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

2020 CASE LAW UPDATE

SEPTEMBER 2019 – AUGUST 2020

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

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This publication and the 2020 New Law Update constitute the training outline of the Maine Criminal Justice Academy for recertification training in law updates for the year 2020.

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 2019 through August 2020. The document contains summaries of cases of general interest and relevance to Maine law enforcement officers. 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 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 very fact specific, it 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 concerning criminal procedure and other constitutional issues.

Questions, suggestions, or other comments?

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United States Supreme Court

Fourth Amendment – Articulable Suspicion – Vehicle Stop

Vehicle Stop Based on Registered Owner's License Being Revoked Lawful

When a police officer lacks information negating an inference that the owner is driving a vehicle, an investigative stop after running a vehicle's license plate and learning that the registered owner's driver's license is suspended or revoked is reasonable under the Fourth Amendment.

While on patrol, a Kansas police officer ran a registration check on a pickup truck with a Kansas license plate. The officer learned that the truck was registered to Charles Glover, Jr., and that his license was revoked. Inferring that the registered owner was also the driver, the officer stopped the truck. The officer confirmed that Glover was the driver and issued him a citation for being a habitual violator. Glover moved to suppress all evidence from the stop, arguing that the officer lacked reasonable suspicion of a violation of law to pull him over. The state argued that a law enforcement officer may infer that the owner of a vehicle is the one driving the vehicle, absent information to the contrary. The state trial court disagreed and granted Glover's motion to suppress. The Kansas Supreme Court held that the inference impermissibly "stacked" assumptions and would relieve the state of its burden of showing reasonable suspicion for a stop.

The U.S. Supreme Court ruled that when a police officer lacks information to the contrary, it is reasonable for the officer to assume that the driver of a vehicle is its owner, and if the owner's license is revoked, to conduct an investigative stop of the vehicle. Courts must allow officers to use common sense to make judgments and inferences about human behavior. In this case, the officer's common-sense inference was that the vehicle's owner was most likely the driver, which provided enough suspicion to stop the vehicle. It does not matter that a vehicle's driver is not always its registered owner; the officer's judgment was based on common-sense judgment and experience. Thus, the officer had reasonable suspicion and the traffic stop did not violate the Fourth Amendment.

Kansas v. Glover (April 6, 2020)
https://www.supremecourt.gov/opinions/19pdf/18-556_e1pf.pdf

Note: This decision is consistent with the finding in State v. Tozier, decided by the Maine Supreme Judicial Court in 2006, which found that an officer does not violate the Fourth Amendment by making a traffic stop when the officer randomly checks a license plate number of a vehicle on a public road, learns the owner's license is suspended or revoked, and observes no other circumstances that demonstrate the driver is not the vehicle's owner.

http://www.courts.state.me.us/opinions/2006%20documents%20/06me105to.htm

United States Court of Appeals for the First Circuit

Fourth Amendment – Third Party Consent to Search – Apparent and Actual Authority

Sister had Neither Apparent nor Actual Authority to Consent to Search

The Fourth Amendment generally requires that the government obtain a warrant based on probable cause before conducting a search. However, a warrant is not necessary where there is voluntary consent, either from the property owner or from a third party who has common authority over the property. A third party has common authority if he or she has mutual use of the property.

Bryan Moran stored several closed, opaque, black plastic garbage bags containing some of his belongings in a storage unit that belonged to his sister, Alysha Moran. While detained at the Billerica (Massachusetts) House of Corrections, Moran learned that his sister's storage unit needed to be emptied and Moran asked his sister to move his black plastic bags. Law enforcement suspected that Bryan Moran was storing drugs in a storage unit and when they learned of the call, officers went to Alysha Moran and obtained signed consent to search. The consent authorized law enforcement to search her apartment, her car, and her storage unit. By signing the form, Alysha certified that she was voluntarily consenting to the search. When the storage unit was opened, Alysha told authorities that the black garbage bags in the unit belonged to her brother and the boxes containing Christmas decorations belonged to her. Alysha did not limit her written consent or object to any part of the search. During the search, officers found fentanyl in the garbage bags belonging to Bryan Moran.

Indicted for possession with intent to distribute fentanyl, Bryan Moran filed a motion to suppress the fentanyl as the fruit of an illegal search. The U.S. District Court denied the motion, finding that even though Bryan Moran had a reasonable expectation of privacy in the black garbage bags, his sister had *actual* authority to consent to the search and she voluntarily gave consent. Moran filed a motion for reconsideration, which the district court denied. In its denial, the district court declined to reach the issue of whether Alysha had *actual* authority to consent and instead found that Alysha had *apparent* authority to consent. Moran appealed to the First Circuit, arguing that his sister's general consent to search the storage unit did not extend to his property.

