Recent Court Decisions Relevant to Maine Law Enforcement Officers

United States Supreme Court
United States Court of Appeals for the First Circuit
Maine Supreme Judicial Court Sitting as the Law Court

2016 CASE LAW UPDATE

SEPTEMBER 2015 – AUGUST 2016

Maine Criminal Justice Academy
Maine Chiefs of Police Association
Maine Office of the Attorney General

August 31, 2016

Prepared by
Brian MacMaster & Margie Berkovich
Investigation Division – Office of the Attorney General

This publication and the 2016 New Law Update constitute the training outline of the Maine Criminal Justice Academy for recertification training in law updates for the year 2016.

Preparers' Note

The preparers of this document reviewed the published decisions of the United States Supreme Court, the United States Court of Appeals for the First Circuit, and the Maine Supreme Judicial Court Sitting as the Law Court as they relate to criminal procedure for the period September 2015 through August 2016. Cases were selected based on general interest and relevance to Maine law enforcement officers, and summaries prepared. Accordingly, this document is not a listing of all decisions of the three appellate courts.

The summaries are those of the preparers, and do not represent legal opinions of the Maine Office of the Attorney General or interpretations by the Maine Criminal Justice Academy or the Maine Chiefs of Police Association.

If a particular decision is of interest to the reader, the entire text of the decision is available by clicking on the relevant Internet link. Given that court decisions are generally very fact specific, this is highly recommended for a more comprehensive understanding, and particularly before taking any enforcement or other action.

The preparers wish to recognize the support and assistance of Assistant Attorney General Donald W. Macomber of the Attorney General's Criminal Division, who reviewed this document and offered meaningful comments and suggestions, and who is always available to answer questions posed to him throughout the year concerning criminal procedure and other constitutional issues.

Questions, suggestions, or other comments?

Brian MacMaster or Margie Berkovich
Investigation Division – Office of the Attorney General
6 State House Station – Augusta, ME 04333-0006
Telephone: (207) 626-8520
brian.macmaster@maine.gov
margie.berkovich@maine.gov

United States Supreme Court

Fourth Amendment – Warrant Requirement – Searches Incident to Arrest & Exigent Circumstances

Do Breath and Blood Tests Require a Search Warrant in OUI Cases?

The Fourth Amendment categorically permits warrantless breath tests as a search incident to an arrest, but not so with blood tests. In the absence of consent, a warrant is required for a blood draw unless the circumstances permit a warrantless search under exigent circumstances. The metabolization of alcohol in the blood does not by itself constitute exigent circumstances.

This case involved three Fourth Amendment challenges to laws in North Dakota and Minnesota that made it a crime to refuse a breath or blood test to determine BAC. The U.S. Supreme Court decided that the taking of a blood sample or administering a breath test is a search governed by the Fourth Amendment. The Court went on to decide that the Fourth Amendment categorically permits warrantless breath tests under the search incident to an arrest exception to the warrant requirement, but the search incident to arrest exception does not apply to blood tests.

The Court reasoned that the incident-to-arrest exception is a product of assessing and balancing the degree to which a search intrudes upon a person's privacy and the degree to which it promotes or supports legitimate governmental interests. The Court noted that it had previously decided that breath tests do not implicate significant privacy concerns in that the physical intrusion is negligible and the tests involve a minimum of inconvenience. However, that is not the case with blood tests, the Court said, in that blood tests require piercing the skin and extracting a part of the person's body, a process significantly more intrusive than blowing into a tube.

The Court went on to say that motorists may not be criminally punished for refusing to submit to a blood test based on implied consent. The court stated, "It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit."

Birchfield v North Dakota (June 23, 2016)
https://www.supremecourt.gov/opinions/15pdf/14-1468_8n59.pdf

—¦—

Fourth Amendment – Exclusionary Rule – Attenuation Exception

Can Evidence from an Unlawful Terry Stop be Admissible?

One exception to the Exclusionary Rule is known as the attenuation doctrine, which provides for admissibility of illegally seized evidence when the connection between the unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance.

This case arose from a 2006 incident where the police received an anonymous tip that drugs were being sold out of a house. After observing the property for suspicious activity for the next week, an officer stopped and detained Edward Strieff, Jr., as he was leaving the house. The officer ran Strieff's identification, and discovered that he had an outstanding arrest warrant for a

traffic violation. When Strieff was searched incident to his arrest under the warrant, methamphetamines and drug paraphernalia were discovered in his pockets. Strieff was then charged with drug-related offenses. Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The Utah Supreme Court ultimately agreed and ordered the evidence suppressed.

The U.S. Supreme Court ruled that the evidence seized incident to Strieff's arrest was admissible based on an application of the attenuation factors from *Brown* v. *Illinois* (1975). The Court noted that in the Strieff case there was no flagrant police misconduct. The officer was at most negligent; his errors in judgment hardly rose to a purposeful or flagrant violation of Strieff's Fourth Amendment rights. After the unlawful stop, the officer's conduct was lawful, and there was no indication that the stop was part of any systemic or recurrent police misconduct. The Court went on to say that the officer's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest. Citing precedence, the Court said that the Exclusionary Rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality. However, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. Assuming, without deciding, that the officer lacked reasonable suspicion to stop Strieff initially, the discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest.

