NOVEMBER 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

As I mentioned in last month's Message from the Attorney General, the Law Enforcement Education Section and the Criminal Law Revision Commission, under a grant from the Maine Criminal Justice Planning and Assistance Agency, are planning and coordinating the Maine Criminal Code Education Project. The Project will offer training to Maine law enforcement officers in the recently enacted Maine Criminal Code. A major component of the Project will be a series of classes specifically designed to assist law enforcement officers in adapting to the Code. These classes will feature videotaped lectures by Professor Sanford J. Fox, General Counsel to the Criminal Law Revision Commission. Each class will be conducted by a District Attorney, an assistant or an Assistant Attorney General. The classes will run for approximately ninety minutes, and will consist of a one hour taped lecture followed by a one-half hour discussion period.

Professor Fox's lectures will cover ten one-hour tapes. Law enforcement officers therefore can expect ten classes amounting to a total of 15 classroom hours. Specific dates and times of the classes will be worked out for each prosecutorial district in the weeks ahead.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

ARREST/SEARCH AND SEIZURE:
A § 1.1 Reasonable Grounds
A § 4.4 Derivative Evidence ["Fruit of the Poisonous Tree"]
CONFESSIONS:
B § 1.3 Miranda
B § 2.4 Derivative Evidence ["Fruit of the Poisonous Tree"]

Defendant was convicted of murder. He was arrested without probable cause and without a warrant under circumstances indicating the arrest was investigatory. He was taken to the station house, given the Miranda warnings on two separate occasions, and gave inculpatory statements on both occasions. His pretrial motion to suppress the statements was denied. The state supreme court, although recognizing the unlawfulness of petitioner's arrest, held that the statements were admissible on the ground that the giving of the Miranda warnings served to break the causal connection between the illegal arrest and the giving of the statements, and defendant's act in making the statements was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun v. U.S.*, 371 U.S. 471, 486, 83 S.Ct. 407, 416-417, 9 L.Ed. 2d 441, 454 (1963).

The U.S. Supreme Court held that the state supreme court erred in adopting a per se rule that Miranda warnings, by themselves, purged the taint of an illegal arrest, so that any subsequent statement, even one induced by a wanton and purposeful Fourth Amendment violation, was admissible so long as it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments. When the exclusionary rule is used to effectuate the Fourth Amendment, it serves interests and policies that are distinct from those it serves under the Fifth, being directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment remains. Wong Sun requires not merely that a statement meet the Fifth Amendment voluntariness standard but

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that it be "sufficiently an act of free will to purge the primary taint" in light of the distinct policies and interests of the Fourth Amendment.

The question whether a confession is voluntary under Wong Sun must be answered on the facts of each case. Though the Miranda warnings are an important factor in resolving the issue, other factors must be considered such as the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. The burden of showing admissibility of in-custody statements of persons who have been illegally arrested rests on the prosecutor. The state failed to sustain its burden in this case of showing that petitioner's statements were admissible under Wong Sun. *Brown v. Illinois,* 43 U.S.L.W. 4937 (U.S. Supreme Court, June 26, 1975).

COMMENT: The defendant in this case was arrested without probable cause and without a warrant. Statements given after an illegal arrest are very difficult to get into evidence. On retrial, the critical question is whether the statements given after the Miranda *warning were a sufficient act of free will to purge them from the taint of the illegal arrest. This case points out the need for law enforcement officers to take careful notes concerning circumstances surrounding the giving of a* Miranda *warning so that, if an arrest is later determined to be illegal, the officer may use his notes to recall other details surrounding the admission which may prove the statements were an act of free will, and not tainted by the illegal arrest.*

ARREST, SEARCH AND SEIZURE:
A § 2.6 Consent-Abandonment

Federal drug agents were waiting for defendant's private airplane to arrive at the airport because the agents suspected the arrival of contraband. When the airplane arrived, the defendant got out, a person drove up to the plane, talked to the defendant, left his car with the defendant and walked to a nearby administration building. Defendant backed the car up to the plane and opened the trunk of the car. Federal drug agents, who were not in uniform and who had no visible weapons, approached the defendant, identified themselves, and requested permission to inspect the cargo without advising defendant that he could refuse. The defendant agreed without hesitation, produced the keys and unlocked the plane's cargo door himself. The agents found contraband inside. The trial court concluded defendant's consent to search the airplane was not voluntary and granted his motion to suppress.

