

MAINE STATE LEGISLATURE

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ALERT

FEBRUARY 1974

CRIMINAL DIVISION

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



MESSAGE FROM THE
ATTORNEY GENERAL
JON A. LUND

FROM THE LEGISLATURE

22 M.R.S.A. §2387. Forfeiture of all property used in delivering illegal drugs

The main article of this issue is devoted to a discussion of 22 M.R.S.A. §2387, the recently passed Maine law dealing with forfeiture of all property used to manufacture, dispense, or distribute controlled substances. This article is presented as a response to several requests for information about drug law enforcement, and I encourage all law enforcement personnel to read it carefully.

Also, I am pleased to announce that the Law Enforcement Officer's Manual, which the Law Enforcement Education Section has been preparing for some time, has gone to press. The printer tells us that the Manual should be ready for distribution sometime in May. Further announcements about the Manual will appear in the Message from the Attorney General column of future ALERT Bulletins.

Jon A. Lund
JON A. LUND
Attorney General

In 1973, the Maine Legislature enacted a statute providing for the forfeiture to the state of all property used in the manufacture or delivery of illegal drugs. Since the enforcement of Maine's drug laws will now entail, to a great extent, enforcement of the forfeiture statute, Maine law enforcement officers will be expected to have a thorough knowledge of the provisions of that statute. This article will discuss the provisions of the forfeiture statute and will offer some suggestions as to the interpretation of its language and as to its enforcement.

It is important to note that because the forfeiture law has been enacted only recently, the Maine courts have not as yet had an opportunity to interpret its provisions. Thus, the suggestions presented in this article should be treated as nothing more than suggestions, since there is no guarantee that the Maine courts will construe a given provision of the statute in a particular way. As a general rule of thumb, however, officers should expect the courts to construe the statute very strictly, since the Law Court has indicated

that it looks with disfavor upon an interpretation which favors forfeiture. See, e.g., *C. Company v. City of Westbrook*, 269 A.2d 307, 309 (Supreme Judicial Court of Maine, 1970)

To provide easy reference to the provisions of the forfeiture statute, those provisions are set out below in their entirety.

22 M.R.S.A. § 2387. Forfeiture of all property used in delivering illegal drugs

1. Property forfeited. The following property shall be subject to forfeiture to the State and all property rights therein shall be in the State:

A. All materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, dispensing, distributing, importing or exporting any substance in violation of sections 2210, 2210-A, 2212-B, 2212-C 2212-E, 2362, 2362-C, or 2384;

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B. All conveyances, including aircraft, watercraft, vehicles or vessels, which are used or are intended for use, to transport, conceal or otherwise to facilitate the manufacture, dispensing, or distribution of, or possession with intent to manufacture, dispense or distribute a substance in violation of sections 2210, 2210-A, 2212-B, 2212-C, 2212-E, 2362, 2362-C or 2384.

2. Jurisdiction. Property subject to forfeiture under subsection 1, paragraph A shall be declared forfeited by any court having jurisdiction over said property or having final jurisdiction over any related criminal proceeding brought under any provision of this chapter.

3. Exceptions. The court shall order forfeiture of all conveyances subject to subsection 1, paragraph B, except as follows:

A. No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of sections 2210, 2210-A, 2212-B, 2212-C, 2212-E, 2362, 2362-C or 2384;

B. No conveyance shall be forfeited by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of this State or of any state.

C. No conveyance shall be subject to forfeiture unless the owner thereof knew or should have known that such conveyance was used in and for the unlawful manufacturing, dispensing or distributing of any illegal substance covered by the sections referred to in paragraph B of subsection 1. Proof that said conveyance was used on 3 or more occasions for the purpose of un-

lawfully manufacturing, distributing or dispensing any controlled substance shall be prima facie evidence that said owner knew thereof or should have known thereof.

4. Petition; order. A county attorney or the Attorney General may petition the Superior Court in the name of the State in the nature of a proceeding in rem to order forfeiture of a conveyance subject to forfeiture under subsection 1, paragraph B. Such petition shall be filed in the court having jurisdiction over the said conveyance. Such proceeding shall be deemed a civil suit, in which the State shall have the burden of proving all material facts by a preponderance of the evidence and the owner of said conveyance or other person claiming thereunder shall have such burden as to all exceptions set forth in subsection 3. The court shall order the State to give notice by certified or registered mail or hand delivered by a deputy sheriff to the owner of the said conveyance and to such other person as appears to have an interest therein and shall promptly, but not less than 2 weeks after notice, hold a hearing on the petition. At such hearing, the court shall hear evidence and make findings of fact and enter conclusions of law, and shall thereupon issue a final order, from which the parties shall have such right of appeal. Such final order shall provide for disposition of the said conveyance by the State or any subdivision thereof in any manner not prohibited by law, including official use by an authorized law enforcement or other public agency, or sale at public auction or by competitive bidding. The proceeds of any such sale shall be used to pay the reasonable expenses of the forfeiture proceedings, seizure, storage, maintenance of custody, advertising and notice, and to pay any bonafide mortgage thereon, and the balance, if any, shall be deposited in the treasury of the State, county or municipality making such seizure.

