CRIMINAL LAW REVISION COMMISSION
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CRIMINAL PROCEDURE

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 5. SEARCH AND SEIZURE

Preliminary Draft No. 3; May 1972

Reporter: George M. Platt
Professor of Law
University of Oregon

Subcommittee No. 2

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GENERAL PROVISIONS

Section 1. Definitions. As used in this Article 5, unless the context requires otherwise:

(1) "Judge" means any judge of the district or circuit court, the Oregon Court of Appeals and the Oregon Supreme Court.

(2) "Police officer" means any sheriff, municipal policeman and any member of the Oregon State Police.

COMMENTARY

A. Summary

The definitions are set out to clarify who may apply for and which judicial officers may issue search warrants. The former is limited to a sheriff, municipal policeman or a state policeman.

B. Derivation

The definitions are new.

C. Relationship to Existing Law

Under existing Oregon law, ORS 141.040 states that any magistrate authorized to issue an arrest warrant is authorized to issue a search warrant. Pursuant to ORS 133.030 this means all district, circuit, Court of Appeals and Supreme Court judges as well as county judges and justices of the peace. The definition of "judge" in subsection (1) of this section does not include county judges and justices of the peace. It is the position of the Commission that the complexities of search and seizure law make it mandatory that the person charged with issuing warrants be legally trained. Since it is possible that county judges and justices of the peace may be laymen, these judicial officers are eliminated from the search warrant process.

The Oregon Criminal Code of 1971 defines a peace officer in ORS 161.015 as a sheriff, constable, marshal, municipal policeman, member of the Oregon State Police and such other persons as may be designated by law. The subcommittee believes that this group is too broad for the purposes of this Article. Only those persons identified with regular police organizations are given the authority

to apply for search warrants. Semi-official police, such as railroad detectives and plant guards, who may qualify as peace officers under the definition of ORS 161.015, should not be able to obtain a search warrant because of their inexperience in the area and less likelihood that their applications would be supervised by the district attorney.

Section 2. Prohibition of unauthorized searches and seizures. No search or seizure shall be authorized or executed except in accordance with the provisions of this Article 5 and Article 2 [Stopping of Persons].

COMMENTARY

A. Summary

This section prohibits all searches and seizures except those specifically allowed in other sections of this Article (e.g., searches and seizures pursuant to a warrant, incidental to an arrest) and the provisions relating to Stopping of Persons.

B. Derivation

The language of this section is based on section ss 1.02 of the MCP.

C. Relationship to Existing Law

No comparable provision exists in Oregon legislation on the general level of the proscription in this section. Like most other states the Oregon statutes in the search and seizure field (or lack of such statutes) leave to implication the prohibition of unauthorized searches and seizure. In a few instances ORS specifically authorizes seizures. See ORS 164.368 (stolen Christmas trees); 167.540 and 167.555 (gambling devices); 142.080 (vehicles used to transport stolen property). The silence of the legislature with respect to the kinds of searches and seizures which are permissible leaves the policy limits to be determined by the courts based on their notions of what is constitutionally permissible. Such a failure by the legislature has the effect of authorizing any search which the Constitution does not prohibit. For example, under this Article no provision is made for inventory car searches, it being the intent that such searches are not acceptable as a matter of policy. This section, then, effectuates this policy decision because it outlaws any search not specifically authorized, i.e., the inventory car search in the example.

Statutes should, as pointed out in the MCP commentary (Tent. Draft No. 3, p. 10), "be so phrased as to leave a certain amount of judicial elbow room for the exercise of discretion. But it is believed that there should be a statutory basis for every search and that searches lacking such a basis should be explicitly prohibited."

Section 3. Permissible objects of search and seizure. (1) The following are subject to search and seizure under this Article 5 and Article 2 [Stopping of Persons]:

(a) Information concerning the commission of a criminal offense;

(b) Contraband, the fruits of crime, or things otherwise criminally possessed;

(c) Weapons or other things used or likely to be used as means of committing a crime; and

(d) A person for whose arrest there is reasonable cause or who is unlawfully held in concealment.

[(2) With the exception of handwriting samples and other writings or recordings of evidentiary value for reasons other than the testimonial content of such writings or recordings, things subject to search and seizure under subsection (1) shall not include personal diaries, letters, or other private writings or recordings, unless they have served or are serving a substantial purpose in furtherance of a criminal enterprise.]

COMMENTARY

Special note: The subcommittee voted to recommend to the Commission that subsection (2) be deleted. It was left in this draft, and placed in brackets, to enable the Commission to review it because of its controversial policy.

A. Summary

This section is intended to specify the things - including information and individuals - that are subject to search and seizure under the ensuing Articles of the draft.

Under subsection (1), paragraphs (b) and (c), the subjects of search and seizure are tangible physical objects. Ordinarily, that will also be the case under paragraph (a),

which reflects the Supreme Court's recent decision removing the constitutional barriers to the seizure of "mere evidence." See Warden v. Hayden, 387 US 294 (1967). The draft uses the phrase "information concerning" instead of "evidence of" to cover the situation where the fruits of the search are not tangible objects, and where their value is negative rather than positive. When a homicide has been committed, the police may need a search warrant to examine the scene of the crime, and look for bloodstains, fingerprints, means of ingress and egress, and the like. The fact that the window in the deceased's room was locked and impossible of access from outside is not literally "evidence of the commission" of a criminal offense, but it is important "information concerning" the offense, because it establishes that the killer must have entered some other way. If the police cannot gain access by consent for such investigations, legal authority should be available.

Although paragraph (d) probably is not necessary, this view is not universally entertained, and there appears to be no objection to the authorization of search warrants to enter premises for purposes of arrest or rescue.

Subsection (2) covers the possibility of constitutional limitations on the seizure of private documents, such as diaries, which contain evidence of crime but have not been used as instrumentalities of crime. The diary of Sirhan Sirhan, for example, would probably fall into this category. The proposed exception does not extend to documents sought for reasons other than their testimonial content, nor to documents, however "private," that have been or are being used as instrumentalities of crime.

B. Derivation

The section draft follows closely the language in section ss 1.03 of the MCP. The policies, if not the exact language presently contained in ORS 141.010, which sets out the grounds for issuance of search warrants, are in substantial accord with the policies in the draft.

C. Relationship to Existing Law

The existing statutory material throughout the country on this matter exhibits great variety. Several states, including Oregon in its statute setting out the purposes for which a search warrant may be issued (ORS 141.010), follow a common and apparently elderly form which covers property

which is "stolen or embezzled," which has been "used as the means of committing a crime." In many other states this form is used as the base, with additions or variations. Specific reference to "stolen" or "stolen and embezzled" property is common to most of them, and no doubt reflects the ancestral common law warrant for stolen goods. Several states particularize the permissible objects by types of crime -- gambling, liquor, fish and game laws, etc. -- instead of by general categories.

"Evidence" as the object of a search warrant: Until the Court's recent decision in Warden v. Hayden, 387 US 294 (1967), there were constitutional obstacles to the issuance of a search warrant for mere "evidence" of a crime; some unlawful possessory aspect was required under the so-called "mere evidence" rule enunciated in Gouled v. United States, 25 US 298 (1921). But the Gouled case was explicitly overruled by the Hayden case, at least as concerns "non-testimonial" evidence.

The demise of the mere evidence rule had been widely predicted and in fact was anticipated in 1963 when the Oregon legislature added language to ORS 141.010 permitting the issuance of a search warrant for the purpose of seizing evidence of a crime, a development probably stemming from the tortured holding in State v. Chinn, 231 Or 259, 373 P2d 392 (1962). In Chinn the Oregon Supreme Court found that evidence was admissible under the instrumentality provision of ORS 141.010 when in reality the "instrumentalities" of the crime of rape (empty beer bottles, a camera, a soiled bed sheet) more closely resembled "mere evidence" of the crime.

Exception for diaries and other private records: Prior to the Court's decision in the Hayden case, two judges who had given recent and careful consideration to the shortcomings of the "mere evidence" rule had both expressed the view that certain kinds of documents might remain beyond the constitutional reach of a search warrant. In a case decided in 1965, Chief Justice Weintraub stressed the "marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect." In the Court of Appeals' decision in the Hayden case itself, Chief Judge Haynesworth drew a distinction between tangible evidentiary articles which might legitimately be seized, and "a diary containing incriminating entries," the seizure of which would be "prohibited by the Fourth and Fourteenth Amendments."

The Hayden case involved identifying garments, and thus raised no issue of the constitutional sanctity of private documents. Nevertheless, in his opinion for the Court, Mr. Justice Brennan was careful to leave the question open (387 US at 302-03):

> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. Schmerber v. California, 384 U.S. 757. This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

There is, of course, no special sanctity for documents as distinguished from other physical objects. A lottery ticket is a document but it is also, if lotteries are prohibited, an instrument of crime. Diaries and letters may be but are not necessarily instrumentalities of crime, and are testimonial utterances of the writer, which lottery tickets are not.

Since the ALI Council meeting in February 1970, the Court of Appeals for the Second Circuit has answered the question left open by Mr. Justice Brennan in the negative. United States v. Bennett, 409 F2d 888 (2d Cir 1969). Judge Friendly's rejection of any limitation on the type of documents subject to seizure was based in part on a belief that such considerations are relevant to the Fifth rather than the Fourth Amendment, and in part on a doubt that such limitations effectively serve the cause of privacy, inasmuch as ordinarily documents must be read in order to determine whether or not they are in fact instrumentalities, so that the limitation in seizability does not narrow the search. The ALI Council found these arguments persuasive and by a vote of 24 to 3 struck the provision from the MCP draft. However, the ALI membership voted to retain the provisions.

Acknowledging the force of Judge Friendly's second point, your Reporter remains of the belief that documents which serve no purpose in the furtherance of any criminal enterprise, and are admissions pure and simple, should not

be permitted objects of search or subjects of seizure. Apart from the substantial constitutional doubts which the matter presents, there are sound reasons of policy for the proposed limitation. Seizure and disclosure of private letters and diaries is a particularly abrasive infringement of privacy. An area of complete freedom for personal conversation and writing, so long as there is no furtherance of crime involved, preserves important First Amendment values. The forced production of private diaries and letters, to obtain admissions or other statements against interest, runs perilously close to the ban on self-incrimination.

A recent case in the 7th Circuit lends support to the position taken in subsection (2) of this section. In the case a doctor's personal books and papers in his office had been seized pursuant to a search warrant issued in a federal tax evasion investigation. The court noted in its opinion that recent cases strengthening the Fifth Amendment privilege against self-incrimination would be violated if the government were able to circumvent the privilege with respect to documents just by getting a warrant. Hill v. Philpott, 9 Cr L Rep 2239 (7th CA 1971).

SEARCH AND SEIZURE PURSUANT TO WARRANTS

Section 4. Issuance of search warrant. (1) Who may issue. A search warrant may be issued only by a judge.

(2) Who may apply. Application for a search warrant may be made only by a prosecuting attorney having jurisdiction over the prosecution of the offense or offenses in connection with which the warrant is sought, or by [a] any police officer.

(3) Contents of application. The application shall [describe with particularity the individuals or places to be searched and the things to be seized,] consist of a proposed warrant in conformance with section 6 of this article and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that such things are in the places, or in the possession of the individuals, to be searched. If an affidavit is based in whole or in part on hearsay, the affiant shall set forth facts bearing on the informant's reliability and shall disclose, as far as possible, the means by which the information was obtained.

COMMENTARY

A. Summary

Subsection (1), in accordance with modern practice, confines the authority to issue search warrants to Oregon judges of the district court level and above.

Under subsection (2) only prosecuting attorneys and police officers are authorized to apply for search warrants. The definition of police officer is limited to sheriffs, municipal policemen and state policemen in section 1.

Subsection (3) embodies the Fourth Amendment's requirements of "Oath or affirmation" and particularity. It also requires that affidavits be in hand at the inception of the proceedings, so as to discourage frivolous or speculative applications based on the chance that a witness may give sufficient supporting oral testimony. The second

sentence embodies special requirements of particularity with respect to hearsay affidavits based on the statements of "informers," which the Supreme Court has articulated in cases such as Aguilar v. United States, 378 US 108 (1964), Spinelli v. United States, 393 US 410 (1969), and, most recently, U. S. v. Harris, 91 S Ct 2075 (1971).

B. Derivation

The language of the section comes largely from MCPP section ss 2.01 (1), (2) and (3).

C. Relationship to Existing Law

The limitations as to who may issue and apply for search warrants in subsections (1) and (2) are explained in the Commentary to section 1, supra.

As to the contents of the warrant application, covered in subsection (3) of the section, the U. S. Supreme Court has decided over a dozen cases dealing with the sufficiency of affidavits to support a finding of probable cause to issue a search warrant. The first case in this line was Byars v. U. S., 273 US 20 (1927), and the most recent is U. S. v. Harris, 91 S Ct 2075 (1971). The matter has generally been treated as one of constitutional dimension for judicial determination with little or no effort being made through state legislation, including that of Oregon, to deal with the problem by statute.

The Court's decisions in this area are closely tied to the particular facts in hand, and the cases are correspondingly easily distinguishable and lend themselves to discretionary disposition. This circumstance makes it difficult to extract rules of general application, suitable for statutory statement.

The Byars case and others in its wake have indicated the Court's disapproval of conclusory statements in the affidavits. The question of probable cause must be decided on the basis of what is put before the magistrate, and he must be given enough to make up his own mind, and not have to rely on the applicant's judgment. Aguilar v. U. S., 278 US 108 (1964). Hearsay evidence which would not be admissible in evidence at the trial may be considered, Brinegar v. U. S., 338 US 160 (1949), but in that event the affiant must set forth the grounds for treating the hearsay as credible. Spinelli v. U. S., 393 US 410 (1969).

It is around the matter of hearsay leads or tips from "informers" that the Court has recently been divided. From the opinions one may gather at least two desiderata: (1) that the affiant state the grounds for his belief that the informer is reliable, and (2) that the affiant indicate how the informer acquired his knowledge. The last sentence of subsection (3) embodies those criteria. The Harris case, decided in 1971, seems to ease some of the more restrictive requirements announced in the Spinelli case. It would seem desirable as a minimum to insure the validity of the affidavit involving hearsay that the following be included, based on suggestions contained in section 20.56, Oregon Criminal Law Handbook (1965):

(1) The information must come from a law enforcement officer or a reliable informant.

(2) If it comes from the reliable informant, the affidavit should contain both an assertion that the informant is reliable and the facts in support of this. (In the Harris case the affidavit did not establish this in the usual way, which consists of a recitation of the times the informant had previously supplied tips leading to valid arrests and seizures. Instead, in the Harris case, the fact, inter alia, that the informant had furnished statements against his own criminal interest were accepted largely as establishing his reliability. Harris also recognizes reputation evidence against the person to be searched.)

(3) Facts and circumstances must be asserted to support the conclusion that criminal conduct is being engaged in or that evidence of crime is contained in the premises at or very near the time of the affidavit. This must come either from the affiant's own observations, those of fellow police officers, or those of the informant. (For a discussion of some of the recent probable cause cases, see Platt, Criminal Procedure, 49 Or L Rev 287, 292-297 (1970)).

It is believed that the language in subsection (3) as to content of the application is approximately and necessarily general enough to reflect the present or future stance of the U. S. Supreme Court. This is clearly an area where there must be considerable play in the joints to allow constitutional interpretation by the courts without freezing into Oregon law a particular holding or view.

Section 5. The hearing. (1) Record of proceedings on application. Before acting on the application, the judge may shall examine on oath the affiants, and the applicant and any witnesses he may produce, and may himself call such witnesses as he considers necessary to a decision. He shall make and keep a fair summary of the proceedings on the application, and a record of any testimony taken before him.

(2) Basis for issuance. If the judge finds that the application meets the requirements of this section and that, in the basis of the record made before him, there is probable cause to believe that the search will discover things specified in the application and subject to seizure under section 3 of this Article, he shall issue a search warrant based on his finding and in accordance with the requirements of sections 4 through 12 of this Article. If he does not so find, the judge shall deny the application.

(3) Secrecy. The proceedings upon application for a search warrant shall be conducted with secrecy appropriate to the circumstances[.] until the warrant is executed.

COMMENTARY

A. Summary

Subsection (1) requires the judge to whom application is made to take testimony, and authorizes him to call witnesses on his own initiative. If no oral testimony is given, the magistrate is required to make a "fair summary" of the proceedings; if testimony is given, it must be recorded.

Subsection (2) embodies the constitutional requirement of probable cause. The requirement is one of probable cause to believe that things (a) specified in the application, and (b) subject to seizure under section 3 of this Article, will indeed be found by the search proposed. If the judge is satisfied that such a showing has been made, and that the application otherwise meets the requirements of the code, he makes a finding to that effect and issues a warrant.

Since the only reason for issuing search warrants ex parte is to avoid giving advance warning to those in control of the premises to be searched, a requirement of secrecy prior to execution of the warrant is desirable. After execution of the warrant there may be no further reason for secrecy, and the proceedings on the return are, of course, adversary in nature. If the judge declines to issue the warrant, or if it is returned unexecuted, there may be reason for continued secrecy, and the word "appropriate" is intended to leave such occasional but conceivable problems to the judge's discretion.

B. Derivation

The section is based on MCPP section ss 2.01, paragraphs (4), (5) and (6). It is similar in policy to ORS 141.050 which also requires the judge to examine affiants and authorizes him to call witnesses.

C. Relationship to Existing Law

The language in subsection (2) with respect to the hearing and record keeping generally reflects the present ORS provision. However, the present practice in Oregon, according to the Lane County District Attorney's office, appears to be that the hearing on the application is very informal. Rarely does the judge hear or call additional witnesses. At most he might ask some questions of the police officer seeking the warrant. Apparently no record is kept of these questions so that the affidavit is the only record.

The goal of the Commission is to encourage the police to seek search warrants and to facilitate this in all ways possible. Requiring a more formal record-making procedure tends to make more cumbersome the obtaining of warrants. It may, however, serve another purpose which might be viewed as outweighing the extra burden. If the judge causes a record to be kept of all that is said at the "hearing" on the application, it may prove beneficial should the affidavit be challenged later in a motion to suppress.

The provision in subsection (3) on secrecy of the hearings is new to Oregon law in language but not as a practical matter of regular operation. Surprisingly few states (apparently only three) have such a provision, yet the practice clearly is one of secrecy. The draft language reflects this policy.

Section 6. Contents of search warrant. (1) Date and address. A search warrant issued pursuant to sections 4 and 5 of this Article shall be dated and shall be addressed to and authorize its execution by an officer authorized by law to execute search warrants issued by the judge.

