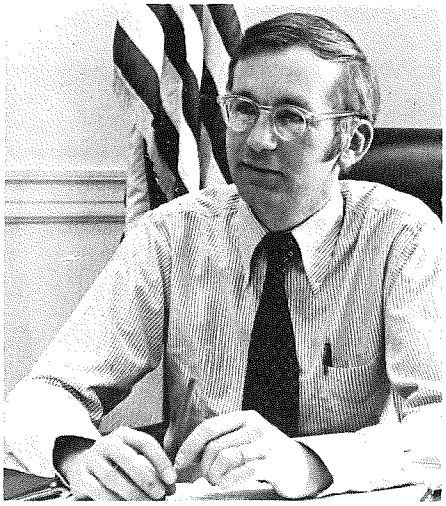
MAY 1974

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

This issue of ALERT is devoted mainly to legislation passed by the Special Session of the 106th Maine Legislature. Some of the bills presented in this issue went into effect as emergency measures when they were approved; others will not go into effect until June 28, 1974, 90 days after the adjournment of legislature. The designation (Emergency) will appear after the title of each bill that has already gone into effect as an emergency measure.

Many of these new laws will present new problems for Maine law enforcement officers. It is not our intent to deal in depth with these problems in this issue. Rather, the purpose of this issue is to acquaint members of the criminal justice system with the content and purpose of some of the new laws and to merely call their attention to others.

We will attempt to deal with enforcement problems created by some of these laws via the FORUM column in future issues of ALERT. In order that we may learn of your enforcement problems, I welcome all criminal justice personnel to write or call this office for needed guidance in enforcing any of the laws recently passed by the legislature. The number of the Law Enforcement Education Section is 289-2146.

Jon A. Lund

JON A. LUND
Attorney General

FROM THE LEGISLATURE

The following is a presentation and discussion of some of the important legislation passed by the Special Session of the 106th Maine Legislature. Some bills create new law and others merely amend previously existing legislation. In order to avoid confusion, each piece of legislation will be set out in full as it now stands in the statute books. If the entire bill is new, the entire bill will be set in **bold** print. Otherwise, only the amended portion of existing legislation will be printed in **bold.** Those statutes which were amended by deleting some of their wording will be presented in regular print as they now stand after the deletion.

Self-explanatory bills will be quoted without comment. Bills that need clarification as to purpose, impact, or meaning and bills which are too long for quotation will be followed by a brief italicized comment. The numbers appearing before the title of each bill are chapter numbers, which are included here for everyone's convenience in referring to specific bills.

C.638 AN ACT Relating to Threatening Communications

17 M.R.S.A. §3701. Threatening Communications

Whoever makes, publishes or sends to another any communication, written or oral, containing a threat to injure the person or property of any person, **when such offense is of a high and aggravated nature, shall be deemed guilty of a felony and a conviction thereof** shall be punished by a fine of not more than $500 or by imprisonment for not more than 5 years, or by both; **but when such offense is not of a high and aggravated nature, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than $100 or by imprisonment for not more than 11 months.** If the communication is written and is anonymous or signed by any other than the true name of the writer, the punishment shall be a fine of not more than $1,500 or imprisonment for not more than 10 years, or by both. If any such threat is against the person or property or member of the family of any public official, the punishment shall be imprisonment for not more than 15 years.

COMMENT: The purpose of this amendment is to revise the law regarding threatening communications by making only threatening communications of a high and aggravated nature punishable as a felony and all other threatening communications punishable as a misdemeanor. Before the enactment of this amendment, all threatening communications were punishable as a felony.

C.647 AN ACT to Amend the Law Relating to Attempted Escapes from the Maine State Prison

34 M.R.S.A. § 710. Assaulting officers; escape; prosecution

If a convict sentenced to the State Prison for life or for a limited term of years or transferred thereto from the Men's Correctional Center under section 808-A or committed thereto for safekeeping under Title 15, section 453, assaults any officer or other person employed in the government thereof, or breaks or escapes therefrom, or attempts to do so, he may be punished by confinement to hard labor for any term of years, to commence after the completion of

[*Continued on page 2*]

his former sentence or upon termination of such sentence by the State Parole Board; said termination shall not take place sooner than the expiration of the parole eligibility hearing date applicable to his former sentence. The warden shall certify the fact of a violation of this section to the county attorney for the County of Knox, who shall prosecute such convict therefor.

COMMENT: This section was amended to enable prosecution for attempted escape from the Maine State Prison in any instance of such attempt, regardless of whether force was used in the attempt. Before this amendment was enacted, only those persons who forcibly attempted to escape from the State Prison could be prosecuted.

C. 650 AN ACT Requiring a Lighted Headlamp on Motorcycles Using the Highway

29 M.R.S.A. § 999. Motorcycles and motor driven cycles

In addition to the requirements of this chapter, motorcycles and motor driven cycles shall be operated on the highway **with a lighted headlamp on when in motion and** in such manner that no more than 2 such vehicles shall be operated abreast within the same lane of operation.

No person shall operate on the highway any motorcycle or motor driven cycle equipped with handlebars that are more than 15 inches in height above the uppermost portion of the seat when depressed by the weight of the operator.

