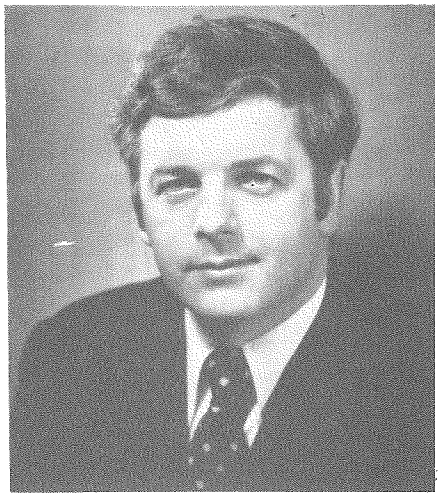
AUGUST 1976

ALERT

CRIMINAL DIVISION

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



MAINE COURT DECISIONS

MESSAGE FROM THE ATTORNEY GENERAL JOSEPH E. BRENNAN

Because of the enactment of the Maine Criminal Code and other important legislation by the Special Sessions of the 107th Maine Legislature, the ALERT Bulletin in 1976 has been devoted almost entirely to presenting and explaining legislation. This and next month's ALERTs will be devoted entirely to summaries of recent court decisions in an attempt to keep law enforcement officers informed of developments in case law.

Also, enclosed with this month's ALERT is a pamphlet describing programs, courses, and other activities at the Maine Criminal Justice Academy. Each officer should read this pamphlet thoroughly to determine how the Academy can help to further his occupational and career needs.

Joseph E. Brennan

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Attorney General

CONFESSIONS/SELF-INCRIMINATION:
B § 1.3 Miranda
EVIDENCE:
E § 1.10 Opinion: Expert-Polygraph

The investigation of the death of a baby centered on the defendant almost immediately and he agreed to take a lie detector test. Results of the test led to the charging of the defendant with manslaughter. Admissions made by defendant during the course of polygraph testing formed the basis for the court's conclusion that the defendant was guilty of assault and battery high and aggravated.

Defendant claimed that because the admissions resulted from reactions to questions asked during testing, the effect of the court's ruling was to permit the results of the polygraph tests to be received in evidence. The court held:

> "While we remain firm in our previously announced position that the results of a polygraph test are not admissible in evidence because their inherent reliability has not been accepted in the scientific community, we conclude that admissions made by an accused after the polygraph testing procedure has terminated, although made in response to questions prompted by the polygraph examiner's interpretation of *'reactions to questions asked during the testing,'* are admissible if such admissions are found to be voluntary beyond a reasonable doubt." *State v. Bowden,* 342 A.2d 281, 285 (Supreme Judicial Court of Maine, July 1975).

COMMENT: A polygraph examination may not be used as an excuse to interrogate a suspect without giving him Miranda *warnings. Furthermore, any admissions obtained from a suspect as a result of questions prompted by his reactions to a polygraph examination must be voluntary beyond a reasonable doubt in order to be admissible in court. Therefore, if a law enforcement officer conducting a polygraph examination coerces the person examined in any way, any admission or confession will be inadmissible in court.*

SEARCH AND SEIZURE:

A § 2.3 Incident to Arrest—Arrest or Search for One Offense, Seizure for Another

A § 2.4 Persons and Places—Without a Warrant

Defendant was found operating a motorcycle without a proper license and with an inadequate exhaust. The law enforcement officer elected to arrest the defendant and take him into custody. The officer then requested the defendant to empty his pockets and place the contents on the hood of the car. The officer then "patted down" the defendant, felt a small hard object, and removed it. The object was a plastic cylindrical container. When opened, the container produced pink tablets in a glassine bag. These tablets subsequently turned out to be phencyclidine.

The single issue before the Law Court was whether Article 1, Section 5 of the Maine Constitution requires that scope limitations be placed upon warrantless searches of the person made incident to valid custodial arrests. Following *State v. Dubay,* 338 A.2d 797 (Me. 1975), the court held that there are no scope limitations on a search incident to a valid arrest because " . . . 'the validity of the custodial arrest per se' . . . provides 'sufficient justification' for 'unlimited . . . searches of the person.' " 343 A.2d at 590, quoting *State v. Dubay, supra,* at 800. The court took pains to point out that the issue of the lawfulness of the *custodial* nature of the arrest was not before the court. *State v. Paris,* 343 A.2d 588 (Supreme Judicial Court of Maine, August 1975).

