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CRIMINAL PROCEDURE

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 5. SEARCH AND SEIZURE

Tentative Draft No. 1; September 1972

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ARTICLE 5. SEARCH AND SEIZURE

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ARTICLE 5. SEARCH AND SEIZURE

GENERAL PROVISIONS

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

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

(2) "Police officer" means a sheriff, municipal policeman or 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. The definition of police officer is meant to include deputy sheriffs as well as sheriffs.

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 Commission 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.

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Section 2. Permissible objects of search and seizure. The following are subject to search and seizure under this Article:

- (1) Evidence of or information concerning the commission of a criminal offense;
- (2) Contraband, the fruits of crime, or things otherwise criminally possessed;
- (3) Weapons or other things used or likely to be used as means of committing a crime; and
- (4) A person for whose arrest there is reasonable cause or who is unlawfully held in concealment.

COMMENTARY

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 subsections (2) and (3), the subjects of search and seizure are tangible physical objects. Ordinarily, that will also be the case under subsection (1) 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" in addition to "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.

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Although subsection (4) 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.

B. Derivation

The section draft follows closely the language in section ss 1.03 of the MCPP. 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.

SEARCH AND SEIZURE PURSUANT TO WARRANTS

Section 3. Issuance of search warrant. (1) A search warrant may be issued only by a judge.

(2) Application for a search warrant may be made only by a district attorney or by any police officer.

(3) The application shall consist of a proposed warrant in conformance with section 5 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 any unnamed informant's reliability and shall disclose, as far as possible, the means by which the information was obtained.

(4) Instead of the written affidavit described in subsection (3) of this section, 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.

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.

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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).

Subsection (4) permits a police officer to obtain search warrant authority by calling the judge on the telephone. The judge, over the phone, puts the officer under oath and makes a recording of the conversation.

B. Derivation

The language of the section comes largely from MCPP section ss 2.01 (1), (2) and (3). The language of subsection (4) on telephonic search warrants is based on California Penal Code s. 1526 (1970).

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.

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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.)

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(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.

The telephonic warrant system authorized in subsection (4) is new to Oregon law and procedure. Since the definition in section 1 of the word "judge" no longer includes justices of the peace and county judges, the telephoned warrant system has been adopted especially for use in those counties which may not have a resident circuit court judge or a conveniently located district court judge. The vast spaces of eastern Oregon in particular have prompted the Commission to include this unique device. Further details of the system are included in subsection (3) of section 4, infra.

Section 4. The hearing. Before acting on the application, the judge may 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. The summary or other record shall be admissible as evidence on any motion to suppress.

(2) If the judge finds that the application meets the requirements of this Article and that, on 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 2 of this Article, he shall issue a search warrant based on his finding and in accordance with the requirements of sections 3 through 10 of this Article. If he does not so find, the judge shall deny the application.

(3) The judge may orally authorize a police officer or a district 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 judge as provided in section 10. In such cases a 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 in the manner provided by law.

(4) Until the warrant is executed, the proceedings upon application for a search warrant shall be conducted with secrecy appropriate to the circumstances.

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 2 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.

Subsection (3) contains further details of the telephonic search warrant system introduced in section 3, subsection (4).

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. Subsection (3) is based on California Penal Code s. 1528 (1970).

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

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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 (4) 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 language reflects this policy.

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Section 5. Contents of search warrant. A search warrant shall be dated and shall be addressed to and authorize its execution by an officer authorized by law to execute search warrants.

(2) The warrant shall state, or describe with particularity:

(a) The identity of the judge issuing the warrant and the date the warrant was issued;

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

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

(d) 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) Except as otherwise provided herein, the search warrant shall be executed between the hours of 7 a.m. and 10 p.m. and within five days from the date of issuance. The judge issuing the warrant may, however, by endorsement upon the face of the warrant, authorize its execution at any time of the day or night and may further authorize its execution after five days, but not more than 10 days from date of issuance.

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 only between the hours of 7 a.m. and 10 p.m. unless otherwise authorized on the face of the warrant. The warrant is to be executed in five days or no later than 10 days from date of issuance if so authorized.

B. Derivation

The section is based on section ss 2.02 (1), (2) and (3) 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 subsection (2) (d) (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.

