MARCH-APRIL 1977

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

Much legislation has been proposed and debated this year concerning various issues of interest to the criminal justice community. One of the major pieces of legislation dealing with the criminal law is L.D. 1581, "AN ACT to Establish the Maine Juvenile Code," which will be scheduled for public hearing soon. This bill is a comprehensive revision of existing juvenile laws dealing with custody, arrest powers, bail, adjudication, sentencing dispositions, confessions, right to counsel, right to jury trial, bindover procedures, publicity, appeals, runaways, probation and rehabilitation services. This bill merits examination by all law enforcement officials concerned with juveniles. Copies may be obtained by writing to the Clerk of the House, State House, Augusta, Maine 04333.

The Law Enforcement Education Section is in the final stages of updating the Law Enforcement Officer's Manual. Anyone having ideas for changes or additional topics which might be included in the Manual should contact the Law Enforcement Education Section at the earliest opportunity at Room 507, State Office Building, Augusta, Maine 04333. Tel. 289-2538.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

CONFESSIONS/SELF-INCRIMINATION:

B § 1.1 Voluntariness
B § 1.3 Miranda

Defendant was convicted of felonious homicide punishable as manslaughter and he appealed. Defendant and one Knight had engaged in a scuffle at defendant's home, during which a shot was fired from defendant's rifle, fatally wounding Knight. After defendant telephoned for ambulance assistance, a law enforcement officer came to defendant's home, secured it, and shortly thereafter found defendant walking on a nearby highway and asked him to enter the cruiser. The officer immediately gave defendant the *Miranda* warnings and the defendant assured the officer he understood the rights described by the officer. When asked if he wished to talk about what had happened, defendant said that he and Knight loaded the rifle, started wrestling, and the rifle went off. During his conversation with defendant the officer was aware that defendant had been drinking but he concluded that defendant was capable of normal body movement and rational conversation.

Three hours later defendant returned to the crime scene and described the shooting to another officer investigating the scene, indicating that Knight accidentally shot himself. The officer then read the *Miranda* warnings to defendant. A discussion followed and the defendant admitted that he had shot Knight while wrestling with him. The officer noticed that defendant had been drinking and characterized his condition as "borderline," but found that the defendant was able to respond logically and with understanding. Additionally, the officer noted that defendant pronounced his words without slurring. At trial the presiding justice admitted into evidence each of the inculpatory statements of the defendant. The primary issue on appeal was whether the Justice erred in allowing into evidence the statements made by defendant to the second officer before that officer had given *Miranda* warnings to defendant, three hours after the first officer had given defendant *Miranda* warnings.

The court denied the appeal, holding that defendant's statement to the second officer was properly

admitted into evidence since defendant had effectively waived his rights at the time the first officer informed him of those rights. This waiver continued effective, despite the lapse of three hours, to the time of the second officer's conversation with defendant. The lapse of three hours, *by itself,* did not require suppression of the statement due to the second officer's failure to repeat the *Miranda* warnings. Citing *State v. Myers,* 345 A.2d 500 (Me. 1975), the court noted that "the lapse of even a substantial period after the giving of a *Miranda* warning does not *per se* render such warning ineffective and require repetition of it" for subsequent statements to be admissible.

The court further determined that during the three-hour period nothing occurred which showed that defendant had withdrawn the waiver of his rights or that his ability to *voluntarily* waive his rights had become impaired. The sole question remaining, then, was whether defendant was actually competent to waive his rights at the time he spoke with the first officer. The fact that an individual is under the influence of alcohol does not, by itself, mean that he cannot waive his rights protected by *Miranda.* Here the court held that although defendant was impaired to some degree by alcohol when he spoke with the officer, the totality of circumstances indicated that defendant understood both the rights described to him in the *Miranda* warnings and the consequences of his acts and statements. *State v. Peterson,* 366 A.2d 525 (Supreme Judicial Court of Maine, December 1976).

COMMENT: Statements are not per se *inadmissible simply because of a lapse of time between* Miranda *warnings and the defendant's statements. To determine whether a waiver of rights following* Miranda *warnings remains effective, the court will look at other factors besides the mere passage of time. These factors include whether there were interruptions in the interrogation, whether there was a change in physical location, whether different law enforcement officers were involved, whether the statements sought to be admitted differed significantly from any prior statements, and whether the defendant rescinded his waiver of rights or his ability to voluntarily waive his rights became impaired. If circumstances have changed significantly between questionings, then repetition of* Miranda *warnings is required. To be certain that any statements given will be admissible, it is generally safer to repeat the warnings.*

