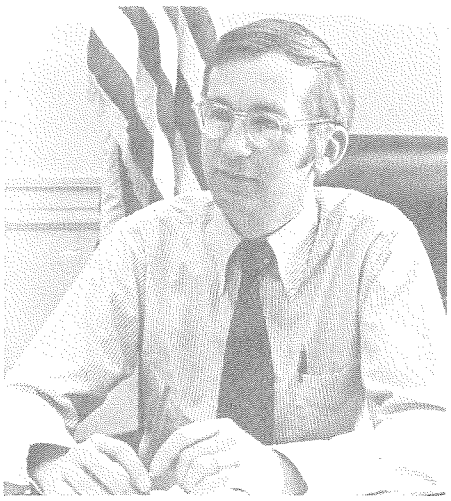
AUGUST 1973

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

It has come to my attention that there are still some law enforcement officers in Maine who are not receiving the ALERT Bulletin regularly. Whatever the reason for this, I would like to point out that the ALERT Bulletin is available on request to all law enforcement officers in Maine without charge. Furthermore, copies of all back issues of ALERT are available on request, also free of charge.

I, therefore, urge that either individual officers or heads of law enforcement agencies send us the names and home addresses of any officers who are not receiving ALERT together with requests for back issues that are needed. Kindly address all such requests to:

Law Enforcement Education Section
Criminal Division
Department of the Attorney General
State House
Augusta, Maine 04330

Jon A. Lund

JON A. LUND
Attorney General

PLAIN VIEW II

In the main article of last month's ALERT, we attempted to define "plain view" and we discussed three of the six elements or requirements of the plain view doctrine:

1. **The officer must be in a place where he has a legal right to be.**
2. **A person's reasonable expectation of privacy must not be violated by unreasonable governmental intrusion.**
3. **The officer must observe the item of evidence.**

In this issue, we will conclude our coverage of plain view and will discuss the last three elements of the doctrine.

4. The item of evidence must be lying in the open.

The requirement of the plain view doctrine that the evidence must be lying in the open has been expressed in several ways. Among the terms used by different courts are "in plain view", "in plain sight", "in open view", "open to view", and "in the open". All of these mean substantially the same thing, but do not give much help to the law enforcemtnt officer in determining what items he may and may not seize. The best way to determine the meaning of these terms is to examine the cases interpreting them.

First of all, it is well settled that a law enforcement officer may use mechanical or electrical aids to assist him in observing items of evidence so long as he is in a position in which he has a legal right to be and is not intruding upon someone's reasonable expectation of privacy. In one case, a law enforcement officer was told, when he arrived at a drive-in restaurant, that a car had been parked in the parking lot for an hour with its lights on and with a person lying in the back seat. The officer went over to the car to see if anything was wrong. He shined a flashlight into the car and observed defendant lying in the back with a sawed-off shotgun resting on the floorboard between his feet. He then arrested the defendant and seized the shotgun.

The court held that the observation of the shotgun by the officer came within the plain view doctrine and was therefore not a search. The officer was in a place where he had a legal right to be, and his use of the flashlight did not, in itself, make his observations unlawful.

> "When the circumstances of a particular case are such that the police officer's observation would not have constituted a search had it occurred in daylight, then the fact that the officer used a flash-

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light to pierce the nighttime darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory. The plain view rule does not go into hibernation at sunset." *Marshall v. U.S.*. 422 F.2d 185, 189 (5th Circuit Court of Appeals, 1970)

In another case, an officer stationed himself in a field about 50 yards from the defendant's house and with the aid of binoculars, watched the activities of the defendant, a known liquor violator. The officer observed the defendant placing two large cardboard boxes (each of which contained six gallons of untaxed whiskey) into a 1961 Buick. The liquor was later found in the car while it was being operated on a public street by another person. The court held that the officer's use of binoculars to observe defendant's activities did not constitute an illegal search. *U.S. v. Grimes,* 426 F.2d 706 (5th Circuit Court of Appeals, 1970).

Courts have also held that it is not a search if a law enforcement officer looks through an open door or window and observes evidence lying in the open. An example is a case where an officer was investigating a complaint that mechanical work was being done on a car on a public street in violation of the law. The officer observed several young men gathered around two cars, one of which was a partially stripped late model car, parked in a garage. As the officer approached in his police car, one of the youths closed the garage door. The officer was in the vicinity again four days later and saw the garage door open. He observed from the street that the late model car had been completely stripped and that the front plate was missing. The officer checked his list of missing vehicles and found that the car had been reported missing. Based on this information the officer obtained a search warrant, and the defendant was convicted of grand larceny.

