MAY 1975

ALERT

CRIMINAL DIVISION

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

IMPORTANT RECENT DECISIONS

MESSAGE FROM THE ATTORNEY GENERAL JOSEPH E. BRENNAN

This issue of ALERT is devoted entirely to summaries of important recent court decisions. I call your attention particularly to the case of *People v. Superior Court* dealing with the "fruit of the poisonous tree" doctrine and the Maine case of *State v. Granville* dealing with the warnings to be given persons arrested under the implied consent law.

I would also like to announce that the Law Enforcement Education Section will be distributing copies of the Law Enforcement Officer's Manual in compliance with the many requests we have received over the last few months. Every person requesting a Manual will either receive a Manual or a letter explaining why we were unable to send him one. Anyone who does not receive either a Manual or a letter by the end of June should contact the Law Enforcement Education Section immediately.

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SEARCH AND SEIZURE:
A § 2.6 Consent
A § 4.4 Derivative Evidence
CONFESSIONS:
B § 1.3 Miranda
B § 2.4 Derivative Evidence

Defendant was arrested for burglary of an electrical contractor's office when his fingerprint was found on a flashlight found there. He was taken to the police station and given Miranda warnings. He replied that he did not wish to discuss the case. Nevertheless, the officer prolonged the conversation, informing the defendant that his fingerprint had been found at the contractor's office, advising him that a search warrant could be obtained for his residence, commenting that he thought defendant had been involved in other burglaries, and asking defendant's help in apprehending an accomplice in the contractor's office burglary. When defendant was told that the next step was to obtain a warrant to search his residence, he told the officer he would show him the stolen property because he didn't want his relatives' property disturbed. He then confessed to the burglary and consented to the search of his residence, where the stolen property was found.

The court held that the continuation of the interrogation of defendant after he said he did not wish to discuss the case clearly violated his rights under *Miranda*. The following language from *Miranda* was quoted: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-474, 86 S.Ct. at 1627, 16 L.Ed. 2d at 723.

The court also held that the defendant's consent to the search of his home was the fruit of the unlawful interrogation. In order for the consent to be legal, the state would have to show at least an intervening independent act by the defendant or a third party which broke the causal chain linking the illegal interrogation with the stolen property. In other words, the state would have had to show that the evidence was not obtained by exploitation of the illegal interrogation. Here the consent of the defendant was not sufficiently an act of free will to remove the taint of the illegal interrogation. When the officer informed the defendant his fingerprint had been found in the contractor's office, defendant

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responded "The flashlight?"—thereby suggesting he knew a flashlight had been left at the scene of the crime. Defendant's consent to the search may well have been influenced by his assumption that he had already admitted involvement in the crime. Also, the record showed that defendant's consent was prompted by the officer's statement that he was going to get a search warrant. It was clear that defendant's motive in consenting to the search was his concern that the property of his relatives not be disturbed. His consent was therefore not an independent act sufficiently separated from the illegal interrogation. *People v. Superior Court,* 530 P.2d 585 (Supreme Court of California, January 1975)

COMMENT: This case is a good example of the "fruit of the poisonous tree" doctrine. In general, that doctrine states that evidence obtained in violation of a person's constitutional rights cannot be used to develop leads or gather other evidence to aid in a prosecution against him.

It is often difficult for an officer to know when his evidence-gathering activity may be tainted by prior illegal activity, either by himself or by other officers. For example, an officer may think he has complied with all legal requirements in obtaining a confession from a suspect. If a judge later decides, however, that the confession was illegally obtained, any other evidence gathered as the result of the information obtained from the confession is likely to be held inadmissible in court.

Few guidelines can be set out for the officer in this area because of the great variety of situations that arise. Of course, officers are advised to be thoroughly familiar with all required legal procedures in order to minimize the likelihood of violations of individual rights. Equally important, officers should carefully record in detail the specific facts and circumstances surrounding all searches, arrests, and confessions, especially when they are based on information gathered from a prior search, arrest, or confession. Thereby, if the prior police activity is declared illegal, the court will have sufficient information upon which to decide whether there was an independent justification for the subsequent search, arrest, or confession, thus removing the taint of the prior unlawful activity.

CRIMES/OFFENSES:
C § 4.1 Narcotics
EVIDENCE:
E § 1.1 Sufficiency

Defendant was convicted of possession of a controlled substance with intent to distribute. Police officers entering an apartment to execute a search warrant came upon the defendant and a companion holding hypodermic needles to their arms. On a coffee table near the defendant the officers found an envelope with 15 packets of heroin. The individuals were arrested and the officers conducted a search of the apartment. In a drawer the officers found a brown paper sack containing seven cartons and a small bottle of dormin, a package of 1000 staples, thirteen envelopes, a stapler, a strainer, scissors, and a small measuring utensil. The officers also found another brown paper sack containing 431 tinfoil squares. There was testimony that all these items were commonly used for preparing and packaging heroin for street sale, that the occupants of the apartment were users of heroin, and that the fifteen packets of heroin seized would last an addict only one or two days. Defendant claimed that possession of a controlled substance by a user in a form and amount he might commonly have for his own use would not support an inference of intent to distribute.

