FEBRUARY - MARCH 1975

ALERT

CRIMINAL DIVISION

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

JUVENILE LAW

AND PROCEDURE I

MESSAGE FROM THE ATTORNEY GENERAL JOSEPH E. BRENNAN

I am pleased to announce that the distribution of the Law Enforcement Officer's Manual to full-time officers in Maine is nearly completed. If any law enforcement agencies or full-time officers have not yet received the Manual, please contact the Law Enforcement Education Section at 289-2146.

We have a limited number of Manuals available for distribution to part-time officers and other criminal justice personnel. We need to know how many people would like copies of the Manual so we can distribute them fairly and adequately. Please send all requests to the Law Enforcement Education Section and include the number of Manuals requested and the reasons why the Manuals are needed. We will attempt to fill all requests as best we can.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

Juveniles present unique and often difficult problems for law enforcement officers because acts and offenses committed by juveniles are not governed by the criminal law but by a separate body of law often referred to as the juvenile law. The reason juveniles are treated differently than adults is because many juveniles are immature, impulsive and impressionable and therefore less responsible for their acts than adults. The juvenile law attempts to provide an informal means of correcting deviant behavior by treating juveniles as young persons in need of aid, encouragement and guidance and assuring that juveniles receive care, custody and discipline approximating that which they should receive from their parents. By avoiding the label of criminal and the use of strict criminal procedure, the juvenile law attempts to salvage what otherwise may be a wasted life and prevent juveniles from later entering the adult criminal justice system.

To further the purpose of correcting deviant behavior in juveniles, the legislature has established a special court, called the juvenile court, to handle juvenile problems. The authority of the juvenile court derives from the doctrine of *parens patria,* a Latin phrase meaning "father of his country." The doctrine refers to the duty of the state to protect its children. The purpose of this article is to explain to the law enforcement officer the juvenile law, the unique procedure of the juvenile court, and the rights of juveniles, before, during and after they have entered the juvenile court system. By understanding the juvenile law and procedure, and also understanding the rights of juveniles, the law enforcement officer will be able to more effectively and efficiently discharge his duties under the juvenile law while promoting the best interests of the juvenile. Maine's juvenile laws are collected in 15 M.R.S.A. §2501 et. seq. and law enforcement officers should familiarize themselves with those laws in conjunction with reading this article.

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DEFINITIONS

1. **Adjudication of a commission of juvenile offense** is "the adjudication or judgment which is made by an appropriate juvenile court, or by the superior court in appeal cases from juvenile courts, upon its finding that a juvenile has committed any of the offenses or acts . . . " coming within the jurisdiction of the juvenile court. 15 M.R.S.A. §2502 (1).
2. **Habitual truancy** means "habitual and willful absence from school without sufficient excuse; or failing to attend school for five day sessions or ten half-day sessions within any period of six months without sufficient excuse; or failing to attend school, without regular and lawful occupation, and growing up in ignorance." 15 M.R.S.A. §2502 (2).
3. **Juvenile court** means the district court when it is exercising jurisdiction over juveniles who have allegedly committed acts or offenses falling within the jurisdiction of the juvenile court. 15 M.R.S.A. §2502 (3).
4. **Juvenile offender** means "any child under 18 years of age who has been found by an appropriate juvenile court to have committed any acts or offenses . . ." coming within the jurisdiction of the juvenile court. 15 M.R.S.A. §2502 (4).
5. **Minority** means "under the age of 18." 15 M.R.S.A. §2502 (5).

JURISDICTION OF THE JUVENILE COURT

In Maine, the district court acts as the juvenile court and has exclusive, original jurisdiction over juvenile offenses. Exclusive, original jurisdiction means that all juvenile matters must be heard first by the juvenile court.