Defendant contended on appeal that the officer's observations violated his Fourth Amendment rights. The court held that the observations were not a search but came under the plain view doctrine.

"Private Hairston testified at the pre-trial hearing that the garage door was ajar and that he was able to look under and observe the parts and tools strewn about. The police are free to observe circumstances and evidence that are in plain view to the public ...That the policeman may have to crane his neck, or bend over, or squat, does not render the doctrine inapplicable, so long as what he saw would have been visible to any curious passerby." *James v. U.S.,* 418 F.2d 1150, 1151 (District of Columbia Court of Appeals, 1969)

It is important to note again in connection with cases involving looking through open doors and windows, that the officer must be in a place where he has a legal right to be. In the *James* case, for instance, the officer was standing on a public way when he looked under the garage door. If, however, the officer had been standing on the defendant's property when he looked in the garage, his observations probably would have constituted an unlawful search. As the court said in the case of *Brock v. U.S.*:

"Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment." 223 F.2d 681 (5th Circuit Court of Appeals, 1955)

Also, as indicated by the language of the *Brock* case and the above section on invasion of privacy, the law enforcement officer must be very much attuned to possible invasions of a person's privacy when looking into doors and windows. Courts are giving more and more recognition to the right of privacy in their decisions. It may no longer make that much difference whether or not an officer is standing on a person's property when he looks through a window or door. For example, it would seem to be a much greater invasion of privacy for an officer to look into a bathroom window from a neighboring roof with binoculars than it would if the officer merely looked into an open window or door while standing in someone's driveway. Therefore, even if an officer is in a place where he has a legal right to be, his peering into open windows and doors may still constitute an illegal search if it invades someone's reasonable expectation of privacy. Law enforcement officers should check the *Maine Court Decisions* and *Important Recent Decisions* columns of future ALERT bulletins for further developments in this area.

Another question which arises in connection with whether an object is open to view is how far an officer may go in examining an item more closely before the examination constitutes a search rather than a mere plain view observation. Because no definite answer, in the form of guidelines, can be given to this question, we will examine several recent cases to attempt to determine what is permissible police activity in this area.

Several courts have held that it is not a search for an officer to look within or under a parked automobile for a vehicle identification number, because there is no expectation of privacy as to such a number. The language of the court in the case of *U.S. v. Palk* is worth of quotation in this regard:

"A car is not a home. An automobile runs and stops on the public roads, where viewers may crawl under it or press their faces against its windows. Its exterior and much of its interior are within the "plain view" of the casual or purposeful onlooker, and thus are not protected by the Fourth Amendment from searching eyes....

Thus the VIN (vehicle identification number) on the rear axle or on the car frame are outside any reasonable expectations of pri-

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vacy. Those that may be seen only by opening the car door or hood are no more private: Doors and hoods are continually opened to the eyes of observers. Although opening the door of a car may involve a technical trespass, such action does not invade any expectations of privacy." 433 F.2d 644, 647-8 (5th Circuit Court of Appeals, 1970).

It should be emphasized that this does *not* mean that an officer may open the doors or hood of any car to look for identification numbers whenever he feels like it. Although he does not need probable cause to take such action, he does need to be able to provide some legitimate ground or the inspection will be considered an illegal search. *U.S. v. Powers,* 439 F.2d 373 (4th Circuit Court of Appeals, 1971).

In another case involving closer examination of items, police were lawfully in the defendant's apartment for the purpose of arresting him. While they were looking for him, one officer observed a pair of shoes believed to have been worn by the defendant at the time of a murder. The officer picked up the shoes and examined the heels, and they were later introduced in evidence against the defendant.

The court held that there was no search by the officer.

"Detective Shelby was lawfully in defendant's apartment. He reasonably believed defendant to be hiding in the apartment and had every right, supported by probable cause, to search for the suspected killer. Shelby's discovery of the shoes was not the result of a general search for evidence. Rather, the pair of shoes was seen during the course of the search for Eddington. In our view, Shelby's subsequent action in lifting the shoes and examining their heels involved no more than 'legitimate and restrained investigative conduct undertaken on the basis of ample factual justification'...." *People v. Eddington,* 198 N.W. 2d 297, 302 (Supreme Court of Michigan, June 1972).

It should be emphasized again that even though an officer may examine items more closely in situations like those described above without the examination being a search, if he looks into a closed container, it will usually be considered a search. For example, in one case, officers were conducting a narcotics raid on an apartment, and they observed defendant's purse lying on a table. One of the officers opened the purse and found a small bag of marijuana. When the defendant admitted that the purse was hers, she was arrested for possession of marijuana.

