

# MAINE STATE LEGISLATURE

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# ALERT

SEPTEMBER 1974

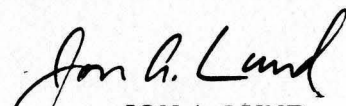
## CRIMINAL DIVISION



**MESSAGE FROM THE  
ATTORNEY GENERAL  
JON A. LUND**

Searches for alcoholic beverages at public gatherings and refusals to submit to chemical tests in O.U.I. situations have been the subject of frequent inquiries from law enforcement personnel. This month's FORUM column is devoted to a discussion of these two topics. I hope that the comments in FORUM will clear up any confusion which may exist in these areas of law enforcement activity.

It has come to my attention that some law enforcement officers who have notified this office of address changes have failed to receive ALERT at their new locations for a period of one or two months. The computer which prints the ALERT mailing list does not always function as well as one would like. Officers who fail to receive ALERT after a change of address should notify the Law Enforcement Education Section of this fact and should specify the back issues of ALERT which they are missing.

  
**JON A. LUND**  
Attorney General

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

## ROAD BLOCKS II

### LEGAL CONSIDERATIONS

In the main article of last month's ALERT, we discussed practical considerations regarding the establishment of road blocks. The discussion in that article emphasized the need for the law enforcement officer to be mindful of his own safety and the safety of others when he establishes a road block.

Because road blocks are used largely to investigate crime and to apprehend violators of the law, and because the stopping of automobiles at road blocks constitutes an intrusion upon individual rights of privacy, a number of legal considerations are involved in the establishment and manning of road blocks. This month's main article will deal with these legal considerations. The article will discuss when officers may establish road blocks, procedures which may be undertaken at road blocks, legal authority for the commandeering of vehicles, and the officer's liability for injuries occurring at road blocks.

### Legal Authority For Roadblocks

Although Maine has no statute which expressly authorizes law enforcement officers to establish road blocks, the absence of statutory authorization does not deny officers

the power to establish a lawful road block. Authority to establish road blocks follows necessarily from the duty of law enforcement officers to prevent crimes, enforce the law, and apprehend violators, and their acknowledged authority to perform these functions.

### Lawful Purposes of Road Blocks

Maine law enforcement officers may establish road blocks for three general purposes: (1) to examine motor vehicles and operators' licenses in the enforcement of the motor vehicle laws; (2) to apprehend fleeing felons; and (3) to make inquiries and investigations when a crime has been committed in the vicinity.

Because road block operations frequently involve arrests, searches, and interrogations, officers likely to man road blocks should be thoroughly familiar with those areas of the law. A review of past ALERTs which have dealt with those topics will be helpful. This article will deal only with those legal problems unique to road blocks.

*Road blocks established for the purpose of checking vehicle safety equipment or drivers' licenses*

By statute, Maine law enforcement officers are empowered to  
[Continued on Page 2]



stop and examine motor vehicles in order to inspect safety equipment or operators' licenses. The relevant portions of the statute are as follows:

**29 M.R.S.A. § 2121. Examination of vehicles by police officers.**

Any law enforcement officer in uniform whose duty it is to enforce the motor vehicle laws may stop and examine any motor vehicle for the purpose of ascertaining whether its equipment complies with the requirements of section 2122, and the officer may demand and inspect the operator's license, certificate of registration and permits. He may also examine the identification numbers of said motor vehicle and any marks thereon. Such law enforcement officer if in uniform and if he has probable cause to believe that a violation of law has taken or is taking place may, at any time, stop a motor vehicle for the purpose of arresting or questioning the owner or occupant thereof, or for the purpose of searching said motor vehicle.

It shall be unlawful for the operator of any motor vehicle to fail or refuse to stop such vehicle, upon request or signal of any officer.

\* \* \*

Under 29 M.R.S.A. §2121, an officer may exercise the power to stop and inspect motor vehicles only when he is in uniform. Moreover, this power is limited to those law enforcement officers who are authorized to enforce the motor vehicle laws. Thus, for example, a State Liquor Inspector may not stop an automobile to determine whether its safety equipment complies with statutory requirements. Because §2121 authorizes vehicle equipment checks only to determine if the vehicle's equipment is in compliance with 29 M.R.S.A. §2122, officers should be thoroughly familiar with §2122 and the scope of that section.