COMMENT: This case reaffirms the principle that a lawful custodial *arrest provides sufficient justification for a full search of the person of the individual arrested. The court, however, did not specifically decide whether the arrest in this case was a* lawful *custodial arrest, because the issue was not properly presented to the court. In a future case, the court may decide that a* custodial *arrest is unnecessary in a particular case and that a full search of the person is not justified. Officers, therefore, should always have a good reason for making a full* custodial *arrest. If an officer makes a custodial arrest merely for the opportunity to conduct a full warrantless search of the person of the individual arrested, the search is likely to be declared illegal.*

SEARCH AND SEIZURE:

A § 2.3 Incident to Arrest

A § 2.4 Automobiles-Without a Warrant

A § 2.5 Persons and Places-Without a Warrant

Defendants were convicted of assault while armed with a .22 caliber pistol and they appealed the ruling of the presiding justice denying a motion to suppress a .22 caliber pistol and certain shells. A short time after 1:45 a.m. a car with a loud exhaust passed the house of one Streng, a law enforcement officer. The car returned moments later heading south and, as it passed, a shotgun blast came through Streng's living room window. Streng then went out and began to make temporary repairs to the living room window when a vehicle with a loud exhaust drove by again. Streng jumped for cover and numerous shots were fired towards the house. Streng noticed that the vehicle was an old dark sedan. Pursuant to a tip, police staked out a house that night where an old dark sedan was parked and the ice on the driveway was freshly broken. At 3:55 a.m. the dark sedan left the driveway and refused to stop when signaled by police. When a road-block stopped the car, a shotgun was on the front seat and shotgun shells on the floor between the seat and the door on the front passenger side. Defendants were then arrested, patted down, and an expended shotgun shell was taken from one of the defendants. A closer search of that defendant produced several unexpended .22 caliber shells, and a search of the vehicle produced a .22 caliber pistol from under the front seat. Later, when the vehicle was taken to a local garage for storage, police found a .22 caliber shell on the outside of the sedan. Additional .22 caliber shells were found outside the Streng house and on another defendant after a search at the sheriff's office. The defendants contended that all these seizures violated their Fourth and Fourteenth Amendment rights.

The court held that the shells found on the car when it was at the garage and those found outside the Streng house were in plain view, and no search was involved. In addition, the court held that police had probable cause to arrest the defendants at the road-block because of the facts recited above. Any search of their persons was permissible as a search incident to a valid custodial arrest. The shells found upon their persons, both at the road-block and at the jail, were therefore admissible. The court also held the search of the vehicle at the scene valid under *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970), because there was probable cause to search the vehicle as an instrumentality of the crime, and there were exigent circumstances because of the possible movability of the vehicle. *State v. Little,* 343 A.2d 180 (Supreme Judicial Court of Maine, August 1975).

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CONFESSIONS/SELF-INCRIMINATION:
B § 1.3 Miranda
B § 2.2 Voluntariness

Defendant was convicted of felonious homicide punishable as murder. A law enforcement officer, acting on a radio communication and a tip, approached two vehicles parked on the highway. After talking with one of the persons present (defendant's father), the officer approached the defendant and gave him the *Miranda* warnings. The officer asked the defendant if he wanted to talk and he replied that he did not. When the officer asked the defendant if he understood his rights, the defendant stated, "I killed her (his girlfriend) and I want to get her out of there." The officer then asked where the girlfriend was and defendant told him the motel and room number. Defendant appealed, claiming that his inculpatory statements should not have been admitted into evidence because they were taken in violation of *Miranda*.

The court held that defendant's statements were admissible:

> "Considering the emotional state that the appellant appeared to be in, the officer could not be criticized, after hearing that appellant did not wish to talk to him, for asking him if he understood his right to remain silent. An affirmative answer would have ended the interview but the appellant elected to make the quoted statement. The officer could not be accused of indulging in any subleties because at that time he knew none of the facts.
>
> "The inculpatory statements having been voluntarily made, the officer's inquiry as to where the body might be found falls into the category of a neutral inquiry prompted by the appellant's own statement. As such it was admissible." *State v. Armstrong*, 344 A.2d 42, 51 (Supreme Judicial Court of Maine, September 1975).