SEARCH AND SEIZURE:
A § 2.5 Plain View
A § 2.6 Consent
CONFESSIONS:
B § 1.3 Miranda
CRIMES/OFFENSES:
C § 2.3 Theft

Defendant was convicted of breaking, entering and larceny (17 M.R.S.A. §2103; repealed PL 1975, c. 499, § 11) and he appealed. A Maine summer residence had been broken into and a number of antiques stolen, including a harpsichord bearing a unique inscription, and other unique items. Two California police officers later visited defendant's home in California to investigate a report that the stolen harpsichord was in the house. A resident of the house, one Mulldune, met the officers, who said they would like to speak to him. Mulldune held the outside door open in a manner which the officers interpreted as permission to enter the house. Once inside, the officers observed in plain view the harpsichord with the distinctive inscription and several other items which fit the descriptions of property taken in the Maine break. These items were seized by the officers and defendant was arrested. On appeal, defendant argued that the warrantless seizure of the antiques from his home violated his Fourth Amendment rights.

The court held that the seizure of the antiques was lawful. The entry into defendant's home was made pursuant to the voluntary consent of Mulldune. Because he had full use of the house and had lived there for 7 or 8 months, and because both he and defendant conducted business from the house, Mulldune had sufficient control over the house to consent to the officers' entry. Because the officers were authorized to be where they were and because they had probable cause to believe that the property which they seized was subject to seizure, the seizure of the antiques was lawful under the plain view doctrine.

The court also held that certain statements made by defendant to police in the absence of *Miranda* warnings were not the product of custodial interrogation and therefore were properly admitted into evidence. Defendant had been questioned in his own home, at a reasonable hour, and in the presence of his friends. He was free to move about the house, and no physical or other restraints had been placed on him by police. *State v. McLain,* 367 A.2d 213 (Supreme Judicial Court of Maine, December 1976).

CRIMES/OFFENSES:
C § 6.3 Motorcycle Headgear Law

Defendant was convicted of having operated a motorcycle without protective headgear in violation of 29 M.R.S.A. §1373. He appealed, claiming that the statute was unconstitutional.

Defendant claimed that the statute violated his constitutional guarantee of due process of law. The court held that the requirement that motorcyclists shall wear protective headgear bears a rational relationship to the Legislature's legitimate interest in promoting the public safety and, therefore, the requirement comports with the constitutional mandate of due process of law.

Defendant claimed that the statute invidiously discriminated against motorcyclists in violation of the constitutional guarantee of "equal protection of the laws." The court found that when a motorcycle is operated by a person lacking protective headgear, the dangers to the safety of the public greatly exceed those arising when an unhelmeted person operates either an enclosed four-wheeled motor vehicle or an unmotorized bicycle. The court held that since there was a rational basis for its action, the Legislature did not invidiously discriminate in requiring motorcyclists to wear protective headgear without imposing a similar requirement upon the operators of other types of vehicles or bicycles.

Defendant claimed that the statute abridged the constitutional guarantee of freedom of speech. The court found that the essence of the activity of operating a motorcycle is not "speech." Notwithstanding that the operation of a motorcycle may be the means of making a communicative statement, there is no violation of the constitutional guarantee of freedom of speech when the predominantly "non-speech" facets of the activity are subjected to regulations reasonably calculated to promote the safety of the public highways.

Finally, defendant claimed that the statute impaired his constitutionally guaranteed right to travel. The court held that constitutional protection of the right to travel is not contravened when a state enacts and enforces reasonable regulations to promote public safety. *State v. Quinnam,* 367 A.2d 1032 (Supreme Judicial Court of Maine, January 1977).

SEARCH AND SEIZURE:
A § 2.1 Probable Cause: Warrant

Defendant was convicted of possession of marijuana with intent to sell and possession of hallucinogenic drugs. On appeal defendant argued that the contraband seized in execution of a warrant which had authorized the search of his premises should have been suppressed and excluded as evidence. Specifically, defendant argued that the affidavit failed to show probable cause and therefore did not justify the issuance of the warrant.