Officers ordinarily enforce the motor vehicle laws relating to safety equipment and licensing by stop-

ping only those vehicles which appear to be in violation of the law. Occasionally, however, law enforcement authorities may elect, as a means of enforcement, to examine the equipment, license, and registration of *all* vehicles and operators passing through a particular point. Although motorists have challenged the police practice of establishing road blocks for this purpose, the courts have uniformly held that the use of periodic road blocks established for the purpose of checking compliance with the motor vehicle laws is a legitimate exercise of the state's police power. Cases which have so held include *City of Miami v. Aronovitz*, 114 So. 2d 784 (Supreme Court of Florida, 1959), and *State v. Severance*, 237 A. 2d 683 (Supreme Court of New Hampshire, 1968). Such road blocks, when confined to their proper statutory purpose, do not violate an automobile driver's constitutional right of privacy. Nor do they amount to an illegal search and seizure or an invasion of a motorist's constitutional right to use the public ways. Courts upholding the use of road blocks have concluded that the inconvenience caused to drivers who are stopped at road blocks is not unreasonable when viewed in light of the necessity to protect the general public against unsafe motor vehicles and against unfit or irresponsible drivers. These courts have also noted that this type of spot-checking is often the only practical method of enforcing the law.

Law enforcement officers should note, however, that their power to establish road blocks to enforce compliance with the motor vehicle laws is subject to certain limitations. Such road blocks must be *bona fide* — that is, they must be used *only* to enforce the motor vehicle laws. They cannot be used as a mere subterfuge or as a pretext to search for evidence of some other crime unrelated to the purposes of §2121, i.e., enforcement of laws relating to vehicle safety equipment or the possession of a license permit, or registration. Thus, officers may not establish a road block on New Year's Eve for the

stated purpose of checking equipment and licenses when, in fact, their primary purpose is to discover evidence of drunken driving.

At road blocks established to check safety equipment and operators' licenses, a law enforcement officer may inspect a vehicle to no greater extent than is necessary to ascertain whether the vehicle is in compliance with safety equipment requirements. Thus, for example, an officer may not, in the absence of independent probable cause, search such places as the glove compartment or under the seat, since it is unlikely that inspection of such places will reveal any equipment violation. Of course, if while in the process of lawfully examining an automobile's safety equipment an officer observes contraband or other evidence of a crime in plain view within the automobile, the officer may lawfully seize the contraband.

*Road blocks established for the purpose of apprehending fleeing offenders*

Road blocks may also be employed by law enforcement officers for the apprehension of fleeing violators of the law. If, in light of the time element, it appears that apprehension by means of a road block might still be possible, headquarters (or an individual patrol unit, depending upon local procedure) may call for the establishment of road blocks to cordon off a specific area in which a serious crime has been recently committed. The right of law enforcement officers to set up road blocks in a reasonable manner for the apprehension of fleeing violators was expressly acknowledged in *Kagel v. Brugger*, 119 N.W. 2d 394 (Supreme Court of Wisconsin, 1963). In that case, officers engaged in the high speed pursuit of the defendant set up a road block in order to stop and arrest the defendant. The court stated that the authority to establish such road blocks "is inherent in the power and the duties of law enforcement officers if those duties are to be

[Continued on Page 3]

effectively discharged." 119 N.W. 2d at 396.

Establishing a road block for the apprehension of fleeing offenders and requiring all vehicles to slow down so that officers may observe the vehicles and their occupants does not violate the due process rights of those passing through the block. However, the warrantless arrest of a person at a road block when there is no probable cause to make such arrest, or the indiscriminate searching of all vehicles stopped at the road block *does* constitute a violation of a person's Fourth Amendment rights.

By way of illustration, assume that an armed robbery has taken place and that road blocks have been established on the two likely avenues of escape. Law enforcement authorities have been able to obtain no description of the escape vehicle or the suspects. Concerned about the possible escape of the suspects, but having no information relating to identity, officers at one of the road blocks elect to stop and search each vehicle passing through their check point. Using this procedure, the officers eventually discover the stolen goods in a vehicle and arrest its occupants. In the absence of probable cause to believe that the particular vehicle was the one containing the wanted felons, both the search of the vehicle and the arrest of its occupants would be held unlawful.