CONFESSIONS/SELF-INCRIMINATION: B § 1.3 Miranda

Defendant was arrested in connection with a break and was brought to the county jail, where he was questioned on two separate occasions. The first questioning took place at about 4:30 p.m. at which time complete *Miranda* warnings were given. The second questioning occurred the following morning at approximately 9:00 a.m. At the second questioning, defendant was not given full *Miranda* warnings but was reminded of the rights of which he had been advised the previous day. After replying that he was aware of his rights, defendant gave incriminating statements in response to the police interrogation. Defendant was convicted of breaking, entering and larceny in the nighttime (17 M.R.S.A. §2103). On appeal he argued that the incriminating statements were improperly admitted into evidence because of the inadequacy of the *Miranda* warnings at the second questioning.

The court denied the appeal noting several factors which are significant in determining when an accused must be reinformed of his constitutional rights. These factors are:

> (1) the time lapse between the last *Miranda* warnings and the accused's statements;
>
> (2) interruptions in the continuity of the interrogation;
>
> (3) whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the accused's statement was made;
>
> (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement; and
>
> (5) whether the statement elicited during the complained of interrogation differed significantly from other statements which had been preceded by *Miranda* warnings.

In this case, although 17 hours had elapsed since defendant had been given the full *Miranda* warnings, he was reminded of the rights he had been advised of and he indicated that he was aware of those rights, before giving the incriminating statements. The officer who gave the warnings at the first questioning was the same officer who reminded defendant of those warnings the next morning. Moreover, the questioning was conducted in the same place on both occasions. Although the statements made during the first questioning were significantly different from the inculpatory statements made at the second interrogation, the court was satisfied that defendant was completely aware of his rights throughout the second interrogation. *State v. Myers*, 345 A.2d 500 (Supreme Judicial Court of Maine, October 1975).

COMMENT:
Even though the court held the defendant's statements admissible in this case, the safer procedure is for officers to completely rewarn suspects in custody of their Miranda *rights whenever there is a significant time period between two interrogation sessions. Failure to rewarn suspects in this situation may cause a resulting statement to be declared inadmissible.*

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ARREST/SEARCH AND SEIZURE:

A § 1.1 Reasonable Grounds
A § 2.3 Incident to Arrest
A § 2.5 Persons and Places—Without a Warrant
A § 3.1 Entry

Defendant was convicted of possession of cocaine and appealed, claiming the trial court's denial of his motion to suppress was erroneous. Acting on an anonymous tip that something strange was going on, police went to an apartment, and observed the defendant peering out from behind the door which was open slightly and which appeared to have been broken into. Police ordered the defendant to open the door, entered, and observed the room completely in shambles, with several laundry bags stuffed with clothing and albums. The defendant identified himself and claimed to be in the apartment with the permission of the tenant, but he would not clearly give his own address. Another officer, looking for additional means of identifying the defendant, went into an adjacent alcove, picked up and searched a jacket and observed what he thought was cocaine in pill bottles inside a tobacco pouch which was in the pocket of the jacket. Defendant admitted the jacket was his, and was then given *Miranda* warnings and arrested.

On the basis of *Chimel v. California,* 395 U.S. 752, 85 S.Ct. 2034, 23 L.Ed. 2d 685 (1969), the court held that the search of the jacket was constitutional. Although the search preceded the arrest, the police had probable cause to arrest the defendant for breaking, entering and larceny before they searched the jacket. The court said the search of the jacket was " . . . sufficiently contemporaneous with the arrest that both together constituted a single incident." (347 A.2d at 593)

The court also held that the seizure of the jacket in the adjacent alcove was within the permissible scope of the search incident to arrest. Disregarding the officer's admitted subjective purpose of securing evidence of the defendant's identity, the court said:

> ". . . a reasonable and prudent police officer in these circumstances would have been justified in searching the area within which this still unrestrained defendant might obtain a weapon or destroy evidence of the crime of which the police had probable cause to believe him guilty." *State v. LeBlanc,* 347 A.2d 590, 595 (Maine Supreme Judicial Court, November 1975).