(2) Scope of contents. The warrant shall state, or describe with particularity:

(a) The identity of the judge issuing the warrant and the date when and place where application for the warrant was made;

(b) The identity of the applicant and all persons whose affidavits were given in support of the application;

(c) The name of the person to be searched, or the location and designation of the premises or places to be searched;

(d) The things constituting the object of the search and authorized to be seized;

[(e) The times of day or night and the period of time during which execution of the warrant is authorized;] and

[(e)] [(f)] The period of time, not to exceed five days[,] after execution of the warrant, except as provided in subsection (3) of this section, within which the warrant is to be returned to the issuing authority.

(3) Time of execution. [Except upon finding as hereinafter provided, the search warrant shall provide that it be executed during the daytime, and within five days from the date of issuance.] Upon a finding by the judge of probable cause to believe that [the] place to be searched is not readily accessible, or that the objects to be seized are in danger

of imminent removal, or that the warrant can only be safely or successfully executed at nighttime, or under circumstances the occurrence of which is difficult to predict with accuracy, the judge may, by appropriate provision in the warrant, authorize its execution at other times but not more than 10 days from the date of issuance.

(4) Warrants for documents. If the warrant authorizes the seizure of documents other than lottery tickets, policy slips, and other non-testimonial documents used as instrumentalities of crime, the warrant shall require that it be executed in accordance with the provisions of section 12 of this Article, and may, in the discretion of the judge, direct that any files or other collection of documents, among which the documents to be seized are reasonably believed to be located, shall be impounded under appropriate protection where found, or removed pursuant to section 12 of this Article.

COMMENTARY

A. Summary

The contents of the warrant, as described in subsections (1) and (2) of this section, are in general conformity with existing statutory provisions, except for the requirement that the period within which the return must be made be shown. For anyone who wishes to contest the warrant, this is vital information.

Subsection (3) directs that, in the absence of unusual circumstances, the warrant require that it be executed in the daytime and within five days. Nighttime or delayed execution may be authorized only on the basis of special findings by the judge justifying such action.

Subsection (4) is the first of several which are intended to require a new procedure for the handling of intermingled documents. It should be read in conjunction

with section 12, infra, and section 15, dealing with intermingled documents, as these sections embody the proposed procedure in its entirety. Subsection (4) provides only that if the warrant authorizes the seizure of testimonial documents, the warrant shall require its execution in accordance with section 12, and may provide for impounding rather than removal of the documents in question.

B. Derivation

The section is based on section ss 2.02 (1), (2), (3) and (4) of the MCPP and in the main incorporates the requirements presently set out in the warrant form contained in ORS 141.080 which is not incorporated as part of this draft. Not included in present Oregon law are the items contained in subsections (2) (b) (identity of the applicant) and (f) (times of day or night execution is authorized).

Subsection (3) has similarity to ORS 141.130 with an important difference as is noted in the explanation below. Subsection (4) has no counterpart in Oregon statutes.

C. Relationship to Existing Law

Subsection (2) (b), requiring that the identity of the applicant be contained in the search warrant, is highly desirable from the standpoint of the person served so that he can better determine whether or not to contest the warrant. The further requirement in (2) (b) that the warrant contain the names of all persons whose affidavits were given in support of the warrant should cause no difficulty. Routinely in Oregon such affiant is a police officer and no other affidavits are normally submitted.

Subsection (3) contains an important innovation for Oregon law. Where possible, searches should be conducted in daylight hours. The invasion of private premises in the small hours of the night smacks of totalitarian methods and is more likely to create the terror that precipitates gun battles. Obviously there are occasions when it is imperative that the search be conducted at night. Subsection (3) permits such searches if the judge finds present the factors described in subsection (3).

Subsection (3) generally requires that the warrant be served within five days which is shorter than the basic ten-day execution requirement of ORS 141.100. Subsection (3) of the draft section does, however, provide that upon a special showing that the five days is not enough time, a period of up to ten days may be granted. It seems desirable to keep the time allowed for execution of search warrants as short as possible. This tends to eliminate problems with respect to staleness of the warrant which often form a fruitful basis for attack on the legality of the warrant.

Subsection (4), which is based on section ss 2.02 of the ALI draft has an interesting background. At an ALI Council meeting in February 1969 during the discussion of excluding private writings from items which are seizable, Judge Charles Breitel proposed that special procedural safeguards be devised for documentary searches, so as to minimize the invasion of privacy. The same thought is expressed in Judge Friendly's opinion in the Barnett case, wherein he suggested (409 F2d at 896) "that an approach geared to the objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized."

This draft embodies this approach and is the first of three provisions in which the procedure is set forth, the others being sections 12 and 15.

Subsection (4) is intended to exclude from the new procedure things which are documents only in the sense that they are papers bearing writing, and which therefore raise no problems of testimonial content and carry no privacy values. Overall, the Breitel-Friendly concept is a fruitful one, and it is not believed to be impractical or excessively burdensome procedurally. The proposal is apparently novel, and existing statutes are of little aid in its formulation or evaluation. Essentially, it calls for taking out of the hands of the police the task of sifting through documents to discover those which may be seizable, and remitting the operation to scrutiny in adversary proceedings before a judicial officer.

Section 7. Execution of warrant. (1) Persons authorized. A search warrant may be executed only within the period and at a the times specified therein, and only by a police officer. The police officer charged with its execution may be accompanied by such other officers, or persons having knowledge of the premises to be searched or the location of the things to be seized, as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

(2) Notice of authority. Except as provided in subsection (3) of this section, the executing officer shall, before entering the premises, give appropriate notice of his identity, authority and purpose to the person to be searched, or to the person in apparent control of the premises to be searched, as the case may be.

(3) Execution without notice. If the executing officer reasonably believes that the notice required by subsection (2) of this section would lead to the destruction of evidence, result in the escape of a suspect or increase the peril to the officer's safety, the officer may execute the warrant without prior notice.

(4) Service of warrant. Before Upon undertaking any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or to the person in apparent control of the premises to be searched. If the premises are unoccupied or there is no one in apparent control, the officer shall leave a copy of the warrant suitably affixed to the premises.

COMMENTARY

A. Summary

The provisions in subsection (1) make the terms of the search warrant binding on the executing police officer. The executing officer is authorized to have assistance from other officers and private persons where appropriate.

Subsection (2) embodies the common law rule, found in the statutes of many jurisdictions, that the executing officer's entry upon premises must be preceded by notice of his identity, authority and purpose.

The notice requirement of subsection (2) may, pursuant to subsection (3), be disregarded by the executing officer if he has reasonable cause to believe that giving notice would result in increased peril to himself, the flight of the culprit, or the loss of evidence.

Subsection (4) requires that a copy of the search warrant shall be given to the individual whose person or premises are searched. Inasmuch as the proceeding on a search warrant is judicial in nature, and may become a contested proceeding, the requirement seems essential, in order to put the possibly aggrieved party on notice of the authority and purported reasons for the search, and enable him to prepare to contest it if he so desires.

The draft also requires that a copy of the warrant be given before the search is begun. This is so that the "searchee" may know that there is color of authority for the search, and that he is not entitled to oppose it by force. It likewise requires that the warrant shall be read to the person searched rather than merely handed to him, so that he will be immediately apprised of what it is, and so that the problems of illiteracy may be mitigated.

B. Derivation

The section follows the language of MCPP section ss 2.03 (1), (2), (3) and (4). Substantively there is little deviation from similar provisions in ORS 141.110 and the knock and announce rules of Oregon based on ORS 133.290.

C. Relationship to Existing Law

The requirement that an officer executing a search warrant for closed premises shall, before attempting an entry, give notice of his authority and purpose to whomever may be within, is the traditional common law requirement. It is also frequently found in state statutes, including Oregon. See ORS 141.110 and 133.290. There appears to be no reason to eliminate the requirement, as stated in subsection (2), absent the emergent circumstances which are the subject of subsection (3).

Subsection (3) is intended to accomplish the same general purpose as the New York statute commonly known as the "no-knock" law. NY Code Crim Proc section 799. The constitutionality of such a provision is supported by Ker v. California, 374 US 23 (1963), approving a California judge-made rule dispensing with the need for notice in emergency circumstances. Oregon has recently approved the no-knock approach in State v. Mitchell, 93 Or Adv Sh 89, ____ Or App ____ (1971), and State v. Gassner, 488 P2d 822 ____ Or App ____ (1971). The approach of these two cases is reflected in the language of this section.

The question remains whether that finding may be made by the officer executing the warrant, or only by the magistrate issuing it. The New York "no-knock" statute requires that the issuing magistrate must have found, on proper proof, that the circumstances call for dispensing with notice, and must insert such a direction in the warrant itself. The rule of the California courts, on the other hand, authorizes the officer to dispense with notice if he has reason to believe that notice would endanger the safety or success of the undertaking. This view has also been adopted in Oregon in the Mitchell case, supra.

Other sections on arrest in this Code impose no such requirement in connection with arrests, whether or not under warrant, if the officer has reasonable cause to believe that notice would enable the suspect to escape, or endanger the officer or others.

The provisions with respect to the requirement of prior approval ought to be the same with respect to both arrests under warrant and searches under warrant. Clearly, too, circumstances may arise where officers making a warrantless arrest may need to make an unannounced entry. In the light of these considerations, there is no sufficient reason to require predetermination by a magistrate in search warrant cases, and the draft is based on that conclusion.

Section 8. Scope of the search. The scope of search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. Upon discovery of the persons or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of the search the officer discovers things, not specified in the warrant, which he reasonably believes to be subject to seizure under section 3 of this Article which he did not [and could not have expected] reasonably expect to find, he shall also take possession of the things discovered.

COMMENTARY

A. Summary

This section makes explicit the well-established rule that the search must be no broader in scope than the warrant justifies. Once the things specified in the warrant are found, its authority is exhausted providing something does not transpire during the search which justifies a further search outside the warrant's authority.

B. Derivation

The language is drawn from MCPP section ss 2.03 (5). There is no specific provision covering this in ORS.

C. Relationship to Existing Law

This section reflects generally the law of Oregon and other jurisdictions in circumscribing what the police may seize under the authority of a search warrant to the things described in the warrant. The section also recognizes the well-established rule that something may occur during the authorized search which in effect would expand the otherwise limited search authority. For example, what is found may furnish the basis for a valid arrest, and the arrest may provide authority for a further search of the person and immediate vicinity of the individual arrested, in accordance with search incident to arrest provisions.

It is possible that, in the course of conducting a search for things specified in the warrant, the officer may observe things not so specified which are contraband, or which for some other reason appear to be things subject to seizure under section 6, supra. If the officer's basis for such belief is reasonable, he should be entitled to seize them, just as when he observes such things elsewhere in the lawful conduct of his duty. This latter authority is limited, however, by Coolidge v. New Hamp., 91 S Ct 2022, 2040-41 (1971). The Court said that if the initial intrusion is bottomed upon a search warrant which fails to mention a particular object, though the police know its location well ahead of time and intend to seize it, then there is a violation of the express constitutional requirement of "warrants...particularly describing...the things to be seized." Pursuant to Coolidge, then, police must be much more careful about what they list. They will not now have the wide latitude they supposed existed under the plain view rule. Thus under Coolidge if the police expect to find evidence or contraband, or if the police could anticipate finding certain evidence or contraband, it may not be seized under the plain view rule.

The majority opinion in State v. Alexander, ____ P2d ____, ____ Or App ____ (1972), refused to apply the Coolidge limitation on the facts. The dissent by Judge Schwab, however, took the view that the "not inadvertent" discovery limitation did apply. In any event, the Coolidge rule, embodied in the language of this section, is clearly recognized by both the majority and minority in Alexander.

Section 9. List of things seized. Promptly upon [Upon] completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person from whose possession they are taken, or the person in apparent control of the premises from which they are taken. The list shall be prepared in the presence of the person to whom the receipt is to be delivered. If the premises are unoccupied or there is no one in apparent control, the executing officer shall leave the receipt suitably affixed to the premises.

COMMENTARY

A. Summary

The requirement of this section that a list of things seized be given by the executing officer to the person from whose possession they are taken, is part of the classical common law of search and seizure.

B. Derivation

The section is based on MCPP section ss 2.03 (6).

C. Relationship to Existing Law

The requirement that a receipt, listing everything seized, be given to the occupant of the premises is a common law feature of search warrant procedure, which is usually found in statutory form, including Oregon, in ORS 141.120. All the reasons for giving the occupant a copy of the warrant apply likewise to the requirement of a receipt. And here, as in the case of the warrant, a copy should be left affixed to the premises if no responsible person is on hand to receive it.

Section 10. Use of force in executing warrants. (1) The executing officer and other officers accompanying and assisting him may use the degree of force, short of deadly physical force, against persons, or to effect an entry, or to open containers, as is reasonably necessary for the execution of the search warrant with all practicable safety.

(2) The use of deadly physical force in the execution of a search warrant is justifiable only:

(a) If the officer reasonably believes that there is a substantial risk that things to be seized will be used to cause death or serious physical injury if their seizure is delayed and that the force used creates no substantial risk of injury to persons other than those obstructing the officer; or

(b) If the officer reasonably believes that the use of deadly physical force is necessary to defend the officer or another person from the use or threatened imminent use of deadly physical force.

draft, deadly physical force is not permissible unless there is no substantial risk to innocent bystanders, and there is substantial risk that failure to effect a prompt seizure of the things sought will result in death or serious bodily harm. The phrase "other than in self-defense" is inserted in order to make it clear that an officer may use such degree of force as is reasonably necessary to defend himself.

B. Derivation

The section is taken from MCPP section ss 2.03 (7).

C. Relationship to Existing Law

The present Oregon law embodied in ORS 144.110 provides that the amount of force which may be used to execute a search warrant, both as to breaking into premises and in overcoming resistance, is the same as that allowed for the

execution of an arrest warrant. The quantifying of the authority to break into premises and containers with the same authority under arrest law is unexceptional. But it appears desirable to differentiate the use of force in the execution of a search warrant.

Under the draft the officer may use such force, short of deadly physical force (see ORS 161.015 (3) for the definition of this term), as may be reasonably necessary for execution of the warrant. But such force shall not extend to use of deadly force except (1) where the officer is acting in self-defense, or (2) where the things a person authorized to be searched for and seized will suffer or be used to cause death or serious bodily harm if the search is delayed, and (3) there is, in the reasonable opinion of the officer, no risk to innocent bystanders.

It will be seen that this standard of use of deadly physical force is premised on a different concept than that which provides for use of deadly force in effecting arrests as provided in the Oregon Criminal Code of 1971, ORS 161.235 and 161.239. Under these sections the policeman's authority to use force is equated generally to the dangerousness of the kind of crime for which he is attempting to make an arrest. For instance, ORS 161.239 provides that the officer may use deadly force if he reasonably believes the person to be arrested has committed the crime of kidnapping or rape. However, the seizure of evidence of either of these crimes may not in any common sense view warrant the use of deadly force in connection therewith unless there is cause to believe that failure to seize the evidence, due to inability to use deadly force, would create danger of serious harm or death. Basically, what the section's policy says is that if the police have to choose between getting evidence under a warrant by using deadly force or losing that evidence, the value of human life outweighs the deadly acquisition of the evidence (barring the exceptional circumstances stated in the draft section).

Section 11. Return of the warrant. (1) Unexecuted warrant. If a search warrant is not executed within the time specified therein, the officer shall return the warrant to the issuing judge on or before the date so specified.

(2) Executed warrant. An officer who has executed a search warrant shall, as soon as is reasonably possible and in no event later than the date specified in the warrant, return the warrant to the issuing judge together with a [verified] signed report of the facts and circumstances of execution, including a list of things seized.

(3) Filing of record. Subject to the provisions of subsection (4) of this section, the issuing judge shall file the warrant, report and list returned to him, with the record of the proceedings on the application for the warrant made pursuant to section 5 of this Article.

(4) Transmittal to court having jurisdiction. If the issuing judge does not have jurisdiction to inquire into the offense in respect to which the warrant was issued or the offense apparently disclosed by the things seized, the judge shall transmit the warrant and the record of proceedings for its issuance, together with the documents submitted on the return, to the clerk of the appropriate court having jurisdiction to inquire into such offense when so ordered by the court having jurisdiction.

COMMENTARY

A. Summary

Subsection (1) requires the return of unexecuted warrants on or before the date the warrant expires.

Subsection (2) embodies and formalizes the traditional common law requirement for return of a search warrant to the issuing magistrate.

Subsections (3) and (4) are routine filing provisions. In some jurisdictions the judges who issue search warrants may not have jurisdiction to try the offenses in connection with which the warrants are issued, and in those circumstances the records should be filed with a court having jurisdiction to proceed in the matter when so requested by the appropriate court. This is true in Oregon counties like Lane where the district court issues almost all search warrants yet has no jurisdiction over many serious crimes in which the warrants may be involved.

B. Derivation

The section follows the language of MCPP section ss 2.04.

C. Relationship to Existing Law

Unexecuted warrants. ORS presently includes very little of the provisions of this section. All ORS 141.100 says about unexecuted warrants is that after the time expires in which they may be served, they become void.

Apparently Georgia and Illinois are the only states that require return of a warrant which has not been executed. Still, the procedure appears to be desirable. In two states the improper issuance of a search warrant is criminally punishable, (North Carolina and Virginia), and in other jurisdictions the proceedings for issuance of an unexecuted warrant, and the reasons for its non-execution, might be relevant in subsequent tort or criminal litigation. It is the intent of subsection (1) of this section that when unexecuted warrants are returned, the issuing judge may make a thorough inquiry as to the reasons the warrant was not executed and that a record of such reasons be kept.

Return. The return of an executed search warrant is an historic and elemental part of the proceedings; the lack of a return was one of the oppressive features of the general warrants in our colonial days. In many states, however, the characteristics of the return remain a matter of common law practice, as the statutes do little more than require that a return be made. Some 15 states, however, have statutory provisions comparable to those in the draft, and the federal rule is of the same sort.

The requirement that the return include an inventory of seized property is universal, including Oregon under ORS 141.130, but the requirement of a report descriptive of the process of execution appears to be the rule only in Rhode Island and Texas. It seems a highly desirable provision, in order that a contemporaneous account be obtained against the event of subsequent challenge to the lawfulness of the execution process.

The provision in subsection (2) requiring return of the executed warrant is more precise than the present Oregon provision. Under ORS 141.130 it is required that the officer executing the warrant "shall forthwith return" it to the issuing magistrate. Although this imperative bespeaks a need for considerable promptness, State v. Cortman, 251 Or 566 (1968), refused to apply the exclusionary rule to evidence seized under a warrant which was not promptly returned. The opinion sets no time limits, not even one in terms of "reasonable delay." Thus apparently in Oregon if the search warrant and the search are valid, the Oregon court does not consider a delay in return of the warrant a relevant matter as to admissibility of evidence seized. This could very well work hardships on defendants who would be frustrated in challenging the seizure process by dilatory returns. To obviate this problem, the proposed draft sets a definite time limit on the return. Section 6 makes it clear that the warrant, when issued, shall indicate the time during which the warrant may be served and the outside date (not to exceed five days after execution of the warrant providing an additional five days has not been granted under the terms of section 6).