5. Records. Any officer, department or agency having custody of

said property or having disposed of said property shall keep and maintain full and complete records showing from whom it received said property, under what authority it held or received or disposed of said property, to whom it delivered said property, the date and manner of destruction or disposition of said property, and the exact kinds, quantities and forms of said property. Said records shall be open to inspection by all federal and state officers charged with enforcement of federal and state drug control laws. Persons making final disposition or destruction of said property under court order shall report, under oath, to the court the exact circumstances of said disposition or destruction.

6. Preliminary order. During the pendency of the proceedings, the court may issue at the request of the State ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody. Process for seizure of said property shall issue only upon a showing of probable cause and the application therefor and the issuance, execution and return thereof shall be subject to the provisions of applicable Maine law.

PURPOSE

Title 22, section 2387 is aimed primarily at curbing the narcotics traffic in the state of Maine by striking at its mobility, namely the conveyances used in the transportation or distribution of narcotics. A conveyance forfeited to the state will not likely be used in the commission of subsequent drug-trafficking offenses. Although forfeiture of private property is ordinarily frowned upon in the law, §2387 reflects the legislative policy that traffic in narcotics, with its harmful effect upon society, justifies the confiscation of conveyances used to transport the controlled substances.

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Another objective of the forfeiture law is to deter individuals from engaging in drug-dealing. Forfeiture of one's conveyance may be a harsher penalty than the sentence imposed for conviction of the drug-related offense. The unfavorable consequences of forfeiture stem not only from the monetary loss resulting from the confiscation of one's automobile, watercraft, aircraft or other conveyance, but also from the hardship or inconvenience involved in the loss of what may be an important source of personal or business transportation. The threat of these consequences may well discourage persons, otherwise disposed to do so, from trafficking in narcotics.

A secondary purpose of the forfeiture law is to reimburse state and local governments for expenses incurred in the enforcement of the drug laws. Reimbursement is accomplished through the sale of forfeited vehicles, although occasionally a conveyance will be retained by the state, county or municipality for government use.

PROPERTY SUBJECT TO FORFEITURE

Section 2387 provides for the forfeiture of two types of property. One type consists of certain controlled substances and materials used in their manufacture or delivery. The other type of property consists of vehicles and conveyances used in the delivery of illegal drugs. These two categories of property are made subject to forfeiture by 22 M.R.S.A. §§2387(1)(A) and 2387(1)(B).

§2387(1)(A) Property

Property which will most frequently be declared forfeit by a court under §2387(1)(A) consists of those substances the delivery or sale of which is made unlawful by the following sections of Title 22: 2210 (sale of barbituates); 2210-A (sale of amphetamines); 2212-B (possession of certain hallucinogenic drugs); 2212-C (exchange, delivery, etc., of certain hallucinogenic drugs); 2212-E (sale of certain hallucinogenic drugs); 2362 (possession

of narcotic drugs); 2362-C (manufacture, sale, etc., of narcotic drugs); 2384 (sale of cannabis, mescaline or peyote). Thus, any narcotic drugs, hallucinogenic drugs, cannabis, mescaline, peyote, barbituates or amphetamines seized in connection with violations of the above statutes are forfeitable to the state under §2387(1)(A).

Not only are these contraband substances themselves subject to forfeiture, but all "materials products and equipment" used to manufacture, compound, process, deliver, dispense, distribute, import or export such substances are also subject to forfeiture. Thus, for example, a suitcase used to import or distribute narcotic drugs may be forfeited. Similarly, any raw materials or equipment used to manufacture hallucinogenic drugs are subject to forfeiture.

A problem arising from the language of §2387(1)(A) is that the section refers to the manufacturing, compounding, processing, etc., of certain substances in violation of specific Maine drug statutes. However, the Maine drug statutes specified do not use this language, but instead penalize whoever "sells, exchanges, delivers, barter, gives or furnishes or possesses with intent to sell, exchange . . . (etc.)." It is suggested that, pending clarification of this difference in language, the language of §2387(1)(A) be interpreted to include the language "sells, exchanges . . . (etc.)." Under this construction, a "sale" in violation of 22 M.R.S.A. §2212-E, for purposes of forfeiture of materials used in connection with the sale, should be deemed a delivery or distribution within the meaning of §2387(1)(A). (Note: Since the same problem exists with respect to the language of §2387(1)(B), the same construction should apply to that section.)

Because §2387(1) is patterned after C. 94C, § 47(a)(2)(3) of the Massachusetts controlled substances statute, which in turn is based upon §505 of the Uniform Controlled Substances Act and Title 21, §881 of the United States Code, officers wishing further aid in defining such terms as "manu-

facturing," "dispensing," and the like, should consult the definitions set out in C. 94C, §1 of the Massachusetts statute, §101 of the Uniform Act or Title 21, §802 of the United States Code. Copies of these statutes can be obtained by writing or calling the Law Enforcement Education Section of the Attorney General's Office.

§2387(1)(B) Property

§2387(1)(B) makes clear that all types of conveyances used in the transportation, distribution, etc. of narcotics are subject to forfeiture. A number of early forfeiture statutes in other jurisdictions used simply the language "vehicles", and thereby raised a question as to whether aircraft and watercraft were forfeitable as "vehicles". This problem is not present in the Maine statute, which makes specific reference to aircraft and watercraft.

A problem which does arise from the language of §2387(1)(B) concerns the meaning of the word "facilitate". This term, which is found in numerous other forfeiture statutes, has been defined in various ways by courts in other jurisdictions.

