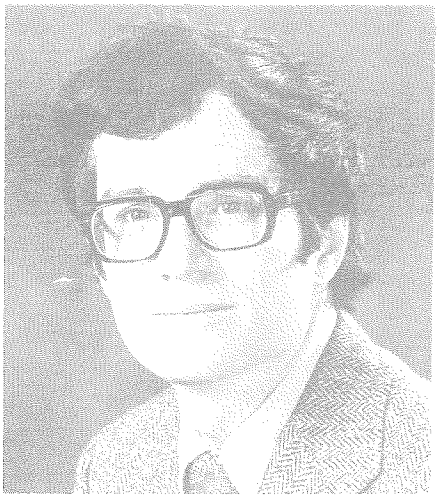
MARCH-APRIL, 1982

ALERT

MAINE DEPARTMENT OF
THE ATTORNEY GENERAL

MAINE CRIMINAL
JUSTICE ACADEMY



MESSAGE FROM THE ATTORNEY GENERAL JAMES E. TIERNEY

I regretfully announce that this issue of ALERT will be the last. We have struggled to finance the project for the past year and a half and have finally run out of funds and sources of funding. This year's ALERT subscription drive fell far short of last year's and the Attorney General's Office is experiencing the same financial constraints as other governmental entities at the state and local level. Moreover, as you know, the Maine Criminal Justice Planning and Assistance Agency, which funded the ALERT Bulletin in its early years, is going out of business early next year.

The ALERT Bulletin has provided Maine's criminal justice community with up-to-date information on criminal law and procedure for nearly 12 years. I would welcome and support any grass roots efforts to fund the continuation of its publication or any creative ideas to provide a similar service to Maine's criminal justice community. Failing such an effort, I would like to reiterate that the Criminal Division of this office remains available to provide whatever assistance possible in the training and education of Maine's criminal justice professionals. Please contact Deputy Attorney General James W. Brannigan, Jr. at 289-2146 to request such assistance.

Finally, Maine's criminal justice community owes a great debt to the dedicated and talented lawyer who has struggled to keep the ALERT viable and informative. Former Assistant Attorney General John Ferdico has steadily improved the quality of our legal system through his tireless educational efforts and deserves the utmost respect from us all for his professional endeavors.

Jim Tierney

JAMES E. TIERNEY
Attorney General

RECENT COURT DECISIONS

ARREST — STOP AND FRISK

In *Washington v. Chrisman,* U.S. , 102 S.Ct. 812, 70 L.Ed 2d 778 (1982), the U.S. Supreme Court held:

> "[I]t is not 'unreasonable' under the Fourth Amendment for a police officer, as a matter of course, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety — as well as the integrity of the arrest — is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested." U.S. , 102 S.Ct. at 817, 70 L.Ed. 2d at 785.

In the *Chrisman* case, the officer had arrested a college student for possession of alcoholic beverages by a person under 21 and the student asked permission to go to his room to get his identification. The officer accompanied the student to his room and while in the room, the officer observed marijuana in plain view.

The Court held that the officer had a right to remain literally at the student's elbow at all times and that no showing of "exigent circumstances" was necessary to authorize the officer to accompany the student into the room. The Court said:

> "Every arrest must be presumed to present a risk of danger to the arresting officer. ...There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious." U.S. at , 102 S.Ct. at 817, 70 L.Ed. 2d at 785.

Since the officer was in a place where he had a right to be, he had a right to seize incriminating evidence or contraband lying in plain view.

In *State v. Preble,* 430 A.2d 553 (1981), the Maine Court reiterated the holding in *U.S. v. Mendenhall* (see the May-June 1981 ALERT), that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person

would have believed that he was not free to leave." 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed. 2d 497, 509 (1980). In the *Preble* case, the defendant contended that prior to his oral confession to committing a homicide, law enforcement officers had detained or seized him in the Fourth Amendment sense and at the time they detained him the officers did not have probable cause to believe he had committed the homicide. Therefore, the defendant contended, his confessions were the "fruit of the poisonous tree," namely the unlawful detention. The Maine court found that prior to the evening in question, over a period of two and a half days, the defendant had voluntarily talked with law enforcement officers at least four times, and on none of those occasions had he been prevented from breaking off the conversation or leaving when he wished to do so. The court also found that

> "he was never physically touched or threatened by either officer; he was never confronted by a weapon, a police uniform, a police cruiser, or other symbol of authority; and he during the questioning in the car remained in the neighborhood well known to him." 430 A.2d at 557.