Utah v Strieff (Decided June 20, 2016)
https://www.supremecourt.gov/opinions/15pdf/14-1373_83i7.pdf

—¦—

United States Court of Appeals for the First Circuit

Maine Case
Fifth Amendment – Miranda
Fourth Amendment – Admissibility of Evidence after Miranda Violation

Did Police Station Interview Require Miranda Warnings?

(1) The fact that the questioning took place in a police station did not create a condition of custody, and Miranda warnings were not required until 38 minutes into the interview when the detective told the suspect that he was no longer free to leave. (2) Even if there had been a Miranda violation, failure to give adequate Miranda warnings does not require suppression of the physical fruits of unwarned statements. (3) Miranda warnings need not be renewed every time there is break in questioning; once an effective Miranda warning is administered, that warning remains effective until passage of time or an intervening event makes the defendant unable to fully consider the effects of a waiver.

On March 12, 2013, a federal grand jury indicted Derek Hinkley on one count of sexual exploitation of a child. Hinkley filed motions to suppress (1) statements he made to a detective at the Lewiston Police Department; (2) physical evidence seized during a search of his apartment after the interview; and (3) statements he made at the Androscoggin County Jail a day after his initial interview. The district court denied all three motions and Hinkley appealed to the First Circuit Court of Appeals.

First Motion to Suppress
Hinkley argued that the statements he made during his initial interview should be suppressed because he was in custody from the beginning of the interview and should have received Miranda warnings at the beginning of the interview. The court disagreed, stating that Hinkley arrived at the police station voluntarily and was never restrained. Only a single officer conducted the interview. The officer told Hinkley at the beginning of the interview and again 29 minutes into the interview that he was free to leave at any time. The court also noted that the tone of the officer was generally one of frustration, not anger or aggression. The court said that the fact that the questioning took place in a police station did not by itself create a condition of custody, and that Miranda warnings were not required until 38 minutes into the interview when the officer told Hinkley that he was no longer free to leave.

Hinkley also argued that the Miranda warnings he was eventually given were ineffective because he never waived his right to remain silent and he lacked the capacity to make a valid waiver. The court stated that Hinkley made a valid waiver by making uncoerced statements after acknowledging that he understood his Miranda rights. As to his claim that he lacked the capacity to make a valid waiver, the district court found that Hinkley's own expert testified that he had average intelligence, and that he had demonstrated average performance on a test specifically designed to determine whether he could understand and respond to Miranda warnings.

Second Motion to Suppress
Hinkley argued that the physical evidence seized from his apartment should be suppressed because it was the "fruit" of an earlier Miranda violation and because the government failed to obtain valid consent to search. However, the Appeals Court pointed out that there was no Miranda violation, so the evidence taken from the apartment was not "fruit of the poisonous

tree" and, even if there had been a Miranda violation, failure to give adequate Miranda warnings does not require suppression of the physical evidence of those unwarned statements.

On the issue of whether there had been valid consent to search, Hinkley pointed to his expert's report and asserted that he lacked the capacity to consent. The court disagreed, stating that a determination is based on the totality of the circumstances, which may include consideration of the defendant's age, education, experience, knowledge of the right to withhold consent, and evidence of coercive tactics. Considering Hinkley's age, demeanor, and intelligence, he was "not so cowed that he was psychologically incapable of giving valid consent." The court also stated that Hinkley's voluntary consent was not negated by the detective's statement that the apartment would be searched eventually, with or without his consent.

Third Motion to Suppress
The appeals court rejected Hinkley's argument that the detective was required to repeat the full Miranda warnings when he spoke with Hinkley at the Androscoggin County Jail the next day. Miranda warnings, the court stated, need not be renewed every time there is a break in questioning. Miranda warnings remain effective until the passage of time or an intervening event makes the defendant unable to fully consider the effect of a waiver. Hinkley's acknowledgment less than 24 hours after the first set of warnings were given that he remembered the warnings, remained familiar with them, and did not need them repeated was a clear indication that the passage of time was not long enough to make his second waiver involuntary.

U.S. v. Hinkley (September 30, 2015)
http://media.ca1.uscourts.gov/pdf.opinions/14-1821P-01A.pdf

—¦—

Maine Case
Fourth Amendment – Probable Cause – Confidential Informants

Did the Confidential Informant's Information Constitute Probable Cause?

Where the primary basis for a finding of probable cause to support a search is information provided by a confidential informant, law enforcement must provide enough information from which a court can credit the informant's credibility

In August 2012, a confidential informant reported to MDEA that Adam White was a large-scale cocaine distributor in the Portland area who had sold him cocaine on several occasions. This information prompted MDEA to open an investigation. What followed included two controlled purchases of cocaine by the same confidential informant; both purchases took place in White's car in a prearranged location. In early February 2013, the confidential informant reported that White was planning to "restock" his cocaine supply and, based on this information, MDEA devised a plan to stop and search White's vehicle. The confidential informant was instructed to place a recorded call to White ordering a "full" ounce of cocaine. MDEA had White's home in Falmouth under surveillance and, approximately 10 minutes after the call, MDEA watched as White and his girlfriend left the Falmouth home in his black Cadillac. In Portland, White's vehicle was stopped for speeding in a school zone. A State Police trooper and his drug-sniffing dog arrived at the stop and the dog alerted to the scent of narcotics by the driver's side door. White and his girlfriend were asked to get out of the vehicle. Three one-ounce baggies of

cocaine were found on White and he was placed under arrest. White's vehicle was searched and a gun and approximately one pound of cocaine in a sealed package in the trunk were recovered. Information gathered during the investigation and the traffic stop were used to get a search warrant for White's home, and additional evidence of drug dealing was taken from the home.