COMMENT: This bill requires motorcycles and motor driven cycles to display a lighted headlamp at all times—in the daytime as well as at night—while in motion on the highway. The intent of the bill is to enable motorists to identify, both quickly and easily, motorcycles on the highway, and to ensure the safety of all motor vehicle operators.

C. 659 AN ACT Relating to the Regulation and Control of Dogs

7 M.R.S.A. § 3458. Local Regulations

Municipalities of this State are empowered to adopt or retain more stringent ordinances, laws or regulations dealing with the subject matter of this chapter. Any less restrictive municipal ordinances, laws or regulations dealing with the subject matter of this chapter are invalid and of no force and superseded by this chapter.

COMMENT: The purpose of this bill is to declare that it is the intent of the legislature that the state dog control law merely add to, rather than replace, existing municipal dog control regulations. The new section contains a reminder, however, that any municipal regulation which is not as strict as the state law is invalid.

C. 666 AN ACT Relating to Cruelty of Animals

17 M.R.S.A. § 1092. Malicious killing or injury to domestic animals or fowl; stealing

Whoever maliciously kills, sells, wounds, maims, disfigures or poisons any domestic animal, **fowl, waterfowl,** livestock, sheep, goats, swine, dog or cat or exposes any poisonous substance with intent that the life of such animal, **fowl, waterfowl,** livestock, sheep, goats, swine, dog or cat shall be destroyed thereby, on **his own land or** the lands owned or in possession of another or on any public or private way or public area, or steals or entices away or confines or harbors such animal, **fowl, waterfowl,** livestock, sheep, goats, swine, **dog or cat** for the purpose of obtaining a reward or for any other illegal purpose shall, when the offense is not of a high and aggravated nature, be punished by a fine of not more than $300 or by imprisonment for not more than 3 months, or by both, and when the offense is of a high and aggravated nature by a fine of not more than $1,000 or by imprisonment for not more than 4 years. The court shall order the person convicted of such a crime to make restitution to the owner thereof of the fair market value for any animal so killed, wounded, maimed, disfigured or poisoned, except as provided in Title 7, section 3602. If the person convicted cannot pay, as ordered, the court may place him on probation until such sentence is fully performed. Such probation may commence as ordered by the court. If he is sentenced to the State Prison or a correctional center, one condition of parole shall be restitution.

17 M.R.S.A. § 1214. Appointment of state humane agents who shall serve as agents of the commissioner in the enforcement of this chapter and as otherwise provided by law. Those personnel appointed as part-time agents shall be unclassified employees whose standards of employment, compensation and hours of employment shall be determined by the commissioner. The jurisdiction of each state humane agent shall extend throughout the State.

C. 672 AN ACT Providing an Enforcement Provision for the Police Training Law

25 M.R.S.A. § 2805. Qualifications

1. Basic training. As a condition to the continued employment of any person as a full-time law enforcement officer by a municipality or county, said person shall successfully complete, within the first year of his employment, a basic training course at the the Maine Criminal Justice Academy. The Board of trustees, under extenuating and emergency circumstances in individual cases, may extend such period for not more than 60 days. In addition, the board of trustees may waive in individual cases such basic training requirement when the facts indicate that an equivalent course has been successfully completed. This section shall not apply to any person employed as a full-time local law enforcement officer on September 23, 1971.

2. Definitions. For the purposes of this section:

A. "Full-time" shall mean employment with the reasonable expectation of earning at least $2,500 in any one calendar or fiscal year for performing law enforcement duties.

B. "Local law enforcement officers" shall mean all persons empowered by a municipality or county to serve criminal processes and to arrest and prosecute offenders of the law.

3. In-service training. As a condition to the continued employment of any person as a full-time local law enforcement officer by any municipality or county, said person shall be enrolled in an in-service training program conducted by the police agency by which he is employed, the Maine Criminal Justice Academy or a program approved by the board of trustees. **The context of and time periods in which such in-service training shall take place shall be established by the board of trustees.**

4. Employment list. Within 30 days of the close of each calendar year, the highest elected official of each political subdivision shall provide the academy board of trustees with a list of the names and dates of employment of all full-time law enforcement officers covered by this section.

25 M.R.S.A.§ 2806. Enforcement provision

1. Power. The board of trustees of the Criminal Justice Academy shall have the power to suspend the right to enforce the criminal laws of the State of Maine of any person determined by such board to be in violation of section 2805.

2. Hearing. In any case affecting the right to enforce the criminal law of any law enforcement officer, the board of trustees shall conduct a hearing on the applicable facts.

3. Procedure. A notice of hearing must be served on the defendant and the chief administrator of the employing law enforcement agency either by personal

[*Continued on page 3*]

delivery in hand, by leaving it with a person of suitable age or discretion at his dwelling place or usual place of abode, or by sending it by registered mail to his last known address. The notice of hearing must be served at least 15 days before the time specified for the hearing. The notice of hearing must specify the time and place of hearing and the consequences of any failure to appear. The notice must also contain a conclusion indicating a violation of section 2805 and a citation of such section.