For purposes of the appeal, the important portion of the affidavit, which was submitted to the magistrate on March 5, 1974, was a as follows:

> "On January 26, 1974, at approximately 6:00 p.m. this affiant . . . [accompanied] by one Kenneth Allen Bowers hereinafter referred to as Boogie Bowers went by automobile to the above described premises owned and occupied by the said Malcolm (Mickey) Willey. Upon arrival this affiant gave Boogie Bowers $50.00 for the purchase of 2 ounces of marijuana. Boogie Bowers entered said premises and shortly returned from within with 2 ounces of marijuana, which marijuana has since been tested with positive results by the Department of Health and Welfare in Augusta. On January 28, 1974, this affiant repeated this process where Boogie Bowers entered said premises and returned with marijuana with similar test results. This process was repeated with like results yet again on February 2, 1974.
>
> "On or about February 2, 1974 Boogie Bowers stated to this affiant that Mickey (Malcolm Willey) always has plenty of marijuana and was expecting a large shipment in a day or two. On other occasions Boogie Bowers has informed this affiant that Malcolm (Mickey) Willey always has grass on hand in said residence and never runs out.
>
> "This affiant further states that he has every reason to believe Boogie Bowers and does in fact believe Boogie Bowers particularly in light of the three occasions stated above where Boogie Bowers said there was marijuana on the above described premises, entered said premises and in fact returned with marijuana from within."

The Law Court held that the affidavit did not establish probable cause because at the time the affidavit was submitted to the magistrate the information was *stale.* Here the informant, Bowers, had made three purchases from January 26 to February 2. The court held that the three purchases at defendant's residence, which were the only facts known to the affiant, were insufficient by themselves to justify a conclusion that *thirty-one days after* the last purchase, there was still probable cause to believe that marijuana was present at defendant's home.

The court indicated that, in addition to the mere passage of time, other factors to be considered in determining whether a past probable cause is still continuing at the time of the request for a search warrant are: (1) the nature of the criminal activity, (2) the length of the criminal activity, and (3) the nature of the property to be seized. Here, the property to be seized was marijuana, a substance which can easily be concealed and moved about, and there was relatively brief surveillance of appellant's residence during the period between

the first purchase and the application for the warrant.

The court also held that the informant's statements that the defendant always had marijuana on hand and that he was expecting a large shipment in a day or two did not help establish probable cause. These were merely conclusions of the informant; the affidavit did not indicate how Bowers acquired this knowledge. *State v. Willey,* 363 A.2d 739 (Supreme Judicial Court of Maine, September 1976).

ARREST, SEARCH AND SEIZURE:
A § 2.2 Incident to Arrest
A § 2.5 Without a Warrant

After being notified that defendant had assaulted a person while on furlough from Maine State Prison, the warden of the prison summarily revoked defendant's furlough. While apprehending defendant at his mother's home in order to return him to prison, one of the officers saw a knife handle sticking out of defendant's pocket and seized the knife. Defendant was later convicted of assault and battery.

On appeal, defendant challenged the denial of his motion to suppress the knife, contending that the officers were not lawfully on the premises when the knife was seized. The Law Court found that although this was not technically a search incident to arrest, the officers were lawfully on the premises to effect the furlough revocation. The seizure of the knife was lawful because defendant's status as a prisoner whose furlough was revoked was the same as one who is physically confined in the prison. Consequently, he was subject to the authority of the prison officials to seize and confiscate such materials as if he were physically confined within the walls of the prison. *State v. Strollo,* Decision No. 1444 (Supreme Judicial Court of Maine, March 1977).

ADJUDICATION:
G § 2.1 Probation

After his conviction for breaking, entering and larceny (17 M.R.S.A. §2103; repealed PL 1975, c. 499, §11), defendant was sentenced to imprisonment for a period of not less than two years nor more than four years. The execution of the sentence was to be suspended after defendant had served sixty days, and he was placed on probation. Defendant was charged with violating the conditions of his probation, and after hearing, the presiding justice revoked probation and ordered execution of the unexecuted portion of defendant's sentence. At the conclusion of the evidence, the presiding justice found that defendant "violated the terms and conditions of his probation in failing to maintain good behavior by driving an automobile into [a named individual]."

On appeal from the revocation of his probation, defendant argued first that the terms "failure to maintain good behavior" were intended to describe only violations of law. Defendant then pointed out that the presiding justice made no specific finding that appellant violated a provision of law. While conceding that the evidence was sufficient to justify a conclusion that he was guilty of any of several different criminal offenses, defendant claimed that the evidence would equally support a finding that he was merely civilly negligent.

In denying the appeal, the court held that in view of the definition of "good behavior" established in *State v. Oliver,* 247 A.2d 122 (Me. 1968) ("Good behavior is behavior conformable to law"), the justice's finding had to be considered as a finding that the appellant's conduct was not conformable to law. Since there was credible evidence to support the conclusion that defendant's conduct failed to "conform to law," the presiding justice did not abuse his discretion in revoking probation. *State v. Columbo,* 366 A.2d 852 (Supreme Judicial Court of Maine, December 1976).

