SEPTEMBER 1976

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

The Maine Prosecutors Association is putting together proposed legislation for the upcoming session of the legislature. All criminal justice personnel who have suggestions on proposed legislation should contact their District Attorneys. The Criminal Law Advisory Commission has been created to provide an ongoing review of the provisions of the Maine Criminal Code. Therefore, all suggestions on proposed legislation relating to the Criminal Code should be brought to the attention of Assistant Attorney General Stephen Diamond at 289-2146 so that they may be considered by the Commission.

All proposals for new criminal legislation will be discussed at the Annual District Attorneys' Training Seminar in early December 1976. I encourage everyone to submit his proposals and suggestions as soon as possible.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

ARREST, SEARCH AND SEIZURE:

A § 1.1 Reasonable Grounds
A § 2.3 Incident to Arrest
A § 3.1 Entry
A § 3.2 Warrant Essential
A § 4.1 Motion to Suppress

On the basis of information that defendant had in her possession marked money used to make a heroin "buy" arranged by an undercover agent, police officers went to her house. She was standing in the doorway holding a paper bag, but as the officers approached she retreated into the vestibule of her house where they caught her. When she tried to escape, envelopes containing heroin fell to the floor from the paper bag, and she was found to have been carrying some of the marked money on her person. After being indicted for possessing heroin with intent to distribute, defendant moved to suppress the heroin and the marked money. The U.S. District Court granted the motion on the ground that although the officers had probable cause to make the arrest, defendant's retreat into the vestibule did not justify a warrantless entry into the house on the ground of "hot pursuit." The Court of Appeals affirmed.

The U.S. Supreme Court held that defendant, while standing in the doorway of her house, was in a "public place" for purposes of the Fourth Amendment, since she was not in an area where she had any expectation of privacy and was exposed to public view, speech, hearing, and touch just as if she had been standing completely outside her house. Thus, when the police sought to arrest her, they merely intended to make a warrantless arrest in a public place upon probable cause. Under *U.S. v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976), such an arrest did not violate the Fourth Amendment. By retreating into a private place, defendant could not defeat an otherwise proper arrest that had been set in motion in a public place. Since there was a need to act quickly to prevent destruction of evidence, there was a true "hot pursuit," which need not

[*Continued on page 2*]

involve an extended hue and cry in and about the public streets. Thus, a warrantless entry to make the arrest was justified, as was the search incident to that arrest. *U.S. v. Santana,* 44 U.S.L.W. 4970 (U.S. Supreme Court, June 1976).

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 lawfully arrested for robbery and 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 his alibi, the prosecutor caused the defendant to admit on cross-examination that he had not offered the exculpatory information regarding 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. Defendant was convicted of robbery.

The U.S. Supreme Court held that the defendant's silence during police interrogation lacked significant probative value. His silence was not so clearly 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) defendant was questioned in secretive, possibly intimidative surroundings with none but police present; (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,* 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed. 2d 99 (U.S. Supreme Court, June 1975).

CONFESSIONS:
B § 1.3 Miranda

Defendant was arrested early in the afternoon in connection with certain robberies and given the *Miranda* warnings by a police detective. After having made oral and written acknowledgement of the warnings, defendant declined to discuss the robberies, whereupon the detective ceased the interrogation. Shortly after 6:00 p.m. the same day, after giving *Miranda* warnings, a different police detective questioned defendant solely about an unrelated murder. Defendant made an inculpatory statement, which was later used in his trial for murder, resulting in his conviction. An appellate court reversed the conviction on the ground that *Miranda* mandated termination of all interrogation after defendant declined to answer the first detective's questions.

The United States Supreme Court held that the admission in evidence of defendant's incriminating statement did not violate *Miranda* principles. Defendant's right to cut off questioning was scrupulously honored, the police having immediately ceased the robbery interrogation after he refused to answer any questions. The questioning regarding the murder was about a crime different in nature, time and place of occurrence, and it began only after a significant time lapse from the initial interrogations and after a fresh set of warnings had been given. *Michigan v. Mosley,* 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed. 2d 313 (U.S. Supreme Court, December 1975).

