



BOARD ON POLICE STANDARDS AND TRAINING

158 12th ST., N.E. • SALEM, OREGON • 97310 • Ph. 364-2171 Ext. 1250 and 1257

TOM McCALL
GOVERNOR

RUPERT L. GILLMOUTHE
Sheriff
Hood River County
Chairman

HAROLD A. ELLSWORTH
Chief of Police
Eugene
Vice Chairman

MEMBERS

JAMES J. DUNLEVY
Mayor
Medford

DON EVA
Attorney
Portland

BYRON W. HAZELTON
Major
Oregon State Police
Salem

BERNARD L. HUELSKAMP
Asst. Special Agent in Charge
Federal Bureau of Investigation
Portland

JAMES H. JONES
Chief of Police
Astoria

THE LAW ON SEARCH AND SEIZURE

Outline prepared by

ROBERT A. LUCAS, Deputy District Attorney

Multnomah County, Oregon

992

000992

Published by:
BOARD ON POLICE STANDARDS AND TRAINING
ENFORCEMENT ASSISTANCE GRANT
Salem, Oregon - January, 1968

Reprint November - 1968

Reprint January - 1969

THE LAW ON SEARCH & SEIZURE

INDEX

1. Introduction
2. Early History of the Law on Search and Seizure
3. Exclusionary Rule, Effect and Exceptions
 - a. In General
 - b. Effect of Exclusionary Rule
 - c. Exceptions to Exclusionary Rule
 - (1) Searches by Private Persons
 - (2) Searches Unreasonable as to Third Persons
 - (3) Impeaching the Defendant's Credibility
4. The Law of Search and Seizure
 - a. 4th Amendment and Art. 1, Section 9 of the Oregon Const.
 - b. Premises Protected by Fourth Amendment
 - c. What Is Not a Search
 - d. What Is Not a Seizure
 - e. Results of an Illegal Search by Police
5. Search With a Search Warrant
 - a. In General
 - b. Search Warrants May Be Obtained For Searches of:
 - (1) Persons
 - (2) Premises
 - (3) Vehicles
 - c. Things For Which a Search Warrant May Be Issued
 - d. Obtaining the Search Warrant
 - (1) Who May Issue Search Warrants
 - (2) Affidavit of Probable Cause
 - (3) Form of Search Warrant

INDEX CONTINUED

- (4) Description of Premises to be Searched
- (5) Description of Property Sought
- (6) To Whom Issued
- e. Executing the Search Warrant
 - (1) By Whom Executed
 - (2) Time of Execution
 - (3) Physical Extent of the Search
 - (4) Time Consumed by the Search
 - (5) Extent of Seizure
 - (6) Use of Force
 - (7) Arrest of Persons on the Premises
 - (8) Search of Persons on the Premises
 - (9) Reading Warrant to Occupant
- f. Receipt for Property Taken
- g. Return of the Search Warrant
- h. Practical Tips in Serving Search Warrants
- 6. Search of the Person
 - a. Search with a Search Warrant
 - b. Search by Consent
 - c. Search of Person Incidental to Arrest
 - (1) In General
 - (2) Purpose of the Search
 - (3) Arrest Must Be Lawful and Bona Fide
 - (4) Who May Search
 - (5) Time and Place of Search
 - (6) Extent of the Search
 - (a) In General

INDEX CONTINUED

- (b) Packages, Suitcases and Other Containers
- (c) Body Cavities
- (d) Blood Samples
- (7) Extent of Seizure
- 7. Search of Premises
 - a. Search of Premises With a Warrant
 - b. Search of Premises With Consent
 - (1) In General
 - (2) Elements of a Voluntary Consent
 - (a) Specific Consent to Search
 - (b) Unequivocal Language
 - (c) Absence of Fraud
 - (d) Miscellaneous
 - (3) Extent of Search
 - (4) Who May Consent
 - (a) Landlord or Hotel Clerk
 - (b) Spouse
 - (c) Employer-Employee
 - (d) Guest or Visitor
 - (e) Common Occupants and Joint Tenants
 - c. Search of Premises Incidental to Arrest
 - (1) In General
 - (2) Probable Cause for Search of Premises
 - (3) Arrest Must Be Lawful and Bona Fide
 - (4) Search Must Be Contemporaneous With Arrest
 - (5) Arrest Inside and Outside the Premises
 - (6) Elements of a Reasonable Search
 - (a) Not Exploratory