On appeal, the circuit court overruled the trial court's decision to suppress the seized contraband, saying their analysis of the facts led them to conclude the government had maintained its burden to prove defendant's consent to inspect the cargo was uncoerced under the totality of the circumstances. When the agents requested permission to search the airplane's cargo, no threats were made, no weapons were used and no uniforms were visible. The defendant immediately agreed, produced the keys and opened the cargo door. The court said the fact that defendant knew the search could prove incriminating did not negate the possibility that the consent was voluntary and not the product of coercion. The court also said a voluntary consent to search may be given by persons who have not been advised, and are presumably unaware, of their right to withhold their consent. *U.S. v. Ciovacco,* No. 74-1430 (1st Circuit Court of Appeals, June 10, 1975).

COMMENT: The defendant's knowledge that he has a right to refuse a law enforcement officer's request to search is only one factor considered by courts in determining whether a consent to search is voluntary under the totality of the circumstances. Of course, if a law enforcement officer advises a person of his right to refuse the officer's request to search, and the search was subsequently consented to, it would be very difficult for a person to claim later that his consent was coerced. For a discussion of consent searches see the Law Enforcement Officer's Manual, Section III-B.

CONFESSIONS/SELF-INCRIMINATION:
B § 1.3 Interrogation-Miranda
DEFENDANT'S RIGHTS/ DEFENSES:
D § 3.1 Alibi
EVIDENCE/WITNESSES:
E § 1.4[a] Improper Reference
E § 2.1 Impeachment: Defendant
E § 3.3 Cross-examination

Defendant was convicted of robbery. Following his arrest he was taken to the police station. After being advised of his right to remain silent, he made no response to an officer's inquiry about the source of money found on his person. Defendant testified at his trial and offered an alibi as a defense. In an effort to impeach this alibi, the prosecutor caused defendant to admit on cross-examination that he had not offered the exculpatory information concerning his alibi to the police at the time of his arrest. The trial court instructed the jury to disregard the exchange but did not declare a mistrial.

The U.S. Supreme Court held that the defendant's silence during police interrogation lacked significant probative value and therefore should not have been allowed into evidence. The court said defendant'silence was not so clearly

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inconsistent with his trial testimony as to warrant admission into evidence as a prior inconsistent statement because (1) defendant repeatedly asserted his innocence during the proceedings; (2) after defendant's arrest he was questioned in secretive, possibly intimidative surroundings with no one but police present; and 3) as a target of eyewitness identification, defendant was clearly a "potential defendant." Under the circumstances of the case, the failure of defendant, who had just been given the Miranda warnings, to respond during custodial interrogation to inquiry about the money could as easily connote reliance on the right to remain silent as to support an inference that his trial testimony was a later fabrication. Since the jury was likely to assign much more weight to the defendant's previous silence than was warranted, evidence of the silence had a significant potential for prejudice. The Court ordered a new trial for defendant. *U.S. v. Hale,* 43 U.S.L.W. 4806 (U.S. Supreme Court, June 23, 1975).

SEARCH AND SEIZURE:
A § 2.3 Incident to Arrest
CRIMES/OFFENSES:
C § 7.1 Conspiracy
EVIDENCE:
E § 1.1 Sufficiency
E § 1.2 Hearsay

Defendant was convicted of distribution of cocaine in violation of 21 U.S.C. §841(a) (1) and 18 U.S.C. §2, and for conspiracy to so distribute in violation of 21 U.S.C. §846. After arranging to purchase cocaine from one Bernier, a federal agent paid Bernier $1400 for an ounce of cocaine. Bernier then stated that she would go see her friend and that she would return soon with three more ounces of cocaine. Agents then observed her enter a vehicle driven by defendant. Bernier then returned to the agent-purchaser, who asked her if she had picked up the rest of the cocaine. Bernier replied that she had and displayed a plastic bag containing three ounces of cocaine. After the agent departed, other agents arrested Bernier. Soon defendant approached on foot. Bernier then pointed at defendant and identified him as her source. Defendant was arrested, taken to the agent's headquarters, and ordered to strip. An agent found in defendant's underwear $1400 in one hundred dollar bills, the serial numbers of which matched the serial numbers on the bills which had been given to Bernier. After handing over the $1400, defendant continued to strip. He was then ordered to bend over, and he was examined visually by an agent, including visual examination of his rectum.