4. Decisions and notification. After the hearing on the applicable facts and law, the board of trustees shall notify the parties to the proceeding of the result of the hearing by sending a copy of the decision by registered mail, return receipt requested, to each party or his attorney of record. There shall be no suspension of enforcement powers until a date at least 2 weeks after the date of the notification of the decision of the board, and if the aggrieved party or parties, during the 2-week period, shall appeal the decision of the board to the Superior Court, then no suspension shall take effect until after hearing by said Superior Court.

5. Appeal procedure. Any party aggrieved by a final decision of the board of trustees, whether such decision is affirmative or negative in form, is entitled to appeal.

The appeal must be instituted by filing of complaint in the Superior Court at Kennebec County within 30 days after notification of the final decision of the board of trustees. Copies of the complaint must be sent to the Commissioner of Public Safety and all other parties of record. No responsive pleading need by filed.

6. Injunction. In the event of any continued violation of section 2805 subsequent to appropriate board decision or Superior Court appeal, the Attorney General may institute injunction proceedings to enjoin the further violation thereof.

COMMENT: This bill requires all full-time law enforcement officers to complete a basic training course at the Maine Criminal Justice Academy during their first year of employment, as a condition of continued employment. The bill also gives to the board of trustees of the Criminal Justice Academy the power to suspend the right to enforce the criminal laws of the state of any person determined to be in violation of 25 M.R.S.A. 2805.

C. 688 AN ACT Relating to Deductions from Sentences of Inmates in County Jails

34 M.R.S.A. § 952. Deductions from sentence

Each **inmate,** who, in the opinion of the sheriff, has faithfully observed all the rules and requirements of the jail, shall be entitled to a deduction of 3 days a month from the term of his sentence, commencing on the first day of his arrival at the jail. An additonal **3 days** a month may be deducted from the sentence of those **inmates** who are assigned duties outside the jail, or those **inmates** within the jail who are assigned to work deemed by the sheriff to be of sufficient importance and responsibility to warrant such deduction. This section shall apply to the sentences of all **inmates** now or hereafter confined within the jail.

COMMENT: The purpose of this bill is to provide for an increase in deductions from sentences of county jail inmates for good time and for working in the jail, in order to encourage county jail inmates to assist in the maintenance of the jail.

C. 691 AN ACT Relating to Nullification of Criminal Records

15 M.R.S.A.§ 2161-A. Expungement of records

Any person convicted of a violation of any law of the State of Maine and who later appealed to and was granted a full pardon by the Governor and Executive Council, shall be entitled to expungement of any records or recordings of such conviction.

The granting of a full pardon shall mean that the person shall, for all purposes, be considered as never having been arrested or convicted for the offense for which such pardon is granted. No person, firm, corporation, or employer shall use information concerning an offense for which a pardon has been granted in any manner to the detriment of the person pardoned.

1. Effect. The effect of expungement of criminal records of pardoned persons as outlined in this section shall be the following:

A. Distribution. To prohibit the distribution or dissemination of any record so expunged;

B. Civil rights. To restore to such persons all civil rights or privileges lost or forfeited as a result of any conviction, the records with respect to which have been expunged;

C. Use. To prohibit the use of any such record for purposes of impeaching the testimony of any person with respect to whom such order was issued in any civil or other action;

D. Inquiry. To prohibit the use, dissemination or distribution of any such record so expunged in connection with an inquiry related to credit purchases or access to educational programs.

2. Responsibility to inform. It is the responsibility of the Secretary of State to notify all law enforcement agencies, regulatory or licensing agencies, correctional institutions, courts and any other offices or officers known to have been involved in the original arrest and conviction or to have a record thereof, of the requirement to expunge such records following the granting of a full pardon. Any person granted a full pardon shall present, within 5 days of the effective date of the pardon, to the Secretary of State a list of all persons, offices, agencies and other entities which such person has reason to believe have records of the arrest or conviction for which pardoned, under their jurisdiction or control and the Secretary of State shall inform said parties of the full pardon being granted and the requirement to expunge their records, and shall inform all parties notified of the penalty provisions of this section.

3. Penalty. It shall be unlawful for any officer or employee of any agency, department, court or other entity who, after receiving notice that a full pardon has been granted, to release, otherwise disseminate or make available for any purpose involving employment, bonding or licensing in connection with any business, trade or profession, or for the purposes of credit applications or application to any educational program, to any individual, corporation, firm, partnership, institution or entity, or to any department, agency or other instrumentality of the State Government, or any political subdivision thereof, any information or other data concerning any arrest, indictment, trial, hearing, conviction or correctional supervision, the records with respect to which were required to be expunged by this section. Any person who shall willfully violate a provision of this section shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 11 months, or by both.

C. 696 AN ACT Providing for Restricted Motor Vehicle Operator's License

COMMENT: This bill adds a provision to 29 M.R.S.A. § 1312 Implied consent to chemical tests; operation under the influence of intoxicating liquor; penalties. *The added provision is quoted below and should be self-explanatory.*

Notwithstanding any other provision of this Title, the Secretary of State shall have the authority to issue a restricted license or permit to any person whose license or permit or privilege to operate a motor vehicle in this State has been suspended as a result of a conviction for a first offense of operating or attempting to operate under the influence of

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intoxicating liquor, provided such person has satisfactorily completed a rehabilitation program conducted under the auspices of the Secretary of State. Such license shall not be issued prior to 30 days from the date of suspension. The Secretary of State is authorized to charge a registration fee not to exceed $30 to participants in the rehabilitation program which shall be applied by him for defraying the expenses of the program.

