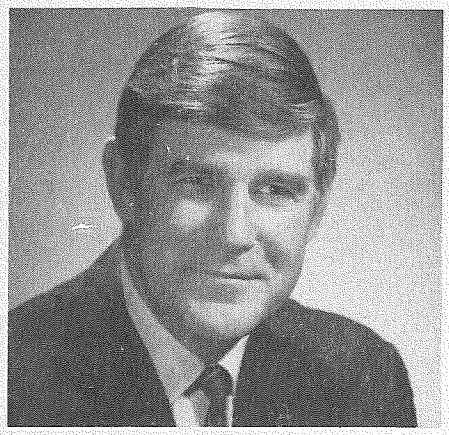
NOVEMBER 1972

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

Because last month's issue of ALERT was devoted entirely to a case summary index and a list of books in the law enforcement library, we have fallen somewhat behind in our case summaries. We are, therefore, devoting the entire issue this month to case summaries in order to catch up on some of the more important decisions handed down in recent months.

I would also like to ask that all chiefs of police and heads of other law enforcement agencies send this office a list of both new men and men who have left their departments over the past year. We are able to keep up with address changes but have no way of knowing who to add to or delete from our mailing list unless you tell us.

James S. Erwin

JAMES S. ERWIN
Attorney General

IMPORTANT RECENT DECISIONS

Search and Seizure; Abandonment JPL

The defendant was convicted of unlawfully possessing and transporting non-tax-paid whiskey. He appealed on the basis that the whiskey should have been suppressed because of an unlawful search.

The defendant was chased by an officer for speeding, and attempted to outrun him. He missed a turn, ran partially off the pavement, and brought his car to a stop. Then, defendant jumped from the car, leaving the lights burning and the engine running, and fled on foot. The officer switched off the engine, made a general inspection of the car, and opened the trunk with the key from the ignition. There, he found the incriminating whiskey.

The court held that the defendant lost his right to constitutional protection by abandoning the car. At the point of fleeing, the defendant "could have no reasonable expectation of privacy with respect to his automobile." The court refused to consider whether defendant had abandoned his car in a strict property-right sense. Instead, the court said:

> "It seems clear by any good sound ordinary sense standard that Edwards abandoned any reasonable expectation to a continuation of his personal right against having his car searched under these circumstances, and thus lost his Fourth Amendment rights, and we so hold." *U.S. v. Edwards*, 441 F.2d 749, 753 (5th Circuit Court of Appeals, April 1971).

Search and Seizure; Stop and Frisk L

Defendant was convicted of possessing stolen mail and appealed. Two police officers drove past a motel known to them to be frequented by narcotics addicts. The defendant and three or four other males were observed standing in front of the motel, and all glanced at the police car as it passed. The defendant was observed having difficulty sustaining his balance and looked as if he was going to fall down. The officers testified that they thought the defendant possibly was injured or under the influence of an intoxicant. The officers passed the motel again observing that the defendant was then a passenger in a car leaving the motel. The car was stopped by police and the defendant and the driver were ordered out of the car and frisked.

The court held that these observations and suspicions did not sufficiently suggest that some criminal activity was afoot. They merely suggested that an intoxicated person was being driven away from a resort of ill repute. This does not suffice under the guidelines set out in the Supreme Court case of *Terry v. Ohio*, 88 S. Ct. 1868 (1968). The intrusion and inconvenience occasioned by the investigatory stop must be balanced against such factors as the seriousness of the suspected offense, the need for immediate police work and the need for preventive action. The stolen mail found during the frisk was, therefore, suppressed because the investigatory stop was not justified. *U.S. v. Davis*, 459 F.2d 458 (9th Circuit Court of Appeals, April 1972).

Search and Seizure—Search Warrant L

Defendants were convicted of "receiving and concealing property (postal money order forms) of the United States, knowing it to be stolen," and they appealed,

(Continued on page 2)

claiming the money order forms were the products of an illegal search.

The defendants checked into a motel after midnight and acted in a manner to arouse the room clerk's suspicions. The room clerk twice searched their room after they "went out on the town" and observed bags of whiskey, a sack of money, tools and guns, and a cutting torch. He gave this information to the police, who then set up a stakeout. The police then, without a warrant, searched the rooms twice, and found, among other things, the blank postal money orders. An affidavit for a search warrant was then drawn listing the money orders among the items sought to be seized. The warrant was issued, the items seized, and the defendants arrested.