INDEX CONTINUED

- (b) Area of Search
- (c) Objects of Search and Seizure
- (d) Scope of Search
- d. Search of Premises Under "Exceptional Circumstances"
- 8. Search of Vehicles
 - a. In General
 - b. Search by a Search Warrant
 - c. Search With Consent
 - d. What Is Not a Search or Seizure
 - e. Search of Mobile Vehicle on Probable Cause
 - f. Search of Vehicle Incidental to Arrest
 - (1) Arrest Must Be Lawful and Bona Fide
 - (2) Arrest Must Be At Vehicle
 - (3) Search Must Be Contemporaneous With the Arrest
 - (4) Extent of Search
 - (5) Extent of Seizure
 - g. Search After Lawful Impoundment
 - h. Traffic Arrests, Motor Vehicle Safety Inspections and Other Detentions

LAW ON SEARCH & SEIZURE

1. Introduction

The law of search and seizure is an area that all police officers, both recruit and experienced, must learn thoroughly and keep current on in order to adequately do their job. The constitutional provisions in this regard are of great importance to law enforcement officers not only because they set out general standards in protecting personal liberties, but also because a misunderstanding thereof will result in frustration to the officer in many instances at the conclusion of the case when it is presented in court. It is imperative that all persons concerned with law enforcement keep abreast of recent decisions and developments regarding search and seizure so as to deny the criminal element the opportunity to evade conviction because of a technical mistake. The purpose of this course is to educate you in the law of search and seizure and to aid in plugging any technical gaps that might allow the criminal element to escape.

2. Early History of the Law on Search and Seizure

a. The common law rule followed in the American colonies was the English rule that evidence obtained by illegal search and seizure was nevertheless admissible in a criminal trial if it tended to prove an issue in the case. This rule is still followed in England, Canada and other common law nations.

b. Later the Colonies began to protest the "Writs of Assistance" which actually were general warrants issued by the Crown. These writs were issued on suspicion only -- no probable cause was required.

3. Exclusionary Rule, Effect and Exceptions

a. In General - In 1914, the United States Supreme Court in Weeks v. U.S., 232 US 383, rejected the common law rule and held that evidence obtained by

an unreasonable search and seizure will be excluded from court. So the "Exclusionary Rule" was born. The rule then applied only to federal officers in federal courts. The court reasoned that this was the only way to enforce the provisions of the Fourth Amendment relating to unreasonable searches and seizures.

This "Exclusionary Rule" was broadened in scope until finally in Mapp v. Ohio, 367 US 643, decided in 1961, the court held that thereafter evidence obtained by procedures that violate Fourth Amendment standards would not be admissible in state courts either.

b. Effect of Exclusionary Rule - The effect of the "Exclusionary Rule" is to cause all evidence that is obtained as a result of an unreasonable search or seizure by police officers to be excluded from court. The minimum standard today in deciding what is an "unreasonable search or seizure" is the Fourth Amendment and cases interpreting it.

c. Exceptions to Exclusionary Rule -

(1) Searches by Private Persons - The 4th Amendment is a restriction against government action only. Evidence obtained by the prosecution through an unlawful search and seizure made by a private person is outside the scope of the rule. Such evidence is admissible.¹ If the court finds that the police participated in the search in any manner whatsoever, it will be tainted and the exclusionary rule will apply.²

(2) Searches Unreasonable as to Third Persons - Another exception relates to evidence obtained by unreasonable searches and seizures by police officers in violation of the constitutional rights of individuals other than the defendant. If the defendant cannot complain or has no standing to complain that the search was unreasonable as to him, then the exclusionary rule does not apply. Beware, however, as the courts have been very liberal in construing that the defendant has standing to complain and holding that his rights were violated.³

(3) Impeaching the Defendant's Credibility - This exception is of little practical significance. It deals with the right of the prosecution to produce the illegally seized evidence to impeach the defendant with after the defendant has denied ever possessing it on direct examination. The unlawful search cannot be used by the defendant as " . . . a shield against contradiction of his own untruths."⁴

4. The Law of Search and Seizure

a. Fourth Amendment and Article 1, Section 9 of the Ore. Constitution

(1) Fourth Amendment -

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) Article 1, Section 9 of the Oregon Constitution

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

(3) As can be readily seen, the federal and state constitutional guarantees relating to search and seizure are almost identical. The key words therein are probably "unreasonable" and "probable cause". Most cases involve interpretations of those terms.

The only searches and seizures made illegal are those which are unreasonable. Neither constitution defines the word "unreasonable". There is no ready made test or fixed formula for use in all situations. The question of reasonableness must find resolution in the facts and circumstances of each case. Following are some of the factors considered in determining whether or not the search was reasonable:

(a) How the search was commenced, ie, with search warrant, by consent, or incidental to arrest?