On these facts, the court held that the defendant was not detained or "seized" in the Fourth Amendment sense and that his otherwise legally obtained confession was not a "fruit of the poisonous tree." This case presents a good example of the factors a court will consider in determining whether a reasonable person would have believed that he was not free to leave.

In *State v. McKenzie,* 440 A.2d 1072 (1982), the Maine court held that an investigatory stop of a vehicle on the highway, based on an informant's tip, was illegal and that all evidence obtained as a result of the initial illegal stop was inadmissible as "fruit of the poisonous tree." The informant, an antique dealer, had told the officer that three people in a described vehicle had attempted to sell her antique dolls and that the officer should "check them out." The informant gave no reasons for her suspicions nor any indication that she saw any evidence of the commission of a crime. Furthermore, the officer had no knowledge of any recent thefts of antiques in his area nor did the officer observe, prior to the initial stop, any furtive action or action suggestive of criminal activity by the defendant. The court, therefore, found the initial stop illegal, since neither the "hunch" of the informant as conveyed to the officer, nor his own observation of the defendant prior to the stop provided specific and articulable facts reasonably warranting suspicion of criminal conduct.

After the initial illegal stop, the officer stopped the defendant's vehicle two more times, once for operating after a license suspension and again after the officer received a report that antique dolls had been reported stolen in a nearby town. During the third stop, the officer obtained a valid consent to search the defendant's vehicle and seized the dolls. In deciding whether the illegal initial stop of the defendant required suppression of the dolls as "fruit of the poisonous tree," the court looked to five factors:

1. The voluntariness of the consent.
2. Police compliance with *Miranda;*
3. The closeness in time between the stop and the consent search;
4. The presence of intervening circumstances; and
5. The purpose and flagrancy of the police misconduct.

Although the court found no problems with factors 1, 2, and 5, the court pointed out that *Miranda* warnings were given only moments after the officer requested permission to search and informed the defendant that otherwise he could apply for a search warrant, the invalid stop occurred approximately three hours before the consent to search, and the only intervening circumstance was the second stop for the license suspension violation. The court concluded that the obvious connection between the initial illegal stop and the seizure of the dolls had not been dissipated by the defendant's consent to search.

SEARCH WARRANTS

In *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the U.S. Supreme Court held that officers executing a valid search warrant for *contraband* may detain the occupants of the premises while the search is being conducted. The court stated, "If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." 452 U.S. at 704-05, 101 S.Ct. at 2595, 69 L.Ed.2d at 351. In further explaining the justification for the detention, the Court emphasized the limited additional intrusion represented by the detention once a search of the home had been authorized by a warrant. The court also pointed out that, when a search warrant for contraband is involved, law enforcement officers have a legitimate interest in preventing flight if incriminating evidence is found and in minimizing the risk of harm to themselves, since the execution of a search warrant for contraband, especially narcotics, "is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." 452 U.S. at 702, 101 S.Ct. at 2549, 69 L.Ed.2d at 349-50.

In *State v. Chase,* 439 A.2d 526 (1981), the Maine court held:

> "[W]here a defendant attacks an affidavit based upon facts attributed to confidential informants and thereby brings into question the validity of a warrant, the trial judge must decide whether in his sound discretion disclosure is warranted. The trial judge in the exercise of his discretion must balance the State's interest in protecting the flow of information against the defendant's need for information material to his defense. Because of the State's interest involved, some showing greater than a bare assertion and supported by more than the mere desire to determine the informant's identity must be made by the defendant. A legitimate question or doubt must be raised in the Court's mind as to the affiant's credibility before disclosure is warranted..." 439 A.2d at 531.

The court also held that if the trial judge orders disclosure and the state refuses to disclose the identity of the informant, the appropriate sanction is suppression of any evidence seized pursuant to the search warrant.