A third party may consent to the search of another person's effects if the third party has "common authority" over the property. A third party has common authority if he or she has mutual use of the property. In this case, in order to validate Alysha Moran's consent to search her brother's belongings, the government was required to establish that as a third party, she had mutual use of the contents inside the black plastic bags.

In its review, the appeals court looked at actual authority and apparent authority and Alysha Moran's voluntary consent to search her property and the property belonging to her brother. The court determined that Alysha Moran, although having access to the bags because they were in her storage unit, such access did not by itself establish her mutual use of what they contained. Accordingly, she did not have the *actual* authority to grant the necessary consent to search the black plastic bags without a warrant. The court went on to address the *apparent* authority question, pointing out that the apparent authority question turns on whether the facts available to the officers at the moment of the search would warrant a reasonable officer to believe that the

consenting party had the apparent authority to consent, regardless of whether the consenting party actually had actual authority. The facts available to law enforcement personnel at the time of the search determine whether law enforcement had a mistaken but objectively reasonable belief that Alysha Morin in fact had the requisite authority to consent to the search. The appeals court held that the officers' belief that Alysha had authority to consent to a search of the bags was not objectively reasonable because she explicitly told the officers that the bags in the storage unit belonged to her brother and the officers did not attempt to do any additional investigation, such as asking her if she had mutual use of the bags, which would have given her actual authority to consent to the search.

The First Circuit reversed the district court's denial for reconsideration on the motion to suppress, vacated Moran's conviction, and remanded the case to the District Court for further consideration consistent with the First Circuit finding. The court's holding was in accord with the holdings of several other federal circuits, which suggest that when faced with ambiguous facts relating to a third party's authority to consent to search, officers should attempt to investigate further before relying on that consent.

U.S. v. Bryan Moran (November 27, 2019)
https://law.justia.com/cases/federal/appellate-courts/ca1/18-1876/18-1876-2019-11-27.html

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Fourth Amendment – Probable Cause – Warrantless Arrest

Warrantless Arrest Based on Information from Confidential Informant

Every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless supported by probable cause. Probable cause exists when an officer, acting upon apparently trustworthy information, can reasonably conclude that a crime has been or is about to be committed and that the suspect is implicated in its commission. Probable cause requires only a fair probability of criminal activity, not an actual showing of such activity.

On May 12, 2017, a Maine DEA Task Force agent received a phone call from a confidential informant in Maine who had supplied reliable information in the past that resulted in drug arrests and convictions. The informant told the agent that a crack dealer called his cell phone from out of state, was bringing a load of crack "up north," and wanted a ride from Boston's South Station to Lewiston. The informant told the agent that he thought, but was not certain, that the caller was a man named Mayo, a person he had once met. It was arranged that the informant, with a second confidential informant as a driver, would pick up the caller at South Station that evening. Instead of one passenger going to Maine, two passengers met the two informants, Cuwan Merritt and Michael Artis.

Prior to the arrival of the four in the Lewiston area, the DEA agent arranged for a traffic stop of the car transporting the men near the Lewiston exit of the Maine Turnpike. After midnight, police pulled the car over and forcibly removed Merritt and Artis from the back seat and patted down for weapons. A state trooper with a drug-detecting dog walked the dog around the men and then manually directed the dog from the feet to the torso on each man. The dog alerted on Merritt's front pocket area and Artis's crotch area. Officers then searched the two men and found a bag of crack cocaine in Artis's pants, but the search did not reveal drugs on Merritt until a more thorough search at the Androscoggin County Jail.

Merritt and Artis were both indicted for possession with intent to distribute cocaine base, and both moved to suppress the drugs found on them. They argued that their initial seizure, including their forcible removal from the car and the intrusive dog sniff, amounted to a *de facto* arrest without probable cause. They did not dispute that the seizure and search were permissible if the officers had probable cause to arrest. The U.S. District Court held an evidentiary hearing and orally denied the motions to suppress, holding that there was sufficient reasonable suspicion to justify the *Terry* stop of the vehicle and its occupants. Artis's attorney filed a motion for clarification on the issue of whether there was reasonable suspicion under *Terry* for the vehicle stop and dog sniff or, instead, whether the seizure constituted a *de facto* arrest for which probable cause was needed. The district court concluded that the police had probable cause to arrest Merritt and Artis for drug trafficking before the police stopped the car.

