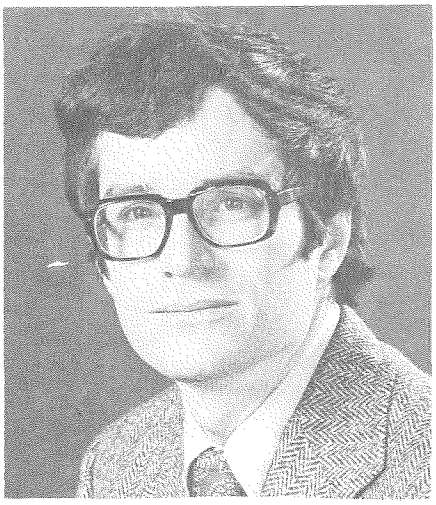
MAY-JUNE 1981

ALERT

MAINE DEPARTMENT OF
THE ATTORNEY GENERAL

MAINE CRIMINAL
JUSTICE ACADEMY



MESSAGE FROM THE ATTORNEY GENERAL JAMES E. TIERNEY

This issue and the September-October 1981 issue of ALERT will present summaries of important court decisions of the United States Supreme Court and the Maine Supreme Judicial Court over the past two years. Because of the large number of cases which need to be explained and because of space limitations, the summaries in these issues will be shorter and less comprehensive than those in previous issues. In general, long fact situations have been eliminated, background information has been reduced, and comments on the court decisions have been shortened. Each case summary contains the bare necessities for understanding the decision together with a brief point of advice for law enforcement officers, where necessary. To save space, the Maine Supreme Judicial Court is referred to simply as the Maine court.

In order to gain a full appreciation of the significance of each case, officers are encouraged to review background information in the Maine Law Enforcement Officer's Manual or in some other standard treatise on criminal procedure. Officers are also encouraged to read the court decisions in their entirety, when possible. Any officer who does not have convenient access to the printed decisions may obtain copies of particular decisions by writing or calling the Criminal Division of the Attorney General's office.

Finally, I would like to remind you that the upcoming July-August issue of ALERT, on Important Recent Legislation, will be the last issue in the 1980-81 subscription series. I will be sending a subscription renewal letter to each subscriber in the near future.

Jim Tierney

JAMES E. TIERNEY
Attorney General

RECENT COURT DECISIONS

ARREST — STOP AND FRISK

In *U.S. v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980), the U.S. Supreme Court held that

> "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.... In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." 446 U.S. at 554-55, 100 S.Ct. at 1877, 64 L.Ed. 2d at 509.

In the *Mendenhall* case, the Court found no seizure where Drug Enforcement Administration (DEA) agents, wearing no uniforms and displaying no weapons, approached the defendant on the public concourse of an airport, identified themselves as federal agents, and asked to see her identification and airline ticket. Furthermore, the defendant's voluntarily accompanying agents to a DEA office upon their request was not a seizure, there being no threats or show of force. The important point of advice for law enforcement officers is that they have a certain amount of leeway in making contact with citizens for various purposes before Fourth Amendment considerations become operative. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification, such as probable cause or reasonable suspicion of criminal activity. Moreover, such questioning of a citizen may include a request to accompany the officer, and a voluntary compliance with

the request does not constitute a seizure.

If officers detain a person to the extent that a reasonable person would believe he was not free to leave, officers must be able to provide a particularized and objective justification for the detention. If the detention is brief and temporary, as in the typical *Terry* investigative stop, the officer must be able to demonstrate that he had a reasonable suspicion that criminal activity was afoot. If, however, the detention goes significantly beyond a brief, temporary, investigative stop, it may be regarded as equivalent to an arrest, for constitutional purposes, and the officer must be able to demonstrate probable cause. Two recent Maine cases involved detentions of this nature.

In *State v. Ann Marie C.,* 407 A.2d 715 (1979), the Maine Court held that there was an arrest for constitutional purposes where an officer stopped a car in which the juvenile defendant was riding; asked the occupants of the car to accompany him to the police station; and questioned the defendant off and on for nearly three hours until she confessed to making bomb threats. Since the officer lacked probable cause, the seizure of the defendant was illegal and her confession, which was a product of the illegal arrest, was required to be suppressed as a "fruit of the poisonous tree," even though she had been given *Miranda* warnings and had waived her rights.