The court suggested alternate procedures to disclosure to be used in certain cases so that the identity of the informant would be revealed only to the court. Nevertheless, in some cases, the only way for the court to satisfy the defendant's legitimate need for information will be to order disclosure of the identity of the informant. In these cases, the state will have to choose between obeying the disclosure order and perhaps losing the services of a valuable informant or disobeying the order and losing the benefit of evidence seized under the warrant. It should be pointed out that careful drafting of the affidavit for the warrant and the avoidance of the appearance of deception will put the State on a much better footing when faced with a motion for disclosure.

WARRANTLESS SEARCHES

In *Robbins v. California,* 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) the U.S. Supreme Court held that closed opaque containers discovered by law enforcement officers during a lawful search of an automobile could not be opened and searched without a warrant. The court stated that the Fourth Amendment protects people and their effects whether the effects are "personal" or "impersonal." Once placed within a closed, opaque container, "a diary and a dishpan are equally protected by the Fourth Amendment." 453 U.S. at 426, 101 S.Ct. at 2846, 69 L.Ed.2d at 751.

Therefore, officers may not conduct a warrantless search of a closed, opaque container, even though it is found during the course of a lawful search of an automobile. The only exceptions of this rule are: (1) If the contents of the container are open to plain view, the officers may seize the contents without a warrant; (2) If the contents of the container can be inferred from its outward appearance (such as a kit of burglar tools or a gun case), the officer may seize the contents without a warrant; and (3) If a container found in an automobile is seized incident to the arrest of an occupant of the automobile, the search and seizure of the contents of the container are governed by the case of *New York v. Belton,* discussed below.

In *New York, v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the U.S. Supreme Court held:

> "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.... Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." 453 U.S. at 460-61, 101 S.Ct. at 2864, 69 L.Ed.2d at 775.

In a footnote, the court defined a container as any object capable of holding another object. A container thus includes "closed or open glove compartments, consoles or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." 453 U.S. at 460-61 n.4., 101 S.Ct. at 2864 n.4, 69 L.Ed. 2d at 775 n.4. The court also pointed out that only the interior of the passenger compartment of an automobile may be searched incident to arrest, and not the trunk.

It is important for law enforcement officers to understand that the *Belton* case deals only with the search incident to arrest exception to the warrant requirement and has nothing to do with the so-called "automobile exception" under the *Carroll* doctrine. The Court specifically referred to *Chimel v. California,* the leading case on search incident to arrest, stating that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item." 395 U.S. at 763,

89 S.Ct. at 2040, 23 L.Ed.2d at 694. Therefore, the holding in the *Belton* case does not apply unless there has been a *custodial arrest* of the occupant of an automobile. And it is the *custodial arrest* which provides the justification for examining the contents of containers seized from the passenger compartment of the automobile. If there were no arrest and a closed opaque container were seized from an automobile under the *Carroll* doctrine, a search warrant would be required before the contents of the container could be examined.

In *State v. Philbrick,* 436 A.2d 844 (1981), the Maine Court held that a law enforcement officer could not conduct a warrantless search of the defendant's bloodied knapsack which had been left at the side of a public highway near the scene of a possible homicide. The knapsack was left by the defendant after an incident in which the defendant shot another person, was injured himself, and stopped a passing motorist to obtain a ride to the police station.

The court stated the rule with respect to the search and seizure of abandoned property as follows:

> "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. All relevant circumstances existing at the time of the alleged abandonment should be considered.... Abandonment in the constitutional sense, i.e., in the law of search and seizure exists only if the defendant has voluntarily discarded the property, left it behind, or otherwise relinquished his interest therein under circumstances indicative of his foregoing any further reasonable expectation of privacy with regard to it at the time of the search." 436 A.2d at 854.

The court found that the knapsack had not been abandoned by the defendant.