In *People v. One 1959 Porsche Coupe*, 60 Cal. Rptr. 816, 820 (California Court of Appeal, 1967), the court stated that:

"('Facilitate') means to forward the accomplishment of a purpose. As applied by the (trial) court it means only to 'aid', which does not imply guilty knowledge or a wrongful purpose. 'Facilitate' should be given a meaning similar to the word 'abet' which, in law, implies action taken with a purpose to reach a planned and unlawful objective."

Other courts have given "facilitate" a broader definition, choosing to ascribe to it its ordinary meaning: "to make easy or less difficult; to free from difficulty or impediment." The court in *U.S. v. One 1950 Buick Sedan*, 231 F. 2d 219 (3rd Circuit Court of Appeals,

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1956), applied this definition and held that where the negotiations and payment between a narcotics dealer and a federal agent took place within the dealer's automobile, and where the dealer drove to and from the site of the transaction in his automobile, the automobile "facilitated" the transportation of the narcotics.

Since a majority of the courts appear to favor defining "facilitate" in everyday terms - that is, "to make easy or less difficult; to free from difficulty or impediment" - it is suggested that officers employ this definition.

However, officers must still face the problem of applying the definition of "facilitate" to a given set of facts. Assume for example, that a narcotics dealer drove his own automobile to reach a second automobile which contained a substantial amount of narcotics, and then drove off in the second automobile to transport the narcotics to a buyer. Did the use of the first automobile to reach the second automobile "facilitate the manufacture, dispensing or distribution of . . ." the narcotics? The court in *Howard v. U. S.*, 423 F. 2d 1102 (9th Cir. 1970), was faced with a similar question and concluded that the ease or the difficulty of transporting the marijuana in the second car was not affected by the manner in which the dealer reached the second car. Since the first automobile was not used to facilitate the distribution of narcotics, it was not subject to forfeiture.

Until the courts give some refinement to the term "facilitate", law enforcement officers, as well as the state's prosecuting attorneys, will have to give meaning to the language of §2387(1)(B) on a case-by-case basis. Meanwhile, law enforcement authorities should be developing some standards and guidelines with respect to the enforcement of this section. When establishing local policy, departments should bear in mind that §2387 is aimed at dealers and especially large-scale dealers. There are several reasons for declining to enforce §2387(1)(B) in situations where the amount of drugs involved

is very small. Where only a small amount of drugs is involved, the state will have greater difficulty in proving the "manufacture, dispensing, or distribution of, or possession with intent to manufacture, dispense or distribute" such drugs. Moreover, commencement of forfeiture proceedings in all cases may contribute to greater clogging of already over-clogged court dockets.

Another factor to be considered in the formulation of local or departmental policy should be the value of the car. Although an aim of the statute is to prevent the use of the conveyance in subsequent drug offenses, this objective must be weighed against the time, expense and manpower involved in forfeiture proceedings. Where, for example, an automobile involved in a drug transaction is worth only \$200, it would be better not to commence forfeiture proceedings against the car. In a situation such as this, not only would the expenses of the proceedings outweigh any reimbursement from sale of the automobile, but the forfeiture would likely provide little penalty for the owner of the automobile.

A significant problem with §2387(1)(B) stems from the listing of statutes (for example, 22 M.R.S.A. §§2212-B and 2362) in that section which refer to mere possession of certain drugs, while §2387(1)(B) does not make subject to forfeiture conveyances used in offenses involving mere possession. Instead, §2387(1)(B) makes subject to forfeiture conveyances used "to transport, conceal or otherwise to facilitate the manufacture, dispensing, or distribution of, or possession with intent to manufacture, dispense or distribute" controlled substances. (Emphasis added; note that there is no mention of mere possession.) The question arises, therefore, whether a conveyance is subject to forfeiture where an individual is found in the conveyance and in possession of illegal drugs, but where there is no evidence of manufacturing, dispensing or distributing. Pending legislative or judicial clarification, it is suggested that since §2387 is aimed at the curtailment of drug traffic, enforce-

ment of §2387(1)(B) be concentrated against dealers rather than mere possessors of small amounts.

Thus, the mere presence of illegal drugs in a conveyance should not be sufficient to subject the conveyance to forfeiture. There must be some evidence that the conveyance was used for the delivery of the drugs or for, at least in the case of a violation of 22 M.R.S.A. §2284, possession with intent to deliver.

SEIZURE OF CONVEYANCES

Sub-section 4 of §2387 provides that the forfeiture proceeding is a civil, *in rem* proceeding. In an *in rem* proceeding, the property itself is the defendant. Just as the defendant-person must be brought within the jurisdiction of the court in a proceeding against a person, so the defendant-property must be brought within the jurisdiction of the court in an *in rem* proceeding. In the *in rem* forfeiture proceeding (which, as we shall see, involves only conveyances and not §2387(1)(A) property), the court acquires jurisdiction of the conveyance to be forfeited when it obtains actual or constructive possession of the conveyance. Such possession is acquired by a seizure of the conveyance by the law enforcement agency seeking its forfeiture.

Ordinarily a conveyance subject to forfeiture will be seized at the time that officers make an arrest for a violation of the drug laws. An officer may, of course, lawfully seize a conveyance as an instrumentality in a drug-related crime. (See discussion of seizure and impoundment of vehicles in the November 1970 ALERT, at p. 3.) If law enforcement authorities subsequently determine that the in-custody conveyance is subject to forfeiture, they may petition, pursuant to §2387(4), for its forfeiture. In this situation, because the conveyance is already within the custody of law enforcement officers, it is therefore within the possession of the court and the court has jurisdiction over the proceeding.