(b) Gravity of the offense, ie, kidnapping case or minor in possession of liquor?

(c) Type of premises searched, ie, business or private residence?

(d) Size of object sought?

(e) Nature of thing sought, ie, fruits of crime or mere evidence?

(f) Extent of arrested person's control over premises?

(g) Nature of search, ie, exploratory search?

A discussion of probable cause follows under section dealing with search warrants.

b. Premises protected by Fourth Amendment

(1) Houses - interpreted broadly to include any dwelling,⁵ business, office or store.⁶

(2) Curtilage - generally the yard surrounding a dwelling enjoys the same protection as the dwelling. There are federal district court decisions that have gone both ways on this issue.

(3) Miscellaneous - protection applies towards one's persons, papers and effects. This includes vehicles, safe deposit boxes and mail.

c. What Is Not a Search - It is not a search for an officer to see what is open and visible to the eye when seen from any place where he is lawfully entitled to be. Therefore, an officer observing things while in the following places is not making a search:

(1) Open fields.⁷

(2) Public places.⁸

(3) In private premises while there on lawful business.⁹

d. What Is Not a Seizure

- (1) Abandoned property.¹⁰
- (2) Voluntarily surrendered property.¹¹
- (3) Contraband, known instrumentalities or fruits of crime in plain view while on premises lawfully.¹²

e. Results of an Illegal Search by Police

- (1) Return of property seized unless contraband or stolen property.
- (2) Exclusionary rule applies and evidence cannot be used at trial.

This excludes not only the physical evidence but also testimony by the police that they observed the evidence and seized it.

5. Search With a Search Warrant

a. In General - The first rule to remember involving searches is to ALWAYS OBTAIN A SEARCH WARRANT PRIOR TO MAKING A SEARCH WHEN TIME AND OTHER FACTORS WILL PERMIT THIS! The courts today are encouraging the use of search warrants and are being somewhat liberal in upholding cases involving search warrants.¹³

A search warrant is a written order by a court, based on a judicial determination that probable cause exists for its issuance, requiring a police officer to go to a particular place and look for specified property.

It is incumbent upon all police officers to thoroughly know what is required to obtain a search warrant, how to obtain a search warrant and the proper procedure in executing and making a return on a search warrant. Oregon law enforcement officers should be familiar with the provisions of Oregon Revised Statutes Chapter 141 from ORS 141.010 through 141.200 dealing with search warrants.

b. Search Warrants May Be Obtained For Searches of:

- (1) Persons
- (2) Premises, to include portions thereof such as safe deposit

boxes or lockers

- (3) Vehicles

c. Things For Which A Search Warrant May Be Issued

- (1) ORS 141.010 provides

"A search warrant may be issued upon any of the following grounds:

- (1) When the property was stolen or embezzled.
- (2) When the property was used in the commission of, or which would constitute evidence of, the crime.
- (3) When the property is either in the possession of a person who intends to use it as a means of committing a crime or in the possession of another to whom such person delivered it for the purpose of concealing it or preventing its being discovered."

- (2) This means that a search warrant may be issued to search for:¹⁴
 - (a) Stolen or embezzled property or other "fruits of the crime."
 - (b) Contraband
 - (c) Instrumentalities or property used in the commission of the crime.
 - (d) Evidence of the crime.

(3) A gun used in a robbery, a crowbar used to pry open a window during a burglary and the clothing and mask worn during a bank robbery are instrumentalities of crime.¹⁵ Stolen property and a marked \$5.00 bill received by the defendant in a sale of illegal narcotics are fruits of crime.¹⁶ A handkerchief found in defendant's home, pointed out by the child victim of a sex offense and allegedly bearing some tangible evidence of the offense, was held to be evidentiary only, not an instrumentality by which the crime was committed.¹⁷ In Oregon, by statute since 1963, a warrant can issue to search for evidence only. This differs from the federal rules which do not allow searches for evidence alone.¹⁸

d. Obtaining the Search Warrant

(1) Who may issue search warrants - ORS 141.040 provides

"A magistrate authorized to issue a warrant of arrest may issue a search warrant."

As a matter of practice in Oregon, search warrants should be issued by a judge in the county in which the search is to take place. If a felony is involved the better practice is to have a judge of a state court (municipal judge sitting as an ex-officio justice of the peace, justice of the peace, district court or circuit court judge) issue the search warrant.

(2) Affidavit of probable cause - ORS 141.030 provides

"A search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched."

The Fourth Amendment and Article 1, Section 9 of the Oregon Constitution also require "probable cause" for the issuance of a search warrant.