Under Maine law, a juvenile is defined as any child under the age of 18 years. To come under jurisdiction of the juvenile court, a juvenile must commit what is known as a juvenile offense. Juvenile offenses include any crime punishable under the Maine criminal statutes and the following misconduct unique to juveniles:

1. Habitual truancy;
2. Behaving in an incorrigible or indecent and lascivious manner;
3. Knowingly and willfully associating with vicious, criminal or grossly immoral people;
4. Repeatedly deserting home without just cause;
5. Living in circumstances of manifest danger or falling into habits of vice or immorality.

The types of misconduct listed above are not crimes if committed by an adult.

The juvenile court does not have exclusive, original jurisdiction over the following offenses:

1. Motor vehicle violations under Title 29 of the Maine Revised Statutes;
2. Snowmobile violations under Title 12, chapter 34 of the Maine Revised Statutes;
3. Watercraft registration and safety violations under Title 38, chapter 1, sub-chapter VI of the Maine Revised Statutes;
4. All other traffic laws or ordinances if the offense is a misdemeanor.

These motor vehicle offenses are heard by the District Court or the Superior Court.

However, the juvenile court specifically retains exclusive, original jurisdiction over the following more serious motor vehicle offenses:

1. Using a motor vehicle without authority from its owner (29 M.R.S.A. §900);
2. Operation or attempted operation of a motor vehicle while under the influence of intoxicating liquor or drugs (29 M.R.S.A. §1312);
3. Recklessly operating a motor vehicle and thereby causing the death of another person (29 M.R.S.A. §1315);
4. Operating a motor vehicle in violation of law and the operation is the proximate cause of the death of another person (29 M.R.S.A. §1316);
5. Operation or attempted operation of a snowmobile while intoxicated by the use of intoxicating liquor or drugs or while impaired by the use of intoxicating liquor or drugs (12 M.R.S.A. §1778 (2));
6. Operation of any watercraft, water skis, surfboard or similar device while intoxicated or under the influence of narcotic drugs, barbiturates, marijuana, or intoxicating liquor (38 M.R.S.A. §237 (2)).

The juvenile court also has jurisdiction over petitions filed under the Uniform State Compact on Juveniles. Basically, this act provides a means for states to retrieve and return juveniles who have fled their home states.

INITIATING JUVENILE PROCEEDINGS

1. Application

To initiate juvenile proceedings, a person should have reasonable cause to believe that a juvenile has committed a juvenile offense. Reasonable cause is a belief founded upon facts strong enough to justify a reasonable man in coming to the same conclusion. Any person may apply orally or in writing to the juvenile court to begin proceedings against a juvenile, such as parents, health and welfare officials, probation officials, law enforcement officers, or other concerned persons.

When applying to the juvenile court to initiate juvenile proceedings, care must be taken to select the juvenile court having proper territorial jurisdiction over the juvenile. The juvenile court in the district where the alleged conduct or act occurred is the proper juvenile court having territorial jurisdiction. For example, if the act or conduct which allegedly constitutes a juvenile offense occurred in Portland, the juvenile court sitting in Portland has proper territorial jurisdiction over the juvenile and the petition. When the same

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juvenile has committed a juvenile offense in more than one district, either juvenile court has proper territorial jurisdiction over the juvenile and the petition.

2. Preliminary Inquiry

Once application to the juvenile court has been made, the juvenile court will conduct a preliminary inquiry into the matter. This may include an examination of the applicant, an examination of any supporting witnesses and, where the case requires, an investigation into the background of the juvenile. The court will be looking to see if reasonable cause exists and if the interests of the juvenile or of the public require further action. Emphasis is placed upon the welfare of the juvenile.

After all the evidence has been gathered and presented, the court decides what action, if any, should be taken. If no reasonable cause has been shown or the interests of the juvenile or state do not require further action, no petition will be filed. If, however, the court finds that reasonable cause exists and further action is necessary, the court may authorize a petition to be filed by either the person making the initial application or by the person or persons who made the investigation.