In the above hypothetical situation, the officers conducting the road block would not have had reasonable grounds for believing that every vehicle passing through the block was the vehicle containing the persons guilty of the armed robbery. Unless the officers could show facts and circumstances within their knowledge sufficient to justify a man of reasonable caution in believing that a particular vehicle and its occupants had been involved in the commission of the crime, the requirements for probable cause would not be established so as to justify a warrantless search. The fact that the vehicles and their occupants were found in the locality where the crime was committed would be one factor to be

considered in the probable cause equation, but the existence of this factor alone would not justify a warrantless search.

Assume now that reliable information relayed to the same officers by headquarters contained an accurate description of the suspects and their vehicle. The officers at the road block did no more than slow down the vehicles passing through the road block. Eventually the officers stopped a vehicle fitting the description of the wanted vehicle and arrested its occupants, who likewise matched the description given by headquarters. A search of the vehicle produced the stolen goods. In this instance, both the arrest and the search would be valid since there would be probable cause for both.

It should be noted that although officers may have no description of the *persons* involved in a crime, if they have a description of the *vehicle* used they may, under the *Carroll* doctrine, search the particular vehicle for items subject to seizure where there is probable cause to believe that such items (e.g., burglary tools) are contained therein, and the vehicle is movable.

Since the presence of probable cause is essential to a lawful arrest made at a road block, the accuracy and completeness of the description of the vehicle and/or the suspects given the officers manning the block is critical. If the information supplied them is not enough for probable cause, officers attempting to apprehend a fleeing felon should do no more than stop and question persons at the road block. (This procedure is dealt with more fully below in the discussion of road blocks established for investigatory purposes.) If, after brief questioning, probable cause for arrest does not become immediately apparent, the person must be allowed to proceed.

Finally, because road blocks established for the purpose of apprehending fleeing violators of the law should only be established in cases of serious crimes, law enforcement officers manning such road blocks should be especially conscious of their personal safety. The fleeing

felon is likely to be armed and may take any risk to avoid apprehension.

#### *Road blocks established for investigatory purposes*

The leading case on the subject of road blocks established for purposes of investigation is *U.S. v. Bonanno*, 180 F. Supp. 71 (U.S. District Court, Southern District of New York, 1960). In that case officers had observed a number of people gathering at the home of one Joseph Barbara. On the basis of recent investigation, officers had reason to believe that the persons gathered at the Barbara home were engaged in a conspiracy to violate laws pertaining to the illegal manufacture and distribution of alcohol. In order to investigate this suspected criminal activity, the officers established a road block and allowed vehicles containing known occupants to pass without being detained, but stopped the occupants of other vehicles for purposes of investigation. Those persons stopped proceeded voluntarily, upon request, to a police station where they were questioned as to their names, addresses, ages, occupations, criminal records, and as to their purpose for being at Barbara's residence. After making voluntary statements, these persons were permitted to leave. No one was questioned for more than one half hour. The officers did not make a search of the automobiles or their occupants. The only evidence obtained was the voluntarily statements made at the station.

The court held that such police procedures did not constitute an illegal arrest or an unreasonable search and seizure. The court stated,

"When police reasonably believe that a crime might have been committed, those closely connected in time and placed to the criminal activity are undoubtedly proper subjects for limited police questioning, for they are most likely to have information of value to the investigation . . .

[Continued on Page 4]



“ . . . I can see no difference in principle between the detention of an individual on the street and the stoppage of a car, so long as there is no violence or underhandedness involved in the latter procedure . . . In fact, there might be more justification for a policeman’s stopping of a car leaving the vicinity of a suspected crime, for in such a situation, if action is not immediately taken, there is not likely to be another chance.

“Courts have recognized the right of law enforcement agents reasonably and temporarily to stop vehicles and question occupants on grounds that might not amount to a basis for arrest or search. . . .” 180 F. Supp. at 79-80.

The court said that

“the essential freedom of the individual demands that police not be permitted to stop every car that passes with no other justification than mere inclination or the desire to harass with no legitimate end in view. . . .” 180 F. Supp. at 80.