On appeal, defendant argued that the $1400 should have been suppressed as the fruit of an illegal search. After determining that there existed sufficient facts and circumstances to justify the arrest of defendant, the court addressed defendant's argument that the strip search was unreasonable. The court concluded that there was nothing unreasonable in the circumstances of the instant search, saying:

> "A post-arrest search of the person, plainly authorized by Edwards and DeLeo, may include requiring a suspect to remove his clothes and a visual inspection of his person . . . That is all that happened here. If such procedures were not permissible it would often be difficult to conduct a thorough search for weapons and contraband.
>
> "The facts are not akin to the taking of blood considered in *Schmerber v. California,* 384 U.S. 757 (1966). There the Court, while permitting the enforced taking of a blood sample, limited 'searches involving intrusions beyond the body's surface' to cases where authorities possess 'a clear indication that in fact . . . evidence will be found,' . . . But the present facts do not require us to consider the extent to which compulsory medical procedures may be imposed upon persons lawfully arrested. There was no piercing or probing of Klein's skin, nor forced entry beyond the surface of his body. There was not even any touching of his body. Thus, his only claim is based upon the indignity of being forced to strip in front of the agents and to expose his private parts. But there is no evidence that the stripping was a pretext to humiliate or degrade him, and the modesty of one lawfully arrested must give way to reasonable precautionary procedures designed to detect hidden evidence, drugs, or objects which might be used against others or to cause self-inflicted harm . . ." (Slip opinion at 6-7)

(Footnote and citations omitted) U.S. v. Klein, No. 75-1105 (1st Circuit Court of Appeals, July 28, 1975)

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

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MAINE COURT DECISIONS

SEARCH AND SEIZURE:
A § 2.1 Probable Cause
A § 2.3 Incident to Arrest
A § 2.5 Persons Without a Warrant

Defendant was found intoxicated, arrested and subjected to a full warrantless search of his person before being locked up in jail. His wallet was removed and a search of the contents produced a ball of tinfoil, which, when opened, produced an orange pill containing d-lysergic acid diethylamide (LSD 25). The pill was seized and was the basis for a charge of illegal possession of LSD-25 in violation of 22 M.R.S.A. §2212-B. Defendant contends that the pre-incarceration search of the contents of his wallet and the opening of the ball of tinfoil violated Article I, §5 of the Maine Constitution.

The court held that warrantless pre-incarceration searches of persons validly arrested are reasonable and such searches need not stop once an item has been removed from an arrestee's person. The item then may be examined to identify any objects contained therein. In this case, the wallet may have contained "a small gem or a plastic explosive." Protection of jailers and inmates, along with the proper securing and inventorying of prisoners' personal property are but a few justifications for such a search. Therefore, the search of the wallet and seizure of the pill did not violate Article I, §5 of the Maine Constitution. *State v. Dubay,* 338 A.2d 797 (Supreme Judicial Court of Maine, May 1975).

COMMENT: In the February 1974 ALERT, p. 10 State v. Dubay, *313 A.2d 908 [Supreme Judicial Court of Maine, 1974] was summarized and it was stated that the search described above did not violate the Fourth and Fourteenth Amendment rights guaranteed defendant Dubay under the federal constitution. The Dubay case summarized in this issue of ALERT holds that no rights guaranteed defendant Dubay under Article I, §5 of the Maine Constitution were violated by the pre-incarceration search.*

It is now settled as a matter of federal and state constitutional law that Maine law enforcement officers prior to a lawful incarceration of a defendant may, with neither a warrant nor probable cause, inspect any container found on the defendant's person and seize the contents of the container.

CRIMES/OFFENSES:
C § 2.6 Arson
CONFESSIONS/SELF-INCRIMINATION:
B § 1.1 Voluntariness
B § 2.2 Hearing

There was a fire in the ceiling of a latrine at the Maine State Prison. An investigation revealed that a section of ceiling tile in the burnt latrine had been removed and, on the floor immediately above the latrine, two boards had been knocked out. Crumpled, tightly packed newspapers were packed in the hole created by the removed ceiling tile and the knocked out boards. No electrical wires were in the ceiling where the newspapers were packed. Prison officials subsequently questioned the defendant who confessed to starting the fire. Defendant was found guilty of arson in the second degree. On appeal, defendant claims the corpus delicti of the crime was not established and therefore his confession was improperly admitted into evidence.