3. The Petition

The petition, which customarily is entitled Petition Initiating Juvenile Proceedings, must contain a plain statement of the facts which give rise to the application to the juvenile court. This will be a description of a criminal act or the misconduct constituting a unique juvenile offense and is similar to the statement required in an indictment, information or complaint in the adult criminal justice system. The juvenile's name, home address, and date of birth should be included in the petition. Also required is the name or names of the parents, guardian or other person or persons having custody of the juvenile along with address of each. If no parent, guardian, or person having legal custody is known, then the nearest known relative should be named. In the event that any of the above information is not known, it should be so stated in the petition. The petition must be signed and verified by the applicant.

The form customarily used by the juvenile court for petitions initiating juvenile proceedings appears below:

STATE OF MAINE
District Court

. . . . . , ss
District . . . . . .
Division of . . . . . .
. . . . . .
Juvenile Session

PETITION INITIATING
JUVENILE PROCEEDINGS

RESPECTFULLY REPRESENTS
. . . . . of . . . . . .
. . . . . .

1. The Petitioner is a Sheriff, Deputy Sheriff, Police Officer, Private Citizen.
(Strike out inapplicable terms)

2. The Petitioner files this Petition after applying to the Court and pursuant to authority by the Court.

The Petitioner files this Petition upon Petitioner's own personal knowledge or reasonable belief.
(Strike out inapplicable sentence)

3. The Juvenile complained against is . . . . . of . . . . . and was born on . . . . . .

4. . . . . is the Parent, Legal Guardian, Person having custody or control, nearest known relative. (Strike out inapplicable terms) and lives at . . . . . Street address, ...
(City and County)

5. The facts bringing the Juvenile complained against within the jurisdiction of this Court are:

WHEREFORE the Petitioner prays that this Honorable Court, after issuance of a citation or warrant, and after hearing, adjudicate that the said Juvenile . . . . . has committed a juvenile offense and that the Court take such action in disposition thereof as may be within the power of the Court and as to the Court shall seem meet and proper.

Dated this day of A.D. 19
. . . . . .
(Signature of person filing)

VERIFICATION

STATE OF MAINE
DISTRICT COURT
. . . . . , ss
JUVENILE SESSION

The above Petitioner personally appeared and made oath, upon reasonable belief, to the truth of the above Petition.

Before me, this day of A.D. 19
. . . . . .
Judge.

4. Citation

Upon the filing of a petition with the juvenile court, the court will issue a citation. The citation sets forth the substance of the petition and directs that the person or persons having custody of the child appear with the juvenile at a specific time and place for the hearing of the petition. If the parents or guardian do not have custody of the juvenile, the court may send notice to them in addition to the person who has custody.

The customary Petition Initiating Juvenile Proceedings has a section entitled CITATION on the back side. By placing the citation on the petition, the court notifies the parents or guardians of the date, time and place of the hearing and provides them with the important facts of the petition with only one document.

The juvenile court has power to require by citation the appearance of any other person who is necessary for the hearing. This may include, for example, the applicant, witnesses and other interested parties. If any person fails to obey a juvenile court citation, the court may treat such failure as criminal

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contempt of court and punish the violator accordingly.

The form customarily used by the juvenile court for citations in juvenile cases appears below:

STATE OF MAINE

. . . . . , ss

DISTRICT COURT

CITATION

Upon the foregoing Petition, you . . . . . (Parent, Legal Guardian, etc.) of . . . . . are ordered to bring with you the said . . . . . the juvenile complained against, and to make your appearance at the Juvenile Session of the District Court holden at . . . . . in said County of . . . . . on the . . . . day of . . . . . at . . . . . o'clock in the . . . . . noon.

WHEREFORE, fail not, as you will answer for your default under the pains and penalty of law.