COMMENT: This case gives officers the right to interrogate a suspect after he had exercised his Miranda *right to remain silent only under the following conditions:*

1. The second interrogation attempt must be directed at a crime different in nature and in time and place of occurrence from the crime at which the first interrogation attempt was directed.

2. The suspect must be given complete Miranda *warnings again.*

3. The interrogation must be conducted by a different officer than the one who conducted the first interrogation attempt.

4. A significant time period must elapse between the first and second interrogation attempts.

CONFESSIONS/SELF-INCRIMINATION:
B § 1.3 Miranda
B § 2.3 Use for Impeachment
B § 3.3 Right of Silence
WITNESSES:
E § 1.4[a] Improper Reference
E § 2.1 Impeachment: Defendant

Defendants were convicted of selling marijuana to a local narcotics bureau informant. During their state criminal trials, defendants, who were given *Miranda* warnings after their arrest, took the stand and gave a story favorable to them that they had not previously told the police or the prosecutor. Over their counsel's

[*Continued on page 3*]

objection, they were cross-examined as to why they had not given the arresting officer these exculpatory explanations.

The U.S. Supreme Court held that the use for impeachment purposes of defendants' silence at the time of the arrest and after having been given *Miranda* warnings violated the Due Process Clause of the Fourteenth Amendment. Post-arrest silence following such warnings is open to several possible interpretations. Moreover, it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured by the *Miranda* warning that silence would carry no penalty. *Doyle v. Ohio,* 44 U.S.L.W. 4902 (U.S. Supreme Court, June 1976).

SEARCH AND SEIZURE:
A § 2.1 Probable Cause: Warrant
A § 2.2 Other Warrant Requirements
A § 3.3 Authority
A § 3.4 Execution: Warrant
SELF-INCRIMINATION:
B § 1.1 Voluntariness
EVIDENCE:
E § 1.4 Other Crimes and Offenses

An investigation of real estate settlement activities by a State's Attorney's fraud unit indicated that defendant, while acting as a settlement attorney, had defrauded a purchaser of certain realty (Lot 13T). Investigators obtained warrants to search defendant's offices. The warrants listed specific items pertaining to Lot 13T to be seized "together with other fruits, instrumentalities and evidence of crime at this (time) unknown." In the ensuing search a number of incriminating documents, including some containing statements made by defendant, were seized. Defendant was then charged, among other things, with the crime of false pretenses based on a misrepresentation as to title made to the purchaser of Lot 13T. Defendant's motion to suppress the seized documents was granted as to some documents, but the trial judge ruled that the admission into evidence of others would not violate the Fourth and Fifth Amendments. At the trial, at which defendant was convicted, a number of the seized items (including documents pertaining to a lot other than Lot 13T but located in the same subdivision and subject to the same liens as Lot 13T) were admitted into evidence, after being authenticated by prosecution witnesses.

The U.S. Supreme Court held that the search of defendant's offices for business records, their seizure, and subsequent introduction into evidence did not offend the Fifth Amendment's proscription that "(n)o person . . . shall be compelled in any criminal case to be a witness against himself." Although the records seized contained statements that defendant voluntarily had committed to writing, he was never required to say anything. The search for and seizure of these records were conducted by law enforcement personnel, and when the records were introduced at trial, they were authenticated by prosecution witnesses, not by defendant. Any compulsion of defendant to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, was not present.