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It is possible, however, that law enforcement officers may learn after the arrest or conviction for the drug offense that a conveyance which is not in police custody, was used in connection with the offense. A petition for the forfeiture of the conveyance may then be filed with the court, but before the court can obtain jurisdiction over the proceeding, the conveyance must be seized and brought into the court's possession. The legislature has provided, in §2387(6), for a warrant procedure whereby a forfeitable conveyance not already within police custody may be seized. Under §2387(6), upon a showing of probable cause that the conveyance is subject to forfeiture, the court may issue a warrant for the seizure of the conveyance so that it may be held in custody while the forfeiture proceedings are pending. The aim of §2387(6) is to provide a fast but fair means of seizing property before it can be removed from the court's jurisdiction. Except when emergency circumstances exist, seizure of conveyances which are subject to forfeiture but not already in police custody should always be made pursuant to the procedure set out in §2387(6).

Fourth Amendment Applicable to Forfeiture Proceedings

Law enforcement officers who are responsible for the seizure of forfeitable property should be aware that the Fourth Amendment applies to searches and seizures made in connection with forfeiture proceedings just as it applies to searches and seizures which produce evidence for criminal trials. Although the §2387 forfeiture proceeding is a civil proceeding, it is criminal in nature. This is because, like a criminal proceeding, the object of a forfeiture proceeding is to penalize for the commission of an offense against the law. Because a forfeiture proceeding is criminal in nature, the United States Supreme Court has held that it is subject to the Fourth Amendment. *One 1958 Plymouth Sedan v. Pennsylvania*,

380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed. 2d 170 (1965). In the *One 1958 Plymouth Sedan* case, the court held that the Fourth Amendment exclusionary rule applies to forfeiture proceedings, and therefore any evidence seized in the course of an unlawful search of an automobile could not be used in a proceeding for forfeiture of the automobile.

The practical consequences of the application of the exclusionary rule are great. If proceedings are commenced for the forfeiture of a conveyance which was allegedly used to deliver illegal drugs, and evidence of the drugs cannot be admitted because such evidence was the product of an unlawful search, the forfeiture action will stand little chance of success.

Although the case law on the subject is not uniform, the rule in the First Circuit is that where property is seized in violation of the Fourth Amendment, the state will be unable to enforce forfeiture proceedings against the property. Thus, in *Berkowitz v. U.S.*, 340 F.2d 168 (1st Circuit Court of Appeals, 1965), the court held that property which was not contraband *per se* and which was seized incident to an illegal arrest could not be ordered forfeited in a subsequent forfeiture proceeding. Similarly, in *Melendez v. Shultz*, 356 F. Supp. 1205 (U.S. District Court, Massachusetts, 1973), it was held that where none of the exceptions to the warrant requirement were present, an automobile seized without a warrant could not be forfeited to the state. In *Melendez*, an automobile, which had been impounded by local police for its owner's failure to pay parking tickets, was seized without a warrant from police storage by a federal agent. The federal government sought the forfeiture of the automobile because it had been used to facilitate the transportation of a contraband article, which under federal law made the vehicle subject to forfeiture. The court concluded that there were no emergency circumstances to justify a warrantless seizure, since the vehicle had been in police custody at the time it was

seized. Because the seizure was unconstitutional, the automobile could not be declared forfeited.

The reasoning employed by other courts which have reached a similar result is summarized in the following quotation:

"Since the power or authority of the court to proceed is predicated upon a seizure which brings the property within the possession and control of the court, it follows as of course that such control and possession of the court must be a lawful one. A lawful possession of the property of another cannot be predicated or based upon an unlawful taking or acquiring of such possession. (If the seizure is wrongful or unlawful) the court would have no jurisdiction to forfeit or confiscate the property, because the property was not in its lawful possession and control, so as to be subject to its orders and judgments of forfeiture." *Utah Liquor Control Commission v. Wooras*, 97 Utah 351, 93 P.2d 455, 462 (Supreme Court of Utah, 1939).

Moreover, early decisions of the Maine Law Court suggest that Maine would require a lawful seizure as a predicate to jurisdiction in §2387 forfeiture proceedings. Although these early Maine decisions involved statutes providing for the forfeiture of intoxicating liquors, they expressed a strong preference for lawful seizure which would still seem applicable to proceedings for the forfeiture of conveyances used in the delivery of illegal drugs. Another reason why the Maine courts would likely require a lawful seizure as a prerequisite to forfeiture jurisdiction is that §2387(6) establishes a warrant procedure for the seizure of forfeitable conveyances not already in police custody. Arguably, by establishing such a procedure the legislature manifested its intention that only lawful seizures provide the basis for the jurisdiction of the court in forfeiture proceedings.