The court held that the seizure of the marijuana was illegal. Even though the purse was in plain view, the marijuana itself was not. The officer had to break into the purse to find the marijuana. This was an illegal search because the officer had no warrant, nor could he justify the search under any of the exceptions to the warrant requirement. *State v. Keller,'* 231 S. 2d 354 (Supreme Court of Louisiana, 1970).

As these cases indicate, it may not always be clear to the officer whether he is allowed to examine an item more closely without it being considered a search. When in doubt, the officer should obtain a search warrant, unless the situation presents an immediate danger of loss or destruction of evidence.

5. The item of evidence observed must be "subject to seizure".

The requirement that the item of evidence observed must be "subject to seizure" simply means that the officer must have probable cause to believe that the property comes within one of the four categories of property in Rule 41 (b) of the Maine Rules of Criminal Procedure. These categories of property have been listed and discussed on page 2 of the August 1972 ALERT. They are:

1. Property stolen or embezzled; or
2. Property designed or intended for use or which is or has been used as a means of committing a criminal offense (instrumentalities); or
3. Property, the possession of which is unlawful (contraband); or
4. Property consisting of nontestimonial evidence which will aid in a particular apprehension or conviction ("mere evidence").

This requirement of the plain view doctrine is well illustrated by the Maine case of *State v. Mosher,* 270 A.2d 451 (Supreme Judicial Court of Maine, 1970). In that case, a Massachusetts police officer arrested defendant and two companions for trespassing; they had parked their car on private property. While waiting for assistance, the officer observed articles of clothing wrapped in cellophane lying inside the car. Sometime later, after the car had been removed to the police station, the officer learned through police channels that similar clothing had been recently stolen in Maine. He obtained a search warrant and seized the clothing.

The court found the search warrant defective but upheld the seizure because the items of clothing were in the officer's plain view. The court said:

"Even where....no search is necessary, the accompanying seizure must be accompanied by probable cause or reasonable grounds to believe that the property falls within a category which warrants the seizure." 270 A.2d 451, 453.

In this case, the officer had reasonable grounds to believe that the articles of clothing were *stolen* (category 1 above), based on the report that similar articles had been stolen in Maine.

The important consideration for the law enforcement officer for purposes of this article is that before he seizes any property under the plain view doctrine, he must have probable cause to believe that it falls within one of the four

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categories of property listed above. Otherwise, the seizure will be illegal. For example, if the Massachusetts officer in the *Mosher* case had seized the articles of clothing when he first observed them, the seizure would have been illegal. At that time, he had no reason to believe they were stolen or that they came under any other category of seizable property. It was only after he received the report that similar clothing had been stolen in Maine that he had probable cause to believe the property was seizable.

6. The discovery of the item of evidence by the officer must be inadvertent.

The so-called "inadvertency" requirement of the plain view doctrine is best illustrated by the 1971 U.S. Supreme Court case of *Coolidge v. New Hampshire,* 91 S.Ct. 20022. In that case, police went to defendant's house to arrest him for murder. They also had a warrant to search his Pontiac car for evidence of the murder. They seized the car, which was parked and plainly visible in the driveway, and brought it back to the station where it was searched. Vacuum sweepings from the car were used as evidence at defendant's trial, and he was convicted.

The search warrant was later found to be invalid and the prosecution attempted to justify the seizure of the automobile on the theory that the car was an "instrumentality of the crime", was seized while lying in plain view, and therefore no warrant was needed. The Court said that the plain view doctrine could not be used to justify the seizure in this case because the discovery of the evidence was not inadvertent.

> "....(T)he discovery of evidence in plain view must be inadvertent. The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. *But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances'.*" (Emphasis supplied). 91 S.Ct. 2022, 2040

The significance of the inadvertency requirement for the law enforcement officer is that it reemphasizes the importance of obtaining a search warrant in situations where the officer (1) expects to discover certain evidence, (2) knows its location in advance, and (3) intends to seize it. Unless there are "exigent circumstances", or an emergency, a warrantless seizure in such circumstances will *not* be justified under the plain view doctrine.

It is worthwhile to include here an example of a case in which the court found sufficient "exigent circumstances" to justify the use of the plain view doctrine to support the warrantless seizure of items the location of which law enforcement officers already knew. Law enforcement agents, on several occasions observed the defendant purchase laboratory equipment and chemicals used in the manufacture of amphetamine and carry them into his home. On one occasion, the agents entered the apartment with defendant's consent on the pretense of making an emergency phone call. They observed the laboratory equipment on a kitchen counter. The agents, stationed at a nearby apartment, also observed someone working in the laboratory, and they detected a smell of ether, which is employed in manufacturing amphetamine. Later that night, the agents observed defendant dismantling the laboratory equipment. Believing that defendant was attempting to flee, they called their superiors, who said they were attempting to obtain a search warrant. In the meantime, the agents at the scene went to "secure" defendants apartment while waiting for the delivery of the warrant. When they arrived at the apartment, they immediately arrested the defendant and seized the laboratory equipment, which was in plain view.

