2009
CASE LAW
UPDATE

Summaries of Recent Court Decisions
of Interest to Law Enforcement Officers

United States Supreme Court
First Circuit Court of Appeals
Maine Supreme Judicial Court

SEPTEMBER 2008 – AUGUST 2009

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

August 31, 2009

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This publication and the 2009 New Law Update constitute the training outline of the Maine Criminal Justice Academy for recertification training in law updates for the year 2009.

Preparer's Note

The preparer of this document reviewed the published decisions of the United States Supreme Court, the First Circuit Court of Appeals, and the Maine Supreme Judicial Court for the period September 2008 through August 2009, and selected cases for inclusion in the document believed to be of general interest to Maine law enforcement officers. The document is not a listing of all decisions of the three appellate courts.

In the interest of clarity and brevity, the selected decisions have been summarized. The summaries are those of the preparer – unless noted otherwise – and do not represent legal opinions of the Office of the Attorney General or interpretations of the Maine Criminal Justice Academy or the Maine Chiefs of Police Association.

If a particular decision is of interest to the reader, an Internet link is provided so that the reader can review the entire text of the decision. This is highly recommended for a more comprehensive understanding, and particularly before taking any enforcement or other action.

The preparer wishes to recognize the invaluable support of Assistant Attorney General Donald W. Macomber of the Attorney General's Criminal Division who not only reviewed this document and offered meaningful comments and suggestions, but who is also always available to answer numerous inquiries posed to him throughout the year concerning criminal procedure and other constitutional issues.

If the reader has questions, suggestions, or other comments, the preparer may be contacted at:

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United States Supreme Court

Fourth Amendment – Search of Vehicle Incident to Arrest

Court Restricts Vehicle Searches Incident to Arrest

Police are authorized to search the passenger compartment of a vehicle incident to arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or when officers reasonably believe that evidence relevant to the crime of arrest might be found in the vehicle.

FACTS: Gant was arrested for driving on a suspended license. Gant was handcuffed and locked in a patrol car after which officers searched the passenger compartment of his car and found a firearm and cocaine. Gant argued that it was not possible for him to access the vehicle to gain control of a weapon or evidence, and therefore the search of his vehicle was not reasonable.

HELD: Police are authorized to search the passenger compartment of a vehicle incident to arrest when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. Additionally, officers may search the passenger compartment when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. The Court noted that "it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains." In such a rare case, however, a search incident to arrest of the passenger compartment would be reasonable under the Fourth Amendment. The Court also held that even if an arrestee can no longer access the vehicle's passenger compartment, a search incident to arrest will also be permitted "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." In many cases, such as arrests for traffic violations, there will be no reasonable basis to believe that the vehicle contains relevant evidence. In other cases, however, such as arrests for possession of controlled substances, the basis of the arrest will supply an acceptable rationale for searching the arrestee's passenger compartment.

DISCUSSION: The Supreme Court first established the search incident to arrest exception to the warrant requirement in 1969 (Chimel). The ruling held that police may, incident to arrest, search the arrestee's "lunging area," which is defined as the area from within which the arrestee might gain possession of a weapon or destructible evidence. This exception was intended to protect arresting officers and safeguard evidence of the offense that an arrestee might conceal or destroy. The Court in 1981 (Belton) defined the scope of a *vehicle* search incident to arrest, holding that a search incident to arrest of a vehicle encompasses the entire passenger compartment. Later in 2003 (Thornton), the Court added that a search incident to arrest of a vehicle may be justified even if an occupant has gotten out of the vehicle, closed the door, and walked a short distance away before being arrested. These searches were authorized regardless of an arrestee's ability to access the passenger compartment following the arrest.

Other vehicle search exceptions remain available. The Court noted that other established exceptions to the search warrant requirement remain available to safeguard evidence and protect the safety of officers. For example, if an officer has reasonable

suspicion that a passenger or recent occupant of a vehicle – whether arrested or not – is dangerous and may gain access to a weapon, the officer may frisk the passenger compartment for weapons. Too, if an officer has probable cause that the vehicle contains evidence of criminal activity, the officer may conduct a thorough search of any area of the vehicle in which the evidence might be found. Finally, if an officer conducting an arrest reasonably suspects that a dangerous person is hiding in a nearby vehicle, the officer may conduct a protective sweep of the vehicle by looking in places where such a person might be concealed. Although not specifically mentioned by the Court, an inventory of a vehicle's contents following a lawful impound is another exception to the search warrant requirement. This administrative exception, however, may not be used as a pretext for a criminal search. Consent also remains a viable option.

Arizona v. Gant (April 21, 2009)
http://supct.law.cornell.edu/supct/pdf/07-542P.ZO

Fourth Amendment – Stop and Frisk

Frisk of Passenger for Weapons Constitutional

Terry frisk of passenger who was ordered out of the vehicle during a legitimate traffic stop was lawful where the officer reasonably concluded that the passenger could be armed and dangerous. This was so despite the officer's intention to ask the passenger about gang activities, a matter unrelated to the stop.

FACTS: While patrolling near a Tucson neighborhood associated with the Crips gang, police officers serving on Arizona's gang task force stopped an automobile for a vehicular infraction warranting a citation. At the time of the stop, the officers had no reason to suspect the car's occupants of criminal activity. Officer Trevizo attended