C. Relationship to Existing Law

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 so authorizes service on the face of the warrant in the nighttime hours after 10 p.m.

Subsection (3) generally requires that the warrant be served within five days which is shorter than the basic 10 day execution requirement of ORS 141.100. Subsection (3) of the draft section does, however, provide that if five days is not enough time, a period of up to 10 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.

Section 6. Execution of warrant. (1) A search warrant may be executed only within the period and at the times authorized therein and only by a police officer. A police officer charged with its execution may be accompanied by such other persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

(2) 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) 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 or the safety of other persons, the officer may execute the warrant without prior notice.

(4) Except as provided in subsection (3) of this section, before 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

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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 or other persons, 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 except where the no-knock provisions in subsection (3) apply. 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 whom-ever 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).

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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 Adv Sh 89, Or App _____ (1971), 487 P2d 1156, and State v. Gassner, 93 Adv Sh 349, Or App _____ (1971), 488 P2d 822. 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 7. 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 2 of this Article which he did not 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 reasonably anticipate finding certain evidence or contraband, it may not be seized under the plain view rule.

Section 8. List of things seized. Promptly 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 or vehicle from which they are taken. If the vehicle or premises are unoccupied or there is no one present in apparent control, the executing officer shall leave the receipt suitably affixed to the vehicle or 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 present to receive it.

Section 9. 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.

COMMENTARY

A. Summary

The notion, embodied in this section, that some degree of force may, if necessary, be used to effect the execution of the warrant, is basic to the nature of the process, and is generally recognized. Under the criteria in the proposed 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 or another person.

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 defense of others, 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 10. Return of the warrant. (1) If a search warrant is not executed within the time specified therein, the officer shall forthwith return the warrant to the issuing judge.

(2) 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 signed list of things seized and setting forth the date and time of the search.

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

(4) 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.

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 and is the present Oregon law in ORS 141.130. Subsections (3) and (4) are fairly routine and will work little, if any, change in present practices.

SEARCH AND SEIZURE INCIDENTAL TO ARREST

Section 11. Permissible purposes. Subject to the limitations in sections 11 through 16 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 MCPP.

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 2, 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 14 through 16, infra.

Section 12. Things subject to seizure. In the course of a search conducted pursuant to sections 11 through 16 of this Article, the arresting officer may seize only things subject to seizure as provided in section 2 of this Article. The provisions of section 9 of this Article with respect to the use of force shall be applicable to searches and seizures undertaken pursuant to sections 11 through 16 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 2 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 MCPP section ss 3.01 (2).

C. Relationship to Existing Law

Oregon has no comparable statutory provision.

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Section 13. Custodial search. (1) A person who is arrested and lawfully confined in a correctional facility or juvenile training school may be subjected to such search of the person as is reasonably necessary for custodial purposes, and things subject to seizure under section 2 of this Article, discovered in the course of the search, may be seized.

(2) 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 is admissible in evidence.

COMMENTARY

A. Summary

(1) There may be occasions when a person charged only with a violation or a nonviolent misdemeanor must be confined for his own protection because he is drunk or otherwise helpless, or for some other nonpunitive reason. Under these circumstances, and others where confinement 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.

(2) If the police arrest the operator of a vehicle, the police may search the car only for the purpose of inventorying its contents. Such inventory, however, can be made only if it is reasonable and proper for the police to take responsibility

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for the vehicle by impounding it to safeguard the owner's or operator's property. Any evidence of crime discovered in the inventory may be admitted as evidence.

B. Derivation

Subsection (1) is based on MCPP section ss 3.02 (2). Subsection (2) is based on the decisional law of Oregon. See, State v. Raiford, 93 Adv Sh 1302, ___ Or App ___ (1971), 490 P2d 1036, and State v. Keller, 94 Adv Sh 1818, ___ Or App ___ (1972), 497 P2d 868.

C. Relationship to Existing Law

Subsection (1). Custodial search. 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, 94 Adv Sh 638, ___ Or App ___ (1972), 494 P2d 450, approving custodial searches. For a further comment on custodial searches, see the commentary to section 14, *infra*. The possibility that a person may be lawfully confined in more than one kind of correctional facility necessitates authorizing such searches in "correctional facilities or juvenile training schools."