The court concluded, however, that certain factors, when met, would constitute a reasonable basis for stopping an automobile for the purpose of inquiry, although such factors might provide something less than probable cause for a formal arrest. These factors are:

- (1) belief by the officer involved that a crime might have been committed,
- (2) reasonable grounds for such a belief, and
- (3) absolute necessity for immediate investigatory activity.

Each of these requirements were met in the *Bonanno* case. The officers suspected an alcohol conspiracy, and, based upon facts uncovered during their long investigation, had reasonable grounds for such a belief. Moreover, there was a need for an immediate investigation because, if not stopped, the automobiles and their occupants would not likely be seen again.

The significance of *U.S. v. Bonanno* lies in the court’s approval of road blocks established

for purposes of investigation. If reasonable grounds for investigation exist (that is, if the three requirements listed above are met), the right to stop and question individuals at a road block is a permissible interference with an individual’s freedom of movement.

Questioning at the road block must be brief and must be done in a reasonable manner. Absent consent, persons who are questioned at a road block should not be required to accompany the officer to another location. If probable cause for the arrest of the individual does not become immediately apparent, he must be allowed to continue upon his way. It is important to note that in the *Bonanno* case the persons taken to the police station *consented* to that procedure. If officers detain persons for questioning, either at the road block or by taking them to another location, for too great a period of time, the detention may be deemed an arrest. Ordinarily, however, mere detention of individuals at a road block for questioning does not constitute an arrest.

Officers manning a road block established for investigatory purposes may not conduct a warrantless search of the vehicle or persons he has stopped. If, however, after lawfully stopping the vehicle the officer acquires information which gives him probable cause to believe that a felony has been or is being committed by one or more of the occupants of the vehicle, he may arrest the supposed wrongdoer. Once he has made the arrest, the officer may then search the person incident to the arrest. Moreover, the officer may make a warrantless search of the vehicle, whether or not he has made an arrest, if he has probable cause to believe that seizable goods are contained therein.

It should be noted that a road block established for investigatory purposes will not satisfy the requirements of *U.S. v. Bonanno* unless the officers have a specific crime in mind (in *Bonanno* the crime was conspiracy to violate the alcohol laws) and are stopping vehicles and questioning their

occupants for the purpose of apprehending the criminal. Establishing a road block to check cars for the purpose of “curbing the juvenile problem,” or because there has been an increase of crime in the locality, is not lawful.

### Commandeering of Vehicles

When establishing a road block for the apprehension of fleeing violators of the law, a law enforcement officer has the power to commandeer a motor vehicle, even though the vehicle may be privately owned. This general rule was stated by the court in *Kagel v. Brugger*, 119 N. W. 2d 394, 397 (Supreme Court of Wisconsin, 1963), a case in which officers commandeered two semi-trailers to block the road upon which an officer was chasing the defendant at high rate of speed. The Wisconsin court concluded that the right of an officer to commandeer a vehicle for a road block stems from the statutory and moral duty of citizens to respond to an officer’s call for assistance.

Although the Maine courts have never considered the question, it is most likely that if called upon to do so they would recognize the right of Maine law enforcement officers to commandeer vehicles for use at road blocks. Like Wisconsin, Maine has a statute which makes it an offense for a person to refuse to render aid to an officer when so commanded. (See 17 M.R.S.A. §2951) The reasoning of the Wisconsin court in *Kagel v. Brugger*, therefore, seems likewise applicable to Maine.

Furthermore, the effective discharge of their law enforcement duties would require that Maine officers be able to commandeer vehicles. Oftentimes, especially on wide roads and in situations where additional police assistance cannot be obtained in sufficient time, one police vehicle will not suffice to accomplish the objective of a road block.

In cases of high speed pursuit of violators of the law there is precedent for the right of a law en-

[Continued on Page 5]

forcement officer to commandeer vehicles. (See January 1974 ALERT, p. 5) Since officers may commandeer vehicles to *chase* offenders, there is little doubt that they may commandeer vehicles to *stop* fleeing violators.

