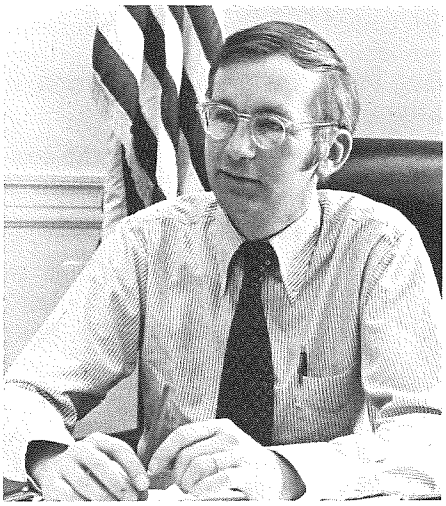
APRIL 1973

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

We continue this month with the second and final installment of the article on Entrapment. It is important to note that this installment refers to and builds on last month's, and both parts of the entrapment article must be read together to make sense. Therefore, if anyone has not received the first installment in the March 1973 ALERT, please notify this office and we will send you one.

I would also like to call your attention to the comment in the FORUM column on page 4 about probable cause to search. Several of the county attorneys have told us that there is confusion among law enforcement officers in this area, and I hope this comment will clear it up.

Jon A. Lund

JON A. LUND
Attorney General

ENTRAPMENT II

REPEATED SOLICITATION

In both *Sorrells* and *Sherman,* the Supreme Court pointed out that the defendants did not fall into the trap until they had been offered repeated opportunities to commit a criminal act. Undercover agents should not misconstrue this to mean that repeated attempts to spring a trap will always damage the state's case.

In *Pierce v. U.S.,* 414 F.2d 163, (U.S. Court of Appeals for the Fifth Circuit, 1969), a federal undercover agent telephoned the defendant 13 times and saw him several times before the defendant agreed to sell counterfeit money. The court found nothing wrong with this because the agents could show that from the beginning, defendant's reluctance was based on the *terms* of the deal, *not* on the deal itself. As soon as the agent offered a substantial increase in terms, the defendant agreed to the sale.

And in *U.S. v. Bradley,* 426 F.2d 148, (U.S. Court of Appeals for the Seventh Circuit, 1970), the court found no entrapment when an undercover agent made four attempts to purchase drugs from defendant before succeeding. In this case, the agent on the first three attempts tried to buy heroin and failed. On the fourth attempt he succeeded in buying marijuana. The court said refusal to commit a more serious offense is not indicative of an unwillingness to commit a lesser offense.

Even if the fourth attempt had been for heroin—and succeeded—it is doubtful that the entrapment defense would work. As the court pointed out, the record showed nothing except repeated opportunities to commit a crime. The offers to buy drugs were not coupled with any of the unfair persuasion or emotional appeals that existed in *Sorrells* and *Sherman.* This suggests that one flaw in the trap will not be enough to trigger the entrapment defense. It also suggests that a trap devoid of any *unusual* emotional appeal or play on old friendship is likely to survive in court.

The case of *U.S. v. Haden,* 397 F.2d 460, (7th Circuit Court of Appeals, 1968), offers a good example of proper investigative conduct by an investigative officer in a criminal scheme necessitating repeated contacts with the subject over an extended period of time.

In the *Haden* case, the undercover agent learned that the defendant was interested in a method by which heroin could be obtained from a morphine sulfate base. The agent contacted him, stating that he had been referred to the defendant by an employee of the company which defendant had previously contacted in an effort to learn the details of the conversion process. Haden denied having made any such contact with the company.

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After a month's time, the agent wrote defendant a letter in which he listed his phone number. Two weeks later, defendant called and a meeting was arranged. At this meeting, a plan was developed in which defendant would obtain the morphine sulfate base, and the agent would assist him in converting it to heroin.

