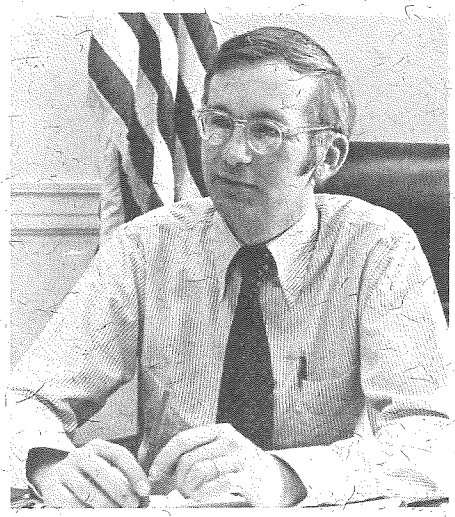
OCTOBER 1973

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

I am pleased to announce that this issue of ALERT marks the beginning of our fourth year of publication. We appreciate the favorable reception that we have received over the past three years from the criminal justice community and we hope to continue providing a valuable service. In early 1974, we will be approaching the legislature for funding to make the Law Enforcement Education Section a permanent part of the Attorney General's Office.

This issue of ALERT is largely devoted to an index of all cases summarized in ALERT since the previous index in the October 1972 ALERT. A discussion of expungement of arrest records and procedures for handling impaired persons appears in the FORUM column.

I would also like to announce that this office will publish the first issue of a monthly prosecutor's bulletin in November 1973. Since the new procescutor's bulletin will summarize all cases of interest to prosecuting attorneys, the ALERT will, in the future, deal only with cases directly affecting law enforcement officers and no longer with cases involving such matters as sentencing, habeas corpus, and trial techniques. This should enable us to include more cases of interest to law enforcement officers than we have in the past and should make the ALERT a more concentrated tool for law enforcement officers.

Jon A. Lund

JON A. LUND
Attorney General

CASE SUMMARY INDEX

October 1972 - September 1973

The following index is divided into two sections—**Important Recent Decisions** and **Maine Court Decisions.** Each section will index the case summaries that have appeared in the corresponding column of the *ALERT* Bulletin over the past year.

In both sections, the index is broken down into several general categories such as, **Admissions and Confessions, Fair Trial, Pre-trial Identification,** etc. Each individual entry under these general categories consists of three lines containing the following information:

1. A brief phrase or sentence describing the nature or holding of the case. (Often this brief description will refer to the general category heading).
2. The title and citation of the case along with an abbreviated designation of the jurisdiction from which the case came and the year in which it was decided.
3. The month and page of the issue of *ALERT* in which the case summary appears. Where a case summary begins on one page and ends on another, both pages will be included. (e.g. 6-7)

For the most part, the index category headings will be the same as those in the October 1972 issue of *ALERT*. Only a few new categories have been added. The category headings in the index should correspond closely to the category headings used in the *ALERT* Bulletins. Nevertheless, there will be some discrepancies, and to avoid confusion, it is suggested that the name of the case, rather than the case summary heading, be your guide in locating the cases in the *ALERTS*.

Two further features of the index are worthy of mention First, with a few exceptions, there is only one entry in the index for each case. Therefore, even though a case might have several holdings fitting into several different categories, only the most important holding will be entered in the index. This has been done to save space and also because this index has been designed not as an all comprehensive reference service, but as an aid to quick recall of recent decisions. Secondly, the entries within each general category are listed in the order in which they appeared in the *ALERT* Bulletins with those appearing in the most recent *ALERTs* listed first. Therefore, they may not be in strict chronological order as to the time the decision was rendered.

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IMPORTANT RECENT DECISIONS

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U.S. v. Zemke, 457 F. 2d 110 (7th Cir. 1972)
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State v. Tibbetts, 299 A. 2d 883 (Me. 1973)
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NOTE: Due to a printing error, the name and citation of this case were not printed in the ALERT after the summary.

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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.

Question

When a law enforcement officer comes upon a person who appears to be mentally disturbed, under the influence of alcohol or drugs, or possibly attempting suicide, should the officer arrest the person, take the person into protective custody, or take some lesser action?

Discussion

A. *Person appears to be under the influence of alcohol or drugs.* Under ordinary circumstances, the officer should refrain from arresting a person he discovers to be under the influence of alcohol or drugs. Except in the case of an individual who is under the influence of barbituates in a public place (see 22 M.R.S.A., § 2215), it is not a crime to be under the influence of drugs. Furthermore, although officers may presently arrest for intoxication, effective July 1, 1974 it will no longer be a crime to be found intoxicated in a public place. Even until that date officers should employ the power of arrest for intoxication only as a last resort, since it is the declared public policy of the State that intoxicated persons not be subjected to criminal prosecution solely for their consumption of alcohol.

Whether the officer should take the person into protective custody, take some lesser form of action or take no action at all rests in the sound discretion of the officer and depends upon the degree of intoxication, the likelihood that the person may inflict harm upon himself or others, and whether assistance is required for the person's welfare. Two bills recently enacted by the Maine legislature — *Public Laws 1973, Chapter 566 and Public Laws 1973, Chapter 582* — provide some guidance on this matter and indicate that the officer's course of action will largely depend upon whether the person is "intoxicated" or "incapacitated by alcohol."

An "intoxicated person" is one whose mental or physical functioning is substantially impaired as a result of the use of alcohol. If the officer comes upon such a person who appears to be in need of help, *and* if the person consents to the help, then the officer may take the person to his home, to an approved public or private facility for the treatment of alcohol and drug abuse, or to some other health facility. Although the officer is not required to take such action, he should render appropriate assistance in all situations in which the person is in need of aid. Of course, when the officer comes upon a person who is intoxicated but who does not require assistance, the officer is justified in taking no action.