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It is important to note, however, that any narcotic drugs, hallucinogenic drugs, barbituates, amphetamines, marijuana, mescaline or peyote subject to forfeiture under §2387(1)(A), even if seized in violation of the Fourth Amendment, must nevertheless be forfeited to the State. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. at 698-99, 85 S.Ct. at 1249-50, 14 L.Ed. 2d at 174; *U.S. v. \$1058.00 in U.S. Currency*, 323 F.2d 211, 212-213 (3rd Circuit Court of Appeals 1963); *State v. Anonymous*, 280 A.2d 816,819 (Circuit Court of Connecticut, 1971). The reason for this is that if the contraband substances were not forfeited to the state but were returned to the individual from whom they were seized, the repossession of the substances by that person would again subject him to criminal penalties. The return of the drugs would clearly frustrate the express legislative policy against possession of such substances. Thus, although an illegally seized contraband substance is not admissible in evidence, it must nevertheless be ordered forfeit.

It is not required that a conveyance subject to forfeiture be seized at the time when the drugs are first discovered within the conveyance. See, *In re One 1962 Volkswagen Sedan*, 464 P.2d 338 (Supreme Court of Arizona, 1970). Such a requirement is not imposed since time is often needed to make a laboratory analysis of a substance to determine whether or not it is a controlled substance.

CONVEYANCES EXCLUDED FROM FORFEITURE

Section 2387(3) provides that under certain circumstances conveyances which would otherwise be subject to forfeiture under §2387(1)(B) shall not be ordered forfeited by the court. These exceptions were established by the legislature to protect the innocent owners of conveyances used by others to transport or conceal illegal drugs.

The question as to whether the conveyances of innocent owners should be forfeited to the state has been troublesome. When faced with the issue, a majority of courts in other jurisdictions have concluded that their forfeiture statutes (which did not contain exceptions for the innocent owner) applied to conveyances irrespective of whether the owner of the conveyance participated in or had any knowledge of the drug-related offense. However, the United States Supreme Court, in *U.S. v. United States Coin and Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed. 2d 434 (U.S. Supreme Court, 1971), has recently indicated that forfeiture statutes were intended to impose a penalty "only upon those who are significantly involved in a criminal enterprise." Section 2387(3) represents acceptance by the Maine legislature of the Supreme Court's assertion that innocent owners of conveyances should not be penalized by forfeiture.

Section 2387(3)(A) excludes from forfeiture a conveyance used as a common carrier unless the owner of the conveyance or the person in charge of the conveyance consented to the unlawful transportation or concealment of drugs. This exception is designed to protect, for example, the taxi cab owner or the commercial airplane owner in situations where a passenger, without the consent of the vehicle's owner, attempts to transport drugs by means of the cab or plane.

Section 2387(3)(B) protects the owner of a conveyance which is used to transport or conceal drugs, but which came into the possession of the offending party or parties unlawfully. Thus, a conveyance which was stolen and which was then used to transport or conceal narcotics would not be subject to forfeiture.

A much broader exception is contained within §2387(3)(C). That section provides that no conveyance shall be forfeited unless the owner knew or should have known that the conveyance was used in the "manufacturing, dispensing, or

distributing" of a controlled substance. One problem with this exception is that it gives rise to the possibility of collusion between an owner and another person. For example, A, the owner of an automobile, may agree with B that B will transport drugs in A's automobile, and that in the event the vehicle is seized, A will deny knowledge of B's unlawful actions and B will claim that A had no such knowledge. To assist the state in overcoming collusive tactics such as this, §2387(3)(C) provides that if the state can show that the conveyance was used for the unlawful manufacture, dispensing or distributing of a controlled substance on three or more occasions, that shall be prima facie evidence that the owner knew or should have known of the illegal activity. ("Prima facie evidence" is evidence which, by itself, is sufficient to prove a particular fact.) This does not mean however, that the state must establish three occasions of unlawful delivery to show knowledge. One such occasion may be all that is needed.

FORFEITURE PROCEEDINGS

Section 2387(4) provides for a proceeding to determine whether property claimed to have been used in the delivery of illegal drugs will be forfeited to the state. A forfeiture proceeding, however, is necessary only in the case of §2387(1)(B) property (conveyances). Once property has been determined by a court to be §2387(1)(A) property, that property is subject to mandatory forfeiture. There is no need for a hearing, notice or other procedural requirements for a court to order §2387(1)(A) property forfeited to the state. The court may order its forfeiture summarily.

Summary Forfeiture of §2387(1)(A) Property

The rationale for summary or immediate forfeiture of controlled substances has already been discussed. The return of a controlled substance, the posses-

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sion of which is unlawful, to the individual from whom it was seized would frustrate the legislative policy militating against the possession of such property. Since the controlled substance must be forfeited, there are no questions to be resolved at a hearing. The state's right to forfeiture of §2387(1)(A) property attaches at the time of the commission of the offense and may be enforced at the time of conviction.

Given that §2387(1)(A) property must be forfeited, what court can order its forfeiture? Section 2387(2) provides that §2387(1)(A) property shall be declared forfeit by the court having jurisdiction over the property (that is, the court which has acquired actual or constructive possession of the property by its seizure) or by the court having final jurisdiction over the prosecution for the related drug offense. Ordinarily it is the court which hears the prosecution for the drug charge which enters the order for forfeiture of the illegal drugs or other property.

It is conceivable that a court might fail to enter a formal order of forfeiture specifying the manner of disposition of forfeited property. An omission such as this might be due to an assumption by the court that the officers who have custody of the property understand that it is to be destroyed. It is recommended that before an officer attempts to destroy or otherwise dispose of forfeitable property, he always obtain from the court an order of forfeiture stipulating the manner of disposition.