The defendants appealed the district court's denial of their motion to suppress. Their primary argument was that there was no investigation or corroboration of the confidential informant's tip that a crime was being committed or was about to be committed. The appeals court said that to determine whether an officer has probable cause for an arrest, the court examines events leading up to the arrest and then decides whether the facts known to the officer at the time of the arrest, viewed from the standpoint of an objectively reasonable officer, amounted to probable cause. In its review, the appeals court noted the district court's reasoning that someone showing up for a ride at South Station after calling to ask for a ride from South Station to Lewiston to sell drugs and promising drugs to the person providing the transportation was in fact probable cause of carrying drugs. The appeals court also noted the district court's conclusion that the informant was reliable and that just because two men and not one were taken from South Station to Lewiston and that neither man was named Mayo did not mean that the two men were differently situated with respect to the drug trafficking purpose of their trip. The appeals court reiterated that probable cause determinations hinge not on discrete pieces of standalone evidence, but on the totality of circumstances. The appeals court affirmed the lower court's denial of the motions to suppress.

U.S. v. Merritt & Artis (December 19, 2019)
https://law.justia.com/cases/federal/appellate-courts/ca1/18-2208/18-2208-2019-12-19.html

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Fourth Amendment – Probable Cause for Arrest ▪ *Fifth Amendment - Miranda*

Fingerprints in Unlawful Arrest Admissible as Routine Booking Procedure

Routine administrative procedures accompanying an arrest, such as fingerprinting, photographing, and getting a proper name and address, are necessary for orderly law enforcement and protection of individual rights. Booking fingerprints are suppressible only where law enforcement purposefully exploits an illegal arrest to obtain fingerprints.

In March 2012, the Department of Homeland Security's Boston Office received information from a confidential informant about a fraudulent tax return scheme in which individuals allegedly used Social Security numbers stolen from Puerto Rican residents to file false tax returns and fraudulently obtain refund checks. On three separate occasions between April and May 2012, the confidential informant met with Odalis Castillo-Lopez with the goal of buying fraudulent refund checks.

On June 7, 2012, a meeting was arranged at the McDonald's in South Attleboro, Massachusetts, under the guise of buying about $160,000 in fraudulently obtained checks. Waiting at the McDonald's for Castillo-Lopez were agents from Homeland Security Investigations and the U.S. Secret Service. Castillo-Lopez arrived at the McDonald's accompanied by a passenger, later identified as Hector Antonio Cruz-Mercedes. Inside the McDonald's, agents approached Castillo-Lopez, asked him some questions, escorted him outside, arrested him, and took him to the Boston Homeland Security office for processing. While some agents focused on Castillo-Lopez, another agent spoke with Cruz-Mercedes and then escorted him outside to the parking lot where a Homeland Security special agent questioned him. Cruz-Mercedes identified himself as "Pedro Colon" and displayed identification documents bearing that name, including a Massachusetts driver's license and a Social Security card. When Cruz-Mercedes was asked by the special agent if the documents were in fact his, he responded that his name was actually Hector Cruz-Mercedes, that he was a native of the Dominican Republic, and that he had unlawfully entered the United States. The agent arrested Cruz-Mercedes for unlawful presence in the United States and seized two cell phones from him. At no point during the interaction was Cruz-Mercedes advised of his *Miranda* rights. After his arrest, law enforcement fingerprinted Cruz-Mercedes during the routine booking process.

Cruz-Mercedes fled the United States and returned to his native Dominican Republic. During his absence, a federal grand jury indicted him on 20 counts related to the tax return fraud scheme, one count for fraudulent use of a Social Security number, and one count for failure to appear. Eventually arrested in the Dominican Republic and extradited to the United States, Cruz-Mercedes, prior to his trial, moved to suppress all evidence obtained as a result of his June 7, 2012, arrest. He argued that his June 7, 2012 arrest was without probable cause, and that the evidence obtained from that arrest constituted the fruits of an unlawful seizure requiring suppression under the Exclusionary Rule.