The court held the warrant invalid. The warrant was based on information gathered during warrantless searches by the police which were per se unreasonable not coming under any exception to the warrant rule. The warrant was thus a fruit of the poisonous tree. *U.S. v. Nelson*, 459 F.2d 884 (6th Circuit Court of Appeals, April 1972).

COMMENT: This case is a restatement of the rule that an affidavit for a search warrant cannot be based on information gathered during an illegal search and seizure.

Search and Seizure: Miranda — Private Investigator JP

Defendant was convicted of arson and other related charges. A self-employed private detective had been hired by an insurance company to determine the origin of a fire in a store the company had insured. In the course of his investigation, he took photographs of the store without a search warrant and interviewed the defendant without giving *Miranda* warnings. This evidence was used to obtain the defendant's conviction. On appeal, the defendant claimed the evidence obtained by the investigator was inadmissible.

The court held that both the photographic evidence and the confessions were admissible. The private investigator was not primarily engaged in law enforcement and was not an agent of law enforcement officials. He had been hired by the insurance company to determine the nature of the fire to protect the company against liability, not to obtain a criminal conviction. He had no prior suspicion of arson, and the company did not request that fraud or arson charges be brought once the evidence was gathered. Since the investigator was acting as a private individual, the Fourth Amendment was not applicable to his examination and photography of the burned premises, and it was not necessary that he advise the defendant of his rights prior to questioning him. *People v. Mangiefico*, 102 Cal. Rptr. 449 (Court of Appeal of California, June 1972).

Search and Seizure — plain view JPL

Defendant was convicted of unlawful receipt and possession of stolen property. Officers, acting on a tip concerning stolen cigarettes, followed defendant to his home and arrested him in front of his open garage. At this time, they saw a number of air conditioners inside the garage and, without a search warrant, went in and examined the air conditioners noting the serial numbers. A check on these numbers showed that the air conditioners were stolen.

The court held that, except in limited and well defined circumstances, a search warrant is required to look for evidence on another's property. The "plain view" exception, put forth by the prosecution, did not apply because the air conditioners themselves did not give any indication they were stolen and they were obviously not contraband or weapons. The serial numbers were not in plain view and it was not until they were inspected and checked that the relationship between the air conditioners and the theft became known. *U.S. v. Sokolow*, 450 F.2d 324 (5th Circuit Court of Appeals, October 1971).

COMMENT: This case warns the law enforcement officer that even though he comes across items in plain view, he cannot examine or seize the items unless the appearance of the items gives an indication that they are contraband, weapons, stolen property, instrumentalities of crime, or evidence of crime.

Search and Seizure—"Emergency" Search L

Defendant was convicted of possession of marijuana. A law enforcement officer, reponding to a call, had learned that a 6-year-old girl had been left alone in her apartment, had apparently fallen down and begun crying, and had been taken in by a neighbor. After questioning the girl at the neighbor's apartment, the officer proceeded to the apartment where the girl lived to see if the girl's mother had returned home. When no one responded to knocking, the officer asked the neighbor to unlock the door. He then stepped inside and called the mother's name. Hearing no answer, the officer entered each room in turn, looking for the girl's mother. In the bedroom he found marijuana on a nightstand in a jar.

The prosecution attempted to justify the search as an emergency search. The court stated the rule that an "emergency search" without a warrant can be justified only by showing an imminent and substantial threat to life, health, or property. In this case, the court held there was no showing that a search of the apartment was necessary to preserve life, health or property. The girl was in no immediate danger, nor is there any evidence that the girl's mother was in need of assistance. In the absence of any other exception to the general requirement that a warrant be obtained before a search, the marijuana was held inadmissible. *People v. Smith*, 101 Cal. Rptr. 893 (Supreme Court of California, May 1972).