Officers should bear in mind the following points with respect to the commandeering of vehicles for use at a road block:

- (1) Commandeer vehicles only when absolutely necessary.
- (2) Commandeer vehicles only to apprehend fleeing violators of the law. Officers should not commandeer vehicles for use at a road block established for the inspection of motor vehicle equipment or operators' licenses. Vehicles should be commandeered for road blocks used for investigatory purposes only in emergency situations, such as where there has been a kidnapping but the description of the vehicle and the suspects is unknown.
- (3) Whenever time permits, the officer(s) responsible for establishing the road block should themselves carefully position the vehicle, ensure that its lights are on, etc. This is because the officer, and not the owner of the commandeered vehicle, may be held liable if injury results from negligence in the establishment of the road block.
- (4) As soon as the commandeered vehicle is in position, ensure that the operator of the vehicle retreats to the safest possible position.
- (5) Do not hold the commandeered vehicle at the road block any longer than necessary.

### Officer's Liability

Law enforcement officers who establish or conduct a road block in a negligent manner may incur civil liability for injuries resulting from their negligence. Thus, the general rule that the law holds officers

accountable for the reasonableness and the validity of their methods, and that officers may be held liable for their negligent acts, applies to the establishment of road blocks as well as to other techniques of law enforcement.

Failure to give adequate warning is the most common basis for police liability for injuries occurring at road blocks. Because road blocks are inherently dangerous to all travelers, and because responsibility for creating the danger lies with the law enforcement agency, it is the duty of the law enforcement officers establishing the block to take extraordinary precautions to ensure the safety of the public.

In *Byers v. U.S.*, 122 F. Supp. 713 (U.S. District Court, Central District of New Mexico, 1954), *rev'd on other grounds*, 225 F. 2d 774 (10th Circuit Court of Appeals 1955), the court held that the government was negligent and liable for injuries resulting when two trucks struck a military road block made up of vehicles which completely blocked one lane of traffic. Although the road block was located near the bottom of an eight-mile downgrade, the earliest warning was located only one-half mile from the block. The evidence showed that if the government had posted warning signs from one and one-half to two miles before the road block, the collision could have been avoided.

Another case supporting the rule that officers may be liable for injuries resulting from failure to give adequate warning of a road block is *Hernandez v. U.S.*, 112 F. Supp. 369 (U.S. District Court, Hawaii, 1953). In *Hernandez*, after federal employees had set up a road block, a passenger on a motorcycle was injured when the motorcycle was forced to go off the road to avoid hitting the road block. The injured passenger brought an action against the government, claiming that his injuries resulted from the negligence of those who set up the road block in failing to give proper warning. Although the court did not reach the question of liability it stated that

"after having exercised its discre-

tion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of hazard created." 112 F. Supp. at 371.

If an officer has reason to believe that a fleeing offender may be traveling at a high rate of speed, the officer's failure to establish the road block at a position which will give the speeding vehicle sufficient room to stop may result in liability. This is illustrated in the case of *Myers v. Town of Harrison*, 438 F. 2d 293 (2nd Circuit Court of Appeals, 1971). In the *Myers* case, an officer had been ordered to take a certain position to cut off the escape of a vehicle which was being pursued on wet roads at speeds ranging up to 100 miles an hour. Instead of remaining in his assigned location, however, the officer, on his own initiative, moved to a position at the bottom of a steep hill so that a driver would not be able to see the patrol car until he reached the top of the hill, some 600 to 800 feet away. The officer took no other precautions. When the pursued car came over the hill at a speed of 90 miles per hour, it swerved to avoid the patrol car and struck a taxicab, killing the cab driver. Testimony at trial revealed that a vehicle traveling at the rate of speed which the officer knew the pursued vehicle to be going could not have stopped in less than 1750 feet. The court held that in light of the wet roads, the known speed of the pursued vehicle, and the failure to take any safety precautions, the officer was negligent in positioning his vehicle at the bottom of the hill. (Note: Although he was negligent, the officer in this case did not have to pay damages to the plaintiff because the plaintiff elected to bring the action against only the municipality and not the officer. If, however, the plaintiff had elected to sue the officer, in all probability the officer would have been held liable.)