It may be that even this more specific requirement for return of a warrant might not or ought not trigger the exclusionary rule in case of its violation. In line with the policy announced in the Cortman case, supra, a future Oregon court might view exclusion of evidence as too great a penalty. This would not be objectionable perhaps, if the delay in the return was not overly long. If the delay beyond the statutory limits could be viewed as "reasonable" under the particular circumstances it would seem to make good sense not to invoke the harsh penalty against the state of exclusion of the otherwise legally obtained and trustworthy evidence. Nevertheless, a statutory statement of preference for early return would seem best to exhort police to make returns promptly so as to avoid possible loss of seized evidence on the motion to suppress or cause unfairness to defendants because of unreasonable delay.

Subsections (3) and (4) are fairly routine and will work little, if any, change in present practices.

Section ~~13~~ 12. Execution and return of warrants for documents. (1) Identification of documents to be seized. If the warrant authorizes documentary seizure as specified in subsection (4) of section 6 of this Article, the executing officer, by all appropriate means, shall try to search for and identify the documents to be seized without examining the contents of documents not covered by the warrant. If the officer identifies them, he shall seize the documents covered by the warrant and deal with them in accordance with the provisions of sections 8, 9, 10 and 11 of this Article.

(2) Intermingled documents. If the documents to be seized cannot be searched for or identified without examining the contents of other documents, or if the documents to be seized constitute items or entries in account books, diaries, or other documents containing matter not specified in the warrant, the executing officer shall not examine the documents but shall either impound them under appropriate protection where found, or seal and remove them for safekeeping pending further proceedings pursuant to subsection (3) of this section.

(3) Return of intermingled documents. An executing officer who has impounded or removed documents pursuant to subsection (2) of this section shall report the fact and circumstances of the impounding or removal to the issuing judge. The report shall be made within three days of the impounding or removal and shall be accompanied by a request of the officer for a hearing on the matter which shall be held within 10 days of the request. Upon due and reasonable notice to all interested persons, the hearing shall be held before the issuing judge, or if he has no jurisdiction, before a judicial officer having such jurisdiction.

At the hearing the person from whose possession or control the documents were taken, and any other person asserting any right or interest in the documents may appear, in person or by counsel, and move for the return of the documents under sections 35 through 37 of this Article, in whole or in part, or may move to specify such conditions and limitations on the further search for the documents to be seized as may be appropriate to prevent unnecessary or unreasonable invasion of privacy. If the motion for the return of the documents is granted, in whole or in part, the documents covered by the granting order shall forthwith be returned or released from impoundment. If the motion is not granted, the search shall proceed under such conditions and limitations as the order shall prescribe, and at the conclusion of the search all documents other than those covered by the warrant, or otherwise subject to seizure, shall be returned or released from impoundment.

(4) Handling and disposition of seized documents. Documents seized shall thereafter be handled and disposed of in accordance with the other provisions of this section and of sections 35 through 37 of this Article.

(5) Use of testimony prohibited. No statements or testimony given in support of a motion made pursuant to this section shall thereafter be received in evidence against the witness in any subsequent proceeding, other than a prosecution for perjury, false swearing or contempt in the giving of such statements or testimony.

COMMENTARY

A. Summary

This section embodies the new procedure for documentary searches conducted under authority of a warrant. The first

subsection is intended to exclude from the new procedure those situations where the documents specified in the warrant can be sought and identified without going through other documents with which they are intermingled. To this end the officer might, for example, ask the possessor of the documents to pick out those covered by the warrant, without consenting to the search and seizure, but in order to avoid invasion of his privacy with respect to the other intermingled documents.

If, however, it appears that there is no way to search for the documents covered by the warrant without examining others, the special procedure prescribed in subsections (2) and (3) must then be followed. The same is true if only one document is involved, but it consists of multiple parts or entries, only one or some of which are sought under the warrant.

When the "intermingling" problem is inescapably present, the search is taken out of the hands of the officer executing the warrant, who becomes a custodian of the intermingled documents, charged with their safekeeping until the provisions of subsection (3) come into play. Depending upon the circumstances, the executing officer may take steps to safeguard the documents where found, or he may remove them under seal to a more suitable place for handling pursuant to subsection (3).

Once the intermingled documents are impounded or removed, the circumstances are to be reported within three days to the issuing authority, together with a request by the officer for a hearing. Within 10 days an adversary hearing is held before the issuing authority if competent, or otherwise before a judicial official having jurisdiction to determine the matter.

The hearing has two purposes: (a) to dispose of motions for restoration of the documents under the provisions of sections 35 through 37, and (b) to impose such limitations on the search among the intermingled documents as may be appropriate to prevent excessive invasions of privacy. In support of such limitations, the moving party might request that the search be conducted in the presence of counsel; might show that certain files or other discreet portions of the intermingled documents could not possibly contain the particular documents or entries sought under the warrant; might request that the search be carried out by a special master or other qualified and judicially-designated examiner rather than by the police; or might suggest other safeguards against unnecessary scrutiny or disclosure of the contents of the documents.

To the extent that a motion for return might be granted, the documents covered by the granting order would be restored at once to the individual entitled to possession. To the extent such a motion were to be denied, the search would then go forward, subject to whatever limitations the court would have imposed.

Subsection (4) relates to details of handling and disposing of seized items. Documents covered by the warrant, and other documents or things discovered in the search and subject to seizure, would be seized by the officer or official conducting the search, and would then constitute the things to be listed and returned to the issuing authority under section 11. They would also constitute the things seized for purposes of custody and disposal under section 35 and motions to suppress under sections 38 through 44.

Testimony offered in support of motions under subsection (3) might, it is apparent, be of a self-incriminating nature. Subsection (5) forecloses subsequent use of such testimony against the witness, subject to the customary exception for perjury or contempt prosecutions.

B. Derivation

The section is based on MCPP section ss 2.05.

C. Relationship to Existing Law

No provision in ORS is comparable to the draft of this section which is apparently novel throughout the country.

The most difficult problem presented by this section is to determine and intelligibly describe the circumstances that will trigger the special procedure. Theoretically, a single document may present "intermingling" in the sense that only part of the document is responsive to the warrant, and that part cannot be discovered without reading the whole. In the case of lengthy documents such as diaries or ledgers, therefore, the invasion of privacy may be just as great as with a file-drawer of correspondence.

Accordingly, it seems impracticable to put any quantitative floor under the provision. At the same time it appeared to be administratatively cumbersome to stipulate that any documentary search would trigger the procedure. Accordingly, the draft adheres to a general and circumstantial test. Whether the intermingled mass is large or small, if the documents or entries sought cannot be identified without reading other matter not within the warrant, then the special procedure must be utilized unless the possessor of the documents is willing and able to pull out all those covered by the warrant.

SEARCH AND SEIZURE INCIDENTAL TO ARREST

Section 13. Permissible purposes. Subject to the limitations in sections 13 through 20 of this Article, an officer who has made a valid arrest under Article 4 of this Code may, without a search warrant, conduct a search of the person, property, premises or vehicle under the apparent control of the arrested person:

(1) To effect the arrest with all practicable safety of the officer, the arrested person and others;

(2) To furnish appropriate custodial care, if the arrested person is jailed; or

(3) To obtain evidence of the commission of the offense for which the person is arrested or to seize contraband, the fruits of crime or other things criminally possessed or used in connection with the offense.

COMMENTARY

A. Summary

This section embodies the basic authorization for searches and seizures incidental to an arrest. The authority becomes effective only upon actually making the arrest. Limitations on the permissible scope of search pursuant to an arrest are contained in sections 18 through 20 of this Article. The section also specifies the several purposes for which a search incident to an arrest may legitimately be made, and which furnish the conceptual basis for both the authorization and the limitations.

B. Derivation

The section is based on section ss 3.01 (1) of the MCP.

C. Relationship to Existing Law

There are no comparable statutory provisions in Oregon but the purposes authorized in this section do not appear to be in conflict with any Oregon decisional law.

In view of the almost total lack of legislative underpinnings for the search incident to arrest -- a lack surely due to its taken-for-granted character for centuries past -- the section specifies the permissible purposes.

The validity of the purpose stated in subsection (1) is recognized with virtual unanimity. Nor would much question be raised about the necessity for custodial searches of jailed persons; the practice, well-nigh universal, is largely devoid of statutory basis and has not been the subject of much professional consideration.

More controversial are the purposes stated in subsection (3). So far as concerns "evidence," the purpose was, of course, clearly invalid during the time (1921-67) that the "mere evidence" rule of the Gouled case was in effect. With the rejection of that rule in the Hayden case, and subject to the possible exemption of testimonial documents discussed in connection with section 3, supra, the two parts of subsection (3) now stand on much the same footing.

Limitations on the permissible physical scope of searches incidental to an arrest are discussed under sections 18 through 20, infra.

Section 14. Things subject to seizure. In the course of a search conducted pursuant to sections 13 through 20 of this Article, the arresting officer may seize only things subject to seizure as provided in section 3 of this Article. The provisions of section 10 of this Article with respect to the use of force shall be applicable to searches and seizures undertaken pursuant to sections 13 through 20 of this Article.

COMMENTARY

A. Summary

This section makes applicable to searches and seizures incidental to an arrest the general limitations on what may be seized in section 3 of this Article. The reference in the section to the amount of force which may be used is contained, as a structural matter, in MCP's provisions on warranted searches, which the Reporter has not yet developed for presentation. The provisions referred to are found in MCP section ss 2.03 (7) which allows only the use of non-deadly force except that deadly force may be used for self-defense or where there is reasonable ground to believe that delay of the seizure will result in the use of the objects to be seized to cause death or serious bodily injury.

B. Derivation

This section is based on MCP section ss 3.01 (2).

C. Relationship to Existing Law

Oregon has no comparable statutory provision.

Section 15. Intermingled documents. If in the course of a search conducted pursuant to sections 13 through 20 of this Article the arresting officer discovers documents and if he has reason to believe that intermingled with them are documents or portions thereof which are subject to seizure under section 3 of this Article and connected with the offense for which the arrest is made, the officer shall handle such documents in accordance with the provisions of section 12 of this Article, and a hearing, in accordance with the provisions of that section, shall be held before a judge of the district or circuit court, except that the hearing shall not be in the district court if the court has no jurisdiction over the offense for which the arrest was made.

COMMENTARY

A. Summary

Section 15 is the last of the provisions establishing special procedures for intermingled documents. It makes applicable to intermingled documents discovered during an arrest search the same procedures that are established for warranted searches by section 12.

B. Derivation

This section is based on MCP section ss 3.01 (3).

C. Relationship to Existing Law

Oregon presently has no comparable statutory provision.

Section 16. Search incidental to arrest for minor offense. (1) The searches and seizures authorized by sections 13 through 20 of this Article shall not be authorized if the arrest is on a charge of committing a violation as defined in ORS 161.565, or a misdemeanor the elements of which involve no unlawful possession or violent, or intentionally or recklessly dangerous conduct, or a traffic offense except:

(a) Driving while under the influence of intoxicating liquor, dangerous drugs or narcotic drugs, as defined in ORS 483.992 (2);

(b) Failure to perform duties after an accident as defined in ORS 483.602 and 483.604; and

(c) Fleeing or attempting to elude a traffic or police officer as defined in ORS 483.049.

(2) This section 16 shall not be construed to forbid the search for dangerous weapons authorized by the provisions relating to Stopping of Persons.

COMMENTARY

A. Summary

The section forbids a search incidental to an arrest if the offense is a violation, a misdemeanor where no violent or reckless conduct is involved and where no unlawful possession is an element of the misdemeanor, or all but the three major traffic offenses listed. However, even in these kinds of offenses, the arresting officer may search within the confines of the stopping of persons' provisions.

B. Derivation

The section is based on MCP section ss 3.02 (1).

C. Relationship to Existing Law

No comparable statute exists in Oregon. This provision would probably have the effect of changing present police practices and some decisional law in Oregon. In most instances where the police arrest a misdemeanant or motorist (or issue a citation in lieu of arrest pursuant to ORS 133.045 through 133.080) no search is made. Where an arrest for a minor offense is made under circumstances where the

officer fears for his safety, a frisk is proper legally (Terry v. Ohio, 392 US 1 (1968)) and as a practical matter. But occasionally where an arrest is made on a traffic charge or a minor misdemeanor charge in present practice, a search may be made beyond a mere frisk either because the officer has a suspicion that he will find evidence of another more serious crime (the pretext arrest) or because the officer has probable cause to arrest for a more serious crime but for reasons of the moment does not elect to do so but instead arrests on a minor, unrelated charge. The pretext arrest to facilitate a general search is frowned upon in the case law. See e.g., State v. Williams, 248 Or 85 (1967), where the Oregon Supreme Court construed the testimony to show that the arrest for vagrancy was not made because the police really believed the defendant had violated the vagrancy ordinance but because the police wished to question the defendant about a burglary. For this reason and because a Miranda warning was not given prior to obtaining consent to search a locker of the defendant, the court ruled the evidence of the burglary disclosed by the search must be suppressed. See also State v. Dempster, 248 Or 404 (1967), where the rule is approved but, because of the facts of the case, not applied. Further limiting the search pursuant to a pretext arrest is the rule that the search incident to arrest must be reasonably related to the offense which prompts the arrest. Perhaps the best recent example of this is State v. O'Neal, 251 Or 163 (1968), in which a marihuana cigarette was suppressed on a possession charge stemming from seizure of the cigarette from the wallet of the defendant after arrest for driving with an expired operator's license and failure to have a rear license plate. No reasonable connection existed, said the court, between the arrest and the place searched. See also State v. Krogness, 238 Or 135 (1964), and U. S. v. Robinson, 8 Cr L Rep 1043, 2179 (DC Cir 1970), where complete search after a traffic arrest was held invalid.

The provision in this section will cause some difficulty in cases like State v. Cloman, 88 Adv Sh 567 (1969). The police had probable cause to arrest the defendant for burglary but instead chose to apprehend him on a curfew ordinance violation. The search pursuant to this arrest produced incriminating evidence used at the trial on a charge later brought for burglary. It is fairly clear that the police were not staging the arrest on the minor charge, or so the Oregon Court held, in approving use of the seized evidence at the trial.

The policy of the draft section seems advisable, despite cases like Cloman. If the police in fact have probable cause to arrest a citizen on a serious charge but choose not to do so, instead arresting for a minor traffic offense

or an unrelated, nonviolent misdemeanor, there is no reason why the police should be allowed a search any more extensive than a frisk in order to protect themselves if the circumstances of the arrest warrant even this. The very fact that police showed later, as they did in Cloman, that they had probable cause to arrest for burglary serves to emphasize that the police ought not to be excused for arresting on a minor charge instead so they could search the defendant's car.

In Cloman the Oregon Court said, "We believe it reasonable to conclude that the officers gave this cause [curfew violation] for arrest because of their uncertainty of the law of probable cause for arrest. We also believe it reasonable to conclude that the actual cause for which the officers arrested Cloman was some charge concerning stolen wire. Under these circumstances we find nothing to be served by holding the arrest invalid because the officers were uncertain about a problem which puzzles the courts." State v. Cloman, 88 Adv Sh 567, 576 (1969). Despite this it seems the desirable policy to insist that police stop using the minor arrest technique in order to give excuse for a search directed at discovering evidence involving a larger crime about which the police already have much information. The draft section would restrict this practice by prohibiting all searches, except frisks in appropriate cases and custodial searches pursuant to section 17 for arrest on a minor, nonviolent offense. Such a provision would go a long way to eliminate abuses in this area.

Section 17. Custodial search. A person who is arrested and confined in jail because of his physical condition or on other reasonable grounds, may be subjected to such search of the person as is reasonably necessary for custodial purposes, and things subject to seizure under section 3 of this Article, discovered in the course of the search, may be seized.

COMMENTARY

A. Summary

There may be occasions when a person charged only with a violation or a nonviolent misdemeanor must be jailed for his own protection because he is drunk or otherwise helpless, or for some other nonpunitive reason. Under these circumstances, and others where jailing is reasonable, following the arrest a search may be desirable for purely custodial purposes. On the basic principle that the police are entitled to observe and seize whatever contraband comes to notice in the course of the lawful conduct of their duties, any things subject to seizure which such a custodial search turns up should be seizable.

B. Derivation

The section is based on MCP section ss 3.02 (2).

C. Relationship to Existing Law

There is no comparable statutory provision in Oregon although ORS 142.210 is indirectly relevant. Since it requires the jail custodian to receipt for a prisoner's "money or other valuables" when they are taken from the prisoner being jailed, the implication is that the jailer may conduct a search. In a related case, State v. Whitewater, 251 Or 304 (1968), the Oregon Supreme Court held that the clothing taken from a prisoner during booking at a jail on traffic arrest charges was subject to seizure as evidence of a different crime. See also State v. Kangiser, 494 P2d 450, ____ Or App ____ (1972), approving custodial searches. For a further comment on custodial searches, see the commentary to section 18, infra.

Special note: Inventory car searches. It is the intent and purpose of the subcommittee that the practice of inventorying the contents of the accused's car is prohibited. This so-called inventory search is not authorized and, pursuant to the provisions of section 2, if a search is not authorized in this Article it may not be undertaken.

Section 18. Search of the person incident to arrest. (1) Permissible scope. An officer making an arrest on a charge other than as described in section 16 of this Article, and the authorized officials at the police station or other police building to which the arrested person is brought, may conduct a search of the arrested individual's garments and personal effects ready to hand, the surface of his body, body hair and the area within his immediate control.

(2) Privacy. The search authorized by subsection (1) shall be carried out with all reasonable regard for privacy, and unless exceptional circumstances otherwise require, search of the arrested person before his arrival at the police station shall be limited to such search as is reasonably necessary in order to effect the arrest with all practicable safety, or prevent destruction of evidence of the crime for which he is arrested.

(3) Search of body cavities. Search of an arrested person's body cavities may be conducted as incidental to an arrest only if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the person was arrested, and if it reasonably appears that the delay caused by obtaining a search warrant would probably result in the disappearance or destruction of the objects of the search, and that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the physical invasion of the arrested person's body.

(4) Search of bloodstream. Search of an arrested person's bloodstream may be conducted as incidental to arrest only if there is probable cause that it will disclose things or information subject to seizure and related to the offense for which the individual was arrested and if there is probable cause to believe that a delay caused by obtaining a search warrant would result in the disappearance or destruction of the evidence.

The search of the bloodstream pursuant to this subsection (4) shall be performed in a reasonable manner by a physician in a hospital environment according to accepted medical practice.

(5) Search limited by purpose. A search authorized by this section may be carried out only if, and to the extent that, there is probable cause to believe that it is necessary in order to carry out one or more of the purposes specified in section 13 of this Article.

(6) Custodial seizure. Things not subject to seizure under section 3 of this Article, which are found in the course of a search conducted pursuant to this section, may be taken from the arrested person's possession if reasonably necessary for custodial purposes. Documents or other recordings may not be read or otherwise examined. All such things must be returned to the arrested person, or to someone authorized to take them in his behalf, as soon as is reasonably practicable.