COMMENT: This case states the general rule governing "emergency searches." Although the court held the evidence inadmissible here, other cases were discussed in the opinion in which the evidence found as a result of an emergency search was held admissible. For example, in one case, police heard a "moaning sound" inside an apartment. Upon entering the apartment to render aid, they saw evidence of a crime. The evidence was held admissible, People v. Clark, 68 *Cal. Rptr.* 713 (1968). *In another case, police were searching for identification in the clothing of a man found seriously injured with*

(Continued on page 3)

a stab wound. Marijuana found during this search was held admissible. People v. Gonzalez, *5 Cal. Rptr.* 920 (1960) *Hopefully, these three examples will give law enforcement officers some idea of the limits of "emergency" searches.*

Plea Bargaining J

Defendant received two twenty-year concurrent sentences after pleading guilty to the federal bank robbery statute. During his arraignment, he was asked by the trial judge if he had been promised anything in exchange for his guilty plea, and he answered "No." After sentencing, he filed an application for a writ of habeas corpus, claiming that his guilty plea had been made as the result of a bargain with an Assistant U.S. Attorney in return for a ten-year sentence. The petition was dismissed at the District Court level and the defendant appealed.

The appeals court held that the defendant's denial of any promises at the time of his conviction did not foreclose further inquiry into the voluntariness of his guilty plea. The court felt that a defendant would deny the existence of a plea bargain, believing it illegal. The following preface to inquiries into the matter of promses was suggested by the court:

> "I now inquire of the (prosecuting attorney) and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the U.S. Supreme Court has specificallv approved plea bargaining and has said it is 'an essential component of the administration of justice . . . to be encourgaed.' You may, therefore, advise me truthfully of any plea negotiation without the slightest fear of incurring disapproval of the court." (460 F.2d 988, 993)

The court stated that a negative response to such an inquiry would finally conclude the subject matter and prevent subsequent litigation. *Walters v. Harris*, 460 F.2d 988 (4th Circuit Court of Appeals, May 1972).

Self-Incrimination J

Petitioner was convicted for armed robbery and unlawful possession of a pistol. At trial, defense counsel moved to delay petitioner's testimony until other defense witnesses had testified. The trial court denied the motion on the basis of *Tennessee Code Annotated*, § 40-2403, which requires a defendant desiring to testify, to testify before other defense witnesses. Petitioner appealed, claiming the statute violates the privilege against self-incrimination.

The Supreme Court held that the statute was unconstitutional on two grounds. 1. It violated the accused's privilege against self-incrimination by not allowing him to know the strength or weakness of his case beforehand, not being able to decide whether to exercise his right to remain silent. 2. It violates due process in that the time when the defendant is to testify is an important, tactical decision as well as a matter of constitutional right. The defense is restricted if denied the opportunity to evaluate the worth of their evidence. By forcing the testimony of the defendant to come first or not at all, the defendant is denied the "guiding hand of counsel." *Brooks v. Tennessee*, 92 C. Ct. 1891 (U.S. Supreme Court, June 1972).

Self Incrimination JP

Petitioners were subpoenaed to appear before a grand jury. Upon refusal, the District Court ordered them to appear and answer questions under a grant of immunity confered pursuant to 1 L U.S. C. § 6002-6003. The petitioners refused to answer on the grounds that their rights against self incrimination were not coextensive with the statute, and they were held in contempt.

The Supreme Court held that the statute's prohibition of the use in any criminal case of testimony or other information directly or indirectly derived from such testimony or other information given under the grant of immunity, is sufficient to compel testimony over the claim of a Fifth Amendment privilege. The Court concluded that "transactional" immunity or full immunity from prosecution for the offense to which the compelled testimony relates, is not constitutionally required. *Kastigar v. U.S.*, 92 S.Ct. 1653 (U.S. Supreme Court, May 1972).

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.

Search and Seizure—Automobile L

In this case a state trooper spotted a car containing three adult men parked at the end of a dead-end road adjacent to a large field surrounded by woods. It was night and it was the hunting season. The trooper approached the car and when he beamed his flashlight into the back seat of the car through the window, he saw one of the three men sitting with a rifle with a clip in it. The trooper then opened the rear door of the car, reached in and removed the clip from the rifle, noticing that there was a bullet at the top of the clip. The trooper next placed the back seat occupant under arrest for carrying a loaded firearm in a vehicle. Then an alleged assault took place and the occupants fled in the car to New Hampshire, where they were seized and returned to Maine. Two of the three occupants were convicted of assault. They appealed on a variety of grounds and the Law Court held that:

1. When the trooper shined his flashlight into the back seat of the auto and saw the rifle, there was no illegal search because the rifle in such circumstances is considered to be in plain view.