C. 706 AN ACT Relating to the Expunging of Certain Records of Arrest

16 M.R.S.A. § 600. Expungement of records of arrest

Any person having been acquitted of a crime in any court or having had a complaint, information or indictment against him dismissed by any court shall be entitled to expungement of any records or recordings of any arrest and detention in connection with such charge, complaint, information or indictment.

The granting of an acquittal of a crime or the dismissal of a complaint, information or indictment shall mean that the person shall, for all purposes, be considered as never having been arrested for such charge or crime. No person, firm, corporation or employer shall use information concerning an offense for which an acquittal or dismissal has been granted in any manner to the detriment of the person who is acquitted or against whom charges have been dismissed.

1. Effect. The effect of expungement of criminal records as outlined in this section shall be the following:

A. Distribution. To prohibit the distribution or dissemination of any record so expunged;

B. Civil rights. To restore to such persons all civil rights or privileges lost or forfeited as a result of any arrest or detention, the records with respect to which have been expunged;

C. Use. To prohibit the use of any such record for purposes of impeaching the testimony of any person with respect to whom such order was issued in any civil or other action;

D. Inquiry. To prohibit the use, dissemination or distribution of any such record so expunged in connection with an inquiry related to credit purchases or access to educational programs.

2. Responsibility to inform. It is the responsibility of the clerk of the court, where such dismissal or acquittal occurs, to notify all law enforcement agencies, regulatory or licensing agencies, correctional institutions, courts and and other offices or officers known to have been involved in the original arrest or to have a record thereof, of the requirement to expunge such records following such acquittal or dismissal. Any person granted a dismissal or acquittal by a court shall present, within 5 days of the effective date of the acquittal or dismissal, to the clerk of that court, a list of all persons, offices, agencies and other entities which such person has reason to believe have records of such arrest under their jurisdiction or control and the clerk shall inform said parties of the acquittal or dismissal being granted and the requirement to expunge their records, and shall inform all parties notified of the penalty provisions of this section.

3. Penalty. It shall be unlawful for any officer or employee of any agency, department, court or other entity who, after receiving notice that an acquittal or dismissal has been granted, to release, otherwise disseminate or make available for any purpose involving employment, bonding or licensing in connection with any business, trade or profession, or for the purposes of credit applications or application to any educational program, to any individual, corporation, firm, partnership, institution or entity, or to any department, agency or other instrumentality of the State Government, or any political subdivision thereof, any information or other data concerning any arrest, indictment, trial, hearing, conviction or correctional supervision, the records with respect to which were required to be expunged by this section. Any person who shall willfully violate a provision of this section shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 11 months, or by both.

COMMENT: This new law repeals and replaces the old 16 M.R.S.A. § 600 on expungement of records of arrest, which was discussed in the FORUM section of the October 1973 ALERT. That discussion of the old law should now be disregarded by all law enforcement officers. The new law expands and clarifies procedures for expungement of arrest records and increases the penalty for violation of the law. Every law enforcement officer should study this new section carefully.

C. 707 AN ACT Relating to the Installation of a Uniform Crime-reporting System

25 M.R.S.A. §1543. Officers to furnish information

It is made the duty of every clerk of every criminal court, including the District Court, and of every head of every department, bureau and institution, state, county and local, dealing with criminals and of every officer, probation officer, county attorney or person whose duties make him the appropriate officer, to transmit, not later than the first and 15th days of each calendar month, to the Supervisor of the State Bureau of Identification, such information as may be necessary to enable him to comply with sections 1542 and 1544. Such reports shall be made upon forms which shall be supplied or approved by the State Bureau of Identification.

It shall be the duty of all state, county and municipal law enforcement agencies, including those employees of the University of Maine appointed to act as policemen, to submit to the State Bureau of Identification uniform crime reports, to include such information as is necessary to establish a Criminal Justice Information System and to enable the supervisor to comply with section 1544. It shall be the duty of the bureau to prescribe the form, general content, time and manner of submission of such uniform crime reports. The bureau shall correlate the reports submitted to it and shall compile and submit to the Governor and Legislature annual reports based on such reports. A copy of such annual reports shall be furnished to all law enforcement agencies.

C. 735 AN ACT Repealing Certain Laws Relating to Games of Chance (Emergency)

COMMENT: This bill repeals and amends several statutory provisions dealing with games of chance and adds a new Chapter 14 entitled Games of Chance. The new chapter is too long to be set out in full here. Its main purposes are to correct certain weaknesses in the gambling laws and to clear up much of the confusion that has prevented effective enforcement of these laws. The principal thrust of the new chapter is to require anyone conducting a game of chance or anyone printing or distributing raffle tickets or other gambling materials to obtain a license from the Chief of the State Police. Further details about the operation of the new gambling law can be obtained from:

State Police
36 Hospital Street
Augusta, Me. 04330
289-2155

C. 760 AN ACT to Establish Guidelines for Release of Accused Persons Pending Trial

15 M.R.S.A. § 942. Release on personal recognizance or bond

1. Factors in the release decision. Any person charged with an offense, other than an offense punishable by life imprisonment, shall at his appearance before a judge of the district court, or bail commissioner, be ordered released pending trial on his personal recognizance or on execution of an