In *State v. Williams,* 412 A.2d 1222 (1980), police officers investigating a burglary stopped the defendant's car and took its occupants to the sheriff's office for questioning lasting longer than one-half hour. Even though the officers did not intend to take the defendant into custody or to charge him with a crime at the time they seized him, his detention was tantamount to an arrest for constitutional purposes and required probable cause.

Two recent Maine cases helped to clarify the technical definition of arrest. In *State v. Daley,* 411 A.2d 410 (1980), the Maine court clarified the element of arrest requiring that there be an "actual or constructive seizure or detention of the person to be arrested by the one having the present power to control him." The court said that merely telling a person he is under arrest, unaccompanied by a physical restraint of his person, will not constitute an arrest unless the person submits to the officer's authority and control. In the *Daley* case, rather than submitting after being told he was under arrest, the defendant fled from the officer. The court held that there was no arrest and that the defendant could not be convicted of escape if he did not initially submit to the officer's authority.

In *State v. Donahue,* 420 A.2d 936 (1980) the Maine court reaffirmed the principle that a physical touching is not an essential ingredient of an arrest, at least where the words of arrest are spoken and the arrestee is in the presence and power of the officer and in consequence of the communication submits to the officer's restraint. In the *Donahue* case the defendant was in a hospital emergency room after an automobile accident when the officer arrived, told him he was under arrest, read him the *Miranda* warnings, and informed him of the implied consent provisions of 29 M.R.S.A. §1312. The court held that where the officer was in complete charge of the situation in the emergency room, and where the defendant submitted himself to the officer's routine "processing" of the case by listening to the officer and indicating awareness of his *Miranda* and implied consent rights, there was an arrest, despite the lack of a physical touching.

Two recent Maine decisions found adequate justification for brief investigative stops. *State v. Hasenbank,* 425 A.2d 1330 (1981) held that when police receive information which, even though provided by an anonymous informant, indicates that the informant has personal knowledge that a described individual is carrying a concealed weapon, the officers, after visually confirming the accuracy of the supplied description, may stop and frisk the individual and lawfully seize any weapons they find. The court said:

> "Adequate indicia of reliability of anonymous tips may arise from the very specificity of the information given respecting the individual suspect, since detailed descriptive characteristics of the person, including the clothes he is wearing, when corroborated by the officers who shortly thereafter find an individual in the given spot or area exactly fitting the description, strongly indicate that the information is based on the personal observation of the informant." 425 A.2d at 1333.

Furthermore, the court emphasized that the officer need not observe any unusual conduct to justify a stop and frisk under these circumstances. The court warned, however, that police may not, on the mere pretext of disarming a potentially dangerous person, conduct a warrantless search of the person with the distinct object of discovering enough evidence to supply probable cause for arrest. Also police should not conduct a stop and frisk under these circumstances unless they have sufficiently detailed information to enable them to make a reliable identification of a specific individual.

In *State v. Bushey,* 425 A.2d 1343 (1981), the court held that the defendant's holding of a piece of fence similar to that surrounding a nearby house provided the law enforcement officer observing

him with reasonable suspicion that the defendant had committed or would commit criminal mischief. The officer therefore had the right to temporarily interrupt the defendant's freedom of movement to prevent or investigate a crime.

In *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed. 2d 238 (1979), the U.S. Supreme Court reaffirmed the rule that an officer may not conduct a patdown search of a person for weapons unless the officer has reason to believe that the person is armed and dangerous. In the *Ybarra* case there was no justification to frisk the defendant, a mere patron of a bar, where the police neither recognized him as a person with a criminal history nor did they have a particular reason to believe that he might be inclined to assault them. Moreover, the defendant's hands were empty, he gave no indication of possessing a weapon, he made no gestures or other actions indicative of an intent to commit an assault, and he acted generally in a manner that was not threatening.