The agent told the defendant that he had no permanent address and that it would be necessary for him to call the defendant to arrange future meetings. The defendant agreed, and at the conclusion of most of the meetings which followed, the defendant, who was extremely cautious throughout the entire operation, instructed the agent to call him to arrange subsequent meetings. At these meetings, the agent suggested, at least twice, that they abandon the plan, but the defendant insisted they proceed. Finally, the defendant met the agent and stated that he had obtained a quantity of morphine sulfate. After furnishing the contraband to the agent, he was arrested and later convicted.

On appeal, the defendant claimed that he had been entrapped. The court disagreed, noting several things that indicated defendant's willingness to commit the crime. The idea to use the morphine sulfate base originated with the defendant; more than once the agent attempted to abandon the plan, but the defendant insisted on continuing; all of the telephone calls, except one that the agent made to the defendant, were at the defendant's instruction or pursuant to a prior understanding; and all the meetings, except the first, were arranged by the defendant. The court commented that the only reluctance displayed by the defendant could be explained by his extreme caution.

It is worthwhile to note the investigative techniques of the agent in this case. He left his telephone number in the initial letter, allowed the defendant to arrange the meetings, and pretended reluctance on a number of occasions. The defendant, thereby, provided the initiative throughout the long involved process. As the defendant proceeded through step after step, he clearly demonstrated his willingness and pre-disposition to commit the crime, and therefore, could not use the defense of entrapment.

INFORMANTS

An informant, working for or at the direction of a law enforcement officer, is the agent of that officer. If the informant entraps a defendant, the defendant can use the defense of entrapment just the same as he could if entrapped by a law enforcement officer. In the case of *Sherman v. U.S.* (above), the court said that the government cannot use an informant in a case and then circumvent the defense of entrapment by claiming ignorance of the informant's conduct.

Because of this, law enforcement officers who use an informant should instruct him carefully on the rules against entrapment. Also, when preparing for trial, an informant should be made aware that he should be prepared to detail all aspects of his contact with a defendant, the same as a law enforcement officer.

"Contingent Fees"

Sometimes an informant will be offered a sum of money if he successfully performs a specific act, such as a purchase of illegal liquor or drugs. In this situation, the informant is said to be employed on a "contingent fee" basis. Courts have laid down guidelines in this area to prevent the entrapment of innocent persons by overzealous informants.

In *Williamson v. U.S.*, 322 F.2d 441 (5th Circuit Court of Appeals, 1962), an informant was offered a sum of money by a law enforcement officer if he could make a purchase of illicit liquor from the defendant. There was no testimony offered in the record as to why the particular defendant was selected. The court reversed the defendant's conviction, holding that an unjustified contingent fee agreement was entrapment as a matter of law. The court said that it could not sanction a contingent fee agreement to produce evidence against a specific defendant as to crimes not yet committed. Such an agreement could cause an informant to induce or persuade innocent persons to commit crimes they otherwise had no intention to commit.

The court indicated that the conviction might have been upheld if there was evidence in the record that the defendant was previously engaged in illicit liquor dealings or that the informant had been carefully instructed on the rules against entrapment.

It is suggested, then, that if a law enforcement officer uses an informant on a "contingent fee" basis, (1) the officer be able to give reasons for believing the defendant is engaged in criminal activity, and/or (2) the officer carefully instruct the informant on the rules against entrapment. For example, in a case similar to the *Williamson* case, a law enforcement officer contacted an informant and promised him $300 if the defendant were caught. The officer in this case, however, testified that the defendant had prior convictions for the same offense and that two neighbors had complained to another officer about the defendant's activities. The court held that this testimory justified the use of the contingent fee arrangement. *Hill v. U.S.*, 328 F.2d 988, (5th Circuit Court of Appeals, 1964).

It is worthy of note that the evidence used to justify the use of a "contingent fee" arrangement also indicates a predisposition by the defendant to commit the crime charged by showing prior, similar, criminal conduct.

MAINE LAW

There are three Maine cases on entrapment; two of which have already been cited (*State v. Allen* and *State v. Gellers*). The third case, *State v. Calanti,* 142 Me. 59 (1946) can serve as a useful vehicle for reviewing some of the principles outlined earlier in the article.