A person "incapacitated by alcohol" is one who, as a result of the use of alcohol, is unconscious or has his judgment otherwise so impaired that he is incapable of realizing and making a rational judgment with respect to his need for treatment. The officer is required to take such a person into protective custody and bring him to an "approved public treatment facility", or, if none is readily available, to an emergency medical service customarily used for incapacitated persons. In doing so, the officer must make every reasonable effort to protect the person's health and safety.

An officer who takes a person incapacitated by alcohol into protective custody is entitled by statute to take reasonable steps to protect himself. Moreover, officers who, in compliance with 22 M.R.S.A., §7118 or 22 M.R.S.A. §1372, assist intoxicated persons or take persons incapacitated by alcohol into custody are deemed by statute to be acting in the course of their official duty and consequently will not be a criminally or civilly liable for resulting injury. The taking of a person incapacitated by alcohol into protective custody is not to be considered an arrest nor is any entry or record to be made indicating that such person has been arrested or charged with a crime.

Although the new legislation does not specify what action an officer should take with respect to persons found under the influence of drugs, it is often difficult to tell whether a person is under the influence of alcohol or drugs. Therefore, when an officer comes upon a person who is under the influence of some stimulant, but the officer doesn't know what, it is suggested that the officer follow the procedures outlined above.

Although law enforcement officers may suspect that their compliance with the new legislation may substantially overload law enforcement manpower, it is anticipated that Emergency Service Patrols established under this legislation will assume much of the burden for implementation of the new procedure.

Before July 1, 1974, when the repeal of the Public intoxication and disturbance law (17 M.R.S.A. §2001) goes into effect, further guidelines to assist law enforcement personnel in the implementation of the Alcoholism and Intoxication Treatment Act are expected to be published in the ALERT and by the Office of Alcoholism and Drug Abuse Prevention.

B. *Person who appears mentally disturbed or who attempts suicide.* A law enforcement officer who comes upon a person who appears to be mentally disturbed should not arrest the person unless he or she has committed a criminal offense. (See ALERT, July, August, and September 1971 on Arrest). Since the condition of being "mentally disturbed" does not constitute a crime, an arrest is not warranted. Likewise, because attempted suicide is not a crime, the officer may

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not arrest a person who has attempted to take his own life.

When a person has attempted suicide, the officer should promptly notify medical authorities (since in addition to possible physical injury the person is highly likely to be mentally unstable or ill) and immediate family. To prevent further suicide attempts the officer should take the individual into protective custody until custody can be transferred to medical authorities or to the family.

Whether an officer should take any action at all, and what action he should take, with respect to a person who seems "mentally disturbed" depends upon the likelihood that the person may harm himself or others. If the person poses little threat of harm, the officer may take no immediate action, although he may wish to notify the individual's family. If the officer believes that the person may harm himself or others, he should take the person into protective custody.

If the officer comes upon a person whom he believes is mentally ill and who poses a likelihood of *serious* harm to himself or others, the officer may elect to pursue an emergency procedure for the involuntary hospitalization of the individual. Pursuant to 34 M.R.S.A., §2333 (1) (see Public Laws 1973, Chapter 547, §19), if the officer believes that the person poses a substantial risk of physical harm (1) to himself as manifested by evidence of threats of, or attempts at suicide or serious bodily harm, or (2) to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm, he may make written application, stating that the individual is mentally ill and poses a likelihood of serious harm. The application should be made to a public or private hospital, institution, or mental health center equipped to provide in-patient care and treatment for the mentally ill. When properly endorsed by a proper judicial officer, the application will authorize a health or law enforcement officer to take the person to a designated hospital. Since this procedure is used only for extremely serious cases, and since a penalty is imposed by 34 M.R.S.A., §2259 upon any person who willfully causes the unwarranted hospitalization of an individual, the officer should utilize this procedure only in the most serious cases and only after consultation with law enforcement or medical authorities.

* * *

Situation:

In 1969 the Maine Legislature passed a law, 16 M.R.S.A. §600, relating to the expungement of records of arrest. The law requires any law enforcement agency having records of a person's arrest or detention to expunge from its records any reference to the arrest of the person on that charge upon receiving notice that the person (1) has been acquitted of that charge, or (2) has had the charge against him dismissed by any court. The statute excludes from expungement investigative and communication records, fingerprints, and photographs.

Question 1

What does 16 M.R.S.A. §600 mean when it says that a law enforcement agency must *expunge* from its records any reference to the arrest of individuals who are either acquitted of charges or have the charges against them dismissed?

Answer

The word *expunge* means to permanently destroy or obliterate. Therefore, when a law enforcement agency receives a certified copy of the docket entry of acquittal or dismissal from the clerk of courts, the agency must permanently destroy or obliterate from its records any reference to the arrest of the person on that charge. This applies to *all* records *except* investigative and communication records, fingerprints, and photographs.

It should be noted that a law enforcement agency does not comply with this statute by merely refusing to disclose information in the records referring to person's arrest. The information must actually be physically destroyed or obliterated.

Question 2

What procedures should law enforcement agencies follow under 16 M.R.S.A., §600 with regard to references to arrest appearing on investigative and communication records, fingerprint cards and photographs?

Answer

The exact language of the statute is:

> "Upon the receipt of the certified copy, each agency shall expunge from its records, *excluding investigative and communication records, fingerprints and photographs*, any reference to the arrest of the person on that charge." (emphasis added)

This language is clear and unequivocal. The Legislature intended that the named records *not* be subject to expungement. Therefore, these records may be used for investigation of crime or any other legitimate purpose even though these records may contain notations of an individuals arrest for a crime for which he was acquitted or for which the charges against him were dismissed.

* * *

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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