The court held that the quantity of heroin found is not the only consideration in determining intent to distribute:

> "Circumstantial evidence is sufficient to support an inference of possession with intent to distribute. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance; the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field. In this case it would require a legal magician to make the evidence of intent to distribute disappear or to transform it into evidence of possession for personal use alone." *State v. Turner,* 222 N.W. 2d 105, 106 (Nebraska Supreme Court, October 1974)

COMMENT: Officers investigating cases involving possession of controlled substances with intent to distribute should carefully gather all the types of circumstantial evidence listed above by the court. Although one type of evidence may not establish intent to distribute, the totality of the evidence may do so.

CONFESSIONS:
B § 1.3 Miranda
EVIDENCE:
E § 1.2 Hearsay

Defendant was convicted of reckless homicide and appealed. At his trial, one law enforcement officer testified that the defendant made damaging admissions after being given the *Miranda* warnings by another officer, who did not testify at the trial. Defendant claimed that the officer's testimony constituted hearsay and was improperly admitted.

The court held that the admission of the officer's testimony did not violate the rule against hearsay. Hearsay does not encompass all out-of-court statements but only those offered for the purpose of proving the truth of the matters asserted in the statement. The officer's testimony in this case was not offered to prove the truth of the *Miranda* warnings but only to prove that they were given before the defendant made a statement. *People v. Richardson,* 316 N.E. 2d 37 (Appellate Court of Illinois, August 1974).

COMMENT: For a discussion of the hearsay rule, see pages V-C4-C6 of the Law Enforcement Officer's Manual.

MAINE COURT DECISIONS

TRAFFIC OFFENSES:
C § 6.5 Driver's License [Implied Consent]
C § 6.2 Driving While Intoxicated—Blood Test
LAW ENFORCEMENT OFFICERS: M § 2

Defendant appealed a conviction of violating 29 M.R.S.A. §1312 (operating a motor vehicle while under the influence of intoxicating liquor). The arresting officer read the following to the defendant from a card:

> "You are under arrest for operating a motor vehicle while under the influence of intoxicating liquor. And you are entitled to a blood or breath test for the purpose of determining the alcoholic content of your blood. You must select and designate either the blood or breath test, and I must advise you that your refusal to take the test—one of these tests, blood or breath, requested by me, will result in your license and/or right to operate being suspended. And the expense for any test taken at my request will be paid for by the State." (Slip opinion at 1)

The single question on appeal was whether this statement by the officer sufficiently appraised the defendant of her rights under the implied consent law to allow the results of a subsequent breathalator test to be admitted into evidence. The court held that it was *not.*

The court said before the results of a blood or breath test may be admitted into evidence, 29 M.R.S.A. §1312(1) requires that a person be advised of the "consequences" of a refusal. Failing to inform a person of the consequences of a refusal renders the test results inadmissible. In this case, the statement by the law enforcement officer was defective because it failed to inform the defendant that a mandatory suspension of three months would be imposed for a first refusal and a six month suspension for any second or subsequent refusal under any Maine implied consent law. The court said the length of suspension is a critical consequence of refusing to take a blood or breath test. Without such information, there could be no informed consent under 29 M.R.S.A. §1312 and therefore the test results were inadmissible. *State v. Granville,* Docket No. 1156 (Supreme Judicial Court of Maine, May 1, 1975).

COMMENT:

This case requires law enforcement officers administering the implied consent law to inform the arrestee of the consequences of a refusal under the implied consent law. Specifically, law enforcement officers must tell the arrestee that a refusal will result in a license suspension for three months if it is a first refusal, or six months if it is a second refusal. Therefore, law enforcement officers are encouraged to use the following implied consent refusal form now being used by the Maine State Police:

> *You are entitled to a blood or breath test for the purpose of determining the alcoholic content of your blood. You must select and designate either the blood or breath test. I must advise you that your refusal to take one of these tests, blood or breath, requested by me, will result in your license and/or right to operate being suspended. Such suspension shall be for a period of 3 months in the case of a first refusal or 6 months in the case of a second or subsequent refusal under the current law or any prior implied consent provision under Maine law. The expenses for any test taken at my request will be paid for by the State.*
>
> *The results of any test taken will be made available to you or your attorney, if requested.*