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unsecured bond which shall be in writing signed by said person on forms approved by the Chief Judge of the District Court, unless said judge or bail commissioner determines in the exercise of his discretion that such release will not reasonably assure the appearance of the person as required. In his determination, said judge or bail commissioner shall, on the basis of any reliable information which can be obtained, take into account the following factors:

A. The nature and circumstances of the offense charged;

B. The accused's family ties in the State of Maine;

C. The accused's length of residence in the community;

D. Employment of the accused in the State of Maine;

E. Any previous flight by the accused to avoid arrest or prosecution for this or any prior alleged offense;

F. Any previous unexcused failure to appear as required to answer prior criminal charges;

G. The accused's financial ability to give bail;

H. The accused's record of convictions.

The judge or bail commissioner shall inform the accused of the penalties provided by subsection 4, if he should fail without just cause to appear before any court or judicial officer as required.

2. Conditions on release. If the judge or bail commissioner determines that release on personal recognizance or on execution of an unsecured bond will not reasonably assure the appearance of the person, the judge or bail commissioner shall impose the first of the following conditions of release which will reasonably assure the appearance of the person, or, if no single condition gives that assurance, any combination of the following conditions:

A. Place the person in the custody of any designated person or organization agreeing to supervise the person, including a public official, public agency or publicly-funded organization;

B. Place restrictions on the travel, association or place of abode of the person during the period of release;

C. Require the person to recognize without surety in a reasonable sum and to deposit with the clerk of the court an amount in cash not to exceed 10% of the amount of the recognizance; and

D. Impose any other condition, not requiring surety, including a condition that the person return to custody after specified hours.

3. Review. Any person aggrieved by the refusal of said judge or bail commissioner to authorize his release on personal recognizance or on the execution of an unsecured appearance bond may petition the Superior Court for a review of such decision. The judge or bail commissioner making such decision shall advise such person of his right to obtain an immediate review of such decision in the Superior Court. If such person chooses to have a review, he shall be furnished a petition for review in a form prescribed by the Chief Judge of the District Court and upon execution of said petition and without the issuance of any writ or other process, the sheriff of the county in which the decision was made shall provide for the transportation of the petitioner forthwith, together with the petition for review and all papers relevant thereto, or copies thereof, to the Superior Court for the county if a justice is then sitting, or to the nearest county in which a justice of the Superior Court is then sitting. In the event that no justice of the Superior Court is then sitting, the petitioner shall be retained in custody until the next business day and upon the morning of such day, without the issuance of any writ or other process, the petitioner's custodian shall provide for his transportation to the Superior Court, as hereinbefore required.

The petition and such papers shall be delivered to the clerk of the Superior Court to which the petitioner is transported and upon their receipt such clerk shall give notice to the county attorney for the county in which the decision was made. Said petition shall have priority over any other matter before said justice and he shall, if he finds in his discretion that the petitioner may be released on his personal recognizance or on execution of an unsecured bond, order such release, or he may make any order of bail he deems appropriate, revising the amount of the recognizance or the number of sureties thereon, or both.

Following a determination of the conditions of release by a judge of the District Court, or review by a justice of the Superior Court, the amount of any recognizance shall not be increased, nor shall any additional surety be required, unless the person making such recognizance shall default thereon or unless the court in its discretion determines that changed circumstances or other factors not previously considered by the court make the present recognizance insufficient to reasonably assure the presence of the defendant, provided that any revision which increases the amount of the recognizance or which requires an additional surety shall be made by an order supplementing rather than replacing any recognizance given pursuant to such initial decision.

Any person aggrieved by a failure to comply with any of the requirements of this section may petition the court as provided in Title 14, section 5501.

4. Failure to appear; penalty. Any person charged with an offense who has been ordered released by a pending trial on his personal recognizance, or on execution of an unsecured or secured appearance bond, who fails without just cause to appear before any court or judicial officer as required, shall be punished by a fine of not more than the maximum provided for the offense charged, or by imprisonment for not more than 6 months if the offense charged was a misdemeanor, or for not more than 5 years if the offense charged was a felony, or by both.

C. 795 AN ACT Relating to Mandatory Sentences for Persons Convicted for Second Offense Breaking, Entering and Larceny or Burglary

C. 641 AN ACT Relating to Breaking and Entering, and Larceny of, Trailers and Semitrailers

17 M.R.S.A. § 751. Definition

Whoever breaks and enters in the nighttime with intent to commit a felony or any larceny or, having entered with such intent, breaks in the nighttime a dwelling house, any person being then lawfully therein, is guilty of burglary. Whether he is, before or after entering, armed with a dangerous weapon, or whether he assaults any person lawfully therein or has any confederate present aiding or abetting or not, in either case he shall be punished by imprisonment for any term of years and in any event the punishment shall be not less than 6 months. **When a person is convicted of a 2nd or subsequent violation of any of the provisions of this section, the imposition or execution of such sentence shall not be suspended and probation shall not be granted.** When a person is convicted and sentenced to imprisonment for a violation of any of the provisions of this section and such violation occurred at a time when said person was on bail in connection with a prior violation of this section, the sentence imposed for said 2nd offense shall not be served concurrently with any sentence imposed in connection with said first offense. All burglars' tools or implements prepared or designed for committing burglary shall be dealt with as provided in section 1813.