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In *Calanti,* a bar owner, licensed to sell by the drink, unlawfully sold a pint to a liquor inspector. The defendant testified without contradiction that the inspector came into the bar, said he had a cold, and asked for a drink. After some conversation about business, the inspector complained about having to wait an hour and a half in line at the liquor store only to fail in his attempt to buy a pint. The defendant refused, saying he didn't have a permit to sell liquor by the bottle. The inspector then bought another drink. After finishing the second drink, the inspector got up, said he had to go to Portland and added that he might get sick if he didn't have a pint. After this appeal, the defendant sold the inspector a pint. The inspector came back two weeks later and bought a second pint, this time with less coaxing, although defendant again refused the first request. Defendant testified at trial that he knew the sales were illegal, but he made it because the inspector "begged" him to sell the bottle.

In the *Calanti* case, the first two elements of entrapment—prior similar conduct and willingness to commit the act—favor neither the prosecution nor defendant. The inspector wisely took the trouble to document two separate sales, but the state introduced no evidence at all of prior record or similar conduct or of any information or observations that might have led them to suspect defendant in the first place.

As for willingness, the facts are that defendant refused the first request to sell. Refusing an opportunity to commit a criminal act—especially when the refusal is unqualified and not an obvious attempt to haggle over price—is usually in defendant's favor. But, standing alone, it will not help defendant. He must also show something unusual in the trap itself and in this case, he failed to do so.

The Maine Supreme Judicial Court found no unfair persuasion in the trap. Defendant could argue that the inspector, like the agent in *Sherman,* complained of being sick and "begged" defendant to sell him a pint. But, the cases are not really the same. In *Sherman,* the government informer and defendant were former cellmates and fellow drug addicts and the informer relied heavily on those shared experiences and the empathy that grows out of them. The agent in *Sorrells* placed great stress on shared war experiences and the common expectation that one old war buddy would help another. In contrast, Calanti and the liquor inspector never knew each other prior to the trap and had no common background or shared experiences.

Anyone bothered by the liquor inspector's begging" for a pint should remember that an undercover agent is not required to look, talk and act like an accountant when he is playing his role. He can, as the *Vaccaro* court said in specific reference to the role of an undercover liquor inspector, "represent himself as a customer and....do and say such things as would not be unusual in such a situation." Most persons who are at all familiar with bars would agree that it is not unusual for a customer who needs a drink to make repeated efforts to persuade the bartender to break the law. The bartender should be accustomed to sad stories about "colds" and the like.

Thus, taking all the facts together, the defendant in *Calanti* could not show innocence as his true state-of-mind when the inspector offered to buy a pint. Not having an innocent mind, the defendant was denied the entrapment defense.

PROOF PROBLEMS

The undercover agent should be sure that the suspect completes every element of the crime himself. The agent can aid the suspect in committing the crime. But, the suspect must do the deed because the acts of an agent cannot be attributed to the suspect. *People v. Lanzil,* 233 P. 816 (Court of Appeal, California, 1925). More important, the agent should be aware that the state bears a heavy burden of proof on entrapment problems. Once the defendant has succeeded in producing some evidence tending to show that he was entrapped (e.g. testimony that the defendant flatly refused the first opportunity to sell drugs to an undercover agent), the state must then prove beyond a reasonable doubt that defendant was *not* entrapped. *Kadis v. U.S.,* 373 F. 2d 370 (U.S. Court of Appeals for the First Circuit. 1967). This is another reason why the undercover agent should keep detailed notes of every piece of information pertaining to prior similar conduct, willingness, and the trap itself.

CONCLUSION

Undercover work is important. It is also difficult, because figuring out a person's true state-of-mind at any given moment is always difficult. Therefore, the undercover agent should make it a habit to review his notes periodically as a check on his own conduct. He should pay particular attention to the complexity of his trap. If the trap starts to get too long-lasting and complicated, the agent should start to question his own objectivity. It may be that the agent is up against a clever and resourceful criminal. It also may be that the agent has encountered an innocent man. The agent should pursue the former. But, he should leave the latter alone.