The U.S. District Court determined that Cruz-Mercedes was under arrest when removed from the McDonald's and questioned in the parking lot. The district court also found that at the time of his arrest, law enforcement agents lacked probable cause for the arrest and that they did not have probable cause to arrest until Cruz-Mercedes revealed his true identity and his unlawful presence in the country. The district court allowed into evidence Cruz-Mercedes's statement that he was Pedro Colon under the booking exception to *Miranda* but suppressed the other statements he made as both fruits of an unlawful arrest under the Fourth Amendment and violative of *Miranda* under the Fifth Amendment. The district court also determined that Cruz-Mercedes's booking fingerprints could be suppressed as a product of the unlawful arrest but reasoned that law enforcement inevitably would have arrested and fingerprinted Cruz-Mercedes, so the fingerprint evidence could be admitted pursuant to the doctrine of inevitable discovery. Cruz-Mercedes entered a conditional guilty plea, reserving the right to appeal the district court's decision on the admissibility of the fingerprint evidence.

The appeals court affirmed the district court's denial of the motion to suppress the fingerprints but on different grounds. The appeals court noted that Cruz-Mercedes's fingerprints were obtained per routine booking procedures. It was also noted that routine administrative procedures, such as fingerprinting, photographing, and getting a proper name and address from a defendant, are incidental events accompanying an arrest whether that arrest is based on probable cause or not and are necessary for orderly law enforcement and protection of individual rights.

Fingerprints are subject to suppression when undisputed facts show that police officers used an investigative detention without probable cause (*de facto* arrest) for investigative purposes related to a specific crime. The appeals court determined that statements made by Cruz-Mercedes about his identity were not suppressible under the *Miranda* booking exception, which covers routine booking questions seeking background information, such as the person's name. Cruz-Mercedes's statement of his unlawful presence in the United States was not a result of the questions or actions of law enforcement was also not subject to suppression.

U.S. v. Cruz-Mercedes (December 18, 2019)
https://law.justia.com/cases/federal/appellate-courts/ca1/19-1082/19-1082-2019-12-18.html

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Fourth Amendment – Search Warrant Affidavit – Reliability of Confidential Informant

Absence of Information of Reliability of CI Not Fatal to Warrant Validity

An informant's tip can establish probable cause even though the affidavit does not contain information about the informant's past reliability. A probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informer has been sufficiently reduced.

Note: A number of issues were appealed, but this summary is focused on the questions related to information in the warrant affidavit provided by a confidential informant and omitted key facts from the affidavit about the confidential informant's criminal history, previous addiction to heroin, bipolar disorder diagnosis, and some false statements made regarding the kidnappings.

Danny Veloz was the mastermind behind a scheme to kidnap drug dealers in Massachusetts and hold them for ransom. Manuel Amparo, a kidnapped victim of the scheme who escaped, alerted the police. Three men were initially arrested, one of whom, Henry Maldonado, cooperated and was the confidential source of information in a warrant affidavit. Indicted for conspiracy to commit kidnapping, six co-defendants plead guilty while Veloz proceeded to trial. Found guilty and sentenced to life in prison, Veloz appealed the District Court's denial of his motion to suppress the evidence seized from his apartment. He argued that the search warrant affidavit relied largely on a confidential informant while not describing the informant as having provided credible information to law enforcement in the past.

The appeals court said that an informant's tip can establish probable cause even though the affidavit does not contain information about the informant's past reliability. A probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informant has been sufficiently reduced. The court pointed to a list of factors, including: (1) whether the affidavit established the probable veracity and basis of knowledge of persons supplying hearsay information; (2) whether an informant's statements reflect first-hand knowledge; (3) whether some or all of the informant's factual statements were corroborated wherever reasonable or practicable; and, (4) whether a affiant assessed, from the affiant's professional standpoint, experience, and expertise, the probable significance of the informant's information.

Taking those factors into account, the court noted that the affidavit represented that the confidential informant had provided a detailed description of Veloz's role in the illegal scheme's operations, including a firsthand description of those operations that was based, in part, on being

inside Veloz's residence, corroboration of some of the information provided by the confidential informant, a statement of the officer's experience and professional assessment reinforcing the reliability of the information from the informant, and that the informant was known to the police and could be held responsible if the information proved to be inaccurate or false.

Veloz argued that the District Court erred in denying his motion for a *Franks* hearing[1] because he had made the required substantial preliminary showing that the agent in charge knew and omitted key facts from his affidavit about the informant's criminal history, previous addiction to heroin, bipolar disorder diagnosis, and some false statements made regarding the kidnappings. The court said that to be entitled to a *Franks* hearing, the defendant must first make a substantial preliminary showing that a false statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth and that the false statement or omission was necessary to the finding of probable cause. In its review, the court said that because the information in the warrant application was so substantial as to the confidential informant's reliability, the omitted information was not material to the probable cause determination.