COMMENTARY

A. Summary

The first subsection of this section provides for the search, incidental to an arrest, of the arrested individual's person and personal effects, which is recognized in the

traditional common law of search and seizure. The geographical scope of the search is confined to the area within which the arrestee might take action to obstruct the arrest or destroy contraband or evidence of the crime for which he is arrested.

Subsection (2) limits the scope of the search at the place of arrest, in the interests of privacy, to the scope necessary for safety and to prevent destruction of evidence.

Subsection (3) limits warrantless search of body cavities to situations where there is a high degree of probability that seizable things have been concealed in this manner, and that delay might cause their disappearance or destruction.

Subsection(4) permits search of the bloodstream in certain situations. Such search is to be conducted only by a physician according to accepted medical practice.

Subsection (5) imposes the general limitations which follow from the purposes for which search incidental to arrest is authorized. If, for example, letters on the arrestee's person, or the contents of his wallet, cannot reasonably be expected to bear any relation to the offense for which he was arrested, then the documents may not be read, and the wallet may be opened only if necessary for purposes of safekeeping.

Custodial search may, of course, result in taking from the arrestee things which are not subject to seizure under section 3 of this Article. Such things are required by subsection (6) to be handled with due regard for privacy, and restored to the arrestee or his authorized representative as soon as possible.

B. Derivation

The section is based on MCP section ss 3.03.

C. Relationship to Existing Law

Like most other states Oregon has no statutory provisions similar to the ones in this section but the authority to search incident to arrest is well established in Oregon and all other states as a matter of common law and practice. The constitutional validity of the search authority conveyed in this section seems clear, and it also enjoys the support of long continued practice. Furthermore in almost every case where the arrested person is jailed, full custodial search is a reasonable procedure.

Scope of search. The permissible scope of search incidental to an arrest was dealt with extensively in the Supreme Court's recent decision, Chimel v. California, 395 US 752 (1969). That case dealt with a search of the premises wherein the arrest was made. The Court explicitly approved searches of the arrestee's person and "the area into which an arrestee might reach," both in order to effect the arrest with safety and to prevent the concealment or destruction of evidence. This "grabbing distance" standard is embodied in subsection (1) of the draft by the phrase "area within his immediate control," approved in the Chimel opinion (395 US at 763).

The Chimel case did not deal with custodial search requirements, and the Court appears not to have confronted them in the context of arrest. Nevertheless, there is no reason to think that custodial searches of persons, unless carried out in a brutal or oppressive way, would encounter judicial difficulties. See, e.g., State v. Kangiser, 494 P2d 450, ____ Or App ____ (1972).

However, the scope of the search must be justified by its purpose, as subsection (5) requires. Custodial search does not require a reading of documents found on the arrestee, nor can such perusal be justified in order safely to effectuate the arrest. Only if the arresting authorities have reason to believe that the documents are fruits, instrumentalities, or evidence of crime are they seizable, subject to the special requirements for intermingled documents.

Searches of the body cavities described in subsection (3) are so personally intrusive and uncomfortable that a higher degree of probable cause - strong probability - is required to justify the search. And only if there is reasonable cause to believe the evidence will be lost if the search is delayed in order to get a warrant will it be permitted.

Subsection (4) reflects the requirements announced in Schmerber v. California, 384 US 757 (1966), with respect to the search incidental to arrest of a person's bloodstream.

Section 19. Search of vehicle incident to arrest. (1) If, at the time of the arrest, the arrested person is in a readily moveable vehicle, or if he or another or others in his company are in apparent control of such a vehicle in the immediate vicinity of the place where the arrest is made, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things subject to seizure under section 3 of this Article and connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things, and seize any things subject to seizure under section 3 of this Article and discovered in the course of the search.

(2) Search of a vehicle under this section shall only be made at the same time as the arrest or as soon thereafter as is reasonably practicable.

COMMENTARY

A. Summary

It is to be noted that this section does not relate to the circumstances under which search of a vehicle is permissible without a warrant and independent of an arrest, under the rule of Carroll v. United States, 267 US 132 (1925), and related decisions. This is covered in section 26. Rather it lays down criteria for searching a vehicle as incidental to the arrest of one of its occupants.

The essential limiting principles are that there must be reasonable ground to believe that the vehicle contains things subject to seizure and connected with the crime for which the individual is arrested, and that the vehicle is moving or readily movable, so that the things might be removed before a search warrant could be obtained.

B. Derivation

The language of the section is based on MCP section ss 3.04 (1).

C. Relationship to Existing Law

This section is in accord with existing Oregon case law on search of cars incident to arrest. See State v. Keith, 90 Adv Sh 531, ____ Or App ____ (1970), which cites and applies State v. McCoy, 249 Or 160 (1968), an opinion of the Oregon Supreme Court dealing with a similar situation. The rationale of McCoy, and to a certain extent of Keith, is based on the fragile concept of the contemporaneousness of the search with the arrest. This rationale is no longer necessary in light of Chambers v. Maroney, 90 S Ct 1975 (1970), in which the U.S. Supreme Court ends any indecision as to the effect of its earlier opinion in Chimel v. California, 89 S Ct 2034 (1969), a case involving search of premises incident to arrest, on delayed car searches. Chambers now says clearly that the police, under appropriate and reasonable circumstances, and where probable cause to search it exists, may seize a car in which the occupant was arrested and delay its search until it is taken to the station house. The opinion explicitly states that such a delayed search is not incidental to arrest. If probable cause to search the car existed at the time of arrest and the delay in the car search was reasonable, the police need not get a warrant before they search because "there is a constitutional difference between houses and cars." Chambers v. Maroney, supra, 90 S Ct at 1982. The kind of circumstances which gave rise to the seizure of the car for search approved in Chambers are not unlike the circumstances in the recent Oregon cases like Keith. In Chambers the occupants were arrested in the car in a dark parking lot in the middle of the night thus making the search on the spot, in the Court's view, impractical and probably dangerous.

As previously noted in the commentary to section 17, it is the purpose of the Commission to prohibit so-called inventory searches - the practice of going through a car to inventory its contents after the police have taken a car into safekeeping for the accused.

Section 20. Search of premises incidental to arrest. (1) If, at the time of the arrest, the arrested person is in or on premises, all or part of which he is apparently entitled to occupy, the arresting officer may search the premises or part thereof and seize any things subject to seizure under section 3 of this Article and discovered in the course of the search, provided that the circumstances of the arrest justify a reasonable belief by the arresting officer that the premises or part thereof contain things that:

(a) Are subject to seizure under section 3 of this Article;

(b) Are connected with the offense for which the arrest is made; and

(c) May be removed or destroyed before a search warrant can be obtained and served.

(2) Search of premises under subsection (1) of this section shall only be made at the same time as the arrest and following as a result of the entry into the premises which was made in order to make the arrest. In determining the scope of search to be undertaken, the officer shall take into account, among other things, the nature of the offense for which the arrest is made, the behavior of the person arrested and others on the premises, the size and other characteristics of the things to be searched for, and whether or not any such things are observed while making the arrest.

COMMENTARY

A. Summary

Subsection (1) of this section embodies a limited authorization for search of premises incidental to an arrest made therein. The principle is the same as for section 19, search of vehicles, except that the danger

of removal of the seizable things arises not from the mobility of a vehicle, but from actions by friends or confederates of the arrested person.

Subsection (2) embodies the requirement that the search immediately follow the arrest, in line with established judicial construction of Fourth Amendment requirements. E.g., Preston v. United States, 376 US 365 (1964). Subsection (2) also contains standards to guide officers in determining the existence of reasonable cause for a search of premises.

Whether the arrest takes place in a vehicle or premises, the arresting officer may, of course, search the area in the immediate control of the person arrested, as authorized in section 18 of this Article.

B. Derivation

The language of this section is based on MCP section ss 3.04 (2).

C. Relationship to Existing Law

Search of premises incidental to an arrest is limited to the vicinity of a person who, on the basis of reasonable belief, is a criminal. This circumstance is sufficient to justify a search of premises as a means of obtaining evidence otherwise likely to be destroyed or removed, and subject to the additional requirements embodied in the draft.

The U. S. Supreme Court's decisions in this area have made a rather murky sequence. The Chimel case has now indicated that an indoors arrest does not furnish justification "for routinely searching rooms other than that in which an arrest occurs--or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." Such searches "in the absence of well-recognized exceptions," the Court declared, "can only be made under the authority of a search warrant."

What the "well-recognized exceptions" may be, the Court did not explicitly state, but may be gathered by implication from other parts of the opinion. The Chimel case was not one of hot pursuit; the police went to the defendant's home armed with an arrest warrant (invalid because the supporting affidavit was conclusory), and there certainly was ample time, whether or not there was adequate cause, to get a search warrant. In his opinion for the Court, Mr. Justice Stewart spoke approvingly of Trupiano v. United States, 334 US 699 (1948), which had laid down as a "cardinal rule" that "law enforcement agents must secure and use search warrants wherever reasonably practicable." This "cardinal rule" was disavowed two years later in United States v. Rabinowitz, 339 US 56 (1950), and the Rabinowitz case was in turn overruled in the Chimel case. The Chimel case, accordingly, appears to involve a revival of the short-lived Trupiano "cardinal rule," and this inference is borne out by a footnote in Justice Stewart's opinion (89 S Ct 2040 note 9) stating that: "Our holding today is of course

entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought,' Carroll v. United States, 267 US 132, 153...."

It appears, therefore, that the Chimel case is intended to rule out "routine" searches of premises incidental to an arrest, especially if the situation is such that a search warrant could have been obtained without danger to the success of the search.

Arrest should not, of course, furnish the basis for a general search for incriminating things, but only (1) for such things as are connected with the offense for which the arrest is made, (2) on the basis of a reasonable belief that they are to be found on the premises, and (3) on reasonable belief that they may be removed or destroyed if not promptly seized. In a great many cases, the joint application of these three standards may eliminate the basis for any search beyond the arrestee's immediate vicinity, and in many more the permissible scope of the search will be very narrow.

While the arresting officer's right to search is limited in purpose to things connected with the crime for which the arrest is made, of course anything properly seizable under s. 3 of this Article, discovered during the search, may be taken.

The limitation in subsection (2) embodies the constitutional rule established in Agnello v. United States, 269 US 20 (1925), and later cases, confining the search authority to the place and occasion of the arrest. Entry into premises can be justified only under a warrant, or to make an arrest on reasonable cause.

The last sentence of subsection (2) gives flexibility to the rule governing the permissible scope of search. If there are observable indications in the immediate vicinity of the spot where the arrest is made which suggest the likelihood of evidence or contraband on the premises, a broader search may then be reasonably justified. One must keep in mind, however, that this does not authorize a probable cause type search possible in the case of vehicles. Vale v. Louisiana, 90 S Ct 1969 (1970), makes this clear. In Vale the police arrested the defendant on the front steps of his house and, having probable cause to believe there were narcotics inside the house, went on in and conducted a search which indeed turned up the narcotics. The Supreme Court ruled the search invalid both on the theory that it

was a search incidental to arrest and that there was probable cause to search. The Court listed the situations under which a broad premises search without a warrant is justified as including only consent searches, Zap v. United States, 328 US 624 (1945); officers responding to an emergency, United States v. Jeffers, 342 US 48 (1951); where the officers are in hot pursuit of a fleeing felon, Warden v. Hayden, 387 US 294 (1966); where the goods ultimately seized were in the process of destruction, Schmerber v. California, 384 US 757 (1964) (a search of the person case but relevant in principle); or where the goods were about to be removed from the jurisdiction, Chapman v. United States, 365 US 610 (1960).

SEARCH AND SEIZURE BY CONSENT

Section 21. General authorization to search and seize pursuant to consent. (1) Subject to the limitations in the other provisions of this Article, an officer may conduct a search and make seizures, without a search warrant or other color of authority, if consent to the search is given.

(2) As used in this Article, "consent" means a statement to the officer, made voluntarily and in accordance with the requirements of sections 22 and 23 of this Article, giving the officer permission to make a search.

COMMENTARY

A. Summary

Subsection (1) contains the basic authorization to conduct searches on the basis of consent, and seize things subject to seizure found in the course of such a search.

Subsection (2) defines "consent"as a statement giving permission to conduct a specific search, given voluntarily and in accordance with the requirements prescribed in section 22 of this Article. Pursuant to section 24, infra, the scope of the search is limited by any limitation in the terms of the consent.

B. Derivation

The language is based on section ss 4.01 of the MCP.

C. Relationship to Existing Law

No comparable provision exists in the Oregon statutes. But the U. S. and Oregon Supreme Courts have long held that Fourth Amendment rights, like those arising under the Fifth Amendment, may be waived. Zap v. United States, 328 US 624 (1946); State v. La Plant, 149 Or 615, 42 P2d 158 (1935).

As a matter of policy, it might be argued that recognition of "consent" searches should be withheld, on the ground that they are over-productive of credibility issues, and susceptible to abuse. But such arguments might be urged with even greater force in the case of confessions or admissions made in the course of police interrogation. Nevertheless, the Miranda case did not go so far as to rule out such evidence, albeit the toleration accorded to confessions obtained from suspects in custody was given somewhat grudgingly.

It is apparent that, subject to the Miranda requirements, Fifth Amendment waivers will continue to be recognized, and confessions or admissions received in evidence, even though no counsel for the suspect is present, if the government is able to discharge the burden of proving that the waiver was voluntary and intelligent. If that is so, it would appear that, subject to comparable safeguards, "consent" searches should remain judicially cognizable, and their evidentiary fruits admissible.

Section 22. Persons from whom effective consent may be obtained. The consent justifying a search and seizure under section 21 must be given, in the case of:

(1) Search of a person, by the person in question or, if the person is apparently under the age of 16, by his parent or guardian; or

(2) Search of a vehicle, by the person registered as its owner or in apparent control at the time consent is given; or

(3) Search of premises, by a person who by ownership or otherwise, is apparently entitled to determine the giving or withholding of consent.

COMMENTARY

A. Summary

If the police wish to search an individual's person based on a consent search, they must, pursuant to subsection (1), obtain the person's consent. However, if the individual to be searched by consent is under 16, the police must obtain the consent of the person's parent or guardian.

Subsection (2) provides that the person who is the registered owner or who is in apparent control of a vehicle is the person from whom the police may obtain consent in order to validly search the vehicle. Note here that unlike subsection (1), if the person apparently in control of a vehicle is under 16, the consent to search such vehicle by the juvenile validates the police search without reference to the juvenile's parent or guardian.

Subsection (3) designates any person who by ownership or otherwise is apparently entitled to give consent for police to search premises. Here it is conceivable that a person under 16 could give such consent if it appeared reasonably to police that such person had the capacity to consent voluntarily and intelligently.

B. Derivation

The language of this section is based on MCP section ss 4.02 (1).

C. Relationship to Existing Law

Oregon statutory law is nonexistent on the question of who may validly consent to police searches. Some case law exists but is scant. The section generally reflects what is apparently the law in Oregon with the exception of the provision contained in subsection (1). Pursuant to this, persons under 16 years of age are incapable of giving valid consent, and this is contrary to the holding in State v. Little, 249 Or 297, 431 P2d 810 (1968), which approved a search based on the consent of the 15 year old defendant. It is interesting to note in passing, too, that the defendant's mother had also consented to the search of her son.

The policy of forbidding police to search the person of a juvenile under 16 without parental consent seems justified when considered with well established law that the consent to search must be intelligent as well as voluntary. Immaturity of the juvenile may well preclude him from understanding the gravity of the waiver of his Fourth Amendment rights.

Why the police may validly search a vehicle upon the consent of a juvenile of less than 16 who is in apparent control of the car when they are forbidden from search of the same juvenile's person without parental consent may be explained in at least two ways. First, not many persons under 16 will be found who are apparently in control of a vehicle. Second, where the rarity occurs the fact that the car is in operation places it into the special category of exceptions to general search rules recognized in such cases as Chambers v. Maroney, 90 S Ct 1976 (1970), and Carroll v. U. S., 267 US 132 (1925), thus obviating further restrictions on the reliance of police on appearances.

The owner of premises is authorized in this section as a proper person to give valid consent for search of premises. If the person giving the consent is in fact not the owner, still the consent given will validly authorize the search if the police reasonably rely on appearances. This reflects Oregon law as well. See State v. Cook, 242 Or 509, 411 P2d 78 (1966); State v. Frazier, 245 Or 4, 418 P2d 841 (1966). Under the language of the section even a juvenile under

16 may effectively consent to a search if it reasonably appears to the police that the youngster has this authority. It, of course, becomes a matter for the court to determine, in light of the age of the consenting juvenile and surrounding circumstances whether it was reasonable for the police to believe the child had authority to consent.

The consent based on appearances as provided in this section may be viewed as settling the ultimate question of the admission of evidence seized pursuant to the consensual search. However, it is possible to take a different view. A strong argument can be made that consent by one in apparent control of a vehicle or premises may validate the search on the grounds that the police cannot be blamed for acting reasonably. But this does not mean that evidence seized can be introduced at trial when the consent was not in fact given by the owner of the vehicle or premises. This issue will be dealt with in the section to be drafted later dealing with evidentiary exclusion.

One more aspect of subsection (1) of this section deserves comment. It may be difficult for police to determine the actual age of a young person they propose to search upon that person's consent. If the person gives police forged or otherwise spurious information to prove that he is 16 or over, the juvenile may not later be heard to argue that since he was in fact under 16 his consent would not be effective to support the ensuing search. As long as the police were relying reasonably on appearances as to the person's age, their search is valid.

Section 23. Required warning preceding consent search. (1) Required warning to persons not in custody or under arrest. Before undertaking a search under the provisions of sections 21 through 24 of this Article, an officer present shall inform the person whose consent is sought that he is under no obligation to give such consent and that anything found may be taken and used in evidence.

(2) Required warning to persons in custody or under arrest. If the person whose consent is required under section 22 of this Article is in custody or under arrest at the time such consent is offered or invited, such consent shall not justify a search and seizure under section 21 of this Article unless such person has been informed:

(a) That he is not obliged to consent to a search and that if he does consent any evidence found may be used in evidence against him; and

(b) That he may consult with an attorney prior to making his decision to consent to a search; and

(c) If he wishes to consult with an attorney before making his decision, but is unable to obtain or afford one, an attorney will be furnished at public expense.

COMMENTARY

A. Summary

Subsection (1) of this section states the requisites of valid consent from a person not under arrest or other restraint at the time the consent is given. It is based on the view that a warning of rights

is essential to the giving of a valid consent. The individual must be made aware that he is under no obligation to give consent and that by consenting he exposes himself to the hazard of yielding up incriminating things. But unless the person whose consent is sought is in custody, a more limited warning than that required by Miranda v. Arizona is deemed appropriate.