. . . . . Judge
Clerk
Complaint Justice

CUSTODY OF THE JUVENILE BEFORE HEARING

1. Custody Prior to Appearing Before the Juvenile Court

There are many situations in which a law enforcement officer may be called upon to take a juvenile into custody. Experience and common sense will aid the officer in determining whether the juvenile should be arrested and proceedings initiated or released in favor of an informal disposition. If a law enforcement officer has an understanding of common juvenile problems and has an ability to deal with young people, he may be able to effectively and efficiently deal informally with juveniles. Often all that is required is a frank discussion with the juvenile and the juvenile's parents concerning the juvenile's conduct. When a relatively minor infraction is involved and the juvenile and his parents appear to be cooperative, an informal disposition should be encouraged. In the event an informal disposition is not appropriate, the juvenile may be taken into custody. This section deals with the responsibilities of the law enforcement officer when an arrest has been made.

There are two situations in which the juvenile may be arrested. One is the commission of a juvenile offense followed by arrest. The second is the issuance of a warrant by the court, either because the juvenile failed to obey a citation or the court felt a citation would be useless and issued a warrant. Each situation presents problems for the law enforcement officer and deserves some attention.

When the juvenile is first arrested, the law imposes specific duties upon the arresting officer. Parents, guardians or other persons having custody of the juvenile must be notified as soon as reasonably possible as well as the State Probation and Parole Board or its representative. Next, arrangements for the custody or safekeeping of the juvenile have to be made pending his appearance before the juvenile court. The law is very clear in this area. Juveniles are not to be treated as criminals, but as young persons in need of aid, encouragement and guidance. As far as possible the officer's treatment of the juvenile should approach that of a parent or guardian. The statutory purpose is to avoid placing any young person in any place of detention unless it is *absolutely* necessary. The reasons for this are two fold. Placing the juvenile with other criminals may do more harm than good by possibly exposing impressionable juveniles to adult inmates who have strong anti-social attitudes. Secondly, the goal of the juvenile justice system is to prevent misguided youths from falling into a life of crime. By placing a juvenile in a place of detention, the law enforcement officer may alienate the juvenile, thus making rehabilitation more difficult. The law, therefore, prefers that juveniles be placed in the custody of parents, guardians or some other responsible person until the hearing. This should be the law enforcement officer's normal procedure.

In exceptional situations where the officer believes that security provisions must be made for the juvenile until he can be brought before the juvenile court, or where a warrant was issued, the officer must transport and deliver the juvenile to a place of detention. It is the affirmative duty of the arresting officer to transport and deliver the juvenile to the place of detention. The place of detention, which may be a jail, must be designated as one for the detention of juveniles by the Department of Mental Health and Corrections and should allow the juvenile to be separate from other inmates. It is unlawful to place a juvenile in a place of detention which has not been properly designated. As a practical matter, there are very few suitable institutions for the placement of juveniles in Maine. For this reason, detention of juveniles prior to hearing has been strongly discouraged by most law enforcement authorities, except in extreme cases or where a warrant is involved. A juvenile who is detained should be brought before the juvenile court as soon as reasonable possible so that the court may decide if continued detention of the juvenile is required.

2. Custody After Appearing Before the Juvenile Court

Once the juvenile has been brought before the juvenile court, the officer's obligation regarding custody is assumed by the court. The court will determine what must be done with the juvenile until the date of the hearing.

The court has a wide range of options in dealing with the juvenile at this stage. The court may require bail or personal recognizance of the parent, legal guardian or other suitable person who has control of, or is related to, the juvenile to keep him in secure custody and to produce the juvenile before the juvenile court as the court may order. These devices are used to assure the presence of the juvenile at the hearing. Where the circumstances demand that the

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juvenile be detained until the hearing, the court may order that the juvenile be detained in any place deemed by the court to be suitable, including a jail or juvenile institution.

For a juvenile to be placed in jail by the court, it is necessary for the court to specifically make such an order. An order shall be made only when it appears to the court to be in the best interests of the community or of the juvenile apprehended. Whenever the juvenile is placed in a jail, he must be kept separate from the other prisoners— it is a *must*. This is consistent with the idea that the juvenile is not to be treated as a criminal, but rather in the nature of a misguided youth in need of aid, encouragement and guidance.