CRIMES/OFFENSES:
C § 3.1 Rape
EVIDENCE/WITNESSES:
E § 1.1 Sufficiency
E § 2.3 Credibility

Defendant was convicted of rape and on appeal he contested the sufficiency of the evidence on the element of force, arguing that the victim's testimony was uncorroborated, contradictory, unreasonable and incredible.

The Law Court denied the appeal. The evidence showed that the young victim had seen defendant fire a handgun and that shortly thereafter he accosted her, threatened her with the gun, and raped her. The justice at the trial level had found the victim a perfectly believable witness, and the Law Court similarly found her testimony far from contradictory, unreasonable or incredible. Furthermore, her testimony was corroborated by the testimony of police officers who entered upon the scene during the incident and saw the handgun. The court stated that it was far from "contradictory, unreasonable, or incredible" that a 15-year old girl would submit to an older male armed with a gun he had just successfully fired. *State v. Jones,* 370 A.2d 248 (Supreme Judicial Court of Maine, March 1977).

CRIMES/OFFENSES:
C § 1.2 Assault
C § 5.2 Breach of the Peace
PROCEDURE:
F § 2.6 Instruction

Defendant was convicted of high and aggravated assault and battery under pre-Code law. He was charged with hitting a police officer during a public disturbance. The

judge instructed the jury that it could consider on the issue of aggravation whether defendant's conduct constituted "a major affront to public order" or "an affront to the exercise of public authority." Defendant contended that this instruction was an improper expression of opinion by the presiding justice on a factual issue and unfairly emphasized the State's theory of the case.

The Law Court held that this instruction was proper. A defendant's resistance to lawful authority may be considered by the jury in determining whether an assault and battery is high and aggravated. Also, the fact that "defendant was involved in a confrontation with the police during a period of public unrest was a factor which the jury was entitled to consider in deciding whether the defendant was guilty of the more serious offense of high and aggravated assault and battery." (Slip opinion at 4) *State v. Thompson,* Decision No. 1443 (Supreme Judicial Court of Maine, March 1977).

CRIMES/OFFENSES:
C § 2.1 Robbery
C § 7.1 Parties

Defendant was found guilty of armed robbery and appealed contending that the evidence was insufficient to support the guilty verdict. Defendant was not present within the variety store at the time the robbery occurred, but was outside in a car. The testimony conflicted whether defendant was flagged down by the perpetrators of the robbery as he coincidentally drove by or whether he was parked waiting for the perpetrators and then rapidly drove away with them. In either case, defendant argued that he could not be convicted as a principal in the robbery because he could not be deemed constructively present at the scene of the robbery if he was not within visible or hearing distance of it. The court held that in order to impose criminal liability, it is not necessary that a defendant be an eye or ear witness to the crime, if he is immediately available by prearrangement for the purpose of assisting the perpetrator in his escape. *State v. Bellanceau,* 367 A.2d 1034 (Supreme Judicial Court of Maine, January 1977).

IMPORTANT RECENT DECISIONS

CONFESSIONS/SELF INCRIMINATION:
B § 1.2 Interrogation-Massiah
B § 1.5 Interrogation-Incompetents
DEFENDANT'S RIGHTS/ DEFENSES:
D § 1.1 Right to Counsel-Pretrial
D § 1.3 Right to Counsel-Waiver

Defendant was arrested, arraigned, and committed to jail in Davenport, Iowa, for abducting a 10 year-old girl in Des Moines, Iowa. Both his Des Moines lawyer and his lawyer at the Davenport arraignment advised defendant not to make any statements until after consulting with the Des Moines lawyer upon being returned to Des Moines. The police officers who were to accompany defendant on the automobile drive back to Des Moines agreed not to question him during the trip. During the trip, defendant expressed no willingness to be interrogated in the absence of an attorney but instead stated several times that he would tell the whole story after seeing his Des Moines lawyer. However, one of the police officers, who knew that respondent was a former mental patient and deeply religious, sought to obtain incriminating remarks from defendant by stating to him during the drive that he felt they should stop and locate the girl's body because her parents were entitled to a Christian burial for the girl, who was taken away from them on Christmas Eve. Defendant eventually made several incriminating statements in the course of the trip and finally directed the police to the girl's body. Defendant was convicted of murder over his objections to the admission of evidence relating to or resulting from any statements he made during the automobile ride.

The U.S. Supreme Court ruled that the statements made by defendant during the automobile ride were inadmissible. The Court held that defendant was deprived of his constitutional right to assistance of counsel. The right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to a lawyer's help at or after the time that judicial proceedings have been initiated against him. In this case, there was no doubt that judicial proceedings had been initiated against the defendant before the automobile trip started, since a warrant had been issued for his arrest, he had been arraigned, and he had been committed to jail. The Court applied the clear rule of *Massiah v. U.S.,* 377 U.S. 201 (1964) that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. Since the police officer's "Christian burial speech" was tantamount to interrogation, defendant was entitled to the assistance of counsel at the time he made the incriminating statements.