If the individual is in custody at the time his consent to a search is given, the full panoply of Miranda concepts comes into play. The requirement in subsection (2) that an attorney be made available to the suspect, if he so desires, appears to be constitutionally necessary.

B. Derivation

The language of this section is based on MCP section ss 4.02 (2) and (3). The provisions in subsections (2) (a), (2) (b) and (2) (c) are drafted to reflect those portions of the Miranda warnings deemed appropriate to the consent search situation.

C. Relationship to Existing Law

The Oregon Supreme Court held in State v. Williams, 248 OR 85, 432 P2d 679 (1967), that Miranda type warnings must be given to a person in custody or under arrest before such person can validly consent to a search. The Oregon Court has not, however, dealt with the question whether a person not in custody or under arrest must be given some kind of warning about the consequences prior to obtaining his consent for a search. This section reflects existing law with respect to custodial consent and fills a void with respect to non-custodial consent.

It is clear from the cases that consent to a search can only be valid if it is given freely, voluntarily and knowingly. The courts have been quite unanimous in recognizing this principle. A problem arises, however, when courts attempt to define and apply the terms "free," "voluntary," and "knowing." While it is generally acknowledged that there is a presumption of involuntariness and that this presumption can be overcome only by clear and convincing evidence, the courts have faced the same problems of deciding after the fact what is such clear and convincing evidence as was the case in the confessions area.

Court decisions in other jurisdictions both before and since Miranda are divided on whether a warning of rights is a prerequisite

to a valid consent search. But it is believed that the position of the legislature in drafting legislation is quite different than that of a court deciding in a particular case, after the fact, whether to invalidate a search because a warning of rights was not given. This seems particularly true where, as here, the legislation is designed to speak primarily to the police. If there is one thing that comes through clearly from almost all of the cases on this issue, whichever way they come out on the warning requirement, it is the extreme difficulty of determining from the record the extent to which the person whose consent was sought acted on the assumption the police had a right to make the search. Unless the police undertake some responsibility for advising the person whose cooperation is sought of his rights, there are created the same problems of establishing that a consent to search is "freely and voluntarily given," as troubled the courts with confessions and led to the requirements imposed by Miranda.

While conflicting arguments can be made as to whether the Fourth Amendment rights involved in the consent search issue require the protection of a warning more, the same or less than the Fifth and Sixth Amendment rights involved in Miranda, the underlying issue in the two situations is similar. It seems unlikely that there is any greater knowledge of one's right to refuse a search than the right to silence. The law relating to availability of a warrant, the right to search without a warrant and the admissibility of evidence seized is at least as confusing to the layman as the law relating to oral admissions.

In this connection, it is important to bear in mind that frequently by obtaining consent officers will be able to make a search for which they would have been unable to obtain a warrant at all, or to make a search far broader in scope than a warrant would authorize. An example of the potential for abuse in a consent search is presented by People v. Stark, 80 Cal Rep 307 (1969). Three young people were stopped for a minor traffic violation--a sign illegally in their car window. The police officer, dissatisfied with their identification and suspicious because of the nervousness of one of the occupants (a 16 year old girl), asked for and received permission to search the car with no idea of what he might uncover. His warrantless search, which by any other criteria would have been deemed unreasonable, uncovered marihuana, and prosecution for the drug violation (not the traffic violation) followed. The giving of an explicit warning of rights seems little enough protection against the broad invasion of privacy involved in such a fishing expedition.

Concern may exist about the possibility that inadvertent and relatively minor errors in the form or timing of the warning might result in the inadmissibility of evidence. The provisions in section 41, infra, should obviate such concern.

Section 24. Permissible scope of consent search and seizure.

(1) Search limited by scope of consent. A search conducted under the provisions of sections 21 through 24 of this Article shall not exceed, in duration or physical scope, the limits of the consent given under section 21 of this Article.

(2) Items seizable as result of consent search. The things subject to seizure in course of a search under sections 21 through 24 of this Article are the same as those specified in section 3 of this Article. Upon completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person consenting to the search.

(3) Withdrawal or limitation of consent. A consent given under section 22 or 23 may be withdrawn or limited at any time prior to the completion of the search, and if so withdrawn or limited, the search under authority of the consent shall cease, or be restricted to the new limits, as the case may be. Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent.

COMMENTARY

A. Summary

Subsection (1) makes explicit what is implicit in the structure of the draft: that a search based on consent may not exceed the limits of the consent.

Subsection (2) makes applicable to consent searches the provisions of section 3 of this draft, and provides for a list, similar to the list called for in the case of warranted searches.

Subsection (3) makes the consent revocable, in whole or in part, at any time during the course of the search. Of course, things already found at the time of the withdrawal remain subject to seizure. Likewise, as indicated by the phrase "under authority of the consent," the search may have disclosed the basis for an arrest, or for obtaining a warrant, in which case it may be continued, but not on the basis of the consent.

B. Derivation

This section is based on the language of section ss 4.03 of the MCP.

C. Relationship to Existing Law

No Oregon statute covers the situation with respect to limiting or withdrawing consent; nor were any cases found dealing precisely with the issues. However, Oregon cases at least analogous in policy suggest that the provisions in the draft section would not be foreign to the present concepts. It is a well settled principle in Oregon, as elsewhere, that if a warrantless search follows an arrest, the scope of the search must be reasonably related to the arrest. State v. Krogness, 238 Or 135, 388 P2d 120 (1964), and cases cited therein at p. 144 dealing with the rule. By analogy then, if the search must be reasonably related to the arrest, then a consent search must be reasonably related to the nature of the consent given and the object being searched for.

If the individual whose consent to a search is sought is moved to give it at all, he is unlikely to specify geographical limits, since that would not disarm suspicion, and rather would direct attention toward the prohibited areas. Nor is he likely to give the officer "five minutes but no more." However, if he is told that the police suspect he is concealing burglars' tools or a sawed-off shotgun on his premises, an invitation to come in and look is a consent to look in places large enough to contain such articles, but not to probe tiny recesses or look through files of documents.

Accordingly, the idea of a limited consent may be practically important, and of course the search must stay within the bounds laid down.

Withdrawal or modification of consent as provided in subsection (3) involves the problems presented if the individual, who has given valid consent to a search, has a change of heart in its course, and seeks to withdraw his consent or attach new limits to its scope.

The practical aspects are obvious. May a guilty suspect seek to throw the police off the track by an appearance of innocence and willing disclosure, thinking his contraband is well hidden, and then terminate the consent if the searches come dangerously close to the hiding place? Will the result not be that whenever the police find something incriminating in the course of a consent search, the defendant will subsequently claim that he withdrew consent, and that the discovery was thus under coercive circumstances? On the basis of these considerations it has been forcefully argued that consent once effectively given is "binding" within the scope initially stated, and that a search is not "unreasonable" in the constitutional sense if it is conducted under a consent once validly obtained.

Case authority on the basic question is scanty and divided. An elderly Kentucky case held that consent once given may not be withdrawn. Smith v. Commonwealth, 197 Ky 192, 246 SW 449 (1923). The court did not give a reasoned basis for this conclusion, and the case was not followed in People v. Martinez, 65 Cal Rep 920 (1968), wherein the court thought that the Miranda case, insofar as it says that an arrestee may withdraw his waiver to questioning, dictates the same result for consent searches.

There is much force in the reasoning of the Martinez case reflected in subsection (3). In addition to the conceptual point, weight must be given to the probability that, if consent once given is irrevocable, the warning would have to include a statement to that effect. In that event, it would probably be much more difficult to secure consent at all, and the rule of irrevocability would defeat its own object.

It seems clear that a consent once given by X may be withdrawn or limited by Y, who has equal or superior control over the premises. Lucero v. Donovan, 354 F2d 16 (19th Cir 1965).

If subsection (3) is included, the second sentence is a necessary clarification, though ordinarily if incriminating things have already turned up, a withdrawal of consent will be unlikely.

EMERGENCY AND OTHER SEARCHES AND SEIZURES

Section 25. Emergency and other searches; general. (1) Use of force. The provisions of section 10 with respect to the use of force shall be applicable to searches and seizures conducted pursuant to sections 25 through 29 of this Article.

(2) Search of the person. Search of a person conducted pursuant to sections 25 through 29 shall be subject to the provisions of section 18 of this Article.

(3) List of things seized. Upon completion of a search undertaken pursuant to sections 25 through 29, the officer making the search shall, if any things are seized, make a list of such things, and deliver a receipt embodying the list to the person from whose possession the things are taken.

COMMENTARY

A. Summary

These provisions apply to emergency, open land and other such searches and seizures with the same requirements for the use of force, search of body cavities, etc., as are applicable to other warrantless searches and seizures.

B. Derivation

The section is based on MCPP section ss 6.01.

C. Relationship to Existing Law

Oregon presently has no comparable provisions.

Section 26. Vehicular searches. (1) An officer who has probable cause to believe that a vehicle is subject to seizure or contains things subject to seizure pursuant to section 3 of this Article may, without a search warrant, stop, detain and search the vehicle and may seize things subject to seizure discovered in the course of the search if all of the following conditions exist:

(a) The vehicle is in a public way or on public waters or other area open to the public or in a private area not open to lawful entry by the vehicle; and

(b) The vehicle is moving or readily moveable; and

(c) There is probable cause to believe that a delay consequent upon procurement of a search warrant will result in the disappearance or destruction of things subject to seizure.

(2) If the officer does not find the things subject to seizure by his search of the vehicle, the officer may search the occupants if:

(a) The things subject to seizure are of such a size and nature that they could be concealed on the person; and

(b) The officer has probable cause to believe that one or more of the occupants of the vehicle may have the things subject to seizure so concealed.

(3) Subsection (2) of this section shall not apply to persons travelling as passengers in a vehicle operating as a common carrier.

(4) This section shall not be construed to limit the authority of an officer under section _____, Article 2 [Stopping of Persons].

COMMENTARY

A. Summary

This section embodies the rule, based on Carroll v. United States, 267 US 132 (1925), that a vehicle may be searched without a warrant if the officer undertaking the search has probable cause to believe that the vehicle contains contraband or other things subject to seizure. It is to be distinguished from the search of a vehicle incident to the arrest of its occupant, as provided for in section 19. Officers are also, under limited conditions, authorized to search the occupants.

B. Derivation

The language is based on MCPP section ss 6.03, Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

No similar provision is found in ORS but the doctrine embodied in the section, at least insofar as the emergency vehicular search is concerned, if not the personal search, is well established in Oregon. See the discussion in State v. Keith, 90 Or Adv Sh 531, 540-41, _____ Or App ____ (1970).

The decision in the Carroll case was based in part (267 US at 150-53) on the long-standing rule that vessels can be searched without a warrant, and in part on the ground that, in the case of vehicles "...it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Is this last factor a presumption of automatic application, or must it be shown in each case that it would not have been feasible to get a warrant? Subsequently the Court held that the fact that sufficient time to get a warrant had elapsed between tip and search did not ban the search, since the officers could not be sure at the time of the tip that they would have enough time. Husty v. United States, 282 US 694, 701 (1931).

The authority given by this section is limited to vehicles on a public way. If the vehicle is on private premises, then an entry must be made to gain access to the vehicle and the rules applicable to the search of premises will be applicable to search of the vehicle. However, subsection (1) has been broadened to include vehicles unlawfully on private premises, to cover situations such as those where a suspect vehicle turns off a public way

onto a private driveway, in order to avoid search. Subsection (4) has been added to ensure that the "stop and frisk" provisions will be available to officers stopping vehicles under the Carroll rule.

A more difficult question is whether or not the right of vehicular search extends to the persons of individuals occupying the vehicle, as provided in this section. The Supreme Court has squarely held that officers may not enter premises without a warrant, even with probable cause to believe that seizable things are within, except to make an arrest based on probable cause with respect to a particular individual. Agnello v. United States, 269 US 20 (1925). The Carroll case lays down a different rule for vehicles. If the Carroll rule is to be accepted at all, it seems both illogical and impracticable to exempt from search the occupants themselves. If they were not in the vehicle, and there was probable cause to believe that they were in unlawful possession of things, they would be liable to arrest on probable cause. Why should there be a different result if they are in a vehicle, assuming probable cause to believe that within the vehicle - whether in the trunk or in their pockets - seizable things are to be found?

However, the Court has held pretty squarely to the contrary in United States v. Di Re, 332 US 581 (1948), at 589:

> "The government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of a guest in a car for which none had been issued....How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search warrant would permit....By mere presence in a suspected automobile, a person does not lose immunities from search of his person to which he otherwise would be entitled."

There are some difficulties with this reasoning, which takes analogy from a search of fixed premises under a search warrant to an emergency search without a warrant, justified as "reasonable" by the mobile character of the thing to be searched. Under the rejuvenescent Trupiano rule and the thrust of the Chimel case, one might reasonably say that if the officers want to

search people as well as premises, they should get a warrant that says so. But this will not do for emergency searches of vehicles, and it seems absurd to say that the occupants can take the narcotics out of the glove compartment and stuff them in their pockets, and drive happily away after the vehicle has been fruitlessly searched.

The draft in subsection (2) attempts to confer a broader right of search of persons found in the vehicle, broader than the right that would be based on probable cause but somewhat less than a right based upon their mere presence in the car. The search is limited by the physical size of the object sought plus a requirement that the officer have probable cause to believe the item will be found on one of the persons in the car.

Passengers on a common carrier are not, of course, in the same sort of association as the occupants of a private vehicle. Such public passengers are excepted from the coverage of the section.

[Section 27. Emergency search of the person. An officer may search a person without a search warrant and without arresting such person if:

(1) The officer has probable cause to arrest the person and the search undertaken relates to the charge upon which the arrest could be made; and

(2) The officer has probable cause to believe seizable items will be found on the person to be searched; and

(3) The officer has probable cause to believe that a delay in the search would result in the loss of any item subject to seizure under section 3 of this Article.]

COMMENTARY

Reporter's special note: This section was not approved by the subcommittee. Because of its controversial nature and unique policy issue, it is forwarded to the Commission for full review.

A. Summary

The police are authorized to search the person of anyone whom they have probable cause to believe is carrying seizable items even though they do not arrest the person contemporaneously to the search. The only limitation is that there must be probable cause to arrest the person, to believe evidence will be found and to believe that a delay in the search may result in loss or destruction of the evidence.

B. Derivation

The language of the section is based on the Oregon Court of Appeals holding, apparently a novel one, in State v. Murphy, 90 Or Adv Sh 679, ____ Or App _____ (1970), and subsequently applied in State v. Peterson, 90 Or Adv Sh 1285, ____ Or App ____ (1970), and State v. Murphy, 90 Or Adv Sh 1793, ____ Or App ____ (1970), (a different Murphy was involved in this case).

C. Relationship to Existing Law

The doctrine announced in the first Murphy case, supra, is novel to Oregon law, and apparently is novel to the established body of search and seizure law elsewhere. The concept is a simple and utilitarian one - if the police have enough on someone to arrest him but choose to search him for easily disposable evidence which they have probable cause to believe they will find on him, they may search. No one has the constitutional right to be arrested, according to Hoffa v. United States, 385 US 293 (1966). Therefore, the rationale of the Murphy case seems to be analogous to the Carroll emergency car search rule. Unfortunately, the Oregon Court of Appeals fails to cite or analyze emergency search case opinions of the U. S. Supreme Court existing at the time Murphy was decided. If the provision in this section is to stand it would seem that it would have to be likened most closely to the Carroll type search, i.e., the object to be searched, a person, is highly mobile, there is probable cause to search because there is probable cause to arrest, and if the search is not made, the evidence would be lost.

The trouble with applying the Carroll doctrine to the search of a person under this section is readily apparent. In the Carroll situation, the police have no authority, at least prior to the search, to arrest anyone they may find in the car they stop. Thus the car cannot be detained initially in the sense that a person may be detained who is subject to arrest. Nevertheless in the Murphy case the person, who could have been arrested and searched incidental to arrest (fingernail scrapings were the object of the search in a wife strangulation case), was held not to be under arrest. Thus, even though the police had a right to legally hold Murphy and perform the warrantless search under the search-incidental-to-arrest rule, they chose to hold him forcibly only long enough to obtain fingernail scrapings. He was not arrested for his wife's murder until a month later.

The section allows police a greater flexibility than is perhaps warranted, a flexibility which may easily result in abuses virtually impossible to restrain. For instance, the police may only have the equivalent of "reasonable suspicion" or strong hunch that the person has committed a particular crime. The search without an arrest may confirm this suspicion and time and further investigation may disclose facts the police might have known at the time of the

search which would have given them probable cause to arrest but which they in fact did not know until later. Then, too, letting a person whom they have probable cause to arrest, walk around until the police believe it a particularly fruitful time to undertake an "emergency probable cause" search smacks of the staged search condemned again by the Supreme Court, most recently in Chimel v. California, 395 US 752 (1969).

Despite these doubts about a search and seizure doctrine not thoroughly established in state or federal decision, the provision seems reasonable and may ultimately earn U. S. Supreme Court approval, especially in light of the current trend of the Court's recent criminal procedure decisions.

Section 28. Search of open lands. A police officer may, without a search warrant, search open lands and seize things which he has probable cause to believe are subject to seizure, if:

(1) The owner or person in possession has not manifested in a reasonable manner his intent to exclude trespassers; and

(2) The officer has probable cause to believe that things subject to seizure are located within the general area to be searched.

COMMENTARY

A. Summary

This section embodies, in part, the so-called "open fields" doctrine established by Hester v. U. S., 265 US 57 (1924). As drafted, the section authorizes police officers to search without a warrant on lands, which ordinarily will be unimproved fields or forests from which the proprietor has made no apparent effort to exclude trespassers. Under the second clause the probable cause requirement is relaxed so as not to require a belief that the particular field or grove contains seizable things, but that the general area to be searched does.

The section makes no specific provision for entry on open lands for purposes of making an arrest, a situation which will normally involve hot pursuit of a suspect. The draft dealing with arrest should make it clear that the principle of the provision (found in MCPP, Tentative Draft No. 2, section 3.06) which permits entry on private premises to make an arrest applies, with appropriate procedural modifications, to open lands. Once the officer is lawfully on the premises to make an arrest, his right to seize property would be governed by section 20, infra.

B. Derivation

The language is taken from MCPP section ss 6.04.

C. Relationship to Existing Law

No ORS provision presently embodies this provision, but it is well-established law.

The Fourth Amendment speaks of "persons, houses, papers, and effects," and the rationale of Hester v. U.S.,

265 US 57 (1924), was that these categories do not extend to "open fields," which therefore lie entirely outside the protection of the Fourth Amendment. In the application of this rule, the old word "curtilage" has been commonly accepted as marking the geographical ambit of the Amendment's coverage.