* * *

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

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FORUM

This column is designed to provide information on the various aspects of law enforcement that do not readily lend themselves to treatment in an extensive article. Included will be comments from the Attorney General's staff, short bits of legal and non-legal advice, announcements, and questions and answers. Each law enforcement officer is encouraged to send in any questions, problems, advice or anything else that he thinks is worth sharing with the rest of the criminal justice community.

Probable Cause

It has come to our attention that there is some confusion among law enforcement officers with regard to probable cause when a search is involved. Apparently because the term "probable cause to search" was used in the December 1972, January 1973, and February 1973 issues of ALERT, many officers thought that if they had sufficient information to justify a search, they could search without a warrant. This is not correct. Once an officer has sufficient information to justify a search, he must *write down that information in an affidavit and request a search warrant from a District Court Judge or complaint justice.* Detailed procedures for obtaining a search warrant appear in the August 1972 ALERT.

The *only* time an officer can conduct a search based on probable cause *without* a warrant is in emergency situations like the movable vehicle situation, as expounded in the *Carroll* and *Chambers* cases. (Please consult the November 1970 ALERT for a detailed discussion of these cases.) It is, however, always preferable to obtain a search warrant, if at all possible, even in the movable vehicle situation. It takes more time and effort to obtain a warrant, but the end result is a more solidly based case, which will withstand attacks by the defense. I quote from a letter received by this office from Assistant Attorney General John O. Rogers, who works out of the County Attorney's Office in Aroostook County.

> "(E)ven if there is sufficient cause for a search under the *Carroll* doctrine, it is far wiser for the officer to obtain a search warrant. We have lost three or four close *Carroll* case motions to suppress, where it is very possible that we would have been able to obtain a search warrant, and if we had obtained a search warrant, we might have been all right."

* * *

Professional Police Registry and Assessment Service

The International Association of Chiefs of Police recently announced a new program to improve career opportunities and upgrade the professional stature and individual recognition of law enforcement officers. The program, known as the Professional Police Registry and Assessment Service, is a response to concern over the limitations on professionally motivated law enforcement personnel to advance within their own profession. The president of the IACP has said that law enforcement must provide for its members the degree of freedom and mobility to achieve higher levels of professionalism within the profession as a whole, rather than within a single police department or city. The IACP feels that professional police personnel should be given the same opportunity for increased individual responsibility and accomplishment as has been accorded other members of professional groups.

To achieve these goals, the Registry will provide a method by which professional law enforcement officers may be made aware of desirable employment opportunities, and at the same time, be a source through which police departments may identify desirable candidates for positions they seek to staff, either from among present members or from other sources. The service requires a written application and interview from officers wishing to participate, and also charges a small fee for certification. The effort and cost may be well worth it, however, for the officer wishing to pursue a lifetime career in law enforcement.

For further information on this new service, write:

Professional Police Registry and Assessment Service
IACP
11 Firstfield Road
Gaithersburg, Maryland 20760

* * *

Trespass to Commercial Property

Situation

An eating establishment has a policy at their lunch counter of allowing only fifteen minutes for the consumption of whatever has been purchased. This is to prevent loitering by individuals in the establishment. A sign is posted which announces this policy. On occasion, police officers have been asked to enforce this policy.

Question

Does a person who exceeds the time limit posted violate the provisions of Title 17, Section 3853 (Trespass to Commercial Property)? The pertinent part of the statute reads:

> "Whoever willfully enters in and upon any land commercially used,..... after having been forbidden to do so by the owner or occupant thereof, either personally or by an appropriate notice posted conspicuously on the premises, shall be guilty of trespass.....

Discussion

The traditional concept of strict interpretation of criminal law would seem to preclude the use of the cited statute in this type situation. Of course, the interpretation of statutes is for the court and they might find it to have been the intent of the legislature to reach such conduct.