U.S. v. Veloz (January 24, 2020)
https://law.justia.com/cases/federal/appellate-courts/ca1/17-2136/17-2136-2020-01-24.html

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Fourth Amendment – Reasonable Expectation of Privacy

Pole Camera Surveillance of Areas Observable by the Public is Lawful

What a person knowingly exposes to the public, even in the person's own home or office, is not a subject of Fourth Amendment protection. There is no objective reasonable expectation of privacy in activity outside a home exposed to public view. The Government's warrantless use of a pole camera to continuously record for eight months did not infringe on the defendants' reasonable expectation of privacy in and around their home; it did not constitute a search or violate the Fourth Amendment.

In January 2017, following a tip, ATF began investigating defendant Nia Moore-Bush for the unlicensed sale of firearms. Moore-Bush and her then-boyfriend-later-husband, Dinelson Dinzey, were living with Moore-Bush's mother, Daphne Moore, in a residential neighborhood in Springfield, Massachusetts. About two weeks after a witness acting on the government's behalf bought four guns illegally from Moore's property, ATF installed a camera towards the top of the public utility pole across the public street from the Moore property. Investigators sought no judicial authorization. The camera was used until the arrests of Moore-Bush and Dinzey about eight months later. The camera captured images on the front side of Moore's house, including the side door, the attached garage, the driveway to the garage, part of the lawn, and a portion of the public street in front of the house. Agents also conducted physical surveillance of the same area. The surveilling officers could see everything the pole camera could see and, additionally,

[1] In *Franks v. Delaware* (1978), the U.S. Supreme Court held that where a defendant makes a substantial preliminary showing that a false statement made deliberately, or with reckless disregard for the truth, was included in an affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held. If the allegation is established by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant is voided, and the fruits of the search suppressed.

license plate numbers of vehicles in the driveway. The pole camera recorded useful evidence throughout its duration and that evidence along with other evidence gathered during the investigation, was used in successful wiretap and search warrant applications.

In 2018, Moore-Bush, Dinzey, Moore-Bush's mother and others were indicted for conspiracy to distribute and possess with intent to distribute heroin and 28 grams or more of cocaine base as well as money laundering and other charges. The defendants moved to suppress the pole camera evidence, arguing that the use of the pole camera was a search that required judicial authorization. They argued that the warrantless use of a pole camera to continuously record for eight months the defendants' home, as well as the comings and goings of occupants and visitors, violated the Fourth Amendment. The U.S. District Court agreed, finding that the defendants had both a subjective and objectively reasonable expectation of privacy in the movements into and around their home. In its argument, the Government relied on an earlier First Circuit case, *U.S. v. Bucci*, which held that there was no reasonable expectation of privacy in a person's movements outside and around the person's home and that use of a pole camera for eight months did not constitute a search. The district court decided that *Bucci* was no longer controlling precedent given the Supreme Court's decision in *Carpenter v. U.S.*, which held that the warrantless acquisition of cell-site location information was an intrusion into a person's reasonable expectation of privacy and a violation of the Fourth Amendment. The district court said that *Carpenter* made clear that a person has an objective reasonable expectation of privacy in his or her movements over such a lengthy period of time, even if those movements are exposed to the public.

The appeals court disagreed, overturning the district court's decision and holding that *Bucci* was the binding precedent because the *Carpenter* opinion was narrow, and it did not call into question conventional surveillance techniques and tools including the use of security cameras. The Supreme Court in *Carpenter* explained why cell-site location information is different than the information obtained by a public view or from a pole camera. Cell-site location information is an all-encompassing record of the cellphone holder's location beyond public roads or walkways and into private residences or offices. A pole camera is on a public street and is taking images of public views; it does not track the whole of a person's movement over time. The appeals court made clear that *Bucci* was the controlling precedent for the circumstances of this case. The use of the pole camera to film the outside of the defendants' home was not a search under the Fourth Amendment.

U.S. v. Moore-Bush (June 16, 2020)
https://law.justia.com/cases/federal/appellate-courts/ca1/19-1582/19-1582-2020-06-16.html

Maine Supreme Judicial Court

Fourth Amendment – Search Warrant – Nexus – Sufficiency of Probable Cause

Affidavit Established Probable Cause for Cell-site Location Information

A finding of probable cause rests on a practical, commonsense determination whether there is a fair probability that evidence of a crime will be found in a particular place. A warrant affidavit must set forth some nexus between the evidence to be seized and the locations to be searched. Thus, an application to search an individual's cell-site location information typically must establish some connection between the individual and the crime for which the individual's whereabouts may constitute evidence; that connection, however, need not be expressly articulated in the warrant application.