> "While it is true that the defendant left his knapsack by the side of the public highway where any curious passer-by might have examined it ... the knapsack's location is the only fact which, if considered in isolation, might suggest that the defendant abandoned it. The totality of the evidence in this record, however, clearly points to a contrary conclusion: the defendant had replaced his gun in the knapsack after the shooting and rebuckled all the closings so that the contents of the pack were not visible; the defendant was emotionally agitated and suffering from a gunshot wound when he stopped David Fleming's car and accepted a ride to the Saco police station; and, the defendant never disclaimed ownership of the knapsack but rather told the Saco police that it was his, so that police knew that the pack belonged to the defendant rather than to the decedent. 436 A.2d at 885."

The court also noted that in the typical abandonment case, the defendant purposefully discards weapons or contraband while police are approaching or are in hot pursuit. In this case, however, the defendant merely left his property behind him, more or less of necessity, making no attempt to discard it or disassociate it from himself.

Finally, the court found that the mere fact that the knapsack was seized at the scene of a possible homicide when no exigent circumstances existed did not in and of itself establish a greater need or justification for a warrantless search.

The knapsack, therefore, was treated as the equivalent of a closed, opaque container in which the defendant had a constitutionally protected right of privacy. Although the police could seize the knapsack as relevant evidence in a possible homicide case, they could not lawfully search the knapsack without first obtaining a warrant.

In *State v. Nason,* 433 A.2d 424 (1981), the Maine court held that a prison inmate could be subjected to a body cavity search for drugs, where the prison officials had probable cause to believe that the prisoner would attempt to smuggle scheduled drugs into the prison and where the search was conducted reasonably. The court emphasized that prison inmates have certain privacy rights but the scope of those rights is narrower than that of non-convicts and those rights must be balanced against the legitimate security interests of the prison. The court found that the interest of the prison prevailed in this case, stating that "[t]he presence of scheduled drugs in prison communities poses serious risks to the interests of those institutions in security, discipline and rehabilitation." 433 A.2d at 427.

The court made the following statement with respect to the reasonableness of the search:

> "Nason was read his rights, abusive language was not used, he was given an opportunity to remove the package of drugs himself, and he was allowed to remove it in a windowless room in the presence of only two officers both of whom were of the same sex as he. Further, he was told that if he refused to cooperate, medical personnel would conduct the search at the prison hospital. Where, as in this case, prison authorities take such steps to conduct the search in a reasonable manner, the absence of counsel does not render the otherwise reasonable intrusion unreasonable." 433 A.2d at 428.

ADMISSIONS AND CONFESSIONS

In *State v. Bleyl,* 435 A.2d 1349 (1981), the Maine court held that the defendant, who went voluntarily to the police station when requested by officers to help in the

investigation of an elderly woman's death and who was not coerced or restrained in any way, was not in "custody" for purposes of requiring *Miranda* warnings, even though the police officers did not specifically tell him that he was free to leave.

The *Bleyl* case also held that statements obtained by police officers from the defendants after the illegal arrests of the defendants were admissible even though obtained shortly after the arrests. The court restated the basic rule that "[t]he admissibility of statements made after an illegal arrest must be determined, on the facts of the particular case, in light of (1) the voluntariness of the defendant's statements (a threshold requirement), (2) police compliance with *Miranda,* (3) the closeness in time of the arrest and statement, (4) the presence of intervening circumstances, and (5) in particular, the purpose and flagrancy of the police misconduct. 435 A.2d at 1360. The court found that the defendant's statements were voluntary, that *Miranda* requirements had been complied with, and that the police did not exploit the arrests in obtaining the statements. Most importantly, however, the court found that the police conduct was in no way purposefully or flagrantly illegal. The police believed in good faith that they had obtained valid arrest warrants and did, in fact, have *probable cause* to arrest the defendants. The reason for the illegality of the arrests was the magistrate's failure to read the affidavit. Since the Fourth Amendment's purpose of deterring illegal police behavior would not have been furthered by suppressing the defendant's statements, the statements were held to be admissible.