It is questionable whether the reasoning of the Hester case can be harmonized with Katz v. United States, 389 US 347 (1967), in which the Court rejected the concept of the "constitutionally protected area" and announced that "the Fourth Amendment protects people not places." There is a limit to this privacy doctrine in the Katz case, however, which requires the government not to be an intruder where a person might reasonably expect to enjoy privacy. Owners of unposted open fields and forests may not qualify under this last condition in the Katz decision. This appears to be the view adopted in State v. Stanton, 490 P2d 1274, ____ Or App ____ (1971). As a matter of policy the old "open fields" rule in its full sweep no longer seems advisable. There was a trespass in the Hester case; rights of quiet enjoyment attach to fields as well as to dwellings, and clandestine trespasses, provocative of self-help if discovered, are not conducive to good order.

Police can, of course, go upon private lands to the same extent as the public generally, and the draft so provides.

Officers under this section are implicitly given authority to use helicopters or other surveillance devices to scrutinize private lands in ways not open to the public generally. The same applies to rangers, wardens, and other officials who may need to go on private lands to enforce fire, conservation, or hunting and fishing laws, but the authority of this latter group of officers is governed by section 34.

It should also be borne in mind that nothing in this section relates to or restricts the right of officers to pursue a fugitive into private grounds.

Section 29. Seizure independent of search. A police officer who, in the course of otherwise lawful activity, observes or otherwise becomes aware of the nature and location of things which he reasonably believes to be subject to seizure under section 3 of this Article, and which therefore can be seized without a search, may seize such things.

COMMENTARY

A. Summary

This section expresses the widely accepted and firmly established "plain view" doctrine. An officer is not supposed to ignore the evidence of his senses, and if while engaged in the lawful discharge of his duties (including "off-duty duties") he observes things which he reasonably believes are subject to seizure, he is authorized to seize them. Harris v. United States, 390 US 234 (1968). Unless the things are abandoned, such observation will ordinarily, of course, furnish probable cause for arrest and search incidental to an arrest.

B. Derivation

There is no comparable ORS provision but the plain view doctrine is solidly established in Oregon case law. See State v. Laundy, 103 Or 443 (1922).

C. Relationship to Existing Law

The authorization with respect to the seizure of things plainly observable in private premises does raise some question under Johnson v. United States, 333 US 10 (1948). There the opium was not visible, but it was plainly observable by order, perceptible off the premises. Nonetheless, entrance and seizure without a warrant was held unlawful.

The case was decided just before the Trupiano case, supra, and the outcome appears to have been heavily influenced by the Court's belief that a search warrant could have been obtained - a consideration later ruled irrelevant in United States v. Rabinowitz, 339 US 56 (1950), but now revived by the Chimel case. However, although the presence of opium in the Johnson case was observable, its location was not evident, and a search was in fact necessary; the authorization in the draft does not cover a search, but only an entry for things already perceived and ready to hand.

Coolidge v. New Hampshire, 91 S Ct 2022 (1971), apparently requires that the plain view rule applies only to seizure of evidence which the police did not expect to find or could not have expected to find. The section is intended to reflect the impact of the Coolidge decision.

INSPECTORIAL SEARCHES - REPORTER'S NOTE

The five following sections apply to administrative inspections common under public health and safety laws and ordinances. These inspections may be viewed as having a common source of authority - the public law itself. However, these public laws take two major forms - one where an activity or particular kind of building or premise is licensed under the public law, and one where no license is involved but inspections are authorized. Examples of the former would be taverns, restaurants, and the like. Examples of the latter would be zoning, housing, and building code regulations. The first four sections, sections 30 through 33, cover the type of inspections normally associated with zoning, housing and like regulations. Section 34 concerns itself with inspection of licensed premises and activities.

The Reporter is not certain that this separate treatment is conceptually correct or practical. It does seem apparent, however, that traditionally licensed activities have had a more careful scrutiny, and inspection activity has usually been more intense based largely on the implied consent to search which goes with the issuance of the license. But even here certain kinds of searches can be characterized as more intrusive than others, e.g., the inspectorial search by the game warden of a fisherman's car or house trailer to insure compliance with the game laws, may be a far more serious and abrasive invasion than the search of the premises of a restaurant to insure proper cleanliness. This distinction is attempted in section 34. See its accompanying commentary.

The provision for inspectorial searches contained in these sections is intended to supplant the provisions scattered throughout ORS in several areas. The authority to inspect and the regulation of such inspections varies considerably from one specific area to the next and for this, as well as other reasons, uniformity seems advisable. There follows a list of some ORS provisions and the description of the specific area of inspection involved as appears in the ORS Index under the subject heading of Search and Seizure. Only a partial listing is set out here to demonstrate the wide variety of inspectorial and seizure powers currently granted: egg inspection, ORS 632.795; day care facilities, 418.850; commercial fishing, 506.595; forest insect disease control, 527.335; potatoes, 632.351; game, 496.675; onions, 632.246; racing enforcement, 462.277.

The sweeping, and in some cases contradictory terms, in these search authorizations are cause for concern. See, e.g., ORS 496.660 with respect to fish and game searches which specifically prohibits the search of "private dwellings" but authorizes the search of "boarding houses."

The provisions contained in the draft sections would also supersede the inspectorial procedures of cities and counties which license and inspect large numbers of businesses.

Section 30. Definitions. As used in sections 31 through 34:

(1) "Inspectorial search" means an entry and examination of premises or vehicles, for the purpose of ascertaining the existence or non-existence of conditions dangerous to health or safety or otherwise relevant to the public interest, in accordance with inspection requirements prescribed by fire, housing, sanitation, zoning, conservation and other laws or ordinances duly enacted for the promotion of public well-being.

(2) "Inspection officer" means an official authorized by law or ordinance to conduct inspectorial searches.

(3) "Inspection order" means an order issued by a magistrate authorizing an inspectorial search.

COMMENTARY

A. Summary

These are the definitions suggested to lay the basis for the ensuing substantive and procedural sections intended to deal with the constitutional and policy issues precipitated by Camara v. Municipal Court, 387 US 523 (1967), and See v. City of Seattle, 387 US 541 (1967).

The definitions are cast in broad terms, with the thought that they may be made applicable, by cross-reference or incorporation, to whatever public well-being codes (fire, housing, etc.), calling for enforcement by inspection, may be in effect in a given jurisdiction.

Ordinarily such inspections are made in buildings, private or commercial, but they may call for inspection of open land or vehicles, and the language is intended to cover all such possibilities. So, too, while one ordinarily thinks of inspection in connection with nuisances or hazards, they may also be necessary in connection with public housing or other construction projects. The phrase "otherwise relevant to the public interest," and use of the word "promotion" rather than "protection" of public well-being, are intended to embrace such situations.

B. Derivation

The section is based on MCPP section ss 5.01.

C. Relationship to Existing Law

Oregon presently has no overall statutory provisions similar to this section although, as noted in the introductory portion, a number of individual, non-uniform inspection provisions are scattered throughout ORS.

Inspection laws and ordinances authorizing the entering of premises, and imposing criminal sanctions for denying entry to the inspection officer, exist in great variety and profusion. Most of them, of course, antedate the Camara case, and are of little help in dealing with the issues there raised.

The conditions disclosed by an inspectorial search may, to be sure, constitute evidence of a crime, if violations of the fire or other codes are criminally punishable in the jurisdiction in question. Awareness of this factor appears to have been one of the principal reasons for the conclusion reached by the majority in the Camara case, and for the overruling of the earlier cases which had held inspectorial searches outside the reach of the Fourth Amendment.

In the See case, decided the same day as the Camara case, the Court made the same constitutional principle applicable to commercial buildings as well as to dwellings. The present definition covers "premises" generally, including open land as well as buildings.

In consequence of these decisions, five states have enacted statutes providing for inspectorial search warrants. The contents of these statutes have been considered in preparing the present draft.

Section 31. Inspectorial search by consent. (1) Voluntary consent. Within the scope of his authority with respect to the places to be inspected and the purpose for which inspection is to be carried out, an inspection officer may conduct an inspectorial search, with the voluntary consent of an occupant or custodian of the premises or vehicles to be inspected, who reasonably appears to the inspection officer to be in control of the places to be inspected or otherwise authorized to give such consent.

(2) Evidence of authority. Before requesting consent for an inspectorial search, the inspection officer shall inform the person to whom the request is directed of the authority under and purposes for which the inspection is to be made and shall, upon demand, exhibit a badge or document evidencing his authority to make such inspections. The officer shall also advise such person that he has a right to refuse to give his consent.

(3) Convenience of occupants. Inspections undertaken pursuant to this section shall be carried out with due regard for the convenience and privacy of the occupants, and during the daytime unless, because of the nature of the premises, the convenience of the occupants, or other circumstances, there is a reasonable basis for carrying out the inspection at night.

COMMENTARY

A. Summary

Under subsection (1), the consent required to validate an inspection and search must be (a) voluntary, and (b) given by someone apparently authorized to consent

But it appears that these are exceptional cases, for refusal of permission to inspect, though by no means non-existent, is comparatively rare. But Mr. Justice Clark, dissenting in the Camara and See cases, cited figures from Portland showing refusal in one out of six home inspections. 387 US at 552-53. In commercial buildings the refusal rate probably would be the lowest.

No prior notice requirements are included, but it is the general practice in most inspection-type searches to publicize proposed inspections. To counterbalance this lack of notice as a requirement, the section in subsection (2) requires that the officer advise the occupant or custodian of the place to be inspected that such person has a right to refuse to allow the inspection as a matter of right. Of course, this does not mean that the inspection will be prevented; it does mean that the officer will then have to obtain an inspection order under section 32 if he wishes to proceed with the inspection.

to such inspections. Pro tanto these are the same as for consent searches under sections 21 through 25, but the remaining provisions and requirements are quite different, as they are based on the premise, more fully explained below, that, unlike other searches, most inspectorial searches will be carried out with the consent of those affected.

The difference appears clearly in connection with subsection (2), which specifies a wholly different and more limited type of "warning" than the Miranda-type statements called for by section 23. Under the present paragraph, all that is required is a statement of authority and purpose supported, if necessary, by a documentary or other physical badge of authority, and a warning that consent may be refused.

Inasmuch as most inspectorial searches are not carried out in the expectation that criminal conduct will be exposed, and in order to encourage public acceptance of and general consent to such searches, subsection (3) provides for accommodation to the convenience of the occupants. A general practice of daytime inspection is no doubt desirable, but there are many circumstances where evening or night inspections may be preferable, as where a commercial establishment is in operation at night, or occupants of private dwellings are absent during working hours.

B. Derivation

The language is taken from MCPP section ss 5.02.

C. Relationship to Existing Law

Oregon presently has no comparable statutory provisions.

While it is true that an inspectorial search may disclose a condition which is evidence of a criminal violation of public well-being laws, violations of such laws are not generally serious offenses, and they are usually punishable by fine only. Oftentimes a violation leads only to a compliance order.

Furthermore, most inspectorial searches are made on a routine "area" basis, without expectation of discovering a particular violation. Upon occasion, as in Frank v. Maryland, 359 US 360 (1959), and the Camara case, supra, the inspection officer may have been tipped off to, or have been able to detect from the outside, a probable violation.

Section 32. Inspection orders. (1) Application. Upon sufficient showing of the circumstances required under subsection (2) of this section, an inspection officer may make application for an inspection order. Such application shall be made to any magistrate authorized to issue search warrants.

(2) Lack of consent. No inspection order shall be issued except upon sufficient showing to the issuing magistrate that consent to an inspectorial search has been refused or is otherwise unobtainable within a reasonable period of time.

(3) Notice and hearing. Due notice and opportunity to be heard in the proceedings upon the application shall be given to the owner and the person in apparent control of the premises or vehicles to be inspected.

(4) Basis for grant of application. The application shall be granted and the inspection order issued upon a sufficient showing that inspection in the area in which the premises or vehicles in question are located, or inspection of the particular premises or vehicles, is in accordance with law, and that the circumstances of the particular inspection for which application is made are otherwise reasonable. The issuing authority shall make and keep a record of the proceedings on the application, and enter thereon his finding in accordance with the requirements of this section.

(5) Issuance and execution. (a) Upon approval of an application under this section, the issuing authority shall issue an order authorizing the applicant, or any other inspection officer duly authorized to conduct inspectorial searches of the type in question,

to conduct the inspection in accordance with the terms of the order. The inspection shall be conducted within 14 days of the issuance of the inspection order.

(b) The officer conducting the inspection shall, if authorized by the issuing authority on proper showing, be accompanied by one or more law enforcement officers who may use such degree of force, short of deadly force, to effect an entry, as is reasonably necessary for the successful execution of the order with all practicable safety. Deadly force may be used only in accordance with the terms of subsection (2) of section 33.

(c) The inspection officer executing the order shall, if the premises or vehicle in question are unoccupied at the time of execution, be authorized to use such force as is reasonably necessary to effect entry and make the inspection.

(d) Subject to the provisions of paragraph (b) of this subsection (5), force shall not be used to overcome resistance to the inspection on the part of the occupants.

(e) After execution of the order or after unsuccessful efforts to execute the order, as the case may be, the inspection officer shall return the order to the issuing authority with a verified report of the circumstances of execution or failure thereof. The order shall be returned within 10 days of the inspection.

COMMENTARY

A. Summary

Subsection (1) provides for the issuance of inspection orders, previously defined in section 30. Such orders are to be issued by magistrates the same as for search warrants.

Under subsection (2), inspection orders are to be sought only if consent under section 31 has been refused, or is unobtainable because the occupants cannot be found, or for some other reason.

The reasons for ex parte issuance of search warrants do not apply to inspection orders. Accordingly, notice and opportunity to be heard are appropriate incidents of the procedure. Notice by registered mail or other reasonable means should be deemed constructive notice sufficient as a basis for the hearing.

Subsection (5) provides in subparagraph (a) for the formal authorization to the inspection officer to carry out the inspection covered by the order. Only if the issuing authority has been shown reasons why the use of force may be necessary and appropriate may the inspection officer avail himself of police assistance to overcome resistance on the part of the occupants, as provided in subparagraphs (b) and (d). However, if the premises are unoccupied, subparagraph (c) authorizes him to use force to effect an entry and make the inspection. Subparagraph (e) requires a return of the inspection order with a report of the action taken thereunder.

B. Derivation

The section is based on MCPP section ss 5.03.

C. Relationship to Existing Law

There are no comparable provisions in ORS.

Necessity of prior refusal of consent. In the See case, the Supreme Court expressly left open the question whether or not prior request and refusal is an essential preliminary to the issuance of a "warrant" for an inspectorial search. 387 US at 545 note 6. In the great majority of cases, it would appear, surprise would not be essential to effective enforcement of the inspection laws. Accordingly, subsection (2) of this section requires an initial effort to obtain access by consent, as the basis for applying for an order.

Ex parte or adversary hearing. Probably because search warrants have always been issued ex parte, the statutes enacted in the wake of the Camara and See cases provide for ex parte proceedings for issuance of inspection orders or warrants. But the justification for ex parte issuance of a search warrant is the probability of criminal behavior associated with the articles sought, which makes surprise an essential element of effective search. In the majority of inspectorial search cases the element of surprise will be unnecessary, and accordingly there will be no need for an ex parte proceeding. Subsection (3) therefore, requires due notice of the proceedings on the application, so that an adversary proceeding may be held if necessary. Notice by any reasonable means should suffice, in order to facilitate prompt disposal of the matter.

Standards of cause to inspect. The issue most sharply contested in the Camara case was the appropriate application of the Fourth Amendment's "probable cause" standard to inspectorial searches. In ordinary searches, there must be probable cause with respect to the particular persons or premises to be searched, and the appellant argued strongly that the same standard must apply to inspectorial searches - a result which would have outlawed "area" or "spot-check" searches of a preventive and "checking" nature, and confined inspection to places where it is reasonably believed that violations already exist.

The Court rejected this argument, and clearly intended to bring about a relaxation of the probable cause standard as applied to inspectorial searches. The precise nature of the relaxation is far from clear; the relevant passage from Mr. Justice White's opinion reads as follows: (387 US at 538)

> "Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."

The final clause appears to be necessary to guard against abusive and oppressive visitations from the standpoint of frequency, time of day, scope of search, and so forth.

Section 33. Emergency inspectorial searches. (1) Conditions warranting emergency search. (a) Whenever it reasonably appears to an inspection officer that there may be a condition, arising under the laws he is authorized to enforce and imminently dangerous to health or safety, the detection or correction of which requires immediate access, without prior notice, to premises for purposes of inspectorial search, and if consent to such search is refused or cannot be promptly obtained, the inspection officer may make an emergency inspectorial search of the premises without an inspection order.

(b) If the inspection officer considers it reasonably necessary, he may have assistance from one or more police officers in making the inspection. The police officers may employ force in the same manner and for the purposes specified in section 32 (5) (b) and subsection (2) of this section 33.

(c) Upon completion of the emergency inspectorial search, the inspection officer shall make prompt report of the circumstances to the judicial authority to whom application for an inspection order would otherwise have been made.

(2) Use of deadly force. If, in the course of an emergency inspectorial search under subsection (1) of this section or an inspectorial search under section 32, it reasonably appears that the use of deadly physical force is necessary in order to effect the search, and that failure to effect the search will cause imminent danger of death or serious physical injury, and that the force employed creates no unnecessary risk of injury to persons other than those obstructing the inspection, the inspection officer and any police officers assisting him may use deadly physical force in order to effect the search.

COMMENTARY

A. Summary

(1) The basic standard for the emergency inspection is the reasonable conclusion that a condition imminently dangerous to health or safety requires an immediate entry to premises, for detection or correction of the condition. Assistance of police officers may be engaged. A report in lieu of return, to the authority who would have been called upon for an order if time had permitted, is required.

(2) There may be circumstances justifying the use of deadly force to carry out an inspectorial search, whether under an order, or under emergency authority. The standard is expressed in terms of the danger to life and limb which is likely to result from a failure to make the search, and the risk of injury to others if deadly force is used.

B. Derivation

The language comes from MCPP section ss 5.04.

C. Relationship to Existing Law

Oregon has no comparable ORS provisions.

Explicit case authority for the substance of this section is lacking, but the tenor of the opinion in the Chimel case lends encouragement to a belief that it will survive constitutional scrutiny.

Section 34. Miscellaneous special searches and seizures. The conduct of any activity or operation of any premises pursuant to a license are subject to inspection, search or seizure without a search warrant. Such inspection, search or seizure shall be conducted according to rules established by the agency or governmental unit conducting such inspection, search or seizure.

(1) In the case of inspection, search or seizure by officers or employes of a state agency, such rules shall be prepared by the agency in consultation with the Attorney General and must be approved by the Attorney General before the rules can become effective.

(2) In the case of inspection, search or seizure by officers or employes of a county or city agency or governmental unit, such rules shall be prepared by the county or the city, as the case may be, in consultation with the district attorney of the appropriate county and must be approved by the district attorney before the rules can become effective.

(3) Such rules shall govern the time, place, manner and intensity of the inspection, search or seizure and all related matters. The rules shall also designate the employes and officers to whom authority is delegated to make the inspections, searches or seizures.