Two other Maine statutes provide for the forfeiture of certain substances which may also be subject to forfeiture under §2387(1)(A). As it relates to the forfeiture of "narcotic drugs" (as defined in 22 M.R.S.A. §2361(15)), §2387 should be read in conjunction with 22 M.R.S.A. §2376, which provides for alternative dispositions of forfeited narcotic drugs. Section 2387 must also be read in light of 22 M.R.S.A. §2367, which provides that narcotic drugs intended for sale, and the vessels in which they

are contained, must be forfeited to the county in which they are found at the time when they are seized.

Commencement of Forfeiture Proceedings

Either a county attorney or the Attorney General may commence a proceeding for the forfeiture of a conveyance used in the delivery of illegal drugs. The proceeding must be brought in the Superior Court. However, there is a problem as to proper venue for the forfeiture proceeding. Although the language of §2387(4) may indicate a legislative intention that proper venue be in the county where the conveyance is located after its seizure, the language is unclear. Pending legislative amendment or judicial clarification, it is suggested that the general venue provision for civil forfeiture proceedings, found in 14 M.R.S.A. §506, be followed. Under that venue provision, the forfeiture proceeding should be brought in the county in which the drug offense was committed.

Once the petition for forfeiture is filed with the court, the state must give notice of the pending proceeding to the owner of the conveyance and to any other person who appears to have an interest in the conveyance. Thus, where an automobile owner has obtained a mortgage to help pay the purchase price of an automobile, both the owner and the mortgagee must be given notice. Notice may be given by certified or registered mail or by hand delivery by a deputy sheriff.

The Forfeiture Proceeding

Because the forfeiture proceeding is a proceeding *in rem* ("against the thing"), the conveyance is the defendant in the action. The purpose of an *in rem* proceeding is to dispose of the defendant-property by awarding it to the party who demonstrates that he has a greater claim to it. In the §2387 forfeiture proceeding, the court disposes of the conveyance by either declaring it forfeited to the state or by returning it to its owner. This disposition is made after the

court has determined who has a greater claim to the conveyance: either the state, because the conveyance is subject to forfeiture under §2387(1)(B), or the owner, because the conveyance is not subject to the provisions of §2387(1)(B) or because one of the §2387(3) exceptions applies.

Section 2387(4) declares that the forfeiture proceeding shall be deemed to be a civil action. Although Fourth and Fifth Amendment protections are ordinarily not involved in a civil action, because forfeiture proceedings are criminal in nature, the protections of the Fourth and Fifth Amendments do apply to such proceedings. Thus, as we have already seen, the Fourth Amendment exclusionary rule may be invoked at a forfeiture proceeding to suppress illegally seized evidence. Furthermore, a witness in a forfeiture proceeding may invoke the Fifth Amendment privilege against self-incrimination. *U.S. v. United States Coin and Currency, supra*.

Although forfeiture proceedings may be considered criminal for purposes of the application of these constitutional amendments, the state need not prove all material facts beyond a reasonable doubt, as it must in criminal trials. Section 2387(4) indicates that the state's burden of proof is that which is imposed in other civil cases. The state must prove all material facts by a preponderance of the evidence. The state must show only that the defendant-conveyance is subject to forfeiture under §2387(1)(B). Once the state has shown this by a preponderance of the evidence, it has proved its case. The burden is upon the owner or other person claiming an interest in the conveyance to prove any of the §2387(3) exceptions.

Once the state has established that the conveyance is subject to forfeiture and the court has determined that none of the exceptions apply, the court has no discretionary power to deny forfeiture. Under such circumstances, forfeiture is mandatory. This is true even if the

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presiding justice should find that loss of the vehicle would work severe hardship on the owner and his family. See *State v. One 1967 Ford Mustang*, 292 A.2d 64 (Court of Appeals of Maryland, 1972).

Finally, it would appear that under the Maine forfeiture statute, if there is an acquittal on the drug offense, there can be no forfeiture of the conveyance. Other jurisdictions are divided on this question. However, there would seem to be little question under the Maine statute, which provides that for a conveyance to be forfeited, it must be used in violation of certain drug laws. Unless such violation is proved by conviction in a criminal action, it is doubtful that the conveyance is subject to forfeiture.

DISPOSITION AND RECORDS

If the court has determined that a conveyance must be forfeited, the court will enter an order which declares the conveyance forfeited to the state, county or municipality and which specifies how the vehicle will be disposed of. Section 2387(4) is controlling as regards the disposition of the conveyance.

The manner of disposition must be set out in the court's order. Although the court may provide for disposition of the conveyance in any lawful manner, the usual means of disposition are either (1) retention and use of the conveyance by a law enforcement or other public agency or (2) sale.

If the conveyance is sold, the proceeds must be used to pay the expenses of the forfeiture proceedings, including expenses incurred in seizure, storage, in-custody maintenance, and expenses incurred in advertising and giving notice of the sale. Proceeds from the sale must also be used to pay any bona fide mortgages on the conveyance. Finally, if there are any funds remaining after the expenses of the proceedings and the mortgages have been paid, the remainder must be deposited in the treasury of the state, county or municipality which made the seizure of the conveyance.

Section 2387(5) imposes strict record-keeping requirements on law enforcement officers responsible for the custody of forfeitable property or for the disposition of forfeited property. The reason for strict record-keeping requirements should be obvious to all officers. Incidents where lax supervision over contraband materials has led to the disappearance of such goods from police control have recently received national attention. Section 2387(5) is designed to ensure that forfeitable property is held and disposed of properly.