Subsection (2). Vehicle inventory search. This provision reflects closely the rule announced in State v. Raiford, 93 Adv Sh 1302, ___ Or App ___ (1971), 490 P2d 1036, which clearly recognized in Oregon that police under proper circumstances may inventory the contents of a vehicle following arrest of the operator. Typically, such inventory search arises in connection with an automobile, but there is no reason why the principle should not extend to trucks, planes, boats or other vehicles, and the draft so provides.

Section 14. Search of the person incident to arrest. (1) An officer making an arrest 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) 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 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 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 by a licensed physician or surgeon, licensed professional nurse, or other qualified person according to accepted medical practice.

(5) 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 11 of this Article.

(6) Things not subject to seizure under section 2 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. 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.~~

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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, nurse or other qualified person, 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 2 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 MCPP 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

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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, 94 Adv Sh 638, ___ Or App ___ (1972), 494 P2d 450.

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 15. Search of vehicle incident to arrest. (1) If, at the time of the arrest, the arrested person is in a vehicle, or if he or another or others in his company are in apparent control of such vehicle, boat or aircraft in the immediate vicinity of the place where the arrest is made, and if the arresting officer reasonably believes that the vehicle, boat or aircraft contains things subject to seizure under section 2 of this Article and connected with the offense for which the arrest is made, the arresting officer may search the vehicle, boat or aircraft for such things, and seize any things subject to seizure under section 2 of this Article and discovered in the course of the search.

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

(3) The provisions of this section shall not be construed as governing the seizure of vehicles pursuant to ORS 471.660.

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 22. 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.

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B. Derivation

The language of the section is based on MCPP 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, 2 Or App 133, 465 P2d 724 (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 contemporaneity of the search with the arrest. This rationale is no longer necessary in light of Chambers v. Maroney, 399 US 42, 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, 395 US 752, 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.

The procedures and provisions for seizing vehicles which contain alcoholic drugs or narcotics under ORS 471.660 are not affected by this section.

Section 16. 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 2 of this Article and discovered in the course of the search, provided that the arresting officer reasonably believes that the premises or part thereof contain things that:

(a) Are subject to seizure under section 2 of this Article;

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

and

(c) Are likely to 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 15, search of vehicles, except that the danger

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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 14 of this Article.

B. Derivation

The language of this section is based on MCPP 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 section 2 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, 399 US 30, 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

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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 17. 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 conduct or a statement to the officer, made voluntarily and in accordance with the requirements of sections 18 and 19 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 conduct or a statement giving permission to conduct a specific search, given voluntarily and in accordance with the requirements prescribed in section 18 of this Article. Pursuant to section 20, *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 MCPP.

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 18. Persons from whom effective consent may be obtained.

The consent justifying a search and seizure under section 17 must be given, in the case of:

- (1) Search of a person, by the person in question; or
- (2) Search of vehicle, boat or aircraft, by the person 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.

Subsection (2) provides that the person 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.

Subsection (3) designates any person who by ownership or otherwise is apparently entitled to give consent for police to search premises.

B. Derivation

The language of this section is based on MCPP 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.

If the police seek consent to search a juvenile, immaturity of the juvenile may well preclude him from understanding the gravity of the waiver of his Fourth Amendment

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rights. This issue must be in the mind of the officer at the time, but can only be settled by court decision in close cases.

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 broad language of the section even a juvenile 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.

Section 19. Required warning preceding consent search. (1)

Before undertaking a search under the provisions of sections 17 through 20 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) If the person whose consent is required under section 18 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 17 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 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.

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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

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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.

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 36, *infra*, should obviate such concern.

Section 20. Permissible scope of consent search and seizure. (1)

A search conducted under the provisions of sections 17 through 20 of this Article shall not exceed, in duration or physical scope, the limits of the consent given under section 17 of this Article.

(2) The things subject to seizure in course of a search under sections 17 through 20 of this Article are the same as those specified in section 2 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) A consent given under section 18 or 19 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 2 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 MCPP.

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.

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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 21. Emergency and other searches; general. (1) The provisions of section 9 with respect to the use of force shall be applicable to searches and seizures conducted pursuant to sections 21 through 24 of this Article.

(2) Search of a person conducted pursuant to sections 21 through 24 shall be subject to the provisions of section 22 of this Article.