On December 26, 2015, a detective investigating two apparent homicides applied for a search warrant for the historical cell site location information (CSLI) of seven telephone numbers, including Marble's, that were in contact with the cell phone of one of the victims in the hours before he was killed. The detective's affidavit supporting the warrant application stated the following facts relevant to the existence of probable cause to justify a search of Marble's cell phone records.

At approximately 3:30 a.m. on December 25, 2015, a woman called 9-1-1 reporting that she had been shot. The police were able to track the 9-1-1 call to the area of Summerhaven Road in Manchester. The police found the bodies of one male victim and one female victim in a car they later learned belonged to the male victim. No gun was found at the scene, but a cell phone was found in the female victim's lap. This cell phone—which belonged to the male victim—was the phone used to make the 9-1-1 call. Marble was a drug dealer operating in Maine and the male victim worked for him. Two days before the murders, the male victim was supposed to collect money from another drug dealer and bring it to Marble, but he did not do so. That same day, Marble obtained two handguns. On December 24, eight calls were made to the male victim's home phone from Marble's cell phone number. Just hours before the murders, the male victim and some friends broke into Marble's apartment while Marble was not there and stole televisions, backpacks, guns, and drugs. Sometime after the male victim left Marble's apartment but while the friends were still there, the male victim sent one of the friends a text message that read "leave." Marble's cell phone was used to call the male victim's cell phone at 2:14 a.m. on December 25, just eighty minutes before the 9-1-1 call.

Based on the affidavit, a judge issued a search warrant authorizing the seizure of records associated with seven cell phone numbers, including Marble's. The police executed the warrant and obtained, from Marble's cell phone service provider, Marble's cell-site location information. Indicted on two counts of murder, Marble moved to suppress the evidence of his CSLI. The trial court denied Marble's motion, concluding that the affidavit established "sufficient probable cause to believe that Mr. Marble was involved in these homicides and further that evidence of the crimes of homicide could be located in his phone." A jury found Marble guilty of both murder counts.

On appeal, Marble argued that the judge who issued the warrant allowing the officers to obtain his CSLI erred in determining that there was probable cause. The Law Court noted

that a finding of probable cause rests on a practical, commonsense determination whether, given all the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. A warrant affidavit must set forth some nexus between the evidence to be seized and the locations to be searched. Thus, an application to search an individual's CSLI typically must establish some connection between the individual and the crime for which the individual's whereabouts may constitute evidence; that connection, however, need not be *expressly* articulated in the warrant application. Here, the court said, the information in the affidavit was sufficient to support the issuing judge's determination that there was probable cause to believe that Marble was involved in both homicides and that his CSLI would contain or constitute evidence relevant to that crime. From the facts in the affidavit, the judge who issued the warrant could infer that Marble knew the victims and was in close and very recent contact with them—the male victim worked for Marble in the local drug trade, and Marble had called him nine times over the course of the prior two days, including one call just over an hour before the murders; that Marble had the ability to commit the crime—he had recently acquired two guns; and that Marble likely had a motive—the male victim appeared to owe Marble money and had also burgled Marble's apartment just hours before the murders. The court concluded that taken together these facts were enough to support the judge's determination that there was a "fair probability" that Marble's historical CSLI would contain evidence of the murders.

State v. Marble (November 7, 2019)
https://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2019/19me157.pdf

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Home Repair Contractor – Theft by Deception – Intent to Deprive – Sufficiency of the Evidence

Evidence was Sufficient to Support Conviction for Theft by Deception

The jury is free to draw all reasonable inferences from the evidence, and exclusively decides the weight to be given to the evidence and the credibility to be afforded to the witnesses. Seldom capable of direct proof, intent is usually inferred from the proven surrounding circumstances.