White was indicted on drug and firearms charges and he filed a motion to suppress the evidence taken from the car and his home, arguing that that the officer that stopped his vehicle did not have the legal justification to make the stop and that the dog's alert did not provide probable cause to search the car. The federal district court denied the motions and White appealed.

On appeal, the court stated that neither the pretextual traffic stop nor the canine sniff took away the basic finding that at the time that these events transpired, officers had adequate probable cause to stop White's vehicle and to search it for evidence of drug dealing under the automobile exception to the Fourth Amendment. The court went on to say that where probable cause is based on information provided by a confidential informant, law enforcement must provide some information so that the court may assess the informant's credibility. The court stated that factors of reliability can include, but are not limited to, showing the informant's veracity and basis of knowledge, whether an informant's statements reflect first-hand knowledge, corroborating facts wherever reasonable and practicable, and the law enforcement officer's assessment of the informant's credibility based on the officer's experience, and expertise. The appeals court pointed to the informant's first-hand knowledge, the prior purchases of drugs from White by the informant, the two controlled buys orchestrated by MDEA, the purchase of drugs taking place in White's car, which was corroborated during the controlled buys, providing White's home address, which was then corroborated by law enforcement, and information supplied by the informant in another case that was later corroborated and used to further that investigation.

U.S. v. White (October 20, 2015)
http://media.ca1.uscourts.gov/pdf.opinions/14-2165P-01A.pdf

—¦—

Fourth Amendment – Community Caretaking Exception

Was the Search under the Community Caretaking Exception Lawful?

The community caretaking exception to the warrant requirement involves police activity that is completely divorced from the detection, investigation, or acquisition of evidence relating to crimes.

On September 29, 2010, the Boston police received a report of a robbery at a restaurant. The manager reported that he pursued a man he saw removing money from the restaurant's safe down several streets until the man entered the back yard of a house. After waiting for a dog to arrive, the officers entered and searched the house. They did not have probable cause. The only person found inside the house was its owner, Scott Matalon, who had been asleep in an upstairs bedroom. Arrested, prosecuted, and acquitted, he later sued the officers and the City of Boston alleging violation of his Fourth Amendment rights. At trial, the officers moved for a judgment based on qualified immunity and the community caretaking exception to the Fourth Amendment's warrant requirement. The federal district court denied the motion and the officers appealed to the First Circuit Court of Appeals.

The appeals court affirmed the lower court's decision, pointing out that a reasonable officer would have known that the warrantless entry was not within the scope of the community caretaking exception and, thus, the intrusion into the plaintiff's home violated his constitutional rights. The court went on to explain that the community caretaking exception is distinguished from other exceptions to the warrant requirement because it requires a court to look at the function performed by a police officer when the officer engages in a warrantless search or seizure. Community caretaking functions do not include detection, investigation, or acquisition of evidence relating to a criminal investigation. When the police officers entered Matalon's home, they engaged in a criminal investigation activity – the pursuit of a fleeing felon in the immediate aftermath of a robbery – and the entry was in the absence of probable cause, a necessary threshold for the more relevant "exigent circumstances" exception to the warrant requirement. Relevant scenarios under the exigent circumstances exception may include (1) hot pursuit of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to the suspect himself.

Matalon v. Hynnes (November 18, 2015)
http://media.ca1.uscourts.gov/pdf.opinions/15-1372P-01A.pdf

—¦—

Fourth Amendment – Entry of Residence with Arrest Warrant – Reasonable Belief

Was there a Reasonable Belief that Suspect Resided at the Residence?

An arrest warrant authorizes the police to enter the suspect's residence when there is reason to believe the suspect is there. Even if it becomes known after entry that the residence is not the suspect's residence, the entry is lawful if the police had a reasonable belief that the suspect lived at the location and would be present at the time the warrant was executed. The pretextual nature of the entry did not make the search unlawful.

On December 16, 2010, a man robbed a bank in Malden, Massachusetts, and escaped a "man-trap" mechanism by firing several rounds into the exit door. An anonymous tip received on January 5, 2011, suggested that the suspect in another bank robbery in Westford, Massachusetts, was Anthony Hamilton. Hamilton's probation officer viewed the Malden bank surveillance images and confirmed that Hamilton was the robber.

The police discovered several potential addresses for Hamilton but the address that appeared on his criminal record, his driver's license, and on outstanding state court probation warrants was a Charlestown address. Despite the information connecting Hamilton to the Charlestown address, the police focused on 16 Harlow Street in Dorchester, an address associated with Hamilton through a public database search. While searching for possible addresses associated with Hamilton, the police learned that another individual named Tommy Smith was also associated with the 16 Harlow Street address, that postal records indicated that Smith had received mail at the address just a month before and that no other address was associated with him. In an attempt to connect Hamilton with the 16 Harlow Street address, the police installed a pole camera on Harlow Street for surveillance purposes. The continuous camera coverage failed to positively

identify Hamilton or Tommy Smith. Nevertheless, an outstanding state arrest warrant listed 16 Harlow Street as Tommy Smith's residence.

At around 6 AM on February 16, 2011, the police arrived at 16 Harlow Street with an arrest warrant for Tommy Smith. Several federal and state police agencies agreed to coordinate on the warrant. The officers from all the agencies involved were informed at a briefing that they were entering 16 Harlow Street to arrest Tommy Smith, but that they might also be able to execute the arrest warrant for Hamilton at that address. When police knocked on the door at 16 Harlow Street, Hamilton's longtime girlfriend Amina Smith answered and told them that Tommy Smith did not live in the apartment. Despite Amina Smith's claim, officers entered the apartment looking for Tommy Smith. The officers found and arrested Hamilton. After arresting Hamilton, the police received signed consent forms from the renter of the apartment and her boyfriend, permitting a search of the apartment. The search disclosed a 9mm pistol with two magazines, bullets, and a gun carrying case from under a mattress in Amina Smith's bedroom.

A federal grand jury indicted Hamilton on charges of armed bank robbery, being a felon in possession of a firearm, and other federal crimes. Hamilton moved to suppress all evidence seized from 16 Harlow Street. The federal district court denied the motion, and Hamilton appealed to the First Circuit Court of Appeals, arguing that the police lacked a reasonable belief that Tommy Smith resided at 16 Harlow Street because the information connecting him to that address was not sufficiently recent to support a reasonable belief that he resided there when the police entered the apartment.

The Appeals Court disagreed and, while acknowledging that the age of the information connecting a suspect to an address is a relevant factor in determining the reasonableness of the officers' belief, said that it is the totality of the information that determines reasonableness. The court went on to say that the police had recent postal records to corroborate the six-month old address information provided by Tommy Smith and it was reasonable for the officers' to believe that Tommy Smith lived at 16 Harlow Street.

U.S. v. Hamilton (April 20, 2016)
http://media.ca1.uscourts.gov/pdf.opinions/14-2150P-01A.pdf

—¦—

Fourth Amendment – Terry Stop – Reasonable Suspicion of Violation of Law

Does a Call for Backup Transform a Consensual Encounter to a Seizure?

Arrival of four police officers in response to a call for backup was not a show of authority sufficient enough to constitute a Terry stop; a mere call for back-up does not automatically transform all citizen-law enforcement encounters into investigatory detentions where reasonable suspicion of a violation of law is required.

In the early hours of September 12, 2012, Boston police received a complaint about a group of people allegedly engaged in drug activity near Madison Park High School. Officer Steven Dodd briefly caught sight of a group of 8-10 persons, but lost track of them and radioed to other officers in the area looking for help in locating the group. Officer Joseph Fisher, who was working a routine patrol at the time, heard the radio report and observed a group of six to eight persons emerging from the area identified in the radio broadcast and traveling toward Roxbury

Street. According to Officer Fisher, the group was moving away from him but a single individual, later identified as Ernest Fields, broke off from the group, and came toward his location. When Fields was next to the cruiser, Officer Fisher called out to him and in a conversational tone asked, "Hey, what's going on tonight?" Upon hearing Officer Fisher's question, Fields turned around, walked back a few steps toward the cruiser, and began speaking with the officer.

Officer Fisher made a few general inquiries, including asking Fields where he was coming from and where he was going. The conversation quickly became "one-sided," with Fields asserting that he was not comfortable with the police, that police made him nervous, that police had killed someone in the South End, and that Officer Fisher would need a reason to search him. Fields became increasingly agitated and Officer Fisher became concerned about the "nature and tone" of his comments and his general behavior, so he called for backup. Within about a minute, four other police officers arrived.

Before requesting backup, Officer Fisher made no commands to Fields, had not requested any identification, had no physical contact with him, had not blocked his path to the street, and had kept his firearm holstered. The backup officers did not speak to Fields and none of the officers were standing in front of him or blocking him from proceeding down Roxbury Street. It was not until Fields inadvertently revealed that he had a knife on his person that the officers moved to physically restrain him. Fields was told that they would be conducting a pat-down frisk and Fields resisted by pushing one of the officer's hands away. The frisk revealed a firearm and ammunition. Fields was later indicted on one count of being a felon in possession of a firearm and ammunition.

Fields sought to suppress the firearm and ammunition on the ground that the police had acquired that evidence as a result of an unlawful seizure. The federal district court ruled that Fields was not seized when Officer Fisher spoke with him or when the four backup officers arrived. Fields appealed, arguing that the presence of multiple officers, the formation of the officers, and the calling of additional officers constituted a "show of authority" converting the encounter into a Terry stop not supported by reasonable articulable suspicion.

The First Circuit Court of Appeals disagreed, rejecting the conclusion that the summoning and subsequent arrival of backup officers automatically transforms all citizen-law enforcement encounters into investigatory detentions. The court stated that the decision to detain someone so that he or she may not leave may be distinct from the decision to call for backup in order to ensure an officer's safety. The court added that the absence of police commands or any sort of verbal demonstration of authority weighs against the conclusion that there was a show of authority sufficient to constitute a seizure. The court went on to say that the U.S. Supreme Court has identified several characteristics of an encounter with law enforcement that may indicate that there was a show of authority. These include (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) some physical touching of the person, or (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

U.S. v. Fields (May 13, 2016)
http://media.ca1.uscourts.gov/pdf.opinions/14-2137P-01A.pdf

—¦—

Fourth Amendment – Consent to Search - Coercion

Was the Consent to Enter Home and Search Backpack Coerced?

The apartment dweller's actions constituted consent to enter. The mention by police of contacting social services while not directly stating that a child would be removed from the home did not negate voluntary consent.

On July 19, 2013, police officers with the Everett, Massachusetts, Police Department executed an arrest warrant for Paul Bey at the home of Clarissa Simmons. Bey was under a restraining order at the time that prohibited him from being within 100 yards of the residence. After Bey's, arrest Simmons signed a consent to search form and told the officers that a backpack found in the bedroom where Bey was hiding belonged to her, but that Bey had been using it. In the backpack, the officers found a loaded 9mm semi-automatic pistol, ammunition, drugs, and a small electronic scale later determined to have cocaine and marijuana residue on it. Bey was subsequently indicted on a number of drug and firearm-related offenses based on the evidence found in the backpack. Bey's motion to suppress the evidence was denied by the federal district court and he appealed to the First Circuit Court of Appeals.

Consent to Enter the Home

Bey's claim that the police did not have consent to enter the residence was rejected by evidence that Simmons gave valid consent, i.e., she said she was unsure if Bey was in the apartment while at the same time looking to her left, putting a finger to her lips in a hushing gesture, and backing into the apartment while opening the door for the officers to enter. The court also noted that a person cannot have a legally recognizable expectation of privacy in a place where the person is not legally allowed to be.

Consent to Search

Bey argued that Simmons' consent to search was coerced because one of the officers mentioned contacting social services. However, the Appeals Court agreed with the lower court's finding that there was no coercion because the officers did not refer directly to the possibility that Simmons' son would be removed from the home if she did not consent. The court also agreed that telling Simmons what would happen if she did not sign the consent form – she and her son would have to leave the apartment for several hours while police applied for a search warrant – did not constitute coercion.

U.S. v. Bey (June 9, 2016)
http://media.ca1.uscourts.gov/pdf.opinions/15-1655P-01A.pdf

—¦—

Fourth Amendment – Probable Cause of Commission of Crime & Nexus to Premises

Did Affidavit Establish Nexus between Criminal Activity and Premises?

To satisfy the probable cause standard for a search, a search-warrant application must reveal probable cause to believe (1) that a crime has occurred, and (2) that specified evidence of the crime will be at the search location. When it comes to the nexus element, a connection with the search site may be deduced by considering the type of crime, the nature of the items sought, and normal inferences as to where a criminal would hide evidence of his crime.

In 2012, a Vermont state trooper stopped an SUV for a traffic infraction. A consent search of the vehicle resulted in the discovery of crack cocaine in the vehicle. What followed was a drug investigation that uncovered drug buys at a drug-stash house located in Springfield, Massachusetts. The seller was Randy Ray Rivera who lived in Springfield with his girlfriend and well known to the Springfield police with 13 prior narcotics convictions and a prior ammunition possession conviction.

A confidential source provided additional information on Rivera and eventually participated in a controlled buy of crack cocaine from Rivera. Based on the information from interviews, surveillance, and the controlled drug buy, DEA obtained federal warrants to search Rivera's residence, as well as the drug-stash house. Rivera challenged the evidence taken from his residence, arguing that the affidavit submitted in support of the application failed to establish probable cause because it did not provide an adequate nexus between his drug dealing and his house. Rivera also asked for a Franks hearing so that he could challenge the truthfulness of the DEA agent's affidavit.[1]

The district court judge concluded that even if the affidavit failed to supply probable cause, Rivera's suppression bid would fail because the DEA agent had obtained the warrants in good faith. The district court judge also concluded that Rivera had failed to make the substantial showing of probable falsity for a Franks hearing. Rivera appealed to the First Circuit Court of Appeals.

The Appeals Court found that there was no reason to review the lower courts "good faith" exception analysis because the search warrant affidavit established a *fair probability* of finding incriminating items in the defendant's residence. The court said that a totality of the circumstances establishes probable cause and can include insight from a law enforcement officer's training and experience, as well as other evidence connecting the home to the drug trade. In rejecting Rivera's claim, the court stated that while the search warrant affidavit did not explicitly say Rivera was at home when he engaged in drug-related telephone calls, it was consistent with common sense that Rivera used his home as a communications point to further his drug crimes.

On the issue of the Franks hearing, the Appeals Court stated that even if the affidavit contained false information, there would have been sufficient evidence to support probable cause without that information.

U.S. v. Rivera (June 9, 2016)
http://media.ca1.uscourts.gov/pdf.opinions/15-1349P-01A.pdf

—¦—

[1] *A defendant is entitled to an evidentiary hearing to challenge the veracity of a sworn statement used by police to procure a search warrant if the defendant makes a substantial preliminary showing that (1) an intentional false statement, or one made with reckless disregard for the truth, was included in the affidavit, and (2) if the allegedly false statement is necessary to the finding of probable cause.*

Maine Supreme Judicial Court Sitting as the Law Court

Fourth Amendment – Seizure – Consensual Encounter

Was the Officer's Interaction with the Driver a Seizure?

Whether a Fourth Amendment seizure has occurred in an interaction between an officer and a citizen is an objective determination that focuses on what a reasonable person would feel under the circumstances. The defendant's contention that he felt unable to leave when the officer identified himself, and the officer's testimony that he would have found a reason to stop the defendant if he had driven away, are irrelevant to whether a seizure occurred.

Arrested and charged with criminal OUI, Bryant Ciomei moved to suppress all evidence derived from his interaction with a game warden, arguing that the game warden unconstitutionally seized him when the warden first encountered him. The game warden was on an early morning patrol for night hunting. He saw a vehicle with illuminated headlights parked in a manner consistent with night hunting. As the warden drew nearer, he saw two people urinating outside of the vehicle. The warden pulled up behind the vehicle in a way that did not prevent it from driving away. He did not turn on his vehicle's flashing lights or siren and there was nothing impeding the vehicle from traveling forward onto the roadway. The warden got out of his vehicle and said, "Hi, game warden." The warden engaged in conversation with Ciomei, who was the driver and owner of the vehicle. The warden asked "what was going on," and Ciomei replied that he was giving his friends a ride home. The warden smelled alcohol on Ciomei's breath, observed that Ciomei's eyes were bloodshot and that his balance was unsteady. After Ciomei admitted to consuming alcohol, the warden administered field sobriety tests. The District Court found that up to the point that the warden observed signs of intoxication, there was no seizure within the meaning of the Fourth Amendment and that the encounter was a consensual one. Ciomei appealed after the District Court denied his motion to suppress.

The Law Court noted that there is no implication of the Fourth Amendment where an officer merely approaches a person on the street or in another public place to ask questions or engage in consensual conversation. It is only when an officer in some way restrains the liberty of a citizen – such as physical force and a show of authority – that a seizure occurs. Some of the factors considered in such an analysis include (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person; (4) the use of language or tone of voice indicating that compliance with the request might be compelled; (5) whether the officer was blocking the defendant's path to leave; (6) the use of sirens, lights, or a loudspeaker; (7) the display of a badge or wearing of a uniform; (8) the location of the encounter; (9) whether there was a chase; and (10) whether the officer approached on foot or in a vehicle.

State v. Ciomei (November 17, 2015)
http://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2015/15me147ci.pdf

Fourth Amendment – Exigent Circumstances for Blood Draw

Did the OUI Blood Draw Require a Warrant?

The burden is on the State to prove by a preponderance of the evidence that exigent circumstances existed. However, exigent circumstances do not operate as an exception to the requirement for a search warrant when they arise out of unreasonable delay by law enforcement in obtaining a warrant. In McNeely, the U.S. Supreme Court held that although the natural metabolization of alcohol does not create per se exigent circumstances, it may do so on a case-by-case basis. Here, the deputy's actions were reasonable under the circumstances.

The defendant was convicted of OUI and violating a condition of release. On appeal, he argued that the trial court was wrong in admitting evidence of his blood-alcohol level derived from a sample of his blood seized without a search warrant. The Law Court disagreed, holding that the trial court was not wrong in denying the motion to suppress based on exigent circumstances.

On April 11, 2014, shortly after 5:00 p.m., a deputy of the Sagadahoc County Sheriff's Department determined that there was probable cause to believe that John Arndt was driving under the influence of alcohol. The deputy transported Arndt to the Bath PD to administer a breath-alcohol test using an Intoxilyzer machine. The deputy took Arndt to Bath PD, rather than the closer Topsham PD, because he had after-hours access to the Bath police station. The deputy would have had to call for a Topsham officer to meet him at Topsham PD to gain access to the Topsham police station. Based on these logistics, the officer believed that using Topsham PD would have caused an undue delay in administering the test.

At Bath PD, the deputy discovered problems with the Intoxilyzer equipment. The deputy made four unsuccessful attempts, starting at 6:02 p.m. and ending at 6:24 p.m., to obtain a breath-alcohol level using the Intoxilyzer. Fearing that further delay would result in the deterioration of evidence the deputy contacted the Bath Fire & Rescue Department to draw a sample of Arndt's blood. The deputy did not get a search warrant and at 6:45 p.m., a paramedic conducted the blood draw. Arndt never objected to any of the tests and although he signed a consent form he was not informed that he could request that a physician draw his blood. Arndt's blood-alcohol level was above 0.15%.

Arndt argued that because the deputy did not have a warrant, there needed to be exigent circumstances present in order to justify the warrantless seizure of a sample of his blood and that the controlling U.S. Supreme Court case, of *Missouri v. McNeely* (2013), stated that metabolization of alcohol by the body does not *per se* constitute exigent circumstances. He also argued that any exigent circumstances resulting from a delay in the administration of the Intoxilyzer test was created by the deputy's decision to transport him to Bath PD for the breath test, rather than to a nearer Topsham PD. He added that the Law Court's holding in an earlier case barred considering any delay caused by law enforcement in determining the existence of exigent circumstances. The State argued that the earlier Law Court case only excludes consideration of an unreasonable delay by law enforcement as exigent circumstances, and that the deputy's actions here were reasonable under the circumstances.

The Law Court determined that the deputy's actions were reasonable under the circumstances. The deputy's belief that he could more quickly administer a blood-alcohol test in Bath was reasonable. The deputy unsuccessfully made four separate attempts to obtain a blood-alcohol level using the Intoxilyzer and by the time the fourth attempt was completed, nearly one and

one-half hours had passed from the time of Arndt's arrest. It was reasonable for the deputy to become concerned that further delay would result in the loss of evidence and, in order to preserve reliable evidence of intoxication, the deputy proceeded with a warrantless blood test.

State v. Arndt (February 18, 2016)
http://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2016/16me31arco.pdf

—¦—

Fifth Amendment – Miranda – Seizure Paramount to Arrest – De facto arrest

Was the Driver in Custody for Purposes of Miranda when Statements Made?

In analyzing whether a person was in custody for purposes of Miranda, the court considers whether a reasonable person would feel he or she was not at liberty to terminate the interrogation and leave, or if there was a restraint on the person's freedom of movement of the degree associated with a formal arrest.

On November 9, 2013, a woman reported that a man in a cemetery in South Portland had assaulted her. The woman later provided a description of the assailant and his vehicle to a detective of the South Portland Police Department. On December 27, 2013, the woman called the detective and told him that she had seen the man drive past her as she was walking near the 7-Eleven on Congress Street in Portland. She also sent the detective a text message that contained the license plate number of the vehicle she had seen. The woman was adamant that the man she had seen in the vehicle was the same man who had assaulted her in the cemetery. When the detective received the woman's phone call, he was off-duty and leaving a grocery store located about ten minutes away from the 7-Eleven. The detective drove to his residence in a nearby town to remove groceries from his vehicle. While he was driving, the detective contacted dispatch and requested the Portland Police Department to locate and stop the vehicle that the woman had described. As the detective was pulling into his driveway, Portland Police advised him that officers had stopped the suspect's vehicle. The detective asked the officers to detain the suspect. He then put his groceries away and proceeded to the scene.

While the detective was en route, the blue lights on the police cruiser detaining the suspect's vehicle remained activated. One of the officers on the scene asked for the suspect's license and registration, and asked him to wait for the detective to arrive. The suspect, Moses King, surrendered his license and registration and at some point, a second officer approached King's vehicle and reiterated that they were "just waiting for that South Portland [detective] to come down and, uh, he has a couple of questions for you." King responded, "Alright," and the officer invited him to roll up his window to stay warm. The officers talked on the sidewalk while waiting. They did not return King's license and registration before the detective arrived. More than 15 minutes after the stop, the detective arrived on the scene. He determined that King and his vehicle matched the description that the woman had provided, then approached King's vehicle, introduced himself, and asked whether King would mind getting out the vehicle.

Less than three minutes later, the detective stated, "I just got a feeling it's you, and if it's you, you might as well just tell me the truth." He continued, "There was a [woman] that was picked up and assaulted . . . and I got a feeling it's you because not only does this car match the description, but she saw you today." King denied the accusation, and the detective falsely asserted, "We have your DNA on her bra, alright?" When King continued to deny the charges,

the detective yelled, "Don't lie to me now, you are balls fucking deep right now, do not start lying to me because I cannot help you if you do. Be honest. You threw her on the ground." King replied, "I didn't throw her on the ground, she fell . . . . She had the money in her bra and I pulled it out of her bra and that was that." King denied the detective's repeated accusations that he had strangled the woman, and then the detective directed the Portland officers to place King in handcuffs. The detective continued questioning King for a brief time before giving him a paraphrased version of the *Miranda* warnings. King acknowledged that he understood his rights, but did not expressly waive his rights, and the detective's questions continued.

There is no dispute that the detective interrogated King before administering *Miranda* warnings; the issue is whether he was in custody for Fifth Amendment purposes when he answered the detective's questions before his formal arrest. In analyzing whether a person was in custody prior to his formal arrest, the court considers whether a reasonable person would feel he or she was not at liberty to terminate the interrogation and leave, or if there was a restraint on the person's freedom of movement of the degree associated with a formal arrest. The custody test involves an examination of the objective characteristics of the interaction between the police and the defendant, and an analysis of a number of factors in their totality.[2]

The Law Court said that considering these factors in their entirety as they related to the circumstances of King's interrogation, some of the factors weighed against a conclusion that King was in custody. The questioning occurred on a public street with which King was familiar. King did not manifest a belief that he was not free to leave, agreed to wait for the detective's arrival, and then agreed to get out of his vehicle and answer the detective's questions. During the wait and subsequent interrogation, King's vehicle was not blocked in and he was not physically restrained. The interrogation was of relatively short duration, and was conducted by a single plainclothes detective.

However, the Court determined, other factors weighed more heavily in favor of a conclusion that King was in custody for purposes of *Miranda*. King was detained for more than 15 minutes before the interrogation commenced. During that detention, his license and registration were taken from him and were not returned. Three officers were present throughout the interrogation and two of those officers were in uniform. The blue lights remained activated and were flashing during the interrogation. The detective told King that he had a feeling that King had committed a crime suggesting that King was the focus of the investigation. The detective also employed an aggressive and accusatory line of questioning and made false statements about evidence tying

[2] The objective characteristics of an interrogation that may be considered in determining whether a defendant was in custody include, but are not limited to, the following factors:
(1) the locale where the defendant made the statements; (2) the party who initiated the contact;
(3) the existence or non-existence of probable cause to arrest (to the extent communicated to the defendant); (4) subjective views, beliefs, or intent that the police manifested to the defendant to the extent they would affect how a reasonable person in the defendant's position would perceive his or her freedom to leave; (5) subjective views or beliefs that the defendant manifested to the police, to the extent the officer's response would affect how a reasonable person in the defendant's position would perceive his or her freedom to leave; (6) the focus of the investigation (as a reasonable person in the defendant's position would perceive it); (7) whether the suspect was questioned in familiar surroundings; (8) the number of law enforcement officers present; (9) the degree of physical restraint placed upon the suspect; and (10) the duration and character of the interrogation.

King to the crime. The Law Court decided that viewed in totality, these objective factors supported the conclusion that King was in custody when he made the incriminating statements.

State v. King (April 12, 2016)
http://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2016/16me54ki.pdf

—¦—

Fourth Amendment – Vehicle Stop – Reasonable Articulable Suspicion

Did Officer Have Reasonable Articulable Suspicion to Stop the Vehicle?

An investigatory stop of a vehicle is justified when the police officer has an "objectively reasonable, articulable suspicion that either criminal conduct, a civil violation, or a threat to public safety has occurred, is occurring, or is about to occur" based on the totality of the circumstances.

On October 19, 2014, a Bangor police officer stopped David Violette and charged him with felony OUI. The trial court denied Violette's motion to suppress the evidence obtained from the stop, and Violette then entered a conditional guilty plea to the charge and appealed the suppression order. He argued that the vehicle stop lacked reasonable articulable suspicion. However, the Law Court found that, *based on competent evidence in the suppression record*, the officer's attention focused on Violette's vehicle because Violette was accelerating the vehicle in such a manner as to cause smoking tires and a squealing noise that lasted for three to four seconds. Based on these facts, the court concluded that the officer had an objectively reasonable belief that Violette had violated a section of Title 29-A that prohibits braking or accelerating that is "unnecessarily made so as to cause a harsh and objectionable noise."

State v. Violette (May 3, 2016)
http://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2016/16me65vi.pdf

—¦—

Fourth Amendment – Affidavit for Search Warrant – Probable Cause

Did Affidavit Establish Probable Cause for Cell Phone Information?

Descriptions of noncriminal activity in a search warrant affidavit cannot support a finding of probable cause unless the warrant also contains allegations of criminal conduct that "color" the noncriminal activity.

A Grand Jury indicted the two defendants in this case, James Simmons and Frederick Campbell on two counts of arson related to fires on June 10 and June 21, 2012. The Superior Court suppressed evidence of cellular telephone records seized pursuant to the warrants, finding that the warrants were unsupported by probable cause. The State appealed, and the Law Court determined that the affidavits established probable cause for the seizure of those portions of Simmons's cell phone records relating to historical cell site location data for June 21, 2012. The Court agreed with the trial court as to the remaining aspects of the suppression order as to Simmons and the order in its entirety as to Campbell.

Frederick Campbell

The only facts contained in the affidavits bearing on Campbell's suspected role in the second fire were that Campbell worked as James Simmons' sternman, and that on the night of the fire, he left the house of a friend he was visiting and expressed an intention to return to the residence but did not do so. This is not enough to establish probable cause. Although the affidavits constituted an attempt to establish a nexus between Campbell's employment as James Simmons' sternman and the ongoing feud between James Simmons and Donald Simmons, there was insufficient information to "color" the significance of Campbell's otherwise noncriminal activity. There were no allegations of any criminal activity planned, anticipated, or committed by Campbell. Even when the information in the affidavits is viewed in a positive light with allowance for all reasonable inferences, the information is too meager to support a probable cause determination that Campbell had anything to do with the fire, much less a finding that evidence of criminality would be found in his cell phone records.

James Simmons

The affidavits did not contain information that would allow a probable cause determination that James Simmons had any criminal involvement in the first fire, which occurred on his own property, or that any of his cell phone records for that night would contain information of criminal activity. In contrast, the information contained in the affidavits drawing a connection between James Simmons and the second fire on Donald Simmons' property was sufficiently incriminating to support a probable cause determination that James Simmons had some criminal involvement in that fire. The affidavits state that James Simmons was engaged in an overtly and sometimes dangerously hostile relationship with Donald Simmons. The affidavits also provided information that on the night of the second fire, Donald Simmons's sternman saw James Simmons' truck traveling at a high rate of speed away from the location of the fire less than two hours before a report of the fire. The statement of Donald Simmons' sternman calls into question an alibi provided by James Simmons's wife that his truck remained parked in their driveway the entire night. The statement of James Simmons' wife was perhaps an effort to create false exculpatory information, which itself has an inculpatory effect. The Court found that the information contained in the affidavits was sufficient to indicate that James Simmons had a significant motivation and opportunity to commit arson, and it supported the magistrate's determination that there was probable cause to believe that James Simmons had some involvement in the second fire.

State v. Simmons & Campbell (July 12, 2016)
http://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2016/16me103si.pdf