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As a matter of police procedure, absent some misconduct on the part of the customer, law enforcement officers should not become involved in what is on the face a civil matter. If the proprietor of the establishment feels strongly enough that the trespass law does apply, he can proceed under the provisions of Rule 80B of the Maine Rules of Civil Procedure to test his theory. This is certainly a more fair method to follow than for the police to act and thereby place the burden of testing the proprietor's theory on his customer.

* * *

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.

Instructions to Jury JP

Defendant was convicted of robbery and he appealed claiming reversible error in the presiding Justice's omission to instruct the jury that an intent to deprive permanently is an essential element of the crime of robbery.

The Law Court noted that defendant's counsel had failed to object at the trial to the Justice's charge to the jury. The court held that since defendant's counsel had made no objection to the charge, defendant's "claims of error are cognizable on appeal under M.R. Crim. P., Rule 52 (b) only if the errors are 'obvious' and 'affecting substantial rights.' "

The Court than held that an intent to deprive an owner of his property permanently "is an essential element of larceny and of robbery which is larceny committed by violence or putting in fear, although neither statute makes specific mention of any requisite intent." The court found the failure to instruct on this element was error and noted that the defendant would have been entitled to a specific instruction on intent to deprive permanently. However, due to the particular circumstances of this case, and examining the charge as a whole, the court held the defendant did not suffer "serious prejudice" as a result of the omission.

Defendant also objected to the instruction regarding the standard of reasonable doubt. The questioned language was as follows: "Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs." Defendant claimed the standard should be that of the "theoretically ordinary prudent person rather than that of twelve individual jurors each acting reasonably." The Law Court upheld the instruction as given, saying that it is impractical and undesirable "to force the jurors to standardize their own reasoning processes with the reasoning processes of the hypothetical ordinary reasonable person." *State v. McKeough,* 300 A. 2d 755 (Maine Supreme Judicial Court, February 1973).

Crimes and Offenses—Concealing Stolen Property JP

Defendant was convicted of knowingly concealing stolen property and he appealed. Defendant operated an antique shop in which a prospective customer observed some displayed merchandise which the customer believed to have been stolen from her possession several months earlier. The customer then left the shop and returned with a local policeman. The officer spoke with defendant's wife, who was operating the shop in the temporary absence of her husband, informed the wife that the articles were "possibly stolen", and requested the items be placed aside and not displayed or sold. Two days later, when a county officer called to investigate, defendant informed him that he (defendant) had placed all of the items back on the counter for sale, and that many items had been sold, including all of the articles which bore the victim's initials. Defendant testified that he believed that he was in lawful possession of the items and therefore, was entitled to sell the items regardless of the officer's warning. At the close of testimony, defendant's counsel requested a jury instruction which would interpret the words "knowing it to be stolen", *17 M.R.S.A. §3551,* to require a subjective test, that is, require the state to show that the defendant himself actually had knowledge that the goods were stolen rather than simply show that a reasonable person, with the information that was available to the defendant, would have known the goods were stolen. The requested instruction was not given.

The Law Court, in reversing the conviction, held the test to be whether the defendant knew the goods were stolen. The Court stated:

> "This is not to say that the defendant must have direct knowledge or positive proof that the goods were stolen, such as he would have gained by actually witnessing the theft or hearing the admission of the thief. It is enough if he was made aware of circumstances which caused him to believe that they were stolen." (299 A. 2d at 925).

Defendant's belief may be resolved by inferences as to intent drawn from "defendant's speech and conduct in relation to the subject matter and from evidence showing the information of which a defendant was aware." *State v. Beale,* 299 A2d 921 (Supreme Judicial Court of Maine, February 1973).

Admissions and Confessions JP

Defendant was convicted of unlawfully killing another human being in a manner constituting murder and he appealed.