When viewed in light of defendant's assertions of his right to counsel during the automobile trip and the officer's use of psychology on him, the circumstance of record provided no reasonable basis for finding that defendant waived his right to the assistance of counsel. The record fell far short of sustaining the State's burden to prove an

intentional relinquishment or abandonment of a known right or privilege. *Brewer v. Williams,* 45 U.S.L.W. 4287 (U.S. March 23, 1977).

COMMENT: This case presents several points of law of importance to law enforcement officers. First, if adversary proceedings have begun against a defendant, *a law enforcement officer may not interrogate him unless his lawyer is present or unless he has knowingly, intentionally and clearly waived his right to have a lawyer present. If the defendant waives his right to a lawyer, the officer should then give the defendant* Miranda *rights. Only after the defendant has waived his* Miranda *rights and in particular his right under* Massiah *to have a lawyer present after the initiation of adversary proceedings, should the officer begin to interrogate him. Once adversary proceedings have begun against a defendant, he has a right to a lawyer at all stages of the criminal prosecution. An officer should not attempt to obtain any information from such a defendant, unless the officer is certain that the defendant has effectively waived all his rights.*

Second, this case points out that the meaning of interrogation is not limited to the direct asking of questions with an intent to obtain information. Any deliberate and designed attempt to elicit information from a defendant will be considered interrogation. In fact, the Court indicated that subtle psychological methods such as those used in this case may be more effective than straight questioning.

Third, this case emphasizes that a waiver of a basic constitutional right is not to be lightly presumed. The police and prosecution have a heavy burden to prove that a defendant intentionally relinquished a known right or privilege. Merely showing that a defendant understood his rights or that he cooperated with the officers is not enough to establish waiver.

ARREST, SEARCH AND SEIZURE:

A § 2.4 Automobiles-Without a Warrant

A § 2.5 Persons and Places-Without a Warrant

Defendant appealed a conviction on federal drug charges. Among the issues on appeal was the admissibility of a gun found on the seat of defendant's car by an agent who took charge of the car after defendant was arrested in it while attempting to drive away from the scene of a drug transaction. The gun was in plain view after the agent entered the car, but defendant contended that the agent was not lawfully inside the car.

The First Circuit found that the agent had a right to be in the car. Under a federal statute (21 U.S.C. §881(a)(4)), vehicles used to transport controlled substances may be forfeited. At the time of defendant's arrest, federal agents had reason to believe that narcotics had been transported in defendant's car. This gave them probable cause to seize the car for possible forfeiture proceedings. The agent's presence in the car was, therefore, lawful, as was the seizure of the gun found in plain view. *U.S. v. Petrozziello,* 548 F.2d 20 (1st Circuit Court of Appeals, January 1977.)

ARREST, SEARCH AND SEIZURE:

A § 3.6 Subpoena

CONFESSIONS/SELF-INCRIMINATION:

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

EVIDENCE:

E § 1.3 Identification

Defendant was suspected of armed robbery. The grand jury, in connection with its investigation, ordered defendant to appear in a lineup. On defendant's refusal to comply voluntarily, the U.S. Attorney sought and the district court issued an order directing him to comply. When defendant failed to appear, the district court found him in contempt and he appealed. Defendant claimed that the grand jury order directing him to appear in a lineup violated the fourth amendment prohibition against unreasonable seizures.

The First Circuit upheld the district court's judgment holding defendant in contempt. The court held that the inconvenience of being forced to appear in a lineup before a session of the grand jury or elsewhere does not make a grand jury subpoena a seizure within the meaning of the fourth amendment. Likening a lineup to the compelled disclosure of a voice exemplar, which has been held to be constitutional, the court held that "one has no more reasonable expectation of privacy in one's face than in one's voice," and "being forced to stand in a lineup does not result in an unconstitutional seizure." (Slip opinion at 5). The grand jury directive to appear in the lineup therefore did not violate the fourth amendment. *In re Melvin,* No. 77-1004 (1st Circuit Court of Appeals, February 1977).

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, Room 507 - State Office Building, Augusta, Maine 04333.

ALERT

Jospeh E. Brennan — Attorney General
Richard S. Cohen — Deputy Attorney General In Charge of Law Enforcement
John N. Ferdico — Director, Law Enforcement Education Section
Michael D. Seltzinger — Ass't Attorney General
Janet T. Mills — Ass't Attorney General

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