[*Continued on page 6*]

17 M.R.S.A. § 754. Breaking and entering with intent to commit felony or larceny.

Whoever, with intent to commit a felony or any larceny, breaks and enters in the daytime or enters without breaking in the nighttime any dwelling house, or breaks and enters any office, bank, shop, store, warehouse, vessel, railroad car of any kind, motor vehicle, aircraft, **trailer or semitrailer as defined in Title 29,** house trailer, or building in which valuable things are kept, any person being lawfully therein and put in fear, shall be punished by imprisonment for not less than 6 months nor more than 10 years; but if no person was lawfully therein and put in fear, by imprisonment for not less than 6 months nor more than 5 years or by a fine of not more than $500. **When a person is convicted of a 2nd or subsequent offense violation of any of the provisions of this section, the imposition or execution of such sentence shall not be suspended and probation shall not be granted.** When a person is convicted and sentenced to imprisonment for a violation of any of the provisions of this section and such violation occurred at a time when said person was on bail in connection with a prior violation of any provision of this section, the sentence imposed for said 2nd offense shall not be served concurrently with any sentence imposed in connection with said first offense.

17 M.R.S.A. § 2103. Larceny of dwelling house by night or breaking and entering.

Whoever, without breaking, commits larceny in the nighttime in a dwelling house or building adjoining and occupied therewith, or breaks and enters any office, bank, shop, store, warehouse, barn, stable, house trailer, mobile home, inhabitable camp trailer, vessel, **trailer or semitrailer as defined in Title 29,** railroad car of any kind, courthouse, jail, meetinghouse, college, academy or other building for public use or in which valuable things are kept, and commits larceny therein, shall be punished by imprisonment for not more than 15 years; and when the offense is committed in the daytime, by a fine of not more than $1,000 or by imprisonment for not more than 6 years.

COMMENT: Ch. 795 provides that any person convicted of burglary or breaking, entering and larceny for a second or subsequent time must be sentenced. The court may neither suspend the sentence of such person, nor place him on probation. Ch. 641 adds trailers and semitrailers to the specified places covered under 17 M.R.S.A. § 754 and 17 M.R.S.A. § 2103.

OTHER BILLS OF INTEREST

Because of space limitations, we have been unable to present or discuss all the recent legislation of interest to criminal justice personnel in this issue of ALERT. We have presented only that legislation which we felt was most important or far-reaching. Because value judgments as to importance may differ, however, we are listing here the titles of all other bills of relevance to members of the criminal justice system. Hopefully the titles of the bills will give some insight as to their content.

Any member of the criminal justice community may obtain further information about any bill mentioned in this issue of ALERT by writing the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine 04330.

C. 643 AN ACT to Permit Hours of Sale of Liquor in Take-out Stores to Correspond with On-premises Establishments

C. 662 AN ACT Relating to the Inspection and Licensing of Motor Vehicle Racing

C. 675 AN ACT Permitting the Supreme Judicial Court to modify the Rules of Evidence

C. 689 AN ACT Relating to Motor Vehicle Accident Reports

C. 690 AN ACT Relating to Certified Copy of Regulations Promulgated by Commissioner of Inland Fisheries and Game as Evidence

C. 722 AN ACT to Transfer the Chief Medical Examiner to the Department of the Attorney General

C. 728 AN ACT to Establish Better Interlocal Cooperation in Preparedness for Civil Disasters and Emergencies

C. 734 AN ACT to Transfer Authority for Watercraft Registration and Safety to Commissioner of Inland Fisheries and Game.

C. 738 AN ACT to Correct Errors and Inconsistencies in the Motor Vehicle Laws

C. 739 AN ACT to Correct Errors and Inconsistencies in the Fish and Game Laws

C. 749 AN ACT Authorizing Municipal Auditoriums to Have a Liquor License

C. 763 AN ACT to Regulate Sale and Processing of Crawfish

C. 772 AN ACT to Clarify the Power of the Commissioner of Maine Department of Transportation and the Chief of the Maine State Police to Lower Speed Limits in Order to Provide Energy Conservation (Emergency)

C. 779 AN ACT Establishing a Full-time Administrative Assistant for the State Parole Board (Emergency)

C. 788 AN ACT to Correct Errors and Inconsistencies in the Public Laws (Emergency)

C. 796 AN ACT to Change Weights and Related Provisions for Commercial Vehicles

IMPORTANT RECENT DECISIONS

ARREST:
A §1.1 Reasonable Grounds
A §1.4 Stop and Frisk

SEARCH AND SEIZURE:
A §2.6 Abandonment

Police officers in an unmarked car observed defendant walking down the street during the afternoon. The officers testified that the defendant quickened his pace when he saw the officers. Upon seeing the defendant quicken his pace, the officers left the police car and started to pursue the defendant who then began to run. During the chase, the officers observed the defendant discard a pack of cigarettes. The officers finally caught up with the defendant and, upon retrieving the discarded cigarette package, found a quantity of heroin therein. The defendant argued that the police had no right to chase and arrest him and therefore the heroin was a result of unlawful police conduct and should be suppressed. The Commonwealth argued that the police had probable cause to arrest, or, alternatively defendant's conduct gave them cause to stop and investigate.