In *State v. Michael L.*, 441 A.2d 684 (1982), the police informed the juvenile defendant of his *Miranda* rights before questioning him about his involvement in several crimes, but the police did not do so in the presence of the juvenile's father and, in fact, never informed the father of the juvenile's *Miranda* rights. The court held:

> "Though it would be preferable to advise an adult interested in a juvenile's welfare of the juvenile's *Miranda* rights, as well as the interrogation itself, failure to do so does not mechanically render a subsequent waiver *per se* invalid. Failure to notify an adult of the juvenile's *Miranda* rights is a factor to be used, in addition to such factors as the juvenile's age, experience, education, background, intelligence, and capacity to understand his rights ...in assessing whether a juvenile has effectively waived his *Miranda* rights." 441 A.2d at 688.

In *State v. Philbrick,* 436 A.2d 844 (1981), the Maine Court held that "[a] reasonable person in the position of [the defendant], who had voluntarily submitted his person to the Saco police, thinking that he had killed a man [in a fight], and who, after his explanation of the event at the station, was rushed to Webber Hospital with a police officer at his side probing the particulars of the scuffle, followed by questioning from a State police officer at that hospital, to be later transported to the Maine Medical Center, again with a police officer present who once more questioned him in the emergency room of that hospital regarding the details of the fight, would reasonably have felt that he was in custody of the police and that his freedom of action was at that point foreclosed." 436 A.2d at 850. The court further explained its finding that the defendant was in custody by stating that the defendant's voluntary account of his encounter with the homicide victim.

> "focused the investigation thereafter on the defendant's own conduct in the altercation; although the officers did not display aggressive action toward him, their continuing presence after his departure from the police station in the small confines of an ambulance or hospital emergency room would suggest a coercive impact of physical police constraint or in the least have a psychological potential on Philbrick for thinking his freedom of action was gone; the defendant was seriously injured, either attached to an ambulance stretcher or confined to a hopsital bed awaiting surgical treatment or recuperative therapy; he was missing his glasses without which he was legally blind; he had no friends or family to boost his morale or to whom he could turn for advice; the defendant's physical condition effectively precluded him from leaving the scene of his interrogation or getting away from the police. Police officers cannot take advantage of a coercive situation which limits an accused's freedom of action and then proceed to interrogate him without proper *Miranda* admonitions." 436 A.2d at 851.

The *Philbrick* case suggests that, even though a law enforcement officer has taken no assertive or aggressive action to create a coercive atmosphere to deprive a person of his freedom of action, in certain circumstances, the officer's mere continuous presence over a long period may create such an atmosphere and may constitute custody for *Miranda* purposes. Officers must, therefore, be sensitive to the person's physical and mental condition and to whether a reasonable person in the particular situation would be under the impression that he was being forcibly detained. If the officer believes that a reasonable person would be under such an impression, the officer should,

before questioning the person, either specifically inform the person that he is not under arrest or in custody and is free to leave at any time, or administer the *Miranda* warnings and obtain a valid waiver of *Miranda* rights. Factors to consider in determining whether a reasonable person might have the impression that he was being forcibly detained are:

(1) Whether a criminal investigation has begun to focus on the person;

(2) Whether the person is confined with the officer in a small room, a vehicle, or other restrictive atmosphere;

(3) Whether the person is injured or otherwise physically or mentally impaired;

(4) Whether the person is physically able to get away from the police; and

(5) Whether friends or family members are present.

The Court in the *Philbrick* case also held that the belated giving of *Miranda* warnings after a person had made a full disclosure of his conduct in a custodial interrogation setting did not purge subsequent statements of the taint of the previous illegal interrogation. The court said:

> "Having let the cat out of the bag by making inadmissible statements in a custodial interrogation context, an accused's subsequent statements, even if made under proper *Miranda* warnings, must be viewed as given under the psychological pressures of having already made those incriminating statements and must be considered as the fruit of the first unlawful interrogation unless the taint of illegality is so attenuated by time, place or other sufficient motivation as to break the link between the two." 436 A.2d at 852.

The court went on to explain that a person's statement must be excluded if in giving the statement, the defendant was motivated by a belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements. The important point for law enforcement officers is that Miranda warnings must be given *before* custodial interrogation and not after the defendant has let the "cat out of the bag."

Comments directed toward the improvement of this bulletin are welcome. Please contact the Criminal Division, Department of the Attorney General, State Office Building, Station #6, Augusta, Maine 04333.

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