CONFESSIONS/SELF-INCRIMINATION:
B § 1.1 Interrogation—Voluntariness
B § 1.3 Interrogation—Miranda
B § 1.5 Interrogation—Incompetents
B § 2.1 Procedure—Prerequisite to Suppression

Defendant was convicted of robbery and appealed. Two days after a robbery, officers came upon the defendant, a suspect in the robbery, on the street. The officers requested that the defendant accompany them to the station for questioning, explaining that he was not under arrest. At the station, defendant was told the reason for the questioning and was carefully given the *Miranda* warnings. Defendant then admitted orally to one officer his participation in the robbery. The officer was then called away and another officer, without readvising defendant, reduced his statement to writing. Since defendant was unable to read, the officer read the written statement to him, and defendant signed it. Defendant claimed on appeal that the statement should not have been admitted into evidence against him because (1) he was not competent to waive his privilege against self-incrimination, and (2) he did not waive the privilege.

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The court held that although defendant was below average in intellectual capacity, was close to illiterate, has been extensively treated at a mental institution, and had drunk two pints of whiskey two to three hours prior to the questioning, the presiding justice was warranted in his conclusion that beyond a reasonable doubt defendant was legally competent to waive his privilege against self-crimination and the *Miranda* rights ancillary to it. At the suppression hearing defendant had evidenced a substantial comprehension of the workings of the legal system. There was no evidence of external inducements, deception, or coercion during the questioning. One of the officers testified that defendant was not intoxicated or under the influence. Finally, the answers and statements given in response to questioning indicated that defendant was aware and able to comprehend and to communicate with coherence and rationality.

The court also held that although defendant never expressly waived his *Miranda* rights and the second officer did not rewarn defendant, the presiding justice was warranted in his conclusion that beyond a reasonable doubt, defendant in fact waived his privilege against self-incrimination and the *Miranda* rights encompassed within it. Waiver may be effected by conduct other than the use of express words of waiver. Here defendant's choosing to speak and not request a lawyer after being advised of his rights and indicating understanding was sufficient. Also, the failure to reinform defendant of his rights did not vitiate the voluntariness of his statement because the second officer undertook no independent interrogation, the substitution of officers was practically simultaneous, and the second officer came in only twenty minutes after the warnings had been given. *State v. Hazelton*, Docket No. 1128 (Supreme Judicial Court of Maine, January 20, 1975).

COMMENT: A law enforcement officer attempting to obtain a waiver of Miranda *rights from a suspect should make careful notes on the various indications that the suspect is competent to waive those rights. Also, despite the holding in this case, it is probably a safer procedure for an officer who takes over the interrogation of a suspect from another officer to rewarn the suspect of his* Miranda *rights.*

SEARCH AND SEIZURE:
A § 4.1 Suppression of Evidence: Motion
EVIDENCE:
E § 1.2 Hearsay
WITNESSES:
E § 3.3 Confrontation
SENTENCING:
G § 2.1 Probation

Defendant was charged with breaking and entering with intent to commit larceny (17 M.R.S.A. §754). After the presiding justice granted defendant's motion to suppress as evidence the property taken from the apartment which defendant allegedly had entered, the prosecutor moved that the indictment against defendant be dismissed. The presiding justice concluded that the property had been unlawfully seized and granted the motion and dismissed the indictment. Subsequently, the State Probation and Parole Board filed a probation-violation report alleging that defendant had violated the terms and conditions of his probation by being knowingly in possession of stolen property—the same property which had been suppressed on the basis of defendant's pre-trial motion. At a hearing to determine whether defendant's probation should be revoked, defendant moved that the property be suppressed as evidence for purposes of the revocation of probation hearing. The motion was denied and the property was admitted into evidence. Defendant's probation was revoked and he appealed, claiming that the denial of his motion to suppress at the revocation of probation hearing constituted reversible error.

The court held that evidence which is suppressed in a criminal proceeding because obtained in violation of the Fourth Amendment may nevertheless be admitted in a revocation of probation hearing. Neither Rule 41(e) M.R. Crim. P., nor the Fourth Amendment exclusionary rule operate to bar the admission of such evidence. Holding that a hearing to revoke a probation is not a "criminal proceeding" to which Rule 41(e) has applicability, the court concluded that the Rule 41(e) procedure of a motion to suppress is not available at such hearings.

The basis for the court's holding that the Fourth Amendment exclusionary rule is inapplicable to probation revocation hearings was that since the

> "rule is operative in any event in all 'criminal prosecutions,' the additional furtherance of its policy objectives achieved by extending the rule to hearings for revocation of probation (or parole) is insufficient to justify the concomitant impairment of the proper functioning of the probation-parole system." (Slip opinion at 9) *State v. Caron*, Docket No. 1143 (Supreme Judicial Court of Maine, March 3, 1975)

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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