The court held that mere flight, in and of itself, does not constitute probable cause. "Although flight may indicate, to some degree, consciousness of guilt, flight standing alone is not sufficient to establish probable cause for arrest." There must be other factors, such as a prior criminal record, the sight of contraband, yells for help, or some other basis to establish probable cause for arrest.

The court also rejected the Commonwealth's contention that the stop and seizure was justified under *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 1968), a case which allowed a stop and frisk under appropriate circumstances. (See November 1971 and December 1971 ALERTs, for

[*Continued on page 7*]

articles dealing with Stop and Frisk). "To come within the *Terry Rule*... the police must be able to point to articulated facts which give rise to the reasonable belief criminal activity is afoot." In this case, no such facts existed. Defendant was merely walking down a well-travelled public street, quickened his pace upon seeing the officers, and started to run when the officers chased him. This is not enough to justify a stop and frisk under *Terry*.

Finally, the court rejected the argument that there was no search at all, but that the property was merely abandoned.

"Although abandoned property may normally be obtained and used for evidentiary purposes by police, such property may not be utilized where the abandonment is coerced by unlawful police action." *Commonwealth v. Pollard,* 299 A. 2d 233 (Supreme Court of Pennsylvania, 1973).

In this case, the throwing away of the cigarette package was a direct result of the policemen's unlawful conduct of chasing the defendant. The abandonment was not voluntary or spontaneous, but was a result of an unlawful act. Therefore, the evidence should have been suppressed at trial. *Commonwealth v. Jeffries,* 311 A. 2d 914 (Supreme Court of Pennsylvania, November 1973)

ARREST:
A §1.1 Reasonable Grounds
A §.4.5 Use of Informers

Defendant was convicted for possession of an unregistered firearm under 26 U.S.C. §§5861(d), 5871. When defendant attempted to make a $100 purchase with an American Express credit card at an automobile service station, the station owner checked with American Express and discovered that the card was stolen. The station owner then contacted police and described the defendant. A police radio bulletin was issued. Officers stopped the car, arrested defendant and in the course of patting him down reached into his pocket and extracted the credit card. Subsequently, a warrant to search defendant's car was obtained. When the auto was searched, a sawed-off shotgun was found.

The issue on appeal was whether at the time the police bulletin was issued the police had sufficient information to establish probable cause to arrest the defendant. If probable cause was not present, the subsequent seizure of the shotgun would have been unlawful since tainted by the earlier police action.

Applying the two-pronged probable cause test of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) (See the January 1973 ALERT), the court rejected the appeal, concluding that the station owner was a reliable informant and that the tip contained sufficient supporting facts to support the conclusion that a crime had been committed.

The court found no merit to defendant's contention that the information furnished by the station owner was unreliable because of the unreliability of the information furnished him by American Express. The court stated:

"(W)e are of the opinion that the mechanism of today's system of credit confirmation is sufficient to support the type of reliability and credibility required by *Aguilar." U.S. v. Wilson,* 479 F.2d 936, 941 (7th Circuit Court of Appeals, May 1973).

MAINE COURT DECISIONS

SEARCH AND SEIZURE: A §2.6 Consent
CRIMES/OFFENSES: C §2.3 Theft

Having discovered a break-in at the company office, the manager of a mining company inventoried missing equipment and notified police. Subsequently, an undercover agent observed in his apartment a large quantity of equipment with which he was unfamiliar. Although the agent alone paid the rent, the defendant and others had been living for three weeks in the apartment with the agent's permission. After arranging to purchase some of the equipment, the agent exchanged marked bills for pieces of equipment with one of the other occupants of the apartment. The agent transferred the equipment to local law enforcement officers, who determined that the purchased equipment was among that stolen in the mining office break. Officers then obtained a warrant to search the agent's apartment. Although the defendant was not present when the officers arrived to execute the warrant, when he did arrive he was arrested and searched. Officers recovered forty dollars from defendant's person and seized equipment which was later identified by the mining company manager. Defendant was convicted of knowingly receiving stolen property in violation of 17 M.R.S.A. §3551.

Although the lower court had ruled the search warrant defective, it had denied defendant's motion to suppress the seized equipment on the ground that the defendant's interest in the apartment was not such as could prevent the agent's consent from legitimizing the search. The Law Court upheld the lower court ruling. A search of premises occupied by persons having joint and equal control, when consented to by one of such persons, is reasonable since each person has sufficient control over the premises to grant consent in his own right. In light of the facts in the instant case (equipment not located in area in which defendant was given exclusive control; defendant paid no rent to agent; defendant had made no arrangement with agent as to conditions or duration of stay) the presiding justice could reasonably conclude that the agent had not surrendered possession and control of the area from which the equipment was seized. Thus, the consenting person (the agent), who had not only common authority over the premises to be searched but in fact had more than joint and equal possession and control of the premises, had sufficient control to bind other occupants by his consent to a search.