The court often allows a juvenile to be released into the custody of a parent or other suitable adult under personal recognizance until the hearing. If the person who is granted custody of the juvenile fails to produce him at the hearing or breaches any of the terms of the release into custody, the juvenile court may find that person guilty of criminal contempt of court and punish the violator.

PROCEDURES IN JUVENILE COURT

The juvenile court has a great deal of discretion in dealing with juvenile petitions. The juvenile court may, for example, dismiss a juvenile petition before a hearing is held if dismissal is in the best interest of the state or the juvenile. Juvenile petitions are often dismissed before a hearing where an informal solution to the juvenile's problem has been decided upon. If a juvenile petition is dismissed, a juvenile does not have a right to sue any person as a result of the proceedings.

Juvenile hearings are held at the court's convenience since juvenile courts do not have a special term. An exclusive date and time must be set aside to hear juvenile cases because juvenile matters are not open to the public and, whenever possible, a room other than the district courtroom is used. This helps to create an informal atmosphere and also to assure privacy.

1. Juvenile Hearing

If a hearing is necessary to properly dispose of a juvenile matter, the time, date and place will be set by the court. The juvenile or his parents cannot avoid the hearing by waiving their right to a hearing, a procedure common in the adult criminal system. This non-waiver rule is unique to the juvenile court. Hearings are informal and the strict rules of evidence are often relaxed in order for the court to get a clearer picture of the juvenile's situation. Regardless of the informality and the relaxation of certain rules of evidence, a juvenile hearing must still provide certain constitutional due process protections. These constitutional due process protections will be discussed in a later section of this article dealing with constitutional rights of juveniles. Once a hearing begins, the court still has the power to suspend the proceedings at any time and may order an investigation of the juvenile by a suitable person. At the hearing, the juvenile court judge may administer all oaths required by law and the juvenile may be represented by counsel or any other interested person. Any person who willfully interferes with any juvenile proceedings or who willfully subverts the policies and purposes of the juvenile law may be held in criminal contempt and punished accordingly.

All matters that occur at the juvenile hearings are private. No mention can be made of the name of a juvenile brought before the juvenile court or to be brought before the juvenile court or what has happened at a hearing, unless the persons giving such information fit within the statutory exception or have the permission of the court. The law is very clear that only law enforcement, correctional or welfare officials who are dealing with other law enforcement, correctional or welfare officials in an *official* capacity may divulge juvenile information. All other persons who are present at a juvenile proceeding are forbidden from divulging or publishing any matter which occurred at a juvenile hearing without first obtaining the court's permission. A key point here is official capacity. Acting in an official capacity means acting within the scope of one's job. A law enforcement officer talking to a corrections official over coffee is not allowed to give out information concerning a juvenile unless the corrections official and the law enforcement officer are involved with the juvenile in a way that relates to the obligations of their jobs. Idle interest is not enough. Unlawfully divulging or publishing information regarding a juvenile is punishable as criminal contempt.

2. Juvenile Court Record

The juvenile court is required to keep a record of all juvenile proceedings. This is known as the juvenile court record. The record must contain a brief outline and description of the juvenile court proceedings, including the disposition of the case. The juvenile court record is kept separately from other district court records and is not open to inspection by the general public. Upon consent of the juvenile court, the juvenile court record may be examined by parents, guardians or other persons deemed directly interested by the court. State probation-parole officers or other correctional, enforcement or welfare authorities may use the juvenile record as a matter of course. The record or testimony in any juvenile proceeding is not competent evidence in any other proceeding except in situations where the juvenile court record is needed by the Secretary of State regarding motor vehicle violations, registrations, and licenses.

* * *

A discussion of the juvenile court's powers of disposition, review and appeal procedures, and constitutional rights of juveniles will appear in the next issue of ALERT.