The victims, a married couple, sought to convert a finished camp property on Sebago Lake into their full-time residence. In August 2016, the victims met McLaughlin, described their plans for renovating the Sebago Lake property, and told him that they had not yet found a contractor for their project. McLaughlin represented himself as a general contractor, agreed to look at their plans, and said that he would be available in a few weeks. During later conversations about the project, McLaughlin held himself out as having 20 years of building experience, a team of four to five carpenters who were available to work at the job site every day, and the ability to procure the services of electricians, plumbers, and excavators. In early December 2016, the victims contracted with McLaughlin to do various construction and installation work on their property with a completion date of June 15, 2017. The contract called for an initial payment of $10,600, followed by payments of $4,040 on the first and fifteenth of each month, and a final payment of $4,040 upon completion. Initially, McLaughlin worked full days at the victims' property nearly every business day. Over time, McLaughlin's appearance at the work site became inconsistent and he worked fewer and fewer hours. In late January or early February 2017, the victims and McLaughlin negotiated a

revised contract with a new completion date of July 1, 2017. In March, it became clear that McLaughlin would not be able to meet the July 1 deadline; the victims and McLaughlin agreed on a new schedule, with a completion date of August 20, 2017, and more specific timelines for completing various phases of the project. McLaughlin's hours continued to decline, first to about three days, totaling 25 hours, per week, then to two days per week, and, finally, to just a few hours on a single day each week. At no point did McLaughlin procure the work crew or subcontractors that he had represented would be available to work on the project.

The victims fired McLaughlin on June 27, 2017. By that time, he had completed, at most, about 20% of the project, and the victims had paid him about $80,000 for labor and materials. Of that sum, the victims paid McLaughlin $10,631 for certain materials, including rough plumbing materials, trusses, a joist, and other general building materials, which he never delivered. The work that McLaughlin did complete was inconsistent with the original building plan, was not structurally sound, violated local building codes, and would not have passed a building inspection. As a result, the victims had to remove all of McLaughlin's work and restart the project from scratch.

McLaughlin was convicted of theft by deception, despite his motion for a judgment of acquittal in which he argued that the State did not prove that he had the requisite "intent to deprive" the victims of their property at the time of the initial deception. On appeal to the Law Court, McLaughlin argued again that the evidence was insufficient for the jury to find beyond a reasonable doubt that he committed theft by deception because the State did not establish that the statutorily required elements of deception and an intent to deprive the victims of their money or property existed at the same time. McLaughlin referred to this as the "nexus" requirement. In its decision affirming the conviction, the court pointed out that a jury is free to "draw all reasonable inferences from the evidence, and exclusively decides the weight to be given to the evidence and the credibility to be afforded to the witnesses." Further, "intent is seldom capable of direct proof. It is usually inferred from the proven surrounding circumstances." The court found that the jury rationally could have found beyond a reasonable doubt each element of theft by deception based on the testimonial and documentary evidence presented at trial and reasonable inferences drawn therefrom.

The victims testified that McLaughlin held himself out as a highly experienced contractor who had a team of laborers at his disposal and the ability to secure various subcontractors to assist in completing the project, and that they would not have hired him but for these representations; they never observed any work crew at the site and McLaughlin never hired any subcontractors; although McLaughlin's work was satisfactory at first, the number of hours he spent at the work site progressively decreased over a period of several months until, by the time he was fired in June 2017, he was working only three or four hours per week; the contract was renegotiated twice because McLaughlin was not making adequate progress and could not complete the work on time; when pressed about the lack of progress or the quality of his work, McLaughlin brushed off the victims' concerns and made excuses; when McLaughlin was fired at the end of June 2017, they had paid him roughly $37,000 for his labor, but he had completed, at most, twenty percent of the work; and they paid McLaughlin $10,631 for various materials that they never received, including rough plumbing materials, trusses, a joist, and other general building materials. Other witnesses for the State, including the Town of Standish's code enforcement officer, testified that the work McLaughlin did complete was not

only inconsistent with the original building plan, but had to be torn down because it was not structurally sound and violated local building codes. The court declared that contrary to McLaughlin's argument, the evidence was enough for the jury to have found that McLaughlin's deception was contemporaneous with the intent to deprive at some point. On this evidence, the jury rationally could have inferred that McLaughlin both deceived the victims about his intent to perform and intended to deprive them of their money all along. Alternatively, the jury could have found that McLaughlin deceived the victims with respect to his ability to perform the work—i.e., his knowledge of home construction, the existence of his team of laborers, and his ability to retain subcontractors—to secure the contract, and, although he may have initially intended to do the work, he developed the intent to deprive later, showing up at the work site periodically as part of a ruse designed to ensure that the victims continued to pay him. Or the jury could have simply inferred that he deceived the victims with respect to those materials that were never delivered and accepted the payments for those materials, totaling $10,631, with the intent not to purchase or deliver the materials, but to instead keep the money. The court noted that there was no need to decide which inferences the jury drew or whether it could have drawn others. McLaughlin's final contention was that his actions constituted a mere breach of contract, not a criminal theft by deception. The court noted that it decided in a 2012 case that theft by deception may indeed occur even when there is a contract between the parties, and even if it were assumed that McLaughlin's initial representations about his ability to complete the work were mere "puffery," exaggerating or overselling his ability to convince the victims to hire him, the evidence here was sufficient to support the jury's verdict.