(3) Upon completion of a search undertaken pursuant to sections 21 through 24, 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. If the vehicle or premises searches are unoccupied or there is no one present in apparent control, the executing officer shall leave the receipt suitably affixed to the vehicle or premises.

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 22. Vehicular searches. (1) An officer who has probable cause to believe that a vehicle, boat or aircraft is subject to seizure or contains things subject to seizure pursuant to section 2 of this Article may, without a search warrant, stop, detain and search the vehicle, boat or aircraft and may seize things subject to seizure discovered in the course of the search if all of the following conditions exist:

(a) The vehicle, boat or aircraft is moving or apparently readily moveable; and

(b) 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 things subject to seizure by his search of the vehicle, boat or aircraft, 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, boat or aircraft 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, boat or aircraft operating as a common carrier.

(4) This section shall not be construed to limit the authority of an officer under section _____, Article _____ [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 23. 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, 2 Or App 133, 465 P2d 724 (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 applies 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. Sub-section (4) has been added to ensure that the "stop and frisk" provisions will be available to officers stopping vehicles under the Carroll rule.

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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~~

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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 23. Search of open lands. A police officer upon probable cause 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 reasonably manifested his intent to exclude trespassers; and

(2) Things subject to seizure are located within the 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 16, 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.,

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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, 93 Adv Sh 1273, ___ Or App ___ (1971), 490 P2d 1274. 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.

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 24. 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 2 of this Article 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. Laundry, 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 odor, 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.

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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.

Section 25. Definitions. As used in sections 26 through 28:

(1) "Inspectorial search" means an entry and examination of unlicensed premises, aircraft, boats 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. Premises, aircraft, boats or other vehicles operated pursuant to a license for an ongoing commercial, trade, occupational or recreational activity, such recreational activity including but not limited to hunting, are not subject to the provisions of sections 27 and 28 of this Article.

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

(3) "Inspection order" means an order issued by a judge 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. Activities authorized by licenses and subject to regulation thereunder are not included within the concept of the inspectorial search. Such license-authorized searches will continue to be governed by existing statutory provisions and decisional law.

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.

There are numerous provisions throughout ORS authorizing ~~searches of premises or vehicles where certain commercial or recreational activity is licensed.~~ See, e.g., ORS 632.795 (egg inspection), 632.351 (game), 527.335 (potatoes). These, and the many other similar provisions relating to other licensed activity are unaffected by the provisions on inspectorial searches in sections 27 and 28.

Section 26. Inspectorial search by consent. (1) Within the scope of his authority with respect to the places or things 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 places or things to be inspected, who reasonably appears to the inspection officer to be in control of the places or things to be inspected or otherwise authorized to give such consent.

(2) 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. If such inspection requires his entry into a dwelling, the officer shall also advise such person that he has a right to refuse to give his consent.

(3) 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 places or things, 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

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to such inspections. Pro tanto these are the same as for consent searches under sections 17 through 20, 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 19. 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.

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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 if the place is used as a dwelling 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 27 if he wishes to proceed with the inspection.

Section 27. Inspection orders. (1) 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 judge authorized to issue search warrants.

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

(3) The application shall be granted and the inspection order issued upon a sufficient showing that inspection in the area in which the places or things in question are located, or inspection of the particular places or things, 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.

(4) The issuance and execution of inspection orders shall be as follows:

(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.

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(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 (4) of section 28.

(c) The inspection officer executing the order shall, if the places or things 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 25. Such orders are to be issued by magistrates the same as for search warrants.

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Under subsection (2), inspection orders are to be sought only if consent under section 26 has been refused, or is unobtainable because the occupants cannot be found, or for some other reason.

Subsection (4) 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.

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.

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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 28. Emergency inspectorial searches. (1) 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.

(2) 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 paragraph (b) of subsection (4) of section 27 and subsection (4) of this section 28.

(3) 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.

(4) If, in the course of an emergency inspectorial search under subsection (1) of this section or an inspectorial search under section 27, 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 statutory 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 29. Handling and disposition of things seized. (1) The provisions of subsections (2), (3) and (4) of this section apply to all cases of seizure, except for a seizure made under a search warrant.

(2) If an officer makes an arrest in connection with the seizure, he shall, as soon thereafter as is reasonably possible, make a written list of the things seized and furnish a copy of the list to the defendant.