In *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63L.Ed.2d 639 (1980), an important U.S. Supreme Court decision, the Court held that, absent exigent circumstances or consent, a law enforcement officer may not make a warrantless entry into a suspect's home in order to make a routine felony arrest. The Court said that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed and that the warrant procedure minimizes the danger of needless intrusions of that sort. The Court went on to say that an arrest warrant requirement, although providing less protection than a search warrant requirement, was sufficient to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. The Court concluded that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603, 100 S.Ct. at 1388, 63 L.Ed. 2d at 661.

An important practical consequence of the *Payton* decision is that law enforcement officers will be applying for more arrest warrants. Unless a suspect is apprehended at or near the scene of a crime or shortly after it is committed, it is more likely that he will be found at home than elsewhere. If the suspect is at someone else's home, however, the case of *Steagald v. United States,* ___U.S. ___, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) applies. That case held that an arrest warrant does not authorize law enforcement officers to enter the home of a third person to search for the person to be arrested, in the absence of consent or exigent circumstances. In order to protect the Fourth Amendment privacy interests of persons not named in the arrest warrant, a *search* warrant must be obtained to justify entry into the home of any person other than the person to be arrested. Indeed, this requirement may place a heavy practical burden on law enforcement officers, requiring them to obtain both an arrest warrant and a search warrant in many cases. An alternative, suggested by the U.S. Supreme Court, is that, in most instances the police may avoid altogether the need to obtain a search warrant simply by waiting for a suspect to leave the third person's home before attempting to arrest that suspect. When the suspect leaves either the home of a third person or his own home, he is in a public place and may be arrested on probable cause alone. Neither an arrest warrant nor a search warrant is required to support an arrest made in a public place.

State v. Carey, 412 A.2d 1218 (1980) held that for purposes of the fresh pursuit statute (30 M.R.S.A. §2364) the term "felony" means any offense for which a warrantless arrest may be made on probable cause under 17-A M.R.S.A. §15(1) (A). In that case, the offense arrested for was operating under the influence involving a motor vehicle accident, and under a special provision, 29 M.R.S.A. §1312(11) (B), a law enforcement officer may arrest without a warrant any person involved in a motor vehicle accident, if the officer has probable cause to believe the person was operating under the influence. The Maine court held that the arrest fell within the meaning of a "felony" arrest under the fresh pursuit statute and therefore the legality of the arrest in another jurisdiction was determined by the less restrictive statutory standard — whether the officer departed to apprehend the defendant "without unreasonable delay" — and not by whether his pursuit was "instant". Officers should refer to the statutes cited to gain a better understanding of the *Carey* decision.

SEARCH WARRANTS

In *State v. Sweatt,* 427 A.2d 940 (1981) the Maine Supreme Judicial Court clarified the law relating to the establishment of the credibility of informants in affidavits in support of requests for search warrants. The general rule is that an ordinary citizen informant, who is an eyewitness to or victim of a crime, is presumed credible and no further evidence of his credibility need be stated in the affidavit. Where, however, the informant is not a disinterested observer, but (as in the *Sweatt* case) is a former associate of the defendant who bore ill feelings toward the defendant, the presumption of credibili-

ty is not applicable. In such instances, more information must be provided in the affidavit relating to the informant's credibility or additional information corroborating the informant's information must be provided to establish the reliability of that information. Therefore, unless the ordinary citizen informant is a disinterested eyewitness to or victim of a crime, additional information should be provided in the affidavit to establish the informant's credibility or to corroborate the information he has given.

Three recent court decisions dealt with the requirement that a search warrant particularly describe the items to be seized. In *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 99 S.Ct. 2319, 60 L. Ed.2d 920 (1979), the U.S. Supreme Court held that the Fourth Amendment does not permit the use of search warrants that do not particularly describe the things to be seized but, instead, leave it entirely to the discretion of those conducting the search to decide what is to be seized. Nor does the Fourth Amendment permit the use of open-ended search warrants, to be completed while a search is being conducted and items are being seized, or after the seizure has been carried out. An officer presented with such a warrant should consult with a local prosecuting attorney before executing the warrant.