State v. Gregory McLaughlin (June 4, 2020)
https://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2020/20me082.pdf

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Fourth Amendment – Warrantless Blood Test – Good Faith Exception

Blood Test Results Admissible Under Good Faith Exception

The statute (Title 29-A, § 2522) that mandates a blood test if there is probable cause to believe that death has occurred or will occur as a result of a crash is unconstitutional. While not precedential in Maine, the U.S. Supreme Court has applied the Exclusionary Rule's good faith exception to situations where an officer reasonably relied on a statute that was later determined to be unconstitutional when the officer had no reason to believe that the statute was unconstitutional and application of the exclusionary rule would not serve its purpose of deterrence.

Important Note. In that it is now clearly established by virtue of this decision that Title 29-A M.R.S. § 2522 is unconstitutional, it is no longer objectively reasonable to rely on the statute in gathering evidence of impaired driving.

On March 18, 2016, law enforcement officers, firefighters, and medical rescue personnel responded to a major motor vehicle crash on Route 17 in Washington, Maine. When they arrived, first responders were faced with a crash scene that involved five vehicles, one of which was engulfed in flames. There were many vehicle occupants potentially in need of medical care, and two drivers who were dead. A large tractor trailer was upside down in a ditch

alongside Route 17, with its load of lumber strewn across the road and into the ditch. The operator of the tractor trailer, Weddle, needed to be extricated from the cab of the truck. In addition to the crash and its aftermath, the first responders were also faced with the closure of Route 17—the major road between Augusta and Rockland—which required the management and redirection of a significant flow of traffic travelling east and west at rush hour. In short, the crash scene was "chaotic, confusing, intense and large."

A sergeant with the Knox County Sheriff's Department, believing that Weddle may have been responsible for the accident, decided that it was necessary to preserve any evidence by taking a blood sample from Weddle. Prior to the blood draw, the officer did not have information that caused him to believe that there was probable cause to believe that Weddle had been under the influence of alcohol or drugs at the time of the crash. Instead, the officer relied solely upon his knowledge and understanding of Maine's mandatory blood draw statute. *See* 29-A M.R.S. § 2522(2). A second officer of the Knox County Sheriff's Department also testified that he did not believe that he had probable cause to believe that Weddle was operating while impaired. It took about an hour to extricate Weddle from his overturned truck. Weddle was placed on a backboard for transport to a hospital via helicopter. While medical personnel were preparing Weddle for transport, the Knox County officer directed an EMT to take a sample of Weddle's blood. At no time before taking the sample did the officer request a warrant, try to gather information about Weddle's state of sobriety, or try to obtain Weddle's consent. Several hours later, while Weddle was at the hospital for treatment, he consented to law enforcement officers obtaining a second sample of blood from some that had been drawn by hospital personnel. The results of the hospital sample showed a BAC of .07%. Several days after the crash, during a vehicle autopsy on Weddle's truck, law enforcement officers discovered a three-quarters-full bottle of Crown Royal whiskey and a shot glass in the cab of the truck.

Following denial of his motion to suppress results of the warrantless blood draw that he claimed was unconstitutional, Weddle was convicted of two counts of manslaughter, two counts of causing a death while operating under the influence, causing injury while operating under the influence, aggravated driving to endanger, driving to endanger, and eight counts of violations of commercial motor carrier operator rules. Weddle appealed, arguing again that the warrantless blood draw was unconstitutional.

While the Law Court agreed that the statute allowing for the warrantless blood draw without probable cause is indeed unconstitutional, it affirmed Weddle's convictions and concurred with the trial court that the BAC results were admissible as a function of the Exclusionary Rule's "good faith exception." Its decision came after finding that no exception to the warrant requirement applied to the situation, including the "special needs doctrine" or the inevitable discovery or exigency exceptions. In so doing, the court overruled its 2007 decision in *State v. Cormier* (2007 ME 112) in which it ruled that the statute did not violate the defendant's Fourth Amendment rights.

State v. Randall Weddle (January 28, 2020)
https://www.courts.maine.gov/opinions_orders/supreme/lawcourt/2020/20me012.pdf

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