IMPORTANT RECENT DECISIONS

ARREST AND DETENTION:
A § 1.4 Detention: "Stop and Frisk"
SEARCH AND SEIZURE:
A § 2.4 Automobiles: Without a Warrant

Defendant was convicted of violating a federal law prohibiting possession of a firearm by ex-felons. Two officers observed defendant driving an automobile near a state police barracks and recognized him as having been convicted of a felony (illegal possession of alcoholic beverages) 12 years earlier. After stopping defendant's car, one of the officers asked to see defendant's driver's license. Defendant showed the officer a valid license. The officer then ordered defendant out of the car. After defendant got out of the car, the officer observed a pistol on the front seat of the car, in a place that would have been under defendant's leg had he still been sitting in the car. The officers seized the pistol, and it was admitted into evidence at defendant's trial. The officers testified that their purpose in stopping defendant was to determine if he still had a valid operator's license and to ascertain what his business was at the police barracks. Defendant appealed, arguing that the seizure of the pistol was unlawful.

The issue before the court was whether, in ordering defendant out of the car, the officers exceeded their lawful authority to stop him for investigative purposes and for the purpose of examining his driver's license. If the officers exceeded their authority in order ing defendant out of the car, the seizure of the weapon would have been unlawful.

The court concluded that because the officers could point to no specific facts or circumstances which would lead them to believe that defendant was armed or dangerous or that he was involved in criminal activity, they exceeded their authority in ordering him out of the car. Because the officers had acted unlawfully, the court held the seizure unlawful. *U.S. v. Cupps,* 503 F. 2d 277 (6th Circuit Court of Appeals, September 1974).

COMMENT: This case holds that where officers stop a motor vehicle for investigative purposes, they may not order the driver [or a passenger] out of the vehicle unless they can point to facts and circumstances which would lead them to reasonable believe that the person is armed or dangerous or that the person is engaged in criminal behavior. Of course when officers do have a legitimate basis for ordering a motorist out of his car, they may, when necessary, use reasonable force in removing the motorist.

SEARCH AND SEIZURE:
A § 2.2 Other Warrant Requirements
A § 4.1 Suppression-Hearing

Defendant was convicted of possession and mailing of a pipe bomb which exploded in a postal annex. Defendant's motion to suppress damaging evidence obtained by postal inspectors pursuant to a search warrant was denied and defendant appeals this ruling. Defendant's claim is that postal inspectors had made representations to the issuing magistrate that were false, that evidence produced at the suppression hearing proved this, and, therefore, the evidence seized should have been suppressed.

The court held that if the postal inspectors made intentional, relevant, and non-trivial misstatements in their application for a search warrant, the evidence seized pursuant to such a warrant must be suppressed. The purpose of suppression is to prevent future misconduct by affiants. If suppression of the evidence resulting from the search was not the remedy, affiants would be in a position of having everything to gain by proving false facts and nothing to lose. The fact that probable cause may have existed without the misstatement would not change the result. *United States v. Belculfine,* 508 F.2d 58 (1st Circuit Court of Appeals, December, 1974).

COMMENT: Officers should be entirely truthful when applying for search warrants. Otherwise, even though the magistrate may issue a warrant, evidence seized pursuant to the warrant may later be suppressed.

CRIMES/OFFENSES:
C § 4.1 Drugs-Marihuana

Defendant and others had a scheme of buying marihuana in bulk in Jamaica and bringing it back to the United States in a chartered yacht. Defendant was convicted of conspiracy and illegally importing marihuana as a result of his scheme. On appeal, defendant claimed his conviction could not stand since he was charged under all counts with dealing in marihuana; marihuana is defined as certain "parts of the plant Cannabis sativa L"; and the government never proved that he had not dealt with other species of cannabis, namely indica or ruderalis. To support his argument, defendant sought to introduce at trial the testimony of Dr. Richard Shultes to the effect that cannabis has two species other than sativa L. After Dr. Shultes' testimony was presented in a hearing without the jury present, the trial court ruled Congress meant to proscribe all species of cannabis, excluded Dr. Shultes' testimony, and denied defendant's motion for acquittal.