The positioning of signs, lights and other devices needed to give

[Continued on Page 6]



adequate warning of road blocks will vary according to terrain, weather, time of day and other conditions. As a general guide to most situations, reference should be made to the minimum standards set out in the August 1974 ALERT dealing with practical considerations concerning road blocks.

At least one court has indicated that where a number of officers are involved in setting up a road block, only the officer (or officers) *in charge* of the road block operation will be liable for injuries resulting from negligence. In *Kagel v. Brugger* (discussed above), the court stated that

“(N)ot every police officer aiding in the establishment of a road block could be charged with negligence but only those who have the responsibility for the establishment and the manner in which it is established.” 119 N.W. 2d at 398.

Notwithstanding this statement of the court, *all* officers engaged in establishing a road block should take it upon themselves to ensure that all necessary safety precautions have been taken.

Even where officers have been negligent in establishing a road block, if the operator of a motor vehicle which is involved in an accident at the road block is negligent in the operation of his vehicle, some or all of the officers' liability may be diminished by the contributory negligence of the driver. Thus, in *Byers v. U.S.*, discussed above, even though the law enforcement officers were negligent in establishing the road block, the injured parties could not recover because the trucks which struck the blockade were operated in a negligent manner in that they were descending the downgrade at a speed greater than that posted.

Although motor vehicle operators may be acting negligently if they approach a road block at too great a speed, law enforcement officers should always anticipate that someone may approach the block at an unsafe speed. Warning signals should therefore be placed at locations which would give a

vehicle exceeding the speed a reasonable opportunity to stop.

Extreme caution must be exercised in the use of firearms at road blocks. (See the discussion of Use of Deadly Force in March 1974 ALERT.) A general rule should be that a vehicle is not to be fired upon simply because it has run through the road block. The language of a federal court is noteworthy here:

“(Officers) should not ... jeopardize lives by firing at automobiles in the hope of puncturing tires, when a slight misaim may result in death, even though the automobile might be occupied by a violator of the law. Especially should this be forborne when inevitably, at times, mistakes will be made, and a car shot at will be occupied by those who are entirely innocent. It must not be forgotten that the innocent may be apprehensive of attack from others than officers of the law, and may, especially in the darkness and in unfrequented roadways, hesitate at a signal to stop, and may conscientiously believe that their only safety is in flight. A fleeing automobile may be defiance of law, but a badly aimed shot may be murder . . .” *U.S. v. Kaplan*, 286 F. 963, 974 (U.S. District Court, Southern District of Georgia, 1923).

## CONCLUSION

This concludes our discussion of the practical and legal considerations regarding road blocks. Although the road block can be a very effective law enforcement technique, officers should remember that road blocks are inherently dangerous. Consequently, officers establishing road blocks should always take whatever precautions are necessary to protect both themselves and members of the public. Furthermore, because the stopping of automobiles at road blocks constitutes an intrusion upon individual rights of privacy, officers' authority to establish road blocks is limited to certain types of situations. Likewise, law enforcement procedures which may be conducted at road blocks are also

limited. If a law enforcement officer fails to take proper safety precautions at a road block, he may be seriously injured or he may be subject to civil liability for injuries incurred by others; if he fails to act within legal limitations at a road block, an arrest or search at the road block may be declared illegal. Finally, because problems of arrest, search and seizure arise so frequently at road blocks, it is again recommended that officers be thoroughly familiar with these areas of the law at all times.

## FORUM

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

### Authority to Search for Alcoholic Beverages

**Question:** At rock concerts conducted in a municipal arena, authorities have observed that youths have been bringing alcoholic beverages into the arena and consuming the beverages during the performances. To prevent this from happening and to avoid having to arrest youths for illegal consumption of alcoholic beverages, may law enforcement officers position themselves at the entrance(s) to the arena and conduct a pat-down search of each individual entering the arena for the purpose of confiscating alcoholic beverages which an individual may have upon his person?