The Supreme Judicial Court, while upholding the conviction on its particular facts established a new procedure relating to the admissibility of confessions. This new procedure is as follows:

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First, "the presiding Justice must conduct an independent evidentiary hearing, in the absence of the jury, pertaining to all the factors upon which the evidentiary admissibility of the confession is legally dependent." Such factors would be the "voluntariness" of the confession and the constitutional requirements such as noted in *Miranda.*

Second, "the presiding Justice shall make his determinations and ruling as to admissibility governed by the principle that the prosecution must prove beyond all reasonable doubts the factors qualifying the confession to be admissible as evidence."

Third, "The ruling of the presiding Justice will thereupon settle the question of the evidentiary admissibility (or inadmissibility) of the confession for all purposes concerned with the further conduct of the trial." The jury is to have no function to perform regarding the legal admissibility of the confession.

Fourth, "The jury's consideration of the confession will be solely for the purpose of allowing the jury to evaluate the totality of the circumstances in which the confession was given for the purpose of assigning credibility and weight to it, in the light of all the evidence, and as part of the jury's function to make the ultimate determination of guilt or innocence." *State v. Collins,* 297 A2d 620 (Supreme Judicial Court of Maine, December 1973).

Indictments—Generally JP

Defendant pled guilty to robbery. Pursuant to *14 M.R.S.A. §5502* (post conviction habeas corpus) defendant filed a petition for relief which was denied. Defendant appealed claiming that the indictment purporting to charge defendant with the crime of robbery was fatally defective in that it failed to allege that the taking was felonious.

The Law Court, in sustaining the opinion, held the word "feloniously" to be a word of procedure (i.e. a legal adjective describing the grade of the act rather than a distinct element of the crime, not descriptive of any particular offense) rather than a word "mandated by the substantive criminal law of this state." Since "feloniously" is a word of procedure, it is governed by M.R. Crim. P., Rule 7 (c) which requires an indictment to be "a plain, concise and definite written statement of the essential facts constituting the offense charged," and need not contain "any other matter not necessary to such statement." *Dow v. State,* 295 A.2d 436 (Supreme Judicial Court of Maine, October 1972).

COMMENT: This same reasoning was recently employed to uphold a rape conviction where the indictment failed to contain the word "feloniously". State v. Mower. *298 A.2d 759 [Supreme Judicial Court of Maine, January 1973].*

Venue JP

Defendant was convicted of uttering a forged instrument and he appealed on the ground that venue was never proved. The relevant facts are as follows: No witness fixed the location of the offense as being Cumberland County. However, there was evidence that the uttering occurred at the Mammoth Mart on Washington Avenue, that the investigating officer was a member of the City of Portland Police Department, that the forged check was deposited in a Portland Bank and bore the endorsement "Mammoth Mart—Portland Store" and that counsel for defendant referred to "Mammoth Mart, Washington Avenue, City of Portland."

The Law Court held that although there was no direct evidence of venue, venue may be established by circumstances, inferences, and the commonly accepted meaning of words. Quoting with approval from the Wisconsin Supreme Court case of *Piper v. State,* 231 N.W. 162, 164, the Maine court continued,

> "While direct proof of venue should be made, absence of it does not defeat conviction, where inference of it may properly be drawn from circumstantial evidence. Where no witness testifies directly to the venue, it is sufficiently proved if there is reference in the evidence to the locality known or probably familiar to the jury were the act constituting the offense was committed, from which the jury may reasonably have concluded that the place was in the county alleged . . ."

Crimes and Offenses—Rape JPL

Defendant was convicted of rape and appealed. He contended that the instruction given to the jury, which stated that either actual physical force or threat of force was sufficient to prove rape, was misleading.

The Court denied the appeal and quoted the following rule:

> "The term 'by force' does not necessarily imply the use of actual physical force to compel submission of the victim to sexual intercourse, but it may mean threatened force or violence if the female does not comply. The threat of such force or violence may create a real apprehension of dangerous consequences, or bodily harm, in order to prevent resistance or extort the consent of the victim, and if it so overpowers the mind of the victim that she dare not resist, it must be regarded as in all respects equivalent to force actually exerted for the same purpose." *State v. Mower,* 298 A.2d 759, 760 (Supreme Judicial Court of Maine, January 1973).