2. Under all of the circumstances (the clip being in place, hunting season, nightime, dead-end road by a field), the trooper had probable cause to search the clip for bullets to find out if it was a loaded firearm; and because of the exigent circumstances (the mobility of the auto), the trooper was justified in reaching into the car and taking the rifle to search it without a warrant.

3. Although the suspected offense was only a misdemeanor, and

(Continued on page 4)

although a police officer in Maine needs more than probable cause to make a misdemeanor arrest without a warrant, (except in certain limited cases), the trooper's conduct was still legal because he was using his probable cause to make a search, not an arrest. Once he made the search, he was certain that the rifle was loaded and he could lawfully make a misdemeanor arrest without a warrant for the offense of carrying a loaded firearm in a vehicle. In other words, the Law Court held that the state law requiring certainty to make a misdemeanor arrest without a warrant is limited to arrests. The higher standard does not extend to misdemeanor searches and the misdemeanor search can be conducted without a warrant on the basis of probable cause (assuming, of course, that there are the necessary exigent circumstances and that the methods, time and place are reasonable under all of the circumstances.) *State v. Stone*, 294 A.2d 683 Maine Supreme Judicial Court.

COMMENT: The Stone *holding is limited to its facts and it should not be interpreted too broadly. It does* not *necessarily give the police officer the power to walk up and down the main street of his community using his flashlight to make "plain view" searches of legally parked cars. The car in the* Stone *case was in an isolated area at the end of a dead-end road in the night. The trooper approached the car because he had reason to suspect that the car might contain teenagers doing some illegal drinking. And it was with this reasonable suspicion in mind that he illuminated the entire car with his flashlight. Therefore, the use of the flashlight and the search and arrest that followed were based on a solid foundation. It might be a far different story if the car had been parked and if the trooper had no reasonable grounds for suspecting that criminal activity was taking place before he used his flashlight.*

On the other hand, it is just as important to note that the fact that the trooper's reasonable suspicion turned out to be wrong did not make the use of the flashlight and the search illegal. What matters is that the trooper at the time of the incident had reasonable grounds for suspecting criminal activity. This reasonable suspicion, even though it turned out to be wrong, justified further investigation by the trooper with his flashlight.

In short, this decision not only makes the three important holdings outlined in the main discussion above. By implication, it also appears to confirm that an officer who does not have probable cause but does have reasonable grounds for suspicion is justified in pursuing further investigation that is appropriate to the circumstances.

The Stone *decision should make a significant contribution to effective law enforcement in Maine. But the decision emphasizes the need for reasonableness and if it is to be used effectively, the law enforcement officer must never forget the balance the courts have tried to strike between the need to enforce the laws and the need to protect individual privacy.*

Sentencing, Guilty Pleas JP

In this habeas corpus proceeding petitioner argued, among other things, that his 25 to 50 year sentence for robbery constituted cruel and unusual punishment, and that his rights were violated when he was not provided with counsel during a lineup identification and during police interrogation.

The Law Court held that a 25 to 50 year sentence is not cruel and unusual, considering that the victim of the crime was a defenseless woman who was shot and permanently paralyzed.

The Law Court also held that when a defendant knowingly and voluntarily pleads guilty, he waives his right to object to all errors of law that are not jurisdictional.

Cunningham v. State, 295 A.2d 250 (Maine Supreme Judicial Court, August 1972)

Fair Trial JPL

Defendant was convicted of assault and appealed on grounds that the trial court abused its discretion when it denied defendant's motion for a continuance to enable him to secure two more witnesses. Defendant's lawyer had been given eight days to prepare for trial.

The Law Court held that when a party seeks a continuance for the purpose of securing witnesses, the party must produce evidence to show:

> "Who they are, what their testimony will be, that it will be relevant . . . and competent, that the witnesses can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance for the trial as set."

The Law Court said defendant had not met this burden in this case and the continuance was properly denied. *State v. Curtis*, 295 A.2d (Maine Supreme Judicial Court, October 1972)

COMMENT: Although the moving party in Curtis *was the defendant, the same strict standard applies to the state when police officers or other state witnesses fail to appear for the trial. Therefore, careful scheduling of assignments is necessary to avoid dismissals, especially at the District Court level.*

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

James S. Erwin — Attorney General
Richard S. Cohen — Deputy Attorney General In Charge of Law Enforcement
Chadbourn H. Smith — Chief, Criminal Division
John N. Ferdico — Director, Law Enforcement Education Section

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