The language of §2387(5) ("Any officer . . . having custody of said property or having disposed of said property . . ." (Emphasis added)) presents a problem because it is unclear whether officers must follow that section's record-keeping requirements for §2387(1)(A) property, for §2387(1)(B) property or for both types of property. It is recommended that officers comply with the provisions of §2387(5) with respect to both types of property.

22 M.R.S.A. §2376(1) is another section which establishes record-keeping requirements with regard to the custody and disposition of forfeitable narcotic drugs. Because both 22 M.R.S.A. §2376(1) and 22 M.R.S.A. §2387(5) establish such record-keeping requirements, the question may arise as to which record-keeping guidelines the officer should follow. First, it should be noted that this problem will arise only when narcotic drugs are involved and only when the narcotic drugs are subject to forfeiture under §2387(1)(A). It is recommended that when both §§2376(1) and 2387(5) are applicable, the officer should conform to the record-keeping requirements of §2387(5). The intent of the legislature would seem to be to impose the stricter standard.

CONCLUSION

Maine's new statute providing for the forfeiture of property used in the delivery of illegal drugs, which is aimed at the curtailment

of drug trafficking in the state, can be a useful device for Maine law enforcement officers whose duty it is to enforce the drug laws. However, the language of the statute raises many questions of interpretation. This article has attempted to offer some suggestions as to the interpretation of the statute's provisions. Law enforcement officers should be attentive to any clarification of the law which may be forthcoming from the courts or the legislature. If questions arise as to the interpretation or application of the statute, officers should notify the Law Enforcement Education Section. Such questions will then be treated in the Forum section of ALERT.

IMPORTANT RECENT DECISIONS

SEARCH AND SEIZURE:

A §4.1 Motion

A §4.4 Derivative Evidence

SELF-INCRIMINATION:

B §3.2 Exercising the Privilege

PROCEDURE:

F §1.1[a] Grand Jury: Authority

Federal agents conducted a search of defendant's place of business pursuant to a valid search warrant issued in connection with a gambling investigation. The warrant specified that the object of the search was to discover and seize bookmaking records and betting paraphernalia. During the search an agent discovered a card which indicated a Dr. Loveland was making periodic payments to defendant. Knowing that a Dr. Loveland had been the victim of a loan-sharking operation which was under federal investigation, the agent seized the card and other items as possibly being a record of loan-sharking. Subsequently, when a grand jury was convened to investigate loan-sharking activity,

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defendant was subpoenaed but refused to testify, invoking his Fifth Amendment privilege against self-incrimination. After being granted transactional immunity, defendant moved for suppression of the evidence and return of the property. The court granted this motion and further ordered that the defendant need not answer any of the grand jury's questions based on the suppressed evidence.

The United States Supreme Court reversed the holding of the lower court and held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Thus, the Court held that the Fourth Amendment exclusionary rule is not applicable to grand jury proceedings.

The court pointed out that the exclusionary rule is a judicially created remedy designed to protect Fourth Amendment rights by deterring unlawful police conduct. Since the exclusionary rule is not a constitutionally guaranteed right, it does not prohibit the use of illegally seized evidence in all types of proceedings. The Court concluded that the rule should not be extended to grand jury proceedings because allowing a grand jury witness to invoke the rule would achieve only a speculative and minimal benefit in deterring unlawful police activity, but would greatly interfere with the effective discharge of the grand jury's duties, for which broad investigatory powers are needed. *U.S. v. Calandra*, 42 U.S.L.W. 4104 (U. S. Supreme Court, January 1974).

SEARCH & SEIZURE:

A §3.4 Execution: Warrant

Defendant was convicted of possessing and concealing counterfeit U. S. Federal Reserve notes with intent to defraud and appealed. Secret Service Agents, after long investigation and surveillance, had obtained a search

warrant to search for "Counterfeit Federal Reserve Notes, materials" and related equipment at defendant's place of business. That evening, government agents observed defendant enter his place of business carrying a briefcase. The agents entered the building, and while searching it, found defendant's briefcase under a desk. The briefcase contained counterfeit Federal Reserve notes. Defendant claimed that the agents knew that the briefcase was his personal property, and therefore the search of the briefcase did not come within the scope of the warrant to search the business premises.

The issue facing the court was to what extent a recognizable personal effect not currently worn, but apparently temporarily placed down, such as a briefcase, falls outside the scope of a warrant to search the premises. The court approached this issue by examining the relationship between the person and the place and said:

"It should not be assumed that whatever is found on the premises described in the warrant necessarily falls within the proper scope of the search; rather, it is necessary to examine why a person's belongings happen to be on the premises. '(T)he Fourth Amendment protects people, not places', *Katz v. United States*, 389 U.S. 347, 352 (1967), and the protective boundary established by requiring a search warrant should encompass those extensions of a person which he reasonably seeks to preserve as private, regardless of where he may be."

The Court held that the defendant's briefcase was properly seized under the warrant to search the premises. Since defendant was a co-owner of the premises and not a mere visitor or passerby, it could reasonably be expected that some of his personal belongings would be there. His expectation of privacy as to the briefcase was less than it would have been if the place searched had been a more public place such as a meeting hall, restaurant or barbershop. *U. S. v. Micheli*, No. 73-1186 (1st Circuit Court of Appeals, November 1973).