COMMENT: It is important to note that, even though the search of the jacket preceded the defendant's arrest, the court found that the officers had probable cause *to arrest before the search was conducted. The search was therefore a valid search* incident to arrest *because it was sufficiently contemporaneous with the arrest. If the officers did not have probable cause to arrest at the time the search of the jacket was made, the search would have been illegal and the cocaine would have been inadmissible in court.*

CONFESSIONS/SELF-INCRIMINATIONS:

B § 1.3 Interrogation-Miranda

Defendant was convicted of felonious homicide in the penalty degree of murder. The victim, an elderly woman, was found in her apartment, badly beaten and sexually abused. Defendant was at that time under indictment for a sexual assault upon another elderly woman and was therefore a suspect in this case. Law enforcement officers went to the defendant's home, told him they were investigating the death, and asked him to come to the station for questioning. Defendant called his attorney on the phone, and after conversing with him, went voluntarily to the police station with the officers. In the police car, defendant asked one of the officers why they wanted to talk to him about the death, and the officer replied that they wanted to find out what he had been doing the night before the body was found. The officer then asked him what he had been doing that night, and the defendant answered that he had been at home all night. Defendant claimed on appeal that this statement should not have been admitted into evidence, because he had not been given *Miranda* warnings.

The court held that the *Miranda* warnings were not required because the defendant was not in custody: (1) He decided voluntarily to accompany the police after talking to his attorney; (2) He was free from physical restraint and intimidation; (3) He exhibited a continuing control of the situation later, in the police station, when he used the department phone to confer with his attorney and then abruptly terminated the interrogation by demanding, and receiving, a ride home; (4) The investigation had not focused on the defendant—he was just one of a general group of potential suspects. *State v. Inman,* 350 A.2d 582 (Supreme Judicial Court of Maine, January 1976).

COMMENT: This case is a reminder that officers need not give the Miranda *warnings every time they question a suspect—only when the suspect is in custody. Nevertheless, whenever there is any question whether a suspect is in custody, the safest procedure is to give the* Miranda *warnings rather than risk a court's declaring a suspect's statement inadmissible.*

ARREST/SEARCH AND SEIZURE:

A § 1.1 Reasonable Grounds
A § 2.3 Incident to Arrest
A § 2.4 Automobiles—Without a Warrant
A § 2.5 Persons and Places—Without a Warrant

On a November evening, two uniformed game wardens were patrolling for night hunting violations and were checking a field where deer frequently congregated to eat. The officers observed a vehicle approach and turn down a side road, illuminating with its headlights a portion of the field. The vehicle then returned to the main road and made movements so as to illuminate the rest of the field. Concluding that these activities indicated a violation of the hunting laws, the officers decided to pursue the vehicle. When the officers put on their vehicle's headlights and flashing blue light on the dashboard, the other vehicle accelerated and a high speed chase ensued. After the officers forced the fleeing car to stop, one of the officers approached the car. As he reached it, however, the car sped off once again. After a collision between the two vehicles ended the chase, the officers arrested defendant. Returning to defendant's automobile, the front door of which was still open, one of the officers observed in the front seat a shotgun and a hunting knife, and on a floor a loose shotgun cartridge and cartridge box. The officer seized these materials, and they were admitted at defendant's trial. Defendant was convicted of night hunting in violation of 12 M.R.S.A. § 2455 and of failing to stop on the signal of a uniformed game warden in violation of 12 M.R.S.A. § 3051(2).

On appeal, defendant contended that the admission of these items into evidence was error because they were the product of an unlawful search and seizure. Specifically, defendant argued that in order for the search to be valid it would have to be justified as a search incident to a lawful arrest for night hunting. Because there was insufficient probable cause to arrest, argued defendant, the arrest was unlawful and therefore the search was unlawful.

The court concluded that the search incident to arrest doctrine was inapplicable to this case. Because the objects were lying in the open in the car, the plain view doctrine would authorize their seizure if the officer was legally justified in being in a position to make the observation which led to the seizure of the evidence. Here, the question of whether the officer was in a place where he had a legal right to be depended upon the validity of the arrest and specifically, whether there was probable cause to arrest. The court held that under the circumstances of this case the officers had probable cause to believe that the offense of night hunting was being committed in their presence. The court added that even if the seized material had not been in plain view, a warrantless search of the car would have been permissible in this case. This is because the officers had probable cause to believe that the automobile contained instrumentalities of the crime and because exigent circumstances existed. *State v. Cowperthwaite,* 354 A.2d 173 (Supreme Judicial Court of Maine, March 1976).