(3) If no claim to rightful possession has been established under sections 30 through 33 of this Article, the court shall order that the things be delivered to the officials having responsibility under the applicable laws for selling, destroying or otherwise disposing of contraband, forfeited or unclaimed goods in official custody.

(4) If things seized in connection with an arrest or under section 24 of this Article are not needed for evidentiary purposes, and if a person having a rightful claim establishes his identity and right to possession beyond a reasonable doubt to the satisfaction of the seizing officer, the officer may summarily return the things seized to their rightful possessor. If the things seized are perishable and it is not possible to return them to their rightful possessor, the seizing officer may dispose of the items as justice and the necessities of the case require.

COMMENTARY

A. Summary

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

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If there is no rightful claim established under sections 30 through 33, the seized items may be ordered by a judge to be sold, destroyed or otherwise disposed of according to laws applicable.

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 33.

Section 30. Motion for return or restoration of things seized.

(1) Within 90 days after actual notice of any seizure, or at such later date as the court in its discretion may allow:

(a) An individual from whose person, property or premises things have been seized may move the appropriate court to return things seized to the person or premises from which they were seized.

(b) Any other person asserting a claim to rightful possession of the things seized may move the appropriate court to restore the things seized to the movant.

(2) The appropriate court to consider such motion is:

(a) The court having ultimate trial jurisdiction over any crime charged in connection with the seizure; or

(b) If no crime is charged in connection with the seizure, the court to which the warrant was returned; or

(c) If the seizure was not made under a warrant and no crime is charged in connection with the seizure, any court having authority to issue search warrants in the county in which the seizure was made.

COMMENTARY

A. Summary

Subsection (1) provides for filing a motion to restore things seized to the person from whose possession they were taken or any other person asserting a rightful claim to possession.

Subsection (2) describes the court in which the motion is to be filed.

B. Derivation

~~The section is based in part on MCPP section ss 7.03.~~

C. Relationship to Existing Law

See the commentary following section 33.

Section 31. Grounds for motion for return or restoration of things seized. A motion for the return or restoration of things seized shall be based on the ground that the movant has a valid claim to rightful possession thereof, because:

(1) The things had been stolen or otherwise converted, and the movant is the owner or rightful possessor; or

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

(3) The movant, by license or otherwise, is lawfully entitled to possess things otherwise subject to seizure under this Article; or

(4) Although the things seized were subject to seizure under this Article, the movant is or will be entitled to their return or restoration upon the court's determination that they are no longer needed for evidentiary purposes; or

(5) The parties in the case have stipulated that the things seized may be returned to the movant.

COMMENTARY

A. Summary

Set out in this section are the specific grounds - five in number - any one of which, if established, will entitle the movant to restoration of the things seized.

B. Derivation

This section is based in part on MCPP ss 7.03.

C. Relationship to Existing Law

See the commentary following section 33.

Section 32. Postponement of return or restoration; appellate review. (1) In granting a motion for return or restoration of things seized, the court shall postpone execution of the order until such time as the things in question need no longer remain available for evidentiary use.

(2) An order granting a motion for return or restoration of things seized shall be reviewable on appeal in regular course. An order denying such a motion or entered under section 35 of this Article shall be reviewable on appeal upon certification by the court having custody of the things in question that they are no longer needed for evidentiary purposes.

COMMENTARY

A. Summary

Since an order granting a motion for the 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 motion, but, for administrative convenience the appeal should be delayed until the things are no longer needed for evidentiary purposes.

B. Derivation

This section is based in part on MCPP ss 7.03.

C. Relationship to Existing Law

See the commentary following section 33.

Section 33. Disputed possession rights. (1) If, upon consideration of a motion for return or restoration of things seized, it appears to the court 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 may:

(a) Return the things to the person from whose possession they were seized; or

(b) Impound the things seized and set a further hearing, assuring that all persons with a possible possessory interest in the things in question receive due notice and an opportunity to be heard; and

(c) Upon completion of the hearing provided for in paragraph (b) of subsection (1) of this section, enter an order for the return or restoration of the things seized.

(2) If there is no substantial question whether the things should be returned to the person from whose possession they were seized, they must be returned to the person upon the release of the defendant from custody.