[Continued on Page 7]

**Discussion:** The pat-down search of the persons entering the arena in this situation would constitute an impermissible infringement of the Fourth Amendment rights of these persons. The pat-down search cannot be justified on a "stop and frisk" theory. The United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (U.S. Supreme Court, 1968), held that an officer who, in light of specific facts and circumstances and in light of his experience, reasonably believes that a person is armed and dangerous may make a limited pat-down of the outer clothing of that person for purposes of conducting a protective search for weapons. Under *Terry*, the only justifiable purpose of a frisk is the protection of the officers and others. A frisk conducted for any reason other than to check for weapons would violate a person's Fourth Amendment rights. Thus, a pat-down search of persons to check for alcoholic beverages is not justifiable under *Terry v. Ohio*.

Because the pat-down search described above cannot be justified on a stop and frisk theory, and because there is no probable cause to search to justify the indiscriminate, warrantless intrusion upon the privacy of each person entering the arena, the pat-down procedure described above would violate the Fourth Amendment's prohibition against unreasonable searches. Therefore, officers can do little more than (1) suggest that authorities post signs warning individuals that if they consume alcoholic beverages on the premises they will be subject to arrest, and (2) exercise arrest discretion where necessary.

### O.U.I. and Chemical Tests

**Question:** If a person lawfully arrested for operating or attempting to operate a motor vehicle while under the influence of intoxicating liquor demands that the State administer both a blood test and a breath test, must the officer ensure that both tests are administered?

**Discussion:** 29 M.R.S.A. §1312 provides that the law enforcement

officer shall inform the accused of the two types of tests available to him and that "said accused shall select and designate one of the tests." (emphasis added) The statute clearly indicates, therefore, that a person arrested for O.U.I. is entitled to only one test. Thus, for example, if a person arrested for O.U.I. selects a breath test and the officer administers this test, the officer may lawfully refuse a request by the person for a blood test.

It should be noted that although the arrested person does not have a right to a second test, the law enforcement officer may request the person to take a second test. If the person consents to a second test, that test may be administered.

**Question:** If a person arrested for O.U.I. insists on having both a blood test and a breath test administered or none at all, does this constitute a refusal under the implied consent law?

**Discussion:** As noted above, a person arrested for O.U.I. does not have a right to have both tests administered. Provision is made in 29 M.R.S.A. §1312 only for a choice of one of the two tests. Consequently, insistence on having both tests administered or none at all would constitute refusal to submit to a chemical test. This conclusion is supported by a California decision; *Kesler v. Department of Motor Vehicles*, 459 P. 2d 900 (California Supreme Court, 1969), in which the court addressed the same issue. In that case, defendant was lawfully arrested for driving under the influence of intoxicating liquor and was advised that if he refused to take a test his license would be suspended. Defendant refused to take a single test, arguing that a single test would not be "scientifically conclusive." The arresting officer then advised defendant that under California law he had a choice of one of the tests but he could not choose all three (California law provided for blood, breath and urine tests), and that continued insistence upon all three tests would be treated as a refusal. Defendant remained adamant, his license was suspended for refusal to submit to a test, and he appealed.

The California Supreme Court rejected the appeal, holding that

"(defendant's) insistence upon taking all three rather than only one constituted, at best, a conditional consent to a test which, under the authorities, must be deemed to be a refusal to submit to a test. . ." 459 P.2d at 903.

If a person insists upon having both tests administered or none at all, the officer should inform the person that his insistence upon both tests will constitute a refusal. If the person still insists upon both tests, the officer should proceed as if the person refused to submit to a test.

## IMPORTANT RECENT DECISIONS

### SEARCH AND SEIZURE:

A § 2.2 Other Warrant Requirements

### SELF-INCRIMINATION:

B § 3.1 Non Testimonial Evidence: Schmerber

Defendant, a suspect in a robbery-murder, fit the description of one of two men seen fleeing the scene of the crime. One of the fleeing men ran bent forward and clutching his stomach, apparently wounded. Within a few minutes an unidentified individual brought the defendant to a local hospital. He was suffering from a stomach wound. An x-ray revealed that a bullet resembling a .38 caliber had come to rest in his spinal canal. The deceased robbery-murder victim had fired a .38 caliber pistol at the robbers. Defendant denied participation in the robbery and told officers that he had suffered a .22 caliber gunshot wound in a gambling game.