Defendant claimed that the seized equipment should not have been admitted into evidence because although it was in plain view, the agents knew before hand that the equipment was in the apartment. Defendant cited the case of *Coolidge v. New Hampshire,* 91 S.Ct. 2022, which held, as we have seen, that the "plain view" doctrine applies only when the discovery of the evidence is inadvertent not where the discovery is anticipated, where the police know in advance the location of the evidence, and intend to seize it.

The court held that the warrantless seizure in this case was valid. The agents made efforts to obtain a search warrant -- a warrantless seizure was not planned. When the agents saw the equipment being dismantled, however, they reasonably concluded that defendant's flight was imminent and that incriminating evidence was about to be carried away. The situation having become acute, immediate action by the agents was required. "Coolidge does not require suppression of evidence seized in plain view during an arrest where the circumstances have become exigent merely because prior knowledge of the evidence was acquired shortly before the seizure." U.S. Lisznyai, 470 F.2d 707, 710 (2nd Circuit Court of Appeals, December 1972)

This case indicates again the strong preference of the courts for warrants. It is likely that the court would have held the search illegal in this case, had not the agents already begun the process of obtaining a search warrant when the emergency plain view search was made. Here, however, the attempt to obtain a warrant clearly showed that a warrantless seizure of the evidence in plain view was *not* planned, but was in response to an emergency.

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This concludes our discussion of the six basic requirements of the plain view doctrine. It is important for the officer to realize that in order to justify a warrantless seizure of an item of evidence under the plain view doctrine, all six of these requirements must be met. If any one of them is not met, and the officer cannot justify the seizure under any of the exceptions to the warrant requirement, the courts will consider it an illegal search and seizure, and anything seized will be inadmissible in court.

* * *

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—Consent; Pre-Trial Identification L

Defendant was convicted of robbery. Following a bank robbery, police discovered a car registered to a Mrs. Bailey near the bank. While at her apartment, the police requested permission to search because she appeared extremely nervous. This search disclosed three men who resembled the description of the robbers. The police then gave Mrs. Bailey the *Miranda* warnings and obtained a signed release to search the apartment for evidence. They then discovered guns, disguises and stolen money. Mrs. Bailey testified that she did not consent to the first search.

The question on appeal was whether the first search, assuming it to be illegal, tainted the later consent search. Defendant argued that the circumstances surrounding the first search and resulting pressure put to bear on Mrs. Bailey -- the fear of being implicated and arrested-- prevented her from knowingly and voluntarily consenting to a warrantless search.

The court noted, however, that Mrs. Bailey received the *Miranda* warning and signed a consent form. These facts established that Mrs. Bailey knowingly relinquished her rights. The remaining issue was whether the consent was a product of coercion or duress. A close examination of the record disclosed that Mrs. Bailey consented because she believed the search would demonstrate her innocence. The court, however, expressly disapproved of an officer's statement that Mrs. Bailey would be "taken downtown" if she did not consent to the second search. This tactic, the court said, could easily have made the consent involuntary if the other factors had not been present.

Another issue developed out of a showing of nine photographs to employees of the bank that was robbed. These photos were shown to them by a Maine State Police officer after he had signed a complaint against the defendant, and three employees identified defendant's photo. The Court held that pre-trial photo identifications do not come under the Wade Gilbert Rule and need not be conducted in the presence of defense counsel.

> "A fair, meaningful identification confrontation at trial requires that defendant be able to reconstruct a pretrial confrontation so that he may expose any unfairness that occurred at the pretrial lineup ...
>
> The record in this case demonstrates that appellant was able to offer into evidence the photos used in the identification. He was able to elicit from the witnesses and the officer conducting the identification procedure, the manner in which the identification procedure, was carried out and the results of the procedure." *State v. Niemszyk,* 303 A.2d 105, 110-11 (Supreme Judicial Court of Maine, April 1973)

Admissions and Confessions L

Defendant was convicted of robbery. He had participated in a bank robbery in Maine. As a result of an alert issued by the Maine State Police Department, defendant was apprehended and incarcerated in the State of Oklahoma. Two Maine State policemen were dispatched to Oklahoma to return the defendant to Maine. Defendant waived extradition.