COMMENT: The Maine Criminal Code was enacted after the decision in the Cowperthwaite *case, and officers should consult §15 of the Code to determine their present authority to make warrantless arrests.*

SELF-INCRIMINATION:

B § 3.1(a) Identification: Wade-Gilbert-Stovall

CRIMES/OFFENSES:

C § 1.2 Assault

EVIDENCE:

E § 1.3 Identification

At about 7:30 in the evening on May 12 a woman, the complainant, was attacked by a man in a Portland park. She promptly notified police and described her assailant. Within minutes of the incident officers interviewed complainant and showed her five "mug-shot-type" color photographs. Complainant quickly picked out the photograph of defendant, saying that she thought that was the man but that she would prefer to see him in person. Two weeks later complainant was told by an officer that the man pictured in the photograph would probably be in the courthouse corridor that morning. As she looked down the corridor, complainant immediately spotted defendant and identified him as the assailant. At trial, the complainant was permitted to make an in-court identification of defendant and a conviction of assault and battery of a high and aggravated nature followed. On appeal, defendant argued that it was error for the trial court to allow the in-court identification because such identification was tainted by the impermissibly suggestive photographic display and out-of-court identification.

The court denied the appeal, holding that neither the photographic display nor the identification in the courthouse corridor violated due process. All five photographs shown complainant had pictured persons who had similar features, including hair length, shape of nose, height of cheekbones, and similar type of dress. Moreover, each photograph's identification as a police "mug shot" was obliterated by tape. Regarding the identification in the courthouse corridor, when the complainant looked down the corridor she observed 30 or 40 persons, several of whom had long hair (she had described her assailant as having shoulder-length hair) and some of whom had the same general appearance as the defendant at the time of the

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assault. At the time she identified him, defendant was sitting on a bench near the end of the corridor farthest from her. The court concluded that neither the photographic display nor the identification in the corridor were impermissibly suggestive so as to taint the in-court identification.

After the complainant had identified defendant at trial, the State proceeded to elicit testimony, over defendant's objection, concerning the photographic identification and the courthouse corridor identification. Defendant contended that it was error to allow the State to introduce this evidence because, he argued, the State is permitted to introduce a lawful out-of-court identification after an in-court identification only when there has been an effort by the defendant to impeach the credibility of the State's witness. The court rejected this contention, finding neither reason nor authority for its support. *State v. Caplan,* 353 A.2d 172 (Supreme Judicial Court of Maine, March 1976).

COMMENT: Ordinarily, when a significant time period separates a crime from a witness confrontation, a lineup is the safest way to ensure that the identification procedure is not unnecessarily suggestive and conducive to irreparable mistaken identification. (See Section IV-C of the Law Enforcement Officer's Manual.). Apparently the court believed that the circumstances in this case provided adequate safeguards to ensure a reliable identification despite the passage of time and the failure to provide a lineup.

CRIMES/OFFENSES: C § 5.2
Vagrancy-Curfew Violation

Defendent was charged with a violation of a Rockland ordinance which provided:

> "No person on probation, or parole, from a legal court sentence shall be, or remain, upon any street or public place after 10:00 P.M. standard or daylight savings time (whichever is in effect as the legal time) unless said person is going or coming from his place of employment or as part of the conditions of his probation or parole. Whoever violates this section of this ordinance shall be punished by a fine of not less than $25.00 and not more than $100.00 or by imprisonment for not more than 30 days, or both such fine and imprisonment."

This case was reported to the Law Court pursuant to Rule 37A, M.R. Crim. P., and the Agreed Statement of Facts established that defendant, while a parolee, was on Main Street in Rockland at 12:30 a.m. on the day he was arrested and was neither going to or from his place of employment nor on the street as part of the conditions of his parole.

After ruling that the parties had complied with Rule 37A, the court held that the ordinance violates the due process clause of the Fourteenth Amendment because "it fails to describe in rationally intelligible terms the conduct it purports to make criminal." The ordinance, which prohibited presence upon any street or public place *after* 10:00 P.M., indicated only the beginning of the time period. It gave no guidance as to the end of the period. Consequently, the ordinance failed to establish an adequate standard to guide persons as to whether their conduct would be criminal *State v. Reed,* (Supreme Judicial Court of Maine, October 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

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.

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