COMMENT: The above case suggests that when a law enforcement officer has a search warrant for premises, but not for a person or persons on the premises, the determination of whether or not a particular object can be properly seized and examined depends in part on its owner's reasonable expectation of privacy in the object, which in turn depends on the relationship of the object's owner to the place being searched.

ARREST:

A §1.1 Reasonable grounds

SEARCH & SEIZURE:

A §2.4 Automobiles — Without a Warrant

Defendant was a passenger in an automobile stopped by patrolling officers for a routine check. Although the officers observed nothing unusual about the vehicle before stopping it, they subsequently determined that the operator of the vehicle did not have a valid license and that the vehicle did not have valid registration plates. While the driver of the car was being questioned, an officer, with the aid of a flashlight, noticed burglary tools on the floor of the vehicle. The occupants of the car were arrested for possession of burglary tools. Subsequent investigation linked defendant to a burglary, of which he was convicted. On appeal, defendant attacked the validity of the "routine" stop as violative of the Fourth Amendment, and contended that all evidence obtained as a result of the allegedly illegal stop should have been suppressed.

In assessing the reasonableness of the stop, the court balanced the government's interest (insuring the safety of the highways by random stopping of automobiles, without cause, to determine if the operator and the vehicle meet Motor Vehicle Code Requirements) against the individual's interest (personal liberty and right to be free from government intrusions made without apparent cause), and concluded that the interest of the individual outweighed that of the government.

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The Court sustained the defendant's appeal, holding that:

"Before a police officer may stop a single vehicle to determine whether or not the vehicle is being operated in compliance with the Motor Vehicle Code, he must have probable cause based on specific facts which indicate to him either the vehicle or the driver are in violation of the code." *Commonwealth v. Swanger*, 307 A.2d 875, 879 (Supreme Court of Pennsylvania, July 1973).

COMMENT: The holding in this case applies only to the stopping, without cause, of a single automobile. It does not apply to a systematic stopping of all vehicles passing through a roadblock established for the purpose of detecting Motor Vehicle Code violations. Such roadblock checks have been upheld by the courts as valid.

MAINE COURT DECISIONS

SEARCH AND SEIZURE:

A §2.1 Probable Cause

A §2.3 Incident to Arrest

A §2.5 Persons without warrant

Defendant was charged with possession of d-lysergic acid diethylamide (LSD-25) in violation of 22 M.R.S.A. §2212-B. After arresting the defendant agreed upon the relevant facts. After arresting defendant for intoxication, officers took him into custody and transported him to the police station. After defendant was booked, but before he was "locked-up," an officer without a warrant, made a full search of defendant's person. Defendant's wallet was removed, and a search of its contents produced a ball of tinfoil, which, when opened, revealed a crushed orange pill. The officer seized the pill, which analysis showed to be LSD-25. The issue as to the legality of the search of defendant's personal belongings was reported to the Law Court for its determination.

Defendant acknowledged that the officers were justified in conducting a full pre-incarceration search of his person and removing his wallet. However, defendant argued that the separate examination of the contents of the wallet and the unravelling of the tinfoil and seizure of the pill infringed upon his Fourth Amendment rights.

Relying on *U.S. v. Robinson*, 42 U.S.L.W. 4055 (U.S. Supreme Court, December 1973), and *Gustafson v. Florida*, 42 U.S.L.W. 4068 (U.S. Supreme Court, December 1973), (see the January 1974 ALERT at pp. 7-8 for discussion of the *Robinson* and *Gustafson* cases), the court rejected defendant's contention.

The United States Supreme Court, in *Robinson* and *Gustafson*, approved (1) the inspection of a container found upon an arrestee's person during the course of a search made incident to a lawful custodial arrest and (2) the seizure of the container's contents if such contents are believed to be " 'fruits, instrumentalities or contraband' probative of criminal conduct." The Maine Law Court, applying *State v. Estabrook*, 241 A.2d 880 (Me. 1968), determined that since the defendant was lawfully arrested and transported to jail where, without interruption of police custody, he was ultimately confined, the search of defendant's person prior to the incarcerative detention was a search incident to a lawful custodial arrest. Since the search was made incident to a lawful custodial arrest, the court reasoned that under *Robinson* and *Gustafson*.

"....the exploration of the contents of the wallet found on the defendant's person and the unravelling of the ball of tinfoil discovered inside the wallet were, even if lacking independent 'probable cause' justification, consistent with protections guaranteed defendant by the Federal Fourth-Fourteenth Amendment." *State v. Dubay*, Docket No. 996 (Supreme Judicial Court of Maine, January 1974).

COMMENT: It has generally been recognized that law enforcement officers may conduct a warrantless stationhouse search of a defendant's person prior to a lawful incarceration. The lawfulness of such a search is based upon the need to check for any contraband or for any personal items which might be used in escape or which the individual might use to hurt himself or others.

However, until the Dubay decision, it was questionable whether an officer who found a container upon a defendant's person in the course of the pre-incarcerative search could examine the contents of the container in the absence of probable cause to believe the container contained contraband or other evidence of criminal conduct. Under Dubay, it is clear that Maine law enforcement officers, prior to a lawful incarceration of a defendant may, with neither a warrant nor probable cause, inspect any container found on the defendant's person and seize the contents of such container if believed to be [or contain] contraband.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.

ALERT

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

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

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