After reviewing decisions in three other circuits, the court upheld the trial court's ruling and defendant's conviction, saying it was immaterial whether marihuana is monotypic or polytypic; Congress meant to prohibit all forms of cannabis when it used the term Cannabis sativa L. The court said the defendant clearly understood in advance that his dealings in marihuana were illegal. *United States v. Honneus,*

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508 F. 2d 566 (1st Circuit Court of Appeals, December, 1974).

MISCELLANEOUS:
M§2 Law Enforcement Officers

The plaintiff originally was arrested without a warrant in her home for taunting a police officer and being a disorderly person in violation of two city ordinances. After her arrest, the plaintiff was taken to jail, released on bail, and later convicted. She paid a fine for the two offenses. Plaintiff now sues the arresting officer claiming that since the ordinances which she was charged with violating were unconstitutional, the arrest constituted false imprisonment and she is entitled to damages from the arresting officer.

The court dismissed the suit against the arresting officer, saying that, even if the ordinances were found to be unconstitutional after the arrest, a law enforcement officer would be protected against liability arising from the arrest if the ordinances were in effect at the time of arrest and the officer acted in good faith. The court reasoned that, although an officer is presumed to know the law, it would be unreasonable to require the officer to predict what ordinances would subsequently be found unconstitutional. *Salom v. Holder,* 304 N.E. 2d 217 (Court of Appeals of Indiana, 1973).

COMMENT: While there is no case law in Maine which expressly accepts the holding of this case, the vast majority of courts that recently have dealt with this issue agree that a law enforcement officer will not be civilly liable for false imprisionment if the ordinance he acted under is later declared unconstitutional as long as he acted in good faith.

MAINE COURT DECISIONS

CRIMES/OFFENSES:
C § 6.2 Driving While Intoxicated-Blood Test
C § 6.5 Implied Consent

Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor, and he appealed. After arresting defendant, officers placed him in the cruiser and explained to him his rights under the *Miranda* doctrine and under the implied consent law (29 M.R.S.A. § 1312). Defendant, who was unknown to the officers, refused to give his name, could produce no driver's license or car registration, and said that he had borrowed the car from his mother and that his father was dead. At one point defendant "broke arrest" and was therefore handcuffed. Upon learning that the owner of the car was the local County Attorney, the officers suspected that defendant might be his son, but defendant insisted that his father was dead. Defendant responded to the officer's explanation of the implied consent law by demanding a blood test. The officers suggested that Dr. Fortier of Saco extract the blood sample, and the defendant agreed but also told the officers that any doctor of their choice would be satisfactory with him. While on their way to the Saco police department with defendant, the officers were told by radio that Dr. Fortier was not available but that Dr. Richards of Alfred would be available. The officers then continued past the Saco police station and headed toward Alfred. Defendant then told the officers that he did not want a "blood test, breath test or anything," that he did not want to go to Alfred and that he wanted to be released on bail in Saco. The officers told defendant that until he disclosed his identity he would not be able to obtain bail, and that in the meantime they would have to detain him in the county jail at Alfred. (The officers indicated that when persons could not obtain or were unable to furnish bail, local procedure called for them to be taken to the county jail.)

On appeal, defendant contended first that the conduct of the officers denied him the opportunity to have a test of his blood administered by a physician of his own choice which he claimed is guaranteed him by the implied consent statute. The court rejected this argument, holding that the officers' conduct did not deny defendant his statutory rights. After his rights had been explained to him, defendant chose to take a blood test but made no request that it be taken by a particular physician. He later refused to submit to any kind of test and never again requested one. The court said:

> "if (defendant) chooses the blood test, (the implied consent statute) permits him to have the specimen withdrawn by a physician of his own choice, if that physician is readily available. This latter right places the police under no obligation to obtain a particular physician for a defendant but the statute anticipates police cooperation in this respect consistent with security and with other police responsibilities. However, the effect of the law is not to guarantee that facilities will always be available for one of these tests of an arrested person." (Slip opinion at 6)