(3) Instead of conducting the hearing provided for in paragraph (b) of subsection (1) of this section and returning or restoring the property, the court, in its discretion, may leave the several claimants to appropriate civil process for the determination of the claims.

COMMENTARY

A. Summary

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. In some of these situations the most satisfactory solution may be to restore the status quo by returning the things to the person from whom they were seized, and the section so provides. In other circumstances the section authorizes impoundment pending settlement, or resolution of the dispute by civil litigation.

B. Derivation

The section is based in part on MCPP 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

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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, in sections 29 through 33, is constructed with that end in view.

EVIDENTIARY EXCLUSION

Section 34. Motions to suppress evidence. (1) Objections to the use in evidence of things seized in any violation of the provisions of this Article shall be made by a motion to suppress.

(2) In any criminal proceeding in which the prosecution proposes to offer in evidence things seized, the prosecution shall give written 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.

(3) If, after receipt of the notice required by subsection (2) 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 (2), 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.

(4) 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.

Subsection (1) perpetuates the existing law on where motions to suppress are filed.

Subsections (2) and (3) 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 (4) 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. It is a matter of legislative intent that the renewal motion is to be filed in the same court where the original motion to suppress was filed.

B. Derivation

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

C. Relationship to Existing Law

Where made. The section continues existing Oregon law and procedure with respect to where motions to suppress are filed.

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

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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.

It is a matter of legislative intent that if at a preliminary hearing the defendant is successful in getting evidence suppressed, the state need not appeal such ruling. It may instead proceed to use the same evidence before the grand jury to get an indictment, and such use shall not be viewed in the context of appeal of the adverse ruling at the preliminary hearing.

The Commission considered inclusion of statements of defendants as part of this section on motions to suppress but decided Fifth Amendment issues and problems with respect to statements of defendants were not to be included in this Article on search and seizure.

Section 35. Standing to file motion to suppress. 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.

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.

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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 36. 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, 403 US 443, 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, 403 US 388, 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.

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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 37. 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 by a preponderance of the evidence that such evidence would 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, 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 by a preponderance of the evidence it probably would have discovered the evidence anyway.

Section 38. 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 by a preponderance of the evidence 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 by a preponderance of the evidence 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.

Section 39. Identity of informants. (1) In any proceeding on a motion to suppress evidence wherein, pursuant to section 38, the good faith of the testimony presented to establish probable cause is contested, and wherein such testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the moving party shall be entitled to prevail on the motion to suppress and evidence obtained as a result of the information furnished by the informant shall be suppressed unless:

(a) The evidence sought to be suppressed was seized by authority of a search warrant and the informant testified in person before the issuing authority; or

(b) The judge, alone and in camera, determines from the affiant by a preponderance of the evidence that such confidential informant exists and is reliable.

(2) If the defendant is entitled to prevail on the motion to suppress under subsection (1) of this section, the evidence obtained as a result of the information furnished by the informant shall be suppressed.

COMMENTARY

A. Summary

If the police seize evidence as a result of the use of an informant whose identity is not disclosed, such evidence shall be suppressed unless as provided in paragraph (a) the evidence was seized pursuant to a search warrant and the informant testified before the issuing judge, or, as provided in paragraph (b) the judge in chambers determines after questioning the affiant that the undisclosed informant was reliable.

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B. Derivation

The section is based in part on MCPP section ss 8.03 (2), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

The existing Oregon statutes have no provision similar to this. The draft section has the goal of providing the defendant with a fair hearing on his motion which raises the validity of the informer-produced probable cause evidence. Yet to protect the informer, and the informer system, so important to day-to-day police work, very stringent restrictions are imposed. It is felt that the section thus achieves a fair balance.

The section does not require the police to disclose the identity of their informant. But to safeguard the defendant and to insure that the affiant (typically a police officer) is not inventing the existence of an informant and to further assure that such informant is reliable within existing legal standards, the trial judge may question the affiant in camera. It is the intent and is part of the legislative history of this section that the only persons present at such interview shall be the judge and the affiant. No record is to be kept and, hence, there will be no details of this interview to review. It is the purpose of the Commission to rely on the experience of the trial judge to spot, during this interview with the affiant, any indication of prefabrication on the part of the affiant.