OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

July 28, 1972

Minutes

Members Present: Senator Wallace P. Carson, Jr. Chairman
Representative Leigh T. Johnson
Representative Robert M. Stults

Delayed: Attorney General Lee Johnson

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter

Agenda: SEARCH AND SEIZURE
Redraft of sections 35, 36 and 37 of Preliminary Draft No. 3

By means of a conference telephone call, Senator Wallace P. Carson, Jr., Chairman, called the meeting to order at 9:00 a.m.

Search and Seizure; Redraft of sections 35, 36 and 37 of Preliminary Draft No. 3

Mr. Paillette explained that in redrafting the three sections rereferred to subcommittee by the Commission at its meeting on July 14, 1972, he had incorporated the motions passed by the Commission and had also attempted to incorporate what appeared to be a reasonable consensus of the Commission, even though a specific direction was not given.

Section 36. Handling and disposition of things seized. The following amendments to subsection (3) of section 36 were approved by the Commission and were incorporated into the draft under discussion:

(1) "Recently" was stricken from the opening sentence.

(2) "Promptly" was deleted in the two places it appeared.

(3) "Stolen" was deleted to make clear that the provision was not limited to stolen items.

Mr. Paillette advised that the structure of section 36 had been changed somewhat and subsection (1) now applied to all cases of seizure except for a seizure made under a search warrant.

If an officer made an arrest, subsection (2) required him to make a list of things seized and furnish a copy of the list to the defendant

or his counsel. He indicated that Chairman Carson had questioned the necessity of specifying "defendant or his counsel." Mr. Paillette's view was that "defendant" included counsel.

Chairman Carson pointed out that if "defendant or his counsel" were used in one part of the code and "defendant" standing alone was used in another part, the two terms could be construed to mean two different things. When the statute talked about giving something to the defendant, he contended that it should be consistent throughout and should use either one term or the other.

Mr. Paillette commented that the Discovery Article spoke in terms of the defendant but was intended to include his attorney.

Representative Stults moved to delete "or his counsel" from subsection (2) of section 36. Motion carried.

Mr. Paillette advised that subsection (3) was unchanged from Preliminary Draft No. 3 except for the amendments approved by the Commission. Representative Stults inquired as to the time limitation and was told by Mr. Paillette that he had arbitrarily chosen a time limit of 90 days, and it appeared in section 37.

Subsection (4), Mr. Paillette said, contained the same requirement as that in Preliminary Draft No. 3 but the last sentence was revised. He had inserted the requirement that if it was not possible to return perishable things seized to the rightful owner, the officer could dispose of them. This was, he said, implicit in the original draft but he did not want to give anyone the idea that they had an open invitation to divide the goods just because it was perishable.

Representative Stults commented that the provision put a collar on the seizing officer and charged him with some responsibility to determine the rightful owner. He asked if the officer would be in any trouble if he made an error in judgment in that situation. Mr. Paillette replied that the officer was only required to return the goods if a person having a claim established identity and his right to possession beyond a reasonable doubt, and the burden was on the claimant to establish this right. If the officer did not know who the rightful possessor was and if no one made a claim, he did not believe the officer was required under this draft to try to find out who the owner was. Professor Platt concurred with Mr. Paillette's interpretation of the section.

Representative Stults moved that section 36 as amended be approved. Motion carried unanimously.

Section 37. Motions for return or restoration of things seized. Mr. Paillette advised that he had redrafted section 37 by dividing it into four sections in order to make the sections shorter and to have separate sections speak to individual aspects of the motion for return or restoration of things seized.

Subsection (1) of section 37, Mr. Paillette continued, wrote in the 90 day requirement. He recalled that there was considerable discussion at the Commission meeting concerning the time limitation and there was also some disagreement. Mr. Blensly was opposed to including a specific time limitation, and Mr. Hennings thought 30 days was not long enough. There was a motion by Senator Burns to set the time period at 60 days, but the Commission had not voted upon that motion. Mr. Paillette indicated he had picked 90 days in view of the statement made by Captain Nolan that the Portland city ordinance permitted the police to dispose of unclaimed goods after 90 days, and by including 90 days in this statute, it would not be in conflict with the Portland ordinance.

Professor Platt observed that the statute could not hope to be uniform with every city ordinance in the state because there might well be ordinances setting the time period at 120 days. He asked if it would change the Portland ordinance if the time period were set at 60 days in the statute. Mr. Paillette replied that in the case of items that were seized, the state law would override the city ordinance, but if there were a general city ordinance that provided only for disposition of unclaimed goods, such as found goods, the city ordinance would control.

Representative Stults said that as he recalled the discussion at the Commission meeting, the general consensus was for 60 days. Mr. Paillette said there was a general feeling that 30 days was not long enough, and he believed it should be expanded.

Representative Stults indicated he was having difficulty understanding the language of section 37 which said, " . . . the court in its discretion may allow: (a) An individual [from whom] things have been seized may move . . . . " Mr. Paillette explained that "allow" as used in subsection (1) was not being used as a verb but modified the court's discretion. Paragraph (a) then said that an individual may move within 90 days. Representative Stults was satisfied with this clarification.