(4) In the case of adoption of such rules for any state agency, the provisions of ORS chapter 183 shall govern with respect to notice, filing and other related matters.

(5) In the case of adoption of such rules of county or city agencies or units, the following requirements must be met:

(a) The agency or unit shall give public notice of its intended adoption at least 20 days prior to adoption;

(b) The proposed rules shall be made available in a designated place in the city hall or county courthouse for public inspection at least 20 days prior to their adoption;

Section 34. Miscellaneous special searches and seizures. Any inspection, search or seizure carried out under the terms of or pursuant to a license shall be conducted according to rules established by the agency or governmental unit conducting such inspection.

(1) In the case of inspection, search or seizure by officers or employes of a state agency, such rules shall be prepared by the agency in consultation with the Attorney General and must be approved by the Attorney General before the rules can become effective.

(2) In the case of inspection, search or seizure by officers or employes of a county or city agency or governmental unit, such rules shall be prepared by the county or the city, as the case may be, in consultation with the district attorney of the appropriate county and must be approved by the district attorney before the rules can become effective.

(3) Such rules shall govern the time, place, manner and intensity of the inspection, search or seizure and all related matters.

(4) In the case of adoption of such rules for any state agency or unit, the provisions of ORS chapter 183 shall govern with respect to notice, filing and other related matters.

(5) In the case of adoption of such rules of county or city agencies or units, the following requirements must be met:

(a) The agency or unit shall give public notice of its intended adoption at least 20 days prior to adoption;

(b) The proposed rules shall be made available in a designated place in the city hall or county courthouse for public inspection at least 20 days prior to their adoption;

(c) The agency or unit shall make appropriate provision to allow any person the opportunity to appear in person or to file written statements with respect to any such proposed rule before its adoption. Notice of the time and place for such appearance or filing shall be given a reasonable length of time in advance;

(d) Each such agency or unit shall file all such rules when adopted with the county clerk or the city clerk, depending on which governmental agency or unit is involved;

(e) Rules may be changed or repealed from time to time in the same manner as for adopting rules.

(6) For the purposes of this section, license means and includes the whole or part of any agency permit, certificate, approval, registration or similar form of permission required by law or ordinance to operate any vehicle or to pursue any commercial activity, trade, occupation or profession, or to pursue any recreational activity including, but not limited to, hunting and fishing.

COMMENTARY

A. Summary

This section applies to all inspections, searches and seizures undertaken pursuant to authority granted under licenses. If the search is conducted by a state agency, rules governing search by that agency shall be prepared in consultation with the Attorney General and must have his approval before being applied. In the case of county or city licenses, such rules shall be prepared by the local agency in consultation with the district attorney and subject to his approval. In the case of state agencies procedures with respect to notice and publication are governed by ORS chapter 183, the Oregon Administrative Procedures Act. Such matters of notice and the like with respect to county and city rules are governed under the terms of subsection (5) of the section. A definition of the word "license" is set out in subsection (6) which applies for the purposes of this section.

B. Derivation

The language of this section is new.

C. Relationship to Existing Law

Inspections of the type to which the present section is directed relate to activities or enterprises traditionally subjected to a high degree of legislatively-authorized regulation and inspection.

Considering the number of statutes and ordinances of this type, and the frequency of prosecutions based on violations of regulatory statutes disclosed by inspections, it is surprising that the case authority on the constitutional limits on these inspections is both scanty and foggy. It is clear that the Camara and See cases do not require warrants in all inspection operations, for at the end of the opinion in the See case, Mr. Justice White wrote that the Court was not questioning the validity of "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." This view has recently been adopted in Oregon. See Portney v. McNamara, 493 P2d 63, ____ Or App ____ (1972). The case held that a city may inspect a bailbondsman's books under a licensing ordinance. The court took the view that such a search is civil and not criminal, and the Fourth Amendment is not violated.

The section supplants all ORS provisions authorizing inspections, searches and seizures by any state agency where a license is involved. It also governs all county and city searches and seizures of this nature. This approach is novel not only in Oregon but probably throughout the entire country.

The Commission believes that each agency has its own peculiar problems depending upon the kind of activity licensed. Yet there are also many similarities among the various agency needs and practices. In order to standardize search procedures where possible and where not possible to insure fair and reasonable procedures and limits, the Attorney General, in the case of state agencies, is authorized to coordinate rule preparation and must approve all rules before they can be enforced. The district attorney performs this function with respect to local agencies. It is anticipated that district attorneys will work closely with one another, perhaps through the Attorney General, to develop uniform procedures and limits.

By authorizing searches pursuant to administratively developed rules at least two major benefits will be realized.

First, the various officers and employes conducting such searches will better know and understand what is expected of them and what they are forbidden to do. Second, the public, including persons within a specific license category, will have access to the rules which enunciate in detail what is allowed and will be able to protest adoption of such rules if desired. Inspections and searches pursuant to licenses have been a low visibility area of the law. The provisions in this section should bring needed visibility to the area.

DISPOSITION OF THINGS SEIZED

Section 35. Scope. The provisions of sections 35 and 36 shall apply to things seized in the course of a search or seizure whether or not authorized by the provisions of this Code.

COMMENTARY

A. Summary

This section is applicable to all things seized.

B. Derivation

The section is based on MCPP section ss 7.01.

C. Relationship to Existing Law

See the commentary following section 37.

Section 36. Notice of seized items; disposition of stolen goods. (1) In all cases of seizure other than under a search warrant if an arrest is made, the officer making the arrest shall, as soon thereafter as reasonably possible, make a list in writing of the things seized. A copy of this list shall be given to the defendant or his counsel.

(2) Disposition of unclaimed goods. If no claim to rightful possession has been established pursuant to section 37 of this Article, the court shall order the things to be delivered to the officials charged with responsibility under the applicable laws for the sale, destruction, or other disposition of contraband, forfeited, and unclaimed goods in official custody.

(3) Stolen goods and perishables. Recently stolen things seized pursuant to an arrest or under section 29 of this Article, may, if the identity of the person having a rightful claim to possession can be promptly established beyond a reasonable doubt to the satisfaction of the seizing officer, be promptly returned to the rightful possessor. Perishable things seized may be disposed of by the seizing officers as justice and the necessities of the case dictate.

COMMENTARY

A. Summary

(1) A list of things seized (where no search warrant is involved) must be given by the officer to the court and the defendant.

(2) If there is no rightful claim established under section 37, the seized items may be ordered by a judge to be sold, destroyed or otherwise disposed of according to laws applicable.

(3) If the police seize things recently stolen and know for sure who the owner is, they are authorized to return the things to the owner. If perishable goods are seized, and the owner is unknown, the perishables may be disposed of by the police as justice and necessities dictate.

B. Derivation

The language is taken in part from MCPP section ss 7.02 (2), (3) and (6).

C. Relationship to Existing Law

See the commentary following section 37.

Section 37. Motions for the return or restoration of seized things. (1) Who may file. Upon the return of a search warrant or within 30 days thereafter, or within 30 days after actual notice of a seizure, whichever is earlier, or at such later date as the court in its discretion may allow:

(a) The individual from whose person, property, or premises things have been seized may move the court to whom the warrant was returned, the arraigning magistrate, or the court having jurisdiction of the offense in question, as the case may be, to return things seized, pursuant to warrant or otherwise, to the person or premises from which they were seized; and

(b) Any other person asserting a claim to rightful possession of the things seized may move the court having jurisdiction of the matter to restore the things seized to such person.

(2) Grounds. Motions for return or restoration of seized things shall be based on the ground that the moving party has a valid claim to rightful possession of things seized, because:

(a) The things had been stolen or otherwise converted, and the moving party is the owner or rightful possessor thereof; or

(b) The things seized were not in fact subject to seizure under this Article 5; or

(c) The moving party, by license or otherwise, is lawfully entitled to possess things otherwise subject to seizure under section 3 of this Article; or

(d) Although the things seized were subject to seizure under section 3 of this Article, the moving party is or will be entitled

to their return or restoration of the court's determination that they are no longer needed for evidentiary purposes.

(3) Postponement of return. In granting a motion for return or restoration of seized things, the court may postpone execution of the order for return or restoration until such time as such things need no longer remain available for evidentiary use.

(4) Appellate review. An order granting a motion for return or restoration of seized things shall be reviewable on appeal in regular course. An order denying such a motion, or entered under subsection (5) of this section, shall be reviewable on appeal upon certification by the court having custody of such things that they are no longer needed for evidentiary purposes.

(5) Disputed possession rights. If, upon consideration of a motion or motions for return or restoration of seized things, it appears that the things should be returned or restored, but there is a substantial question whether they should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants to rightful possession, the court hearing the matter may, in its discretion, return the things to the person from whose possession they were seized, or impound the things seized and remit the several claimants to appropriate civil process for determination of the claims.

COMMENTARY

A. Summary

(1) This subsection distinguishes the two sources from which challenge to the seizure itself, and demands

for return or restoration of the property, may issue: (a) the person who was the object of the search and from whose possession the seizure was made, and (b) some other person asserting rights of possession, generally on the ground that the person who was the object of the search had stolen the things. The subsection also sets time limitations and identifies the tribunal which is to hear the motion.

(2) Existing statutes do not discriminate between grounds which may support a motion for return of seized things, as compared to a motion to suppress evidence. Yet there is plainly a great difference. A narcotics pusher from whom a quantity of heroin has been seized by an unlawful search may be entitled to suppress the heroin as evidence, but not to get it back.

In most if not all circumstances, the legality of the search or seizure is not relevant to disposition of a motion for return or restoration of the property. If possession of the things seized is unlawful, the state retains the things no matter how it got them. If stolen goods are involved and the true owner is on hand with undisputed evidence of title, he should have them restored whether or not their seizure by the police from the thief was proper or improper. If the seizure is for evidentiary purposes of things innocent in themselves, as for example an identifying garment or incriminating records, the lawfulness of the seizure goes only to the question of when they should be returned; when their evidentiary utility is exhausted, the owner should have back his overcoat or his business ledger.

The grounds are set forth in subsection (2) in conformity with the above assumptions.

(3) This subsection provides the necessary flexibility for the contingency provided for in subsection (2) (d).

(4) Since an order granting a motion for return of seized things is a final order, it should be appealable in accordance with general statutory provisions for appeal. The same is true of an order denying such a motion, but for administrative convenience the appeal should be delayed until the things are no longer needed for evidentiary purposes.

(5) Infrequently there will arise cases where it is clear that the state has no lawful claim to possession of the things seized, but it is not clear who has the rightful

claim to possession. The proceedings on motion for return or restoration, collateral as they are to criminal process, are not an appropriate forum for the determination of conflicting claims between or among rival claimants. In some such situations the most satisfactory solution may be to restore the status quo by returning the things to the person from whom the things were seized. In other circumstances, however, adequate protection of the claims of others may require impounding pending settlement, or resolution of the dispute by civil litigation.

B. Derivation

The section is based on MCPP section ss 7.03.

C. Relationship to Existing Law

All but a handful of states have enacted statutes containing provisions for the disposition of things seized by law enforcement officers. They are two types, each followed by about a dozen states; otherwise, both in form and substance, there is great variety but little evidence of a considered approach to the matter.

The Oregon statute, like those in some thirteen other states, clearly betrays its ancestry in the common-law warrant for stolen goods. If the seized property has been stolen, it is delivered to the owner "on satisfactory proof of his title"; if the warrant is issued without probable cause or does not cover the property seized, it is returned to the person from whom it was seized; if the property was used for criminal purposes, it is retained for evidentiary use at the trial. See ORS 141.170 and ORS chapter 142.

Oregon and some eight other states also provide that if, on motion, the seizure is shown to be unlawful, the property shall be returned to the person from whom it was taken, "unless otherwise subject to lawful detention." The quoted clause is to ensure that contraband is not returned, even if taken by an unlawful seizure. No provision is made for return of stolen property to the true owner. See ORS 141.160.

In only a few states do the statutes manifest an awareness of the three principal purposes of seizure: to restore stolen property to the owner, to confiscate contraband or other unlawfully possessed things, and to use the seized things as evidence in a criminal trial. The Kansas statute, perhaps more than any other, is discriminating in these respects, and the draft, though different in form, approximates the Kansas law in substance.

It should also be remarked that, in many states, the disposition provisions relate only to property seized pursuant to a search warrant, and are silent with respect to arrest or other seizures without a warrant. It is important to regularize the post-seizure procedures for seizures without a warrant, since these comprise the great majority of seizures, and the draft is constructed with that end in view.

EVIDENTIARY EXCLUSION

Section 38. Motions to suppress evidence. (1) Where made. Objections to the use in evidence of things seized in any violation of the provisions of this Article 5 shall be made by a motion to suppress. Such motion shall be filed in the circuit court if the offense charged is a felony and in the district court if the offense charged is a misdemeanor.

(2) If the motion to suppress is filed in the district court, a record shall be kept of the proceedings. Either party may appeal an adverse ruling to the circuit court which shall decide the appeal on the basis of the record in the district court.

(3) When made. In any criminal proceeding in which the prosecution proposes to offer in evidence things seized, the prosecution shall give notice to that effect to the defendant as soon as is reasonably possible after the seizure. If no such notice is given within a reasonable time, the seized things shall not be received in evidence, unless the court finds that there was good cause for such failure, and that the defendant has not been prejudiced by such failure.

(4) If, after receipt of the notice required by subsection (3) of this section, the defendant objects to use in evidence of the seized things to be offered, he shall, within a reasonable time after receipt of the notice, file a motion to suppress evidence, which shall be heard and determined by the court in advance of trial. If, despite the prosecution's failure to give notice as required by subsection (3), the court permits the offer in evidence of seized things at the trial, the court shall, upon request, allow the defendant a

reasonable time to prepare and file a motion to suppress. If the defendant fails to file such a motion within a reasonable time required after giving notice, or within such reasonable time as is allowed in the absence of notice, the court shall entertain a subsequent motion to suppress only if it finds that there was good cause for such failure, or that the interests of justice so require.

(5) Renewal. A motion to suppress which has been denied may be renewed, in the discretion of the court, on the ground of newly discovered evidence, or as the interests of justice require.

COMMENTARY

A. Summary

This section provides the procedural framework for motions to suppress evidence.

Subsections (1) and (2) fix the jurisdiction to handle motions to suppress in the judge of the court where the case will be tried.

Subsections (3) and (4) require the prosecution to give reasonable notice of its intention to use seized things whereupon the defendant must give reasonable notice if he intends to move to suppress.

Subsection (5) makes provision for the renewal of a motion to suppress, previously denied. Evidence of the illegality of a search may be difficult for the defendant to obtain, and he should not be foreclosed from a renewed effort to suppress on the ground of newly-discovered evidence, or other considerations of fairness.

B. Derivation

The section is based on MCPP section ss 8.01 (1), (2) and (3).

C. Relationship to Existing Law

When and where made. Under the statutory provisions in some states, motions to suppress may be heard and determined by magistrates having no jurisdiction over the criminal proceeding itself; in such cases, the defendant may be given the right to a hearing de novo on his motion in the circuit court. In Oregon, pursuant to ORS 141.150 and 141.160 and the decision in State v. Harris, 119 Or 427 (1926), an attack can be made on a search warrant before the magistrate who issued it. It is probably more common practice, however, in Oregon to challenge the search by filing the motion in the trial court. The draft provides for disposition of such a motion only by a judge of the court having jurisdiction of the offense to be tried, and in connection with which the seized things are to be offered in evidence. Since the motion is to be disposed of by a court and not a jury, it appears that the ruling should be made by the same court that will rule on other evidentiary issues at the trial - especially since the ruling on the motion to suppress will often, in effect, be decisive for the outcome of the case. It will be recalled that in subsection (4) of section 11 the issuing magistrate is required to transmit a copy of the warrant and other documents to a court with jurisdiction to hear the charge.

To avoid the problems where a motion to suppress has been granted in the district court and the state desires to appeal (see State v. Stahley, 492 P2d 295, ____ Or App ____, (1971)), the district court proceedings on the motion must be of record and the state, as well as the defendant, is given a right to appeal to the circuit court.

Time of making. Existing statutory procedures show wide variation with respect to the time at which motions to suppress may or must be filed. Under the federal rule, it is to be made before trial unless the defendant's failure is for good cause, but the court has full discretion to hear it at the trial as well; this is the pattern for many states. If the motion is permitted at trial, it is commonly required to be made when the evidence is offered; in a somewhat unusual context, the Court has shown a disposition to relax this requirement where constitutional claims are involved.

Disposition of the motion prior to trial seems highly desirable as a general proposition. In many cases, a grant may result in abandonment of the prosecution, and a denial in a guilty plea. If the case goes to trial, the necessity of interruption - possibly prolonged - is avoided. Accordingly, the draft provides for disposition in advance of trial, unless the prosecution or defense, as the case may be, can show good cause to the contrary, or unless the interests of justice require that the defendant be allowed an otherwise tardy hearing. This provision is in line with present Oregon law which requires that the motion to suppress be filed prior to trial unless the defendant is unaware of the seizure and had no opportunity to present his motion. In addition, the defendant must also obtain a ruling on his motion before trial. See the authorities collected in section 20.63, Oregon Criminal Law Handbook.

As a matter of legislative intent, if the district attorney charges a misdemeanor thus placing the trial in the district court and the defendant successfully moves to suppress evidence in the district court, the evidence is for all time lost to the state. It is the purpose of this commentary to make it clear that the district attorney, after losing on the motion to suppress, cannot use the suppressed evidence if he later charges the defendant with a felony.

Section 39. Appellate review of order denying motion to suppress evidence. An order denying a motion to suppress prior to trial shall be reviewable prior to trial if the judge who denied the motion certifies that the question determined by the order is substantial, and that a prompt appeal will materially expedite the termination of the case or otherwise serve the ends of justice.

COMMENTARY

A. Summary

The section is novel in that it allows the defense a pretrial appeal from a denying order only by permission of the judge issuing the order, or an appellate judge, to be granted in the exercise of discretion, if the question is substantial.

B. Derivation

The section is based in part on MCPP section ss 8.01 (4).

C. Relationship to Existing Law

The defendant is entitled to appeal from the denial of a pretrial motion to dismiss. Most states do not allow such an interlocutory appeal by the defendant. Oregon is apparently in this group. It is strongly contended that allowing such an appeal would invite defendants to take advantage of the procedure for purposes of delay. Because of this and the existing strong set against the appeal by the defendant, the ALI has eliminated it from its draft. Nonetheless there are persuasive arguments to be made for it.

The goals to be achieved here are avoidance of unnecessary trials, of trial delays, and of trial interruptions. Despite provisions for an appeal on the search and seizure point after a plea of guilty, some defendants may prefer to go to trial although they would not if their motion to suppress were irretrievably lost. And, in jurisdictions where the trial calendar is months in arrears, it may be possible to settle the search and seizure point on appeal without delaying the trial.

The present authority granted to the state to appeal from an adverse ruling (see ORS 138.060) will be continued but this authority will be located elsewhere in this Code.