The Court also held that the searches and seizures were not "unreasonable" in violation of the Fourth Amendment. The warrants were not rendered fatally "general" by the "together with" phrase, which appeared in each warrant at the end of a sentence listing the specified items to be seized, all pertaining to Lot 13T. This phrase must be read as authorizing only the search for and seizure of evidence relating to the crime of false pretenses with respect to Lot 13T. The seizure of the documents pertaining to a lot other than Lot 13T in the same subdivision and subject to the same liens as Lot 13T did not violate the principle that when police seize 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction," *Warden v. Hayden,* 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed. 2d 782, 792 (1967). The investigators reasonably could have believed that the evidence specifically dealing with fraudulent conduct respecting the other lot could be used to show petitioner's intent to defraud with respect to Lot 13T, and although such evidence was used to secure additional charges against petitioner, its suppression was not required. *Andresen v. Maryland,* 44 U.S.L.W. 5125 (U.S. Supreme Court, June 1976).

COMMENT: This case states that law enforcement officers may search for and seize business records under a warrant without violating a person's Fifth Amendment privilege against self-incrimination under the following conditions:

1) The statements in the records were made voluntarily.

2) The person owning the records is not required to say anything.

3) The search and seizure are conducted by law enforcement officials.

Obtaining business records by search warrant is an important aspect of the investigation and prosecution of white collar crime. Officers conducting such searches should make certain that the person owning the records is not compelled to speak or otherwise incriminate himself in any way.

SEARCH AND SEIZURE:
A § 2.1 Probable Cause: Warrant
A § 2.2 Other Warrant Requirements

Defendants pleaded guilty to one of four counts in an indictment relating to importation and intent to distribute controlled substances, with the stipulation that they would appeal from their conviction only for the purpose of testing the sufficiency of an affidavit used to secure a search warrant that provided the government with the incriminating controlled substances.

Defendants claimed that since the affidavit asserted that a trained dog detected the scent of narcotics in a cabin on a ship that defendants had stayed in, it was necessary to demonstrate in the affidavit the reliability of the dog, analogizing the dog to an informant. Specifically, defendants argued that the dog's proficiency in detecting narcotics had to be set out in the affidavit. The court disagreed. A magistrate's determination of probable cause is based upon common sense and a realistic reading of the entire affidavit. Here the affidavit stated that the dog was "trained" and was being handled by an experienced agent. The magistrate who issued the warrant reasonably could have concluded that the dog, by reason of his training and experience, had the ability to sniff out controlled substances. Other inquiries relevant to human informants were considered irrelevant. However, the court did examine other facts asserted in the affidavit, including the fact that one appellant had given a small portion of the controlled substance to one of the ship's employees, to uphold the sufficiency of the affidavit establishing the finding of probable cause. *U.S. v. Skelcher,* No. 75-1125 (1st Circuit Court of Appeals, June 1976).

COMMENT: Although the court found the affidavit in this case sufficient, the safer procedure is to provide more information in the affidavit to establish the reliability of a narcotics-detecting dog. Possible facts to include in the affidavit would be the time, place, and duration of the dog's training; the training and experience of the dog's trainer and handler; and the dog's "track record" in detecting narcotics.

ARREST, SEARCH AND SEIZURE:
A § 2.1 Probable Cause: Warrant
A § 2.2 Warrant Requirements
A § 2.3 Search Incident to Arrest
A § 2.4 Automobiles—Without Warrant
A § 3.1 Entry

Defendants were found guilty of the following offenses: (1) conspiracy to import 1462.5 lbs. of marijuana (2) importation of 1462.5 lbs. of marijuana; (3) conspiracy to possess 1462.5 lbs. of marijuana with intent to distribute it; and (4) possession of 1462.5 lbs. of marijuana with intent to distribute. On appeal, defendants alleged, among other things, the following as error:

(1) there was no probable cause to issue a search warrant used to secure incriminating evidence;

(2) the warrantless search of a van in an underground parking garage violated the Fourth Amendment rights of two appellants

In dealing with the first issue raised by the defendants, the court focused primarily on defendants' assertion that the affidavit supporting the search warrant had "intentional, relevant and non-trivial misstatements" requiring suppression. Defendants contended that testimony taken at a suppression hearing was contrary to two key facts asserted in the affidavit. The two facts stated in the affidavit were that the agents observed a car leaving the airstrip where the alleged illegal marijuana was brought and that the agents knew the appellant had sent the car. The court held that defendants had failed to establish that the asserted facts in the affidavit were intentional, relevant, and non-trivial misstatements. Contrary to defendants' contention, the court did not find the testimony at the suppression hearing contradictory, but only imprecise. The court said, assuming the statements were inaccurate, they did not amount to intentional, non-trivial misstatements.

The second point on appeal related to the arrest of two of the defendants and the search of the van they were driving in the underground parking garage of their condominium. Defendants' sole contention was that their Fourth Amendment rights were violated when the two agents entered the garage without a warrant. The court held that the defendants had no reasonable expectation of privacy in the common underground parking garage and the fact that the agents may have committed a technical trespass was irrelevant. Hence, the arrest of two of the defendants and the search of the van disclosing 1462.5 lbs. of marijuana did not violate defendants' constitutional rights. *U.S. v. Pagan,* No. 75-1312 (1st Circuit Court of Appeals, June 1976)

COMMENT: If an officer makes intentional, relevant, and non-trivial misstatements of fact in an affidavit supporting the application for a search warrant, either the warrant may not issue or evidence seized pursuant to the warrant may later be declared inadmissible. Since it is impossible for an officer to determine what a magistrate or judge will consider relevant or non-trivial, officers should be very careful to correctly state all facts in affidavits for search warrants.

MAINE COURT DECISIONS

CONFESSIONS/SELF-INCRIMINATION:
B § 1.3 Miranda
EVIDENCE:
E § 1.1 Sufficiency

At the conclusion of a high speed chase, defendant fired a pistol at the pursuing officer and wounded him. Defendant escaped but was subsequently apprehended in Colorado and flown back to Maine where he was charged with larceny of an automobile and armed assault and battery. Defendant was convicted, and he appealed, arguing that statements he made while being transported from Colorado to Maine were taken in violation of *Miranda* and therefore should not have been admitted into evidence.

Before leaving Colorado, defendant was given incomplete *Miranda* warnings by one of the two officers who accompanied him. During the flight, defendant talked with both officers and made incriminating statements. The officers testified that defendant had initiated the conversation in each instance; defendant testified that he had discussions of a general nature with the two officers, but he denied making any admissions. On appeal, defendant contended that even if he had initiated the conversations, the circumstances in which the admissions were made—in the course of a long trip during which he was obliged to sit beside the officer he was accused of having assaulted—made it unlikely that the statements were voluntary beyond a reasonable doubt. The court rejected this contention. There was sufficient evidence in the record to support the trial justice's conclusion that defendant's statements were spontaneous and voluntary and were not the product of custodial interrogation, either direct or subtle. *State v. Farley*, 358A.2d 516 (Supreme Judicial Court of Maine, June 1976).

COMMENT: If an officer plans to interrogate a person in his custody, the officer should always give complete Miranda *warnings. If the officer does not plan to interrogate and does not give the warnings, the officer should not initiate any conversations relating to the crime under investigation. When an officer is transporting a prisoner or has a person in his custody for an extended period of time for other reasons, the officer should make careful notes about any conversations relating to the crime under investigation and how the conversations were initiated. He may want to use the notes later to refresh his memory when testifying at a suppression hearing.*

ARREST, SEARCH AND SEIZURE:
A § 1.1 Reasonable Grounds
A § 1.4 Detention
A § 2.6 Consent
A § 4.1 Motion-Harmless Error
CRIMES/OFFENSES:
C § 2.2 Burglary
C § 2.3 Theft
C § 6.2 Driving While Intoxicated