Before a confession may be admitted into evidence, the corpus delicti (the body of the crime) must be proven. In order to establish the corpus delicti, the state must adduce

> "Credible evidence which, if believed, would create in the mind of a reasonable man, not a mere surmise or suspicion, but . . . a really substantial belief. . ."

that someone had committed the crime of arson. *State v. Grant,* 284 A.2d 674, 676 (Supreme Judicial Court of Maine, 1971). The Law Court rejected defendant's claim, holding that the evidence established adequate proof of the corpus delicti prior to the admission into evidence of defendant's confession.

Defendant also claimed that his confession was improperly admitted into evidence because the trial justice failed to provide defendant with an adequate opportunity to prove the confession was involuntary. At trial, the trial justice excused the jury when a prison official began to talk about the circumstances surrounding defendant's confession. After the prison official finished testifying, the trial justice ruled that the confession was voluntary and ordered the jury back to hear the prison official's testimony regarding defendant's confession. Defendant's trial counsel objected, saying the defendant wished to take the stand and testify regarding a misunderstanding surrounding his conversation with prison officials which would render his confession inadmissible because it was involuntary. The trial justice noted defendant's request but refused to allow him to testify. The Law Court held this was reversible error since the defendant has a right to offer evidence bearing on the

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voluntariness of his confession. Therefore, defendant's conviction was reversed and the case remanded for re-trial in the superior court. *State v. Sheehan,* 337 A.2d 253 (Supreme Judicial Court of Maine, May 1975).

COMMENT: Whenever a defendant confesses to a crime, law enforcement officers should make sure that they obtain sufficient independent evidence that someone committed the crime. Without proof of the corpus delicti, the defendant's confession will be inadmissible in court.

ARREST, SEARCH AND SEIZURE:
A § 1.1 Reasonable Grounds
A § 2.4 Automobiles Without a Warrant

Defendant's motion to suppress a quantity of illicit drugs, seized during a warrantless search of his automobile, was granted by the superior court. On the initiative of the state, the superior court reported to the Law Court the issues raised by the granting of defendant's motion.

A law enforcement officer patrolling in his cruiser heard a police broadcast of a robbery in another town. The getaway car was describe as a Volkswagen with a ski rack, and one of the suspects was described as 5'6", 150 pounds, with shoulder length red hair. Later the officer routinely checked a Mercury without a ski rack parked at a highway turnout, where he observed defendant, who had long hair of light color and seemed short because of the way he was sitting in the car. Later the officer received a repeat broadcast of the robbery and he rechecked defendant and examined his license and registration. Upon satisfying himself that there was some similarity between the defendant and the description of the suspect, the officer radioed for a back-up officer who arrived and announced that defendant had a criminal record. The officer then obtained defendant's permission to search the car. However, when the officer came upon a brown paper bag in the glove compartment, defendant objected to searching it. The officer then told the defendant he had authority to search under the Carroll Doctrine. When defendant still refused, the officer, after determining by feeling that the bag did not contain a weapon, opened it and discovered and seized controlled substances.

The Law Court held that the officer did not have probable cause to search under the Carroll Doctrine and therefore defendant's motion to suppress was properly granted. In light of the utter dissimilarity of defendant's car to the description of the suspect's car, and defendant's lack of proximity or other relation to the crime, the officer's limited identification of defendant was insufficient to establish probable cause. The officer's knowledge of the suspect's prior criminal conduct could not, by itself or in conjunction with slight facts, provide probable cause for arrest. The defendant's objection to the officer's search of the paper bag did not cumulate with other factors to establish probable cause relating to the reported holdup, because the paper bag was not transparent and no reason appeared to connect brown paper bags, whose contents were unknown, with the holdup. Neither did defendant's objections, in themselves, amount to probable cause because the bag itself was not an unduly suspicious object and defendant's objections did not amount to furtive conduct. *State v. Walker,* 341 A.2d 700 (Supreme Judicial Court of Maine, July 1975).

COMMENT: For a discussion of the Carroll Doctrine, see pages III-D1-D5 of the Law Enforcement Officer's Manual.

ARREST, SEARCH AND SEIZURE:
A § 2.3 Incident to Arrest
A § 3.1 Entry
A § 4.4 Derivative Evidence
SELF-INCRIMINATION:
B § 2.4 Derivative Evidence
B § 3.1[a] Identification: Wade-Gilbert-Stovall

Defendant was convicted of robbery and of assault of a high and aggravated nature. The victim was assaulted and robbed while trying to help four persons start their car, which was stalled. His car was then used to push the disabled car to a housing development parking lot, and he was later abandoned in his car on the streets of Portland. After receiving treatment for his injuries, the victim directed a police officer to the disabled car. Further investigation led them to a house and the officer knocked on the outer door. Receiving no reply, the officer noticed that the entryway led into a hallway and he entered and knocked on an inner door. The defendant answered the door and was immediately identified by the victim as his assailant. The officer arrested defendant and searched him, finding several .22 caliber bullets. Defendant claimed that the justice below erred in not suppressing the testimony of the victim identifying the defendant and the bullets seized as a result of the search incident to arrest.