Section 40. Standing to file motion to suppress. (1) A motion to suppress may be made by any defendant against whom things seized are to be offered in evidence at a criminal trial no matter from where or from whom seized.

(2) A motion to suppress evidence may be based upon a violation of any of the provisions of this Article.

COMMENTARY

A. Summary

This section imparts an unlimited standing to defendants who desire to challenge introduction of seized evidence.

B. Derivation

This section is based in part on MCPP section ss 8.01 (5), Tentative Draft No. 4 (April 30, 1971), but is largely unprecedented.

C. Relationship to Existing Law

The "standing" requirement of United States v. Jones, 362 US 697 (1960), allows a defendant against whom seized evidence is offered to move its suppression only if the evidence has been taken in violation of the defendant's own Fourth Amendment rights. The Oregon decisions apparently follow the Jones rule. See Oregon Criminal Law Handbook, sections 20.49 through 20.53.

The applicable federal language, copied in a number of states, permits challenge to the evidentiary use of seized things by any person "aggrieved by an unlawful search and seizure." In the federal system, this has been construed to mean that the challenger must have been aggrieved by the search and seizure, not by the fact that the evidence is offered against him. Thus if an unlawful search of X's premises turns up evidence incriminating Y, the latter has no "standing" to challenge the use of such evidence against himself. United States v. Jones, supra.

The Jones case was decided the year before the Mapp case made the exclusionary rule a constitutional requirement, primarily on the basis of its necessity as the only apparently effective means of enforcing the Fourth Amendment. In California, immediately after the exclusionary rule was adopted, the Supreme Court of California rejected the "standing" doctrine on the ground that it diminished the deterrent effect of the exclusionary rule. People v. Martin, 45 Cal 2d 755 (1955).

Commentators have been divided in their views on the point. The Supreme Court continued to give lip service to the standing rule, but twice found ways to frustrate its effect, and approached its tacit abandonment in Berger v. New York, 388 US 41 (1967). However, the general doctrine of the Jones case was explicitly reaffirmed in Alderman v. United States, 394 US 165.

The Jones and Alderman cases settle the point that, on the constitutional level, the right to raise Fourth Amendment claims can be limited to those whose own Fourth Amendment rights have been invaded. On the policy level, the views expressed by Judge Traynor in the Martin case, supra, are more convincing. The problem of standing has been a vexing one conceptually, productive of aridly technical discussion and decision. In the sense of "case or controversy," certainly the accused has standing to object to the use of evidence which may send him to jail, and which was obtained by unlawful means. The logic of the exclusionary rule, and the deterrence objectives on which it is based, apply equally whether or not the search itself "aggrieved" the defendant. The true thrust of Mr. Justice Holmes' "dirty business" comment in the Olmstead case is felt here in the same way.

The draft reflects the approach in Martin and has the effect of removing any limitations on the standing of a defendant against whom seized evidence, no matter from where or from whom seized, is to be introduced.

Section 41. Determination of substantiality of motion to suppress. A motion to suppress evidence based upon a violation of any of the provisions of this Article shall be granted only if the court finds that the violation was substantial.

COMMENTARY

A. Summary

If the judge finds that the violation of the particular section on search and seizure is established but is not "substantial" he may deny the motion to suppress. What constitutes substantiality is discussed below.

B. Derivation

This section is based on MCPP section ss 8.02 (2), Tentative Draft No. 4 (1971).

C. Relationship to Existing Law

The section is novel. It is an attempt to ameliorate the all-or-nothing effect of the exclusionary rule. In another context it is an attempt to move Fourth Amendment violations into the "harmless error" doctrine and out of the "automatic reversal" concept.

The time for this provision may be at hand if analogous reference is made to some recent cases in the U. S. Supreme Court. The entire concept of the exclusionary rule, announced in Mapp v. Ohio in 1961, is under increasing criticism from some current members of the Court. For example, see the statements in Coolidge v. New Hampshire, 91 S Ct 2022 (1971), of Justice Blackmun (p. 2060). Justice White does not express much enthusiasm for the rule. Chief Justice Burger launches a major attack on the exclusionary rule in his dissenting opinion in Bivens v. United States, 91 S Ct 1999, 2012-20 (1971). Especially significant in this dissent is the Chief Justice's direct and approving references to section ss 8.02 (2) of the MCPP upon which the draft section is based. (See the dissent at p. 2019).

Although it cannot be said with certainty that the exclusionary rule is about to expire, it can be asserted that it is in for reappraisal. Until then the present constitutional stature of the exclusionary rule will hold sway.

If exclusion is constitutionally required, under Mapp, as often will be the case, that is the end of the matter. But the constitutional issue itself may be affected by the factor of substantiality, and the presence or absence of the criteria set forth in this section.

With respect to the question of substantiality, it is the intent of the Commission that the following material constitute legislative history on the point:

In determining whether a violation is substantial the court shall consider all the circumstances, including:

(1) The importance of the particular interest violated;

(2) The extent of deviation from lawful conduct;

(3) The extent to which the violation was wilful;

(4) The extent to which privacy was invaded;

(5) The extent to which exclusion will tend to prevent violations of this Code;

(6) Whether, but for the violation, the things seized would have been discovered; and

(7) The extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

Section 42. Fruits of prior unlawful search. If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to suppression, and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Article.

COMMENTARY

A. Summary

This section undertakes a statement of the "fruit of the poisonous tree" doctrine as applied to search and seizure, under the requirements first laid down in Silverthorne Lumber Co. v. United States, 251 US 385 (1920).

B. Derivation

The section is based on MCPP section ss 8.02 (3), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

This section reflects fairly well-established concepts. If the police illegally seize a notebook which contains information which leads to other evidence which they in due course seize under a search warrant, the section, based on the "fruit of the poisonous tree" doctrine, would allow the defendant to suppress such evidence. But the section provides that the prosecution can defeat such a motion to suppress if it can show it probably would have discovered the evidence anyway.

Section 43. Evidence of probable cause unlawfully obtained. Any evidence obtained in the course of a search, the validity of which is dependent upon probable cause, whether pursuant to a search or arrest warrant, a warrantless arrest, or other authority specified in this Article 5, shall be subject to a motion to suppress if the finding of probable cause, or the officer's reasonable belief, as the case may be, was based in necessary part on information unlawfully acquired from the defendant by an officer.

COMMENTARY

A. Summary

If an officer comes by information illegally (such as trespassory snooping or obtaining it by physical coercion) and this information is used as the basis of obtaining a warrant based on probable cause to search (or arresting without a warrent, etc.), a motion to suppress the evidence subsequently obtained will be allowed.

B. Derivation

The section is based on MCPP section 8.02 (4), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

This section involves extending the exclusionary rule from the trial itself to the hearing on probable cause, on "fruit of the poisonous tree" principles.

The U. S. Supreme Court seems never to have squarely faced the issue. There are implications cutting against the proposed rule in McDonald v. United States, 385 US 451 (1948), and in the dissenting opinions of Justices White and Harlan in Berger v. New York, 338 US 41 (1967). There are lower court cases which support his conclusion. Hair v. United States, 389 F2d 894 (1961); McGinniss v. United States, 222 F2d 598 (1955). But other cases say that probable cause may be based on evidence obtained from "mere technical trespasses." United States v. Buchner, 164 F Supp 836 (1957); United States v. Halsey, 257 F Supp 1002 (1966); United States v. Conti, 361 F2d 153 (1966).

The question is not free from difficulty. Certainly the road would be opened for wholesale violation of the Fourth Amendment guarantees, and the effect of the exclusionary rule largely nullified, if illegally acquired information were to be freely allowed as an ingredient of probable cause for a search or an arrest. But how far is the rule to be extended? If an officer by unlawful means obtains information that a serious crime of violence is planned for a particular time and place, surely that ought not give the criminals a license to proceed unimpeded by the police. Perhaps one might say the information so obtained should not be used against them at their trial on an attempt charge, but if that is to be the rule, then would there have been probable cause for their arrest? Or, to take another example, must a large cache of heroin be left undisturbed because the police used illegal means to learn of its existence? Should the line be drawn between preventive or protective police measures on the one hand and criminal sanctions on the other?

The ramifications of this section's concept plainly extend beyond the area of search and seizure, and call for consideration in a broader context. So far as concerns search and seizure, unlawfully acquired essential ingredients of a probable cause finding ought to provide grounds for a motion to suppress. Nevertheless, prevention of unlawful conduct must dictate flexibility of administration. If a magistrate is asked to issue a search warrant, and the police produce unlawfully acquired evidence establishing with certainty that there is contraband at a given place, a warrant should issue for the seizure, but the contraband should not be admissible in evidence.

Section 44. Challenge to truth of the evidence. (1) Subject to the provisions of subsection (2) of this section, in any proceeding on a motion to suppress evidence the moving party shall be entitled to contest, by cross-examination or offering evidence, the good faith of the affiant with respect to the evidence presented to establish probable cause for search or seizure.

(2) If the evidence sought to be suppressed was seized by authority of a search warrant, the moving party shall be allowed to contest the good faith of the affiant as to the evidence presented before the issuing authority only upon supplementary motion, supported by affidavit, setting forth substantial basis for questioning such good faith.

(3) In any proceeding under subsection (2) of this section, the moving party shall have the burden of proving that the evidence presented before the issuing authority was not offered in good faith.

(4) Where the motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving the validity of the search is on the prosecution.

COMMENTARY

A. Summary

Subsection (1) permits the defendant to challenge the good faith but not the objective truth of testimony offered in support of probable cause, whether the testimony was given before the magistrate issuing a search warrant, or is given for the first time at the hearing on the motion, if it was a warrantless search. The defendant can press his challenge both by cross-examination of prosecution witnesses, or by presenting evidence of his own.

Subsection (2) relates only to motions to suppress evidence seized by authority of a search warrant, where evidence on probable cause has already been considered by the issuing magistrate. In order to discourage frivolous or routine challenges, a preliminary showing of substantial basis for the challenge is required.

Subsection (3) puts the burden of proof on the moving party where a search warrant is challenged.

Subsection (4) provides that the state has the burden to show valid search where there was no search warrant authorizing the police action.

B. Derivation

The language is based on MCPP section ss 8.03 (1), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

This section fairly closely reflects present Oregon law and practice. See sections 20.58, 20.66 and 20.68 of the Oregon Criminal Law Handbook.

PROPOSED AMENDMENTS TO PART II, ARTICLE 5,

REVISED CODE OF CRIMINAL PROCEDURE

Section 4. Issuance of Search Warrant.

It is proposed to amend Section 4 by adding the following material as subsection (4):

(4) Recorded affidavits. In lieu of the written affidavit described in subsection (3) the judge may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be considered to be an affidavit for the purposes of this Article. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the judge receiving it and shall be retained as a part of the record of proceedings for the issuance of the warrant.

It is further proposed to amend Section 5 of Article 5 by creating a new subsection (3), renumbering the present subsection (3) to subsection (4). The following material is proposed as subsection (3):

"(3) Duplicate original warrants. The judge may orally authorize a police officer or a prosecuting attorney to sign the judge's name on a duplicate original warrant. A duplicate original warrant shall be a search warrant for the purposes of this Article, and it shall be returned to the magistrate as provided in Section 11. In such cases, the judge shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant and the duplicate original warrant with the record of proceedings on application for the warrant as provided in Section 11."

COMMENTARY

The proposed amendments substantially embody the provisions of Section 1526(b) and 1528(b) of the California Penal Code. Copies of those sections follow:

'ormati. onstituting probable cause for uance of search warrant where the ound on which disclosure is sought is that attacking probable cause. Theodor v. perior Court, Orange County (1971) 98 l.Rptr. 486, 21 C.A.3d 474.

Sufficiency of affidavits

Where the affidavit informs the magiste of some of the underlying circumnces from which the informant has conded contraband is where he claims it is, d where the magistrate is assured of the iability of the informant because of the 'ormant's personal appearance and testiny before him, a search warrant issued reliance thereon is not invalid under the leral constitution. Theodor v. Superior urt, Orange County (1971) 98 Cal.Rptr. , 21 C.A.3d 474.

Notwithstanding claim that petitioner's -year-old son was not a police agent but voluntary actor whose offer to fetch a mple of contraband from dresser drawer petitioner's bedroom was accepted by lice, where official participation in foray s obvious and undebatable, in that sher- s sergeant ascertained that time was e for surreptitious entry, supplied transrtation, described quantity, and waited purloined material, warrantless search dresser drawer by petitioner's son was alid and contraband obtained as a re- t thereof was subject to suppression. ymond v. Superior Court for Sacrato County (1971) 96 Cal.Rptr. 678, 19 .3d 321.

nformant's statements concerning narics party that was to take place at spec address on specific evening were inficient to support warrant for search of rtment on that evening in absence of ication that informant spoke from peral knowledge, but that deficiency did not der the statements so insubstantial that y could not properly have counted in gistrate's determination, and those tement's ien coupled with officer's inendent stigation and his own obserions, were sufficient to support issuance he warrant for search of named persons premises in which heroin was found. ple v. Bustamante (1971) 94 Cal.Rptr. 64, .A.3d 213.

inding of magistrate that affidavit jus- s issuance of search warrant will be urbed on appeal only if affidavit fails as tter of law to set forth sufficient compet evidence to support findings. In re M. 1) 93 Cal.Rptr. 679, 16 C.A.3d 96.

ffidavit in support of search warrant ch did not contain sufficient factual ter from which magistrate could indeiently determine that informant's re- of illegal activity on part of defendant reliable failed to conform to constitual requirements, and, therefore, evice obtained in search authorized by ch warrant issued pursuant to that afvit was in violation of defendant's conitional right to be secure against unreaable search of his home. People v. Le- (1970) 91 Cal.Rptr. 257, 12 C.A.3d 1006.

view of fact that affidavit in support earch warrant alleged that assistant master had indicated to officer that e believed to contain marijuana would delivered between 9 and 10 a. m., and in of variance in evidence concerning actime of obtaining warrant and actual of service, denial of defendant's manus petition to suppress evidence could been sustained on grounds that there probable cause to believe contraband arrived prior to issuance notwithstandthat affidavit contained no statement officer knew at time he sought warthat delivery had actually been made. ires v. Superior Court of Ventura nty (App.1970) 90 Cal.Rptr. 682.

Changes or additions by amendment

It is not necessary that affidavit filed in support of search warrant recite reliance upon reliable informant, if statement of informer is factual in nature rather than conclusory and indicates that informer had personal knowledge of facts related and if affidavit contains some underlying factual information from which issuing judge can reasonably conclude that information supplied by informer is reliable. People v. Akers (1970) 87 Cal.Rptr. 903, 9 C.A.3d 96.

Although affidavit filed in support of search warrant did not allege facts from which magistrate could determine that informant was reliable, affidavit was sufficient where it disclosed that information supplied by two law enforcement agencies corroborated information received from the informant. Id.

In determining sufficiency of affidavit for issuance of search warrant, test of probable cause is whether facts contained in affidavit are such as would lead man of ordinary caution or prudence to believe and conscientiously to entertain a strong suspicion that contraband is present in place to be searched. Frazzini v. Superior Court In and For Inyo County (1970) 87 Cal.Rptr. 32, 7 C.A.3d 1005.

8.5 Examination of affiant and witnesses

Where magistrate makes an additional examination under oath of person seeking warrant and any witnesses he may produce, magistrate need not record and transcribe such examination as he would if it were to serve as the only basis for the search warrant; he need only take an affidavit, subscribed by the person examined, and the affidavit need not contain the totality of the examination. Theodor v. Superior Court, Orange County (1971) 98 Cal. Rptr. 486, 21 C.A.3d 474.

9. Burden of proof

Because informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over hurried action of officers, greater showing of probable cause is required to justify arrest without warrant than to justify a search pursuant to a warrant. People v. Madden (1970) 88 Cal.Rptr. 171, 471 P.2d 971, 2 C.3d 1017.

11. Review

Only question with which a court reviewing the validity of a search warrant is concerned is whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; probable cause, not moral certainty, is the constitutional standard. Theodor v. Superior Court, Orange County (1971) 98 Cal.Rptr. 486, 21 C.A. 3d 474.

When search is based on warrant the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified officer in acting on his own without a warrant and will sustain the judicial determination so long as there was substantial basis for magistrate to conclude that contraband was probably present. Frazzini v. Superior Court In and For Inyo County (1970) 87 Cal.Rptr. 32, 7 C.A.2d 1005.

§ 1526. Issuance; examination of complainant and witnesses; taking and subscribing affidavits; transcribed statements in lieu of written affidavit

(a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing, and cause same to be subscribed by the party or parties making same.

(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court.

(Amended by Stats.1970, c. 809, p. 1531, § 1.)

1970 Amendment. Added subd. (b).

Supplementary Index to Notes

1. In general

Although a search warrant must be supported by affidavit or, in the alternative, by an oral statement which is recorded and transcribed, the issuing magistrate may also examine on oath the person seeking the warrant and any witnesses he may produce; such examination is within the magistrate's discretion. Theodor v. Superior Court, Orange County (1971) 98 Cal.Rptr. 486, 21 C.A.3d 474.

Even if deposition, a sworn statement and an affidavit are synonymous, deposition and statement still have to be subscribed by person making them before they comply with statutory prerequisite for issuance of search warrant. Powelson v. Superior Court of Yolo County (1970) 88 Cal. Rptr. 8, 9 C.A.3d 357.

1.5 Affidavit

Where the affidavit informs the magistrate of some of the underlying circumstances from which the informant has concluded contraband is where he claims it is, and where the magistrate is assured of the reliability of the informant because of the informant's personal appearance and testimony before him, a search warrant issued in reliance thereon is not invalid under the federal constitution. Theodor v. Superior Court, Orange County (1971) 98 Cal.Rptr. 486, 21 C.A.3d 474.

Affidavit of accomplice or participant in crime may constitute probable cause for issuance of search warrant. In re Golia (1971) 94 Cal.Rptr. 323, 16 C.A.3d 775.

Where affiant, in affidavit for search warrant, alleged that reliable informant had personally seen both sale and use of marijuana in apartment 207, that undercover narcotics agent had stated that narcotics had been used in apartment 207 the previous night, and that informant had stated

Asterisks * * * Indicate deletions by amendment

SEARCH AND SEIZURE
Proposed amendment to
Preliminary Draft No. 3

Sec. 17 P.D. 3

(Inventory search provision to be added as subsection (2) to section 13. Subsection (1) of section 13 deals with custodial search.)

(2) Vehicle inventory search. If an arrest occurs of a person operating any automobile, aircraft, boat or other vehicle and the police have reasonable and justifiable grounds for impounding the vehicle to protect property in the vehicle, the police may conduct a search as may be reasonably necessary for purposes of inventorying the contents of the vehicle. Such search shall be for the purpose of finding, listing and securing from loss, during the arrested person's detention, property found in the vehicle. Evidence of any crime found during such search shall be admissible in evidence.