One detective read the "Miranda warning" to the defendant. He also informed defendant that he was a Maine Police Officer who was to return him to Maine and stated that he wished to ask him some questions. Defendant consented to the interview and in the course of questioning, gave the police a confession and a detailed history of the events leading up to and following the robbery. On the basis of this and other evidence, defendant was convicted of robbery and appealed.

One basis for the appeal was defendant's claim that the Maine detective did not fully inform him of his status in Oklahoma; that he was not an Oklahoma police officer. The court said that whenever a police officer, acting in such capacity, interrogates one suspected of a crime he is required to inform such suspect that (A) he is, in fact, a police officer, and (B) he is conducting the interrogation in such capacity, even though he is, in fact, outside the jurisdiction in which he can make arrests. The reason for this is because questioning by a "private citizen" not acting as a police officer is subject to less restrictions than questioning by a police officer. Here defendant was given a clear and comprehensive explanation of his Fifth Amendment rights arising from his being questioned by a police officer. No claim is made that defendant did not understand the explanation given him. Full compliance was had with *Miranda v. Arizona,* 384 U.S. 436 (1964). *State v. Young,* 303 A.2d 113 (Supreme Judicial Court of Maine, March 1973).

Arrest—Probable Cause L

Defendant, charged with possession of drugs, was denied a motion to suppress evidence and appealed. Police, having received a tip from an informer that there was to be a drug party at the apartment of one Caron, obtained a warrant to search the apartment. (The validity of the warrant was not at issue in this case). When they arrived at the apartment to execute the warrant, the police found in plain view hypodermic needles, syringes, capsules, powdery substances and spoons. Lying on a bed were two men who appeared to have fresh needle marks in their arms. Also present was a young girl holding a hypodermic syringe with needle and two orange-red capsules. Defendant then knocked and entered the apartment. Noting that defendant's eyes were glassy, his facial expression unnatural and his pockets bulging, the experienced officers formed the opinion he was under the influence of drugs and gave him the *Miranda* warnings, searched him (finding drugs in his pockets) and arrested him. One arresting officer testified that he knew, both from the informant and from his personal observation, that defendant was a drug user and that he frequented Caron's drug parties.

The Court held that, in light of the criminal activities in the room, the information received from the informant, and the physical condition of the defendant, the police had probable cause to arrest the defendant and search him incident to the arrest.

Although the officer testified that in point of time he searched defendant's pockets before informing him that he was under arrest, the Court indicated that it was "not important whether the arrest preceded the search or the search preceded the arrest because they were contemporaneous." *State v. LeClair,* 304 A.2d 385, 387 (Supreme Judicial Court of Maine, May 1973).

Assault and Battery JP

Defendant was convicted of assault and battery, high and aggravated in degree. Defendant, a male age 44, visited a friend's house and discovered the complaining witness, a thirteen year old girl, babysitting. She had known defendant as a neighbor for approximately half a year and in all of her prior contacts with him, he had always acted toward her as a gentleman.

Defendant engaged the complaining witness in conversation for about 15 minutes and then took hold of her and kissed her on the cheek and lips. She immediately asked him to "leave me alone," but defendant continued to hold her and proceeded to touch her breasts and placed one hand between her legs in contact with her "private part" from outside her clothing. The complaining witness told defendant again to stop, whereupon he did so. Complainant did not mention the incident until 24 hours later when she told her mother.

The single issue on appeal was the legal meaning of "high and aggravated." Defendant pointed out that he ceased his actions upon the second request by the complaining witness, that no physical injuries were inflicted, and that the psychological impact on the girl was minimal (since she waited 24 hours before reporting the incident.) The Court, however, denied the appeal. Quoting a prior case, *State v Bey,* 161 Me. 23, 27, 206 A.2d 413, 416 (1965), the Court observed that assault and battery may become "high and aggravated in nature" by the presence of "circumstances of aggravation, such as (a) great disparity between the ages and physical conditions of the parties, (b) a differences in the sexes, (c) indecent liberties or familiarities with a female, (d) the purposeful infliction of shame and disgrace..."

The Court also quoted another case which arose on almost identical facts,

> "What intention could the respondent have had other than an evil intention to indulge his lustful desires? By his indecent acts he violated the person and dignity of the child in a manner abhorrent to society." *State v. Rand,* 161 A.2d 852, 854 (Supreme Judicial Court of Maine, 1960)

State v. Towers, 304 A.2d 75, 76 (Supreme Judicial Court of Maine, May 1973)

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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.

Jon A. Lund — Attorney General
Richard S. Cohen — Deputy Attorney General In Charge of Law Enforcement
John N. Ferdico — Director, Law Enforcement Education Section

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