Defendant also contended that the conduct of the officers in removing him from his home area where he could receive the advice of his parents, especially his attorney father, where he could promptly be admitted to bail, and where his family physician could have extracted the blood specimen denied him due process. Rejecting this argument, the court held that under the circumstances of this case the officers' decision to take defendant to the county jail was not unreasonable. Here, the officers could reasonably assume that a person who refused to identify himself would not be admitted to bail in the immediate future and that security considerations plus the known availability of

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a physician in Alfred indicated that his temporary detention be at the county jail in Alfred. The court added:

> "There is no absolute right in the arrested person to have a blood specimen withdrawn in a town of the person's choosing. Minor inconvenience to a Defendant will not outweigh the public interest in the discharge of governmental responsibilities." (Slip opinion at 9) *State v. Ayotte,* Docket No. 1142 (Supreme Judicial Court of Maine, March 3, 1975).

SEARCH § SEIZURE:
A § 2.6 Consent
A § 4.4 Suppression of Evidence-derivative Evidence
CONFESSIONS:
B § 2.4 Derivative Evidence

Defendant was convicted of robbery. Investigation of a Maine robbery led New Hampshire police to the residence of one Bailey. One officer, fearing danger, requested permission to "look around" Bailey's apartment. Whether such permission was granted is in dispute, but the officer found the defendant and others, who fit the description of the robbery suspects, in the kitchen and arrested them. Later Bailey signed a form consenting to the search of her apartment. Acting pursuant to this consent, officers discovered evidence incriminating the defendant in the basement which was used in common by Bailey and other tenants. Defendant claimed that a person leasing an apartment could not properly consent to a search of the basement over which other tenants or their guests had equal authority.

The court found the search of the basement legal. One who possesses common authority over premises has a sufficient interest in his own right to permit its inspection.

Defendant also claimed that his detention in New Hampshire was illegal and that his subsequent confession, given in Maine, was a fruit of that illegal detention and therefore inadmissible. The court held that evidence must be excluded only if it has been obtained by exploitation of an illegality. In this case, the defendant (1) waived his right to challenge the extradition proceedings, and (2) confessed to Maine authorities 42 hours after his detention, and after knowingly and voluntarily waiving his *Miranda* rights. Furthermore, defendant was at no time subjected to rigorous or continuous interrogation. These intervening acts of free will by the defendant removed the effect of the illegal detention in New Hampshire, and the confession was held admissible. *State v. Grandmaison,* 327 A.2d 868 (Supreme Judicial Court of Maine, November 1974).

CRIMES/OFFENSES:
C § 1.2 Assault
C § 1.3 Weapons
PROCEDURE:
F § 2.6 Instructions

Defendant was convicted of armed assault and battery in violation of 17 M.R.S.A. §201-A and appealed. On May 1, 1973, defendant entered a bar for a drink with an *unloaded* gun tucked under a shoulder immobilizer, a strap used to hold an injured arm close to the body. After "last call" was announced and just before 1:00 a.m., the bartender removed defendant's unfinished bottle of beer from the bar. When defendant's attempt to get a replacement failed, he climbed on the bar, drew his gun, jumped on the bartender and hit the bartender on the head with the gun. During the struggle, the bartender got possession of the gun and retreated to the kitchen. The bartender requested a patron to call the police and the defendant then attempted to rip the telephone out. Failing this, defendant threw a deep frying basket at the bartender. The bartender pointed the unloaded gun towards the defendant and defendant started to break a beer bottle, intending to use it on the bartender, but stopped at the request of a friend and ran out to the bar. On appeal, defendant claimed the presiding justice erred in instructing the jury that armed assault was committed even if the gun was unloaded.

The Law Court held that one may have an unloaded gun and still be convicted of armed assault and battery. In reaching its decision, the court said it could not find any evidence to support a loaded - unloaded distinction in the legislative history of any of the statutes which provide for severe mandatory minimum sentences for persons committing certain offenses while "armed with a firearm." *State v. Maxwell,* 328 A.2d 801 (Supreme Judicial Court of Maine, November, 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.

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