The Maine case of *State v. Sweatt,* cited above, also dealt with the requirement that a search warrant describe the items to be seized with a particularity that will enable the searching police officer to identify them with certainty. The *Sweatt* case differed from the *Lo-Ji Sales* case in that some description of the items to be seized appeared in the warrant in the former case, whereas no description of items appeared in the latter case. The warrant in the *Sweatt* case authorized a search for certain tourmaline gems "readily identifiable as being from the Dunton Mine in Newry, Maine." Only a gem expert could identify such tourmalines, and since the search warrant did not require gem experts to be present at the search, the description of the items to be seized was unconstitutionally vague. Officers applying for a search warrant for items requiring an expert to identify them should specifically request in the affidavit that a qualified expert or experts be required to be present during the execution of the warrant to assist the officer in identifying the items.

In *State v. Corbin,* 419 A.2d 362 (1980) the Maine court held that, where the search warrant gave only a general description of the item to be seized and the attached affidavit provided a more detailed description, the officer executing the warrant was entitled to refer to the affidavit to provide the necessary detail. Before referring to an affidavit for a more detailed description of an item in the warrant, however, the officer should make sure that the affidavit is specifically referred to in the warrant and is attached to the warrant.

In *State v. Arnold,* 421 A.2d 932 (1980), the Maine court held that the requirement, in M.R. Crim.P., Rule 41(c), of reasonable cause to justify a nighttime search was met where (1) the affidavit asserted a positive belief, supported by probable cause, that the property sought would be found at the home of the defendant; and (2) the affidavit disclosed, in describing the property to be searched for, that it was property capable of being altered, moved, or destroyed on short notice. In the *Arnold* case, the property sought was human hair, bloodstained clothing, and a watch band. In situations where it is not obvious from the nature of the property, officers should specify in the affidavit why the property is capable of being altered, moved, or destroyed on short notice.

In *State v. Hayford,* 412 A.2d 987 (1980), the Maine court held that the magistrate issuing a nighttime search warrant need not delete entirely the paragraph on the standard search warrant form relating to daytime searches nor need he delete the words "in the daytime" in that paragraph. Therefore, a law enforcement officer executing a search warrant with neither the daytime search paragraph nor the nighttime search paragraph deleted may execute the warrant at any time of night or day. Officers should refer to the standard Maine search warrant form for a better understanding of this case.

In *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed. 2d 238 (1979), the U.S. Supreme Court held that a person's mere proximity to others, independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. In the *Ybarra* case, the defendant was merely a patron in a bar and the police had a search warrant to search the bar and the bartender. The search of the defendant was illegal because the police did not have probable cause particularized with respect to the defendant. The court said that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place. Therefore, if an officer wishes to search a place and also wishes to search specific individuals expected to be at that place, the officer should obtain a search warrant to search the place *and* each specific individual. In order to obtain such a warrant, the officer will be required to establish in the affidavit probable cause to search the place and each specific individual. A search warrant for the place *only* will not justify a search of persons who happen to be there.

WARRANTLESS SEARCHES

In *State v. Fredette,* 411 A.2d 65 (1979) the Maine court held that a consent search of the defendant's home was valid where she had called the police claiming that someone had shot her husband, made no objection to the initial police entry, fully cooperated with police investigative efforts, and encouraged the police in their search. The consent was valid even though the police believed that they had the right to search the home irrespective of consent on the basis of the "homicide scene" exception to the search warrant requirement. (For a discussion of homicide scene searches, see the ALERT Bulletin for November-December 1980, January-February 1981, and March-April 1981). The court also reiterated the rule that the person consenting to a search need not be made aware of the right to object to a warrantless search in order for the consent to be voluntary. It should be noted that the determination of the voluntariness of consent is a sensitive issue based on the totality of the circumstances. Officers should always think first in terms of obtaining a warrant.