A deputy sheriff observed defendant's automobile being driven very slowly and saw a passenger throw a beer bottle out the window. The deputy also observed defendant, the driver of the automobile, continually checking his rear view mirror. The deputy followed the car for twenty minutes and, when the car turned abruptly and speeded up, he pulled it over. The deputy observed a passenger placing something under the seat as defendant's car obediently came to a halt. Defendant emerged immediately, approached the deputy's vehicle and produced his license. The deputy walked over to defendant's car and observed a coin bank under the passenger's legs and gun cases and a tape deck on the back seat. A state trooper who arrived on the scene observed the same items and was given permission to examine the rifles inside the gun cases. The trooper observed and recorded the serial numbers of the rifles and tape deck. Defendant was allowed to depart but was later apprehended when items similar to those observed in his car were reported stolen from a nearby residence. Defendant was convicted of breaking, entering and larceny and on appeal contested the presiding justice's failure to suppress evidence of the serial numbers recorded by the state trooper.

The Law Court denied the appeal. The deputy sheriff acted lawfully in stopping defendant's vehicle because of a reasonable suspicion that the occupants were violating laws relating to intoxicating liquor in automobiles. Thereafter, it was reasonable for the deputy to detain the vehicle to determine if the passenger was intoxicated and to investigate the passenger's furtive conduct. The deputy's plain view observations of the coin bank, gun cases and tape deck justified further detention while a radio report was made to the police. The state trooper's initial observations were a "reasonable incident" of the deputy's lawful investigation. The trooper's search of the gun cases was by

[*Continued on page 6*]

consent of defendant, and the fact that the trooper did not warn him of his right to withhold consent did not make the consent invalid.

The Law Court did not decide whether the trooper committed any constitutional violation by recording the serial numbers without defendant's consent. Any error in admitting the serial numbers was harmless beyond a reasonable doubt in view of the overwhelming independent evidence of guilt, including defendant's own detailed confession. *State v. Fitzherbert,* 361A.2d 961. (Supreme Judicial Court of Maine, August 1976).

CRIMES/OFFENSES:
C § 2.6 Arson—Bombing
CONFESSIONS/SELF-INCRIMINATION:
B § 2.3 Corpus Delicti

Defendant was found guilty of arson in the second degree and appealed. At the State Prison, there was a fire in the ceiling of a latrine. A section of ceiling tile in the 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, and there were no electrical wires in the area.

Defendant claimed for the first time on appeal that there was insufficient evidence to prove the corpus delicti and therefore the jury should not have been allowed to hear evidence that defendant admitted setting the fire. The court held that there was sufficient evidence to establish the corpus delicti prior to and independent of the admission of the confession. *State v. Sheehan,* 337 A.2d 253 (Supreme Judicial Court of Maine, May 1975).

COMMENT: The corpus delicti rule states that a confession is not admissible in court unless the state has furnished independent credible evidence creating a substantial belief that the particular crime was actually committed by someone. This case provides an example of evidence sufficient to establish the corpus delicti for the crime of arson.

FORUM

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

NEWS FROM THE ACADEMY

The following information, items and announcements concern the Maine Criminal Justice Academy in Waterville, which is a bureau of the Department of Public Safety and is the training institution for all law enforcement officers in the State of Maine.

Proposed Legislation

The Academy Trustees have approved proposed legislation calling for certification of law enforcement and criminal justice instructors, increased Trustee authority to inspect payroll records of local police agencies to enforce the mandatory police training law, Trustee discretion to exempt corrections officers in counties from Municipal Police School training and a penalty assessment statute to provide revenue for operational costs of the Academy.

Any chief or sheriff wishing to receive copies of these proposed statutes should contact the Academy.

Chief and Sheriff Certification

At the September meeting of the Academy Trustees, an addition was approved for the Maine Chief and Sheriff Certification Criteria. The addition, which is paragraph 4 of Section B, reads:

> College credits, awarded for criminal justice related courses as determined by the Trustees, may be counted toward Training Hours on an hour-for-hour basis.

Any questions on this modification or on the criteria generally should be addressed to the Academy Director.

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

This bulletin is funded by a grant from the Maine Criminal Justice Planning and Assistance Agency.