"Probable cause" exists for issuance of a search warrant where facts and circumstances within the officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime has been or is being committed.¹⁹ This is more than mere suspicion, but it can be less than the evidence needed to prove guilt at trial. Hearsay information from a confidential informant may be used.²⁰

The name of the informer need not be disclosed unless necessary to show his reliability or necessary to defendant's case.²¹

ORS 141.050 provides

"Before issuing the warrant, the magistrate shall examine on oath the complainant and any witnesses he may produce, take their depositions in writing and cause the depositions to be subscribed by the parties making them."

The Oregon Supreme Court has held that this procedure is the same procedure as that referred to in ORS 141.030 regarding the affidavit.²² In some instances an affidavit by more than one person might be necessary in order to obtain "probable cause".

"If the magistrate is satisfied that there is probable cause to believe that the grounds of the application exist, he shall issue the search warrant." ORS 141.060

(3) Form of search warrant - ORS 141.080 provides that a search warrant shall be in substantially the form set out therein. A sample search warrant and affidavit are attached herewith as Enclosure #1.

(4) Description of premises to be searched - The search warrant must particularly describe the place to be searched. This description is sufficient if it is such that the officer executing the warrant can with reasonable effort identify the exact place, to the distinction of all others.²³

If a search is to be directed at a specified apartment in a building occupied by a certain individual, then those facts should be set out in the affidavit and the search warrant. Multiple unit buildings seem to cause the most problems regarding "particularly describing the place to be searched." It is not sufficient to include the entire building when "probable cause" exists only to search one apartment therein. The best rule is to couple the name of the occupant with the description of the apartment, ie, "Apt. #7, 1020 Main Street, Portland, Multnomah County, Oregon, occupied by Jonathan Jones."²⁴

(5) Description of property sought - The search warrant must "particularly describe" the things to be seized. If the warrant fails to adequately describe the property, any seizure made under it is illegal.²⁵ Obviously, the officer must obtain the most specific description of the

goods that is reasonably possible under the circumstances. For instance, if it is stolen property that is being sought, include the serial number, if known, and the name, size and color of the item.

(6) To whom issued - The search warrant will normally be directed to a certain class of law enforcement officer, such as, "to the sheriff or his deputies" or "to any peace officer of the County of Multnomah".²⁶

e. Executing the Search Warrant

(1) By whom executed - A search warrant must be executed by the officer of the name or title to which issued or within the class specified, assisted by other officers as needed.

(2) Time of execution - ORS 141.100 provides

"A search warrant must be executed and returned to the magistrate by whom it was issued within 10 days from its date, unless such magistrate, before the expiration of such time, by indorsement thereon, extends the time for 5 days. After the expiration of the time prescribed by this section, the warrant, unless executed, is void."

The warrant should, as a general rule, be executed as early as possible within the period of time set out by statute.

(3) Physical extent of the search - The search should include all parts of the building which come within the description in the warrant and which, judged by construction and usage, are reasonably and logically a part of it.²⁷ The size of the object sought will govern the intensiveness of the search. In other words if you are looking for a stolen refrigerator, you are not entitled to search drawers or other small places where the refrigerator could not possibly be concealed. A search for a stolen diamond ring, however, would authorize a search of drawers and other small places. "Reasonableness" is the key. Common sense must be used by the searchers.

Once the articles described in the search warrant are located, identified and seized, the search must end, assuming no intervening legal basis for additional search such as an arrest made on the premises.

(4) Time consumed by the search - Whatever is reasonable under the circumstances is allowed to make the search. No more time than is needed should be utilized. Too much time could turn an otherwise lawful search into an "unreasonable search" so as to make the "Exclusionary Rule" applicable. The courts have upheld a 6½ hour search by nine Federal officers executing a search warrant in a gambling case,²⁸ and a 3½ hour search of a two-story building.²⁹

(5) Extent of Seizure - Only the things particularly described in the warrant, contraband and instrumentalities and fruits of other crimes (such as stolen property) found while conducting the search for the things "particularly described" may be seized.³⁰

(6) Use of force - The following statutes apply:

(a) "In the execution or service of a search warrant, the officer has the same power and authority, in all respects, to break open any door or window, to use all necessary and proper means to overcome any forcible resistance made to him or to call any other person to his aid that he has in the execution or service of a warrant of arrest." ORS 141.110

(b) "The officer may break open any outer or inner door or window of a dwelling house, or otherwise, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." ORS 133.290

The general rule is that the police officer must identify himself as a police officer, state that his purpose is to serve a search warrant and be denied admittance prior to forceably breaking into the premises.

There is a growing line of authority, however, justifying noncompliance with statutes requiring advance notice when exigent circumstances exist,