[Continued on Page 8]



At defendant's trial for robbery-murder, the state sought a search warrant for removal of the bullet. An evidentiary hearing was held, at which uncontroverted medical testimony indicated that removal of the bullet would involve a major intrusion into the defendant's body which could cause a worsening of defendant's condition due to the involvement of spinal nerves. Nevertheless, the trial court approved the warrant, but permitted defendant time to apply to the Arkansas Supreme Court where he sought to have the warrant quashed.

The Arkansas Supreme Court quashed the warrant, holding that under *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (U.S. Supreme Court, 1966) and *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (U.S. Supreme Court, 1952), issuance of the warrant would not meet Fourth Amendment and due process standards of reasonableness. The court said:

"a substantial intrusion into a defendant's body, without his consent, involving pain, trauma and risk of serious complications, is . . . offensive to due process standards as well as the test of reasonableness required by the Fourth Amendment. . ." *Bowden v. State*, 510 S.W. 2d 879, 881 (Supreme Court of Arkansas, June 1974)

**COMMENT:** *It is likely that a court would approve a warrant for removal of a bullet, without a person's consent, where medical testimony indicates that removal would involve no danger to life or health. This was the case in Creamer v. State, 229 Ga. 511, 192 S.E. 2d 350 [Supreme Court of Georgia, 1971], in which the court upheld removal of a bullet where the evidence was uncontradicted that the bullet could be removed, without danger to life or limb, from the fatty, subcutaneous area of the chest in no more than fifteen minutes with a local anesthetic. One state, however, apparently has rejected the removal of a bullet, without consent, under any circumstances. In Adams v. State, 299 N.E. 2d 834 [Supreme*

*Court of Indiana, 1973], the court rejected the procedure where the operation would have required only a local anesthetic to remove the bullet or metallic fragments lodged in the flesh of the buttocks of a felony murder suspect.*

#### SEARCH AND SEIZURE:

##### A § 2.5 Persons and Places — Without a Warrant

Customs agents had discovered cocaine inside a packet within a parcel addressed to an individual, other than defendant, at defendant's address. After removing the cocaine and substituting a cocaine-soap powder mixture, the agents dusted the packet with fluorescent powder and replaced it in the parcel. When the parcel was delivered to defendant's address, defendant agreed to receive the parcel but stated that it was not addressed to him and that the addressee picked up his mail at that address periodically. Agents then obtained a warrant to search the apartment and found a spoon which contained residue of cocaine. Although the parcel was not found within the apartment, it was subsequently found, unwrapped and without the cocaine-soap powder mixture, outside the apartment building. The agents then used an ultraviolet lamp to inspect defendant's hands for traces of fluorescent powder. After the test revealed traces of the powder, defendant was placed under arrest. Defendant was convicted of unlawful receipt, concealment, and possession of cocaine and appealed. Defendant's contention on appeal was that the results of the inspection of his hands should have been suppressed at trial, since the inspection was a personal search and was therefore unauthorized by the warrant to search the premises.

The court held that an ultraviolet inspection of a person's hands constitutes a personal search within the meaning of the Fourth Amendment. The court stated:

"There can be little doubt that an inspection of one's hands, under an ultraviolet lamp, is the kind of governmental intrusion

into one's private domain that is protected by the Fourth Amendment. If the reach of the Fourth Amendment extends to fingerprinting, and a search of one's clothing or personal effects, it should certainly encompass a detailed inspection, by special instrument, of one's skin." 496 F. 2d at 182. (Citations omitted)

However, the court suggested that the warrantless inspection of defendant's hands may have been justified as being incidental to a lawful arrest. But for the search to be upheld on this ground, there would have to have been probable cause to arrest at the time of the search, and the court could not determine on the basis of the record whether there was sufficient evidence to provide probable cause to arrest. Because the court reversed the conviction on other grounds, a new trial would have to take place, at which the trial court could determine whether or not there was probable cause to arrest. *U.S. v. Kenaan*, 496 F. 2d 181 (1st Circuit Court of Appeals, April 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

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

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

Jon A. Lund  
Richard S. Cohen

John N. Ferdico

Peter J. Goranites  
Michael D. Seitzinger

Attorney General  
Deputy Attorney General  
In Charge of Law Enforcement  
Director, Law Enforcement  
Education Section  
Ass't Attorney General  
Ass't Attorney General

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