The court said that police officers may, without violating the constitution, peaceably enter upon the common hallway of a multiple unit dwelling without a warrant or express permission. In this case, since the prosecution offered no evidence that the house where defendant was found was a multiple unit dwelling, the court viewed the police entry as an intrusion on defendant's privacy. Furthermore, even though the officer was acting in good faith for the reasonable purpose of continuing an investigation of a crime,

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he did not have a warrant or probable cause, he did not have reasonable grounds to believe the person to whom he wanted to talk was at that address, nor did it appear that persistent knocking at the outer door would have gotten no response. Absent exigent circumstances, the officer's presence at the inner door was unlawful and constituted a trespass.

The court held, however, that the out-of-court indentification of the defendant was not a result of the exploitation of the illegal entry into defendant's home. At the time of the confrontation, the officer was still in the investigatory process of the robbery with the aid of the victim. His purpose was not to obtain incriminating statements from the defendant, nor was it intended to secure information on physical evidence. The court said:

> "Recognizing the right of the defendant to be protected from prejudicial procedures unnecessarily suggestive and conducive to irreparable mistaken identification by victims of crime or witnesses thereto and balancing the interest of society in the prompt and purposeful police investigation of an unsolved crime, we see, in the totality of the circumstances surrounding the defendant's confrontation by Mr. Hart including the trespassorial aspect of the initial entry into the hallway, no deprivation of any constitutional right." (341 A.2d at 6)

Furthermore, it was important that the victim have the opportunity to see the possible owner of the disabled vehicle while his recollection of the events was fresh in his mind.

When the victim identified the defendant as his attacker, the officer had probable cause to arrest. The subsequent search of defendant, which produced the bullets, was incident to a lawful arrest and the fruits of the search were properly admitted in evidence. *State v. Crider,* 341 A.2d 1 (Supreme Judicial Court of Maine, July 1975).

COMMENT: It is important to point out that the investigating officer was not searching for physical evidence, nor was he seeking to obtain incriminating statements from the defendant. If this had been the case, the court indicates the case would have been reversed. Also, the court clearly states that common hallways of a multiple unit dwelling may be entered without a warrant or express permission.

CRIMES/OFFENSES:
C § 6.3 Traffic Offenses
PROCEDURE:
F § 1.1 Complaint

Defendant was charged with a violation of 29 M.R.S.A. §1362 by a complaint which charged him with "unnecessary acceleration of his motor vehicle so as to cause a harsh, unreasonable and objectionable noise, to wit: squealing tires." The presiding justice denied defendant's motion to dismiss the complaint and ordered the matter reported to the Maine Supreme Judicial Court for a ruling upon the denial of the motion.

Defendant argued first that 29 M.R.S.A. §1362 was so vague and overbroad as to deny him due process. Defendant contended that this statute does not establish any standard by which a person can determine what is a "harsh, objectionable or unreasonable" noise, and therefore a person has no way of knowing the types and degrees of noise prohibited by the statute. The court rejected this argument, holding that the noise forbidden by the statute is framed in words of common use and understanding and sufficiently conveys to drivers an accurate description of what is forbidden. The statute forbids only those noises which are harsh and loud enough to offend the sensibilities of the public to an unreasonable degree and which are unnecessary to the safe movement of traffic.

The court also held that the complaint (quoted above) was sufficient. Although a complaint which charges the offense simply by using the language of the statute is not, in every case, sufficient, here the complaint was not limited to the statutory language. The language "squealing tires" described the noise in words of common use and understanding. Moreover, the complaint stated the manner in which the defendant caused the noise—"by unnecessary acceleration." Thus, the complaint described the sound in unmistakable language and alleged the manner in which it was produced. Additionally, in charging that the acceleration was unnecessary, the State adequately alleged that no emergency situation of highway danger reasonably required the action. *State v. Sylvain,* 344 A.2d 407 (Supreme Judicial Court of Maine, September 1975).

ALERT

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