Defendant also contested the validity of the seizure of the equipment on the grounds that the officers (1) had not obtained from the agent express permission to search his apartment and (2) when executing the warrant, did not disclose that the search was being conducted with the agent's consent. The court held that the conduct of the agent implied consent:

> "The giving of clear, concise and explicit directions to the police both as to what to search for and where to search for it, especially by a third party undercover agent, is strong evidence of invitation to make the search."

Citing *State v. Brochu,* 237 A.2d 418, 424 (Me. 1967), the court also concluded that failure to disclose that the search was being conducted with the agent's consent was not fatal since the officers' mistaken belief that they were acting under a valid warrant would "not nullify the legality of a search reasonably conducted under valid consent." *State v. Thibodeau,* Docket No. 1021 (Supreme Judicial Court of Maine, March 22, 1974)

CRIMES/OFFENSES: C §1.2 Assault
CRIMES/OFFENSES: C §7.1 Parties
PROCEDURE: F §2.5 Verdict
CRIMES/OFFENSE: C §7.2 Lesser Included Offenses

Defendant, indicted for assault with intent to rob, was tried jointly with two co-defendants who were indicted for assault and battery of a high and aggravated nature. The trial judge found the defendant guilty of simply assault and he now appeals his conviction. On September 22, 1972, an acquaintance of defendant agreed to give defendant and a friend a ride to Unity. The alleged purpose of the trip was to get a prescription for drugs from a doctor. The meeting of two additional friends who were to travel with them to Unity and the drinking of some liquor preceded the trip.

[*Continued on page 8*]

Upon arriving at the doctor's office in Unity, defendant's driver/acquaintance remained in the car while the four friends entered the doctor's office. The group was informed by the receptionist that the doctor was not in. When the receptionist heard the doctor coming into the office, she went out and warned him to stay in the rear of the office. She then returned and ordered all the men out of the office. Immediately, a knife was placed against her stomach and she screamed. Upon hearing the yell, the doctor rushed out and was confronted with the knife. He then ordered the men to leave. The defendant and another friend assisted their knife-wielding companion out the door.

The trial justice found the evidence lacking to convict the defendant of assault with intent to rob, but did find him guilty of the lesser included offense of assault, reasoning "the fact that the doctor came in, and was himself, in the presence of this knife,and in the presence of that inflammable situation, indicates an element of assault . . ." Defendant now argues the decision is unsupported by the evidence, since he did not have the knife or threaten the doctor.

One may be convicted as a principal to a crime if he perpetrated the crime "or, while being actually or constructively present, aided and abetted its commission." The person actually committing the crime is termed the principal in the first degree and the person aiding and abetting is a principal in the second degree. An indictment alleging a person is principal is sufficient in Maine to support a conviction for aiding and abetting or as a principal in the second degree. To convict a person as a principal in the second degree, "the State must prove actual or constructive presence, intent, and some form of participation in the perpetration of the crime." The record in this case supports defendant's conviction as a principal in the second degree. The defendant was present when the knife was pointed at the doctor and the trial justice could properly conclude from all the evidence that as defendant had the necessary intent as he entered the doctor's office. Defendant's participation can be inferred from his gathering of the group and his supportive role as a friend during the alleged assault upon the doctor. The court said defendant's presence as a friend of the actual perpetrator could be regarded as encouragement. Therefore, his conviction must stand.

The court also commented on the variance between the conviction of the principal in this case for assault of a high and aggravated nature and the conviction of defendant of only simple assault. "Verdicts as between two defendants tried together need not show a rational consistency." The court held that appellant could properly be found guilty of the lesser included offense. *State v. Mower,* Docket No. 1032 (Supreme Judicial Court of Maine, April 8, 1974)

CRIMES/OFFENSES: C §2.2 Breaking and Entering
CRIMES/OFFENSES: C §7.1 Parties

Defendant was convicted at a jury-waived trial of breaking and entering in the nighttime with intent to commit larceny. On appeal, defendant claims that the verdict is contrary to the weight of the evidence and is not supported by substantial evidence. On February 18, 1973 at 7:15 p.m., police officers observed a bluish-green compact car, occupied by three people, move suspiciously around a building, stop at a nearby boat yard, and turn out its lights. The police officers then heard the sound of breaking glass, saw the car turn its lights on and drive out of the boat yard to the street, stop, and turn its lights off again. The car now contained only one person. The police went to the rear of the building, found a broken window, and saw rays of a flashlight shining inside the building. Hiding in nearby bushes, the police observed two people leave the building through the broken window and begin to walk towards the parked car. Police then attempted to arrest these two individuals. During this time, the defendant had been sitting in the car, frequently looking through the rear window in the direction of the broken window. Defendant was arrested while still sitting in the compact car.

The court said it is a well-established rule that one may be convicted of a crime through circumstantial evidence. Also, one may be convicted as a principal in the commission of a felony although not actually present at the time and place of commission. A person who acts as a lookout at a distance is considered to be constructively present at the time and place of the commission of the felony and may be convicted as a principal. The conclusion unmistakably drawn from the evidence is that the defendant was a lookout while two other men broke and entered the building. The circumstantial evidence was sufficient to find the defendant guilty of breaking and entering in the nighttime with intent to commit larceny. *State v. Jackson,* Docket No. 1031 (Supreme Judicial Court of Maine, April 8, 1974)

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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