In *State v. Carey,* 417 A.2d 979 (1980), the Maine court held that entry of private premises by government agents, deceiving the occupant as to their identity, does not violate the Fourth Amendment, because the occupant has no legitimate expectation of privacy concerning criminal conduct or evidence of such conduct that he voluntarily reveals to the government agent. In the *Carey* case, state liquor enforcement agents entered a fraternity party to which the public had been invited by misrepresenting their identity and they observed in plain view evidence of the defendant's unlawful sale of intoxicating liquor. Since the agents entered for the very purposes contemplated by the occupant, it did not matter that the invitation to enter was not for a commercial purpose or that the agents did not have probable cause to support the issuance of a search warrant.

In *Colorado v. Bannister,* —U.S.—, 101 S.Ct. 42, 66 L. Ed.2d 1 (1980), a police officer stopped a car for speeding and, while issuing a citation, observed in plain view items matching the description of items recently stolen in the vicinity and also observed that the occupants of the car met the description of those suspected of the crime. The U.S. Supreme Court held that these circumstances provided probable cause to seize the incriminating items without a warrant under the "automobile exception" to the search warrant requirement. In *State v. Mower,* 407 A.2d 729 (1979), the Maine court held that a converted school bus/camper being operated on the highways was a mobile vehicle for purposes of the "automobile exception" to the search warrant requirement, even though the defendant used it as his home. The bus could therefore be searched without a warrant if there were probable cause and exigent circumstances.

In *State v. Blais,* 416 A.2d 1253 (1980) the Maine court reaffirmed its holding in *State v. Hassapelis,* 404 A.2d 232 (1979) that although the right to search an automobile establishes the right to seize a container found in the vehicle, the right to search the container itself without a warrant must be independently established. In the *Blais* case, the container lawfully seized from the automobile trunk was an opaque, rolled up plastic bag. Since there were no exigent circumstances (such as the danger of weapons or explosives), since the contents of the container were not in plain view, and since the nature of the container did not reveal its contents (such as a gun case) the subsequent warrantless search of the bag and the seizure of its contents violated the defendant's reasonable expectation of privacy and was illegal. This case illustrates the principle that law enforcement officers should think first of obtaining a search warrant unless the situation presents an obvious exception to the search warrant requirement.

Since the seizure and search of the bag from the vehicle's trunk occurred at the police station some time after the vehicle had been stopped on the highway, the State attempted to justify the search as a routine inventory search. The court found that it was not an inventory search, however, because the State introduced no independent evidence of established police department rules or policy with respect to inventorying impounded vehicles. Officers should not conduct inventory searches of vehicles unless their department has established rules or policy with respect to such searches, and all inventory searches should be conducted in strict conformance with the established rules or policy.

In *Walter v. U.S.,* —U.S.—, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) the U.S. Supreme Court held that FBI agents should have obtained a search warrant before viewing films which were lawfully in their possession and which they had probable cause to believe were obscene. The Court based its opinion on the principle that an officer's authority to possess a package is distinct from his authority to examine its contents. In the *Walter* case, the packages containing the films had been opened by a private party, to whom they had been mistakenly delivered, revealing labels establishing probable cause to believe the films were obscene. The Court held that the FBI agents' possession of the films and limited observation of the labels was lawful. The expansion of the search to actually exhibiting the

films, however, required the authorization of a warrant. The important point to be learned from this case and from the *Blais* case is that whenever a law enforcement officer intends to expand a search of something lawfully in his possession (such as a package, book, film, etc.), he should obtain a search warrant, unless there are exigent circumstances.

In State v. Littlefield, 408 A.2d 695 (1979), the Maine court held that police surveillance of the defendant on a public street was not a "search" or "seizure" under the Fourth Amendment because it involved no unreasonable intrusion on the defendant's expectation of privacy. The court relied on the principle that what a person knowingly exposes to the public is not a subject of Fourth Amendment protection.

In *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), the U.S. Supreme Court held that the installation and use of a "pen register" was not a "search" within the meaning of the Fourth Amendment and, therefore, was permissible without the authority of a search warrant. A "pen register" is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed. A pen register is usually installed at a central telephone facility and records on a paper tape all numbers dialed from the line to which it is attached.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Criminal Division, Department of the Attorney General, State House, Augusta, Maine 04333.

ALERT

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