Mr. Paillette then advised that subsection (2) of section 37 attempted to deal with the question of which court would have jurisdiction in a given situation and was in effect a definitional section.

Regarding paragraph (a) of subsection (2), Representative Stults commented that the court having ultimate trial jurisdiction would always be the circuit court in view of the absolute appeal de novo situation which had been approved. Mr. Paillette concurred that the circuit court would have ultimate trial jurisdiction. Perhaps, he said, the members would prefer not to send all those motions to the circuit court.

Professor Platt was of the opinion that the language should be left as drafted to avoid the problems the Commission had discussed. His own reaction, he said, was that the draft provided a workable procedure and the courts would understand what to do.

Mr. Paillette read from the minutes of the July 14 Commission meeting with respect to this subject:

> "Mr. Blensly was of the opinion that the court having trial jurisdiction over the criminal charge should be the only court having authority to make the final disposition of items seized. Senator Burns concurred and pointed out that, as drafted, the section would lend itself to a 'shopping' situation between courts. Professor Platt agreed and said the provision was analagous to the suppression situation where the district court could not suppress evidence that would be used in the circuit court. In that instance the draft provided that the court which ultimately tried the case was the only court having authority to make the decision on suppression. This section should be amended to include a parallel provision."

Mr. Paillette explained that one of the problems he had encountered in trying to make the two sections parallel was that the sections on suppression were not adopted by the Commission as originally drafted. Paragraph (a) of subsection (2) would eliminate the shopping problem but if "ultimate" were deleted, a question would again be raised because both courts would have trial jurisdiction. Representative Stults expressed approval of the provision as drafted.

Mr. Paillette said that paragraph (c) of subsection (2) was the one that gave him the most concern when he was drafting it. The course he had chosen was an arbitrary way of dealing with the question, but it seemed reasonable to say that any court authorized to issue a warrant in the first instance would be the proper court in which to file the motion.

Representative Stults commented that it left some room for shopping, and Professor Platt remarked that shopping would do no harm in that situation.

Representative Stults moved adoption of section 37. Motion carried unanimously.

Section 38. Grounds for motion for return or restoration of things seized. Mr. Paillette outlined that paragraphs (a), (b) and (c) were the same as those in Preliminary Draft No. 3. Paragraph (d) attempted to clarify the evidentiary purpose limitation. The subject matter of paragraph (e) was discussed by the Commission and it was generally agreed that a stipulation should be allowed. Accordingly, he had added the provision. Professor Platt said that district attorneys probably would not ordinarily want to stipulate to anything, but they might, and this provision would specifically give them that authority.

Representative Stults moved the approval of section 38 as drafted. Motion carried unanimously.

Section 39. Postponement of return or restoration; appellate review. Mr. Paillette advised that section 39 dealt with two aspects: postponement and appellate review. Subsection (1) was the same as Preliminary Draft No. 3 while subsection (2) contained only minor revisions. With respect to the phrase, "on appeal in regular course," as used in the first sentence of subsection (2), he explained that it referred to a regular appeal and was different from the appeal upon certification referred to in the next sentence. The phrase, he said, was taken from the Model Code and was meant to indicate a difference between a regular appeal and one where the court would have to certify that the custody of the things seized was no longer required for evidentiary purposes. Professor Platt commented that there was no reason for such an appeal to be made before trial.

Representative Stults moved adoption of section 39. Motion carried unanimously.

Attorney General Johnson joined the discussion at this point.

Section 40. Disputed possession rights. Mr. Paillette outlined that the first major changes in section 40 occurred in paragraphs (b) and (c) of subsection (1). Those provisions were new and provided for the trial court's determination in an interpleader situation. At the Commission meeting Ms. Kalil had indicated they were following this procedure in Multnomah County and Mr. Paillette said she had sent him a copy of the forms they were using. Paragraph (b) incorporated the due process requirements of "due notice and an opportunity to be heard." It would allow the trial court to divide the things seized and to provide for a hearing in the trial court itself. It did not, however, write in any specific number of days for notice but left that question to the courts. Under paragraph (c) the only guideline would be what appeared to the court to be "fair and just."

Subsection (2) continued the provision in Preliminary Draft No. 3 except that under that draft the only way the court could handle the situation was to remit the claimants to civil process.

Mr. Paillette observed that some of the counties might feel it was better to handle these situations outside of the criminal court, particularly in complicated cases involving a great deal of property and where there were a large number of claimants. He added that the trial court interpleader provision was not actually adopted by the Commission but was merely discussed. He had included it in the draft to see how the subcommittee felt about such a provision.

Professor Platt was of the opinion that there was some advantage to having this provision in the statute, and it would probably have more impact in a large circuit such as Portland. In all likelihood it would make little difference in the smaller circuits where the same judge might try both civil and criminal matters.

Representative Stults moved adoption of section 40. Motion carried unanimously.

Mr. Paillette indicated that the sections just approved by the subcommittee would be before the Commission at its August meeting.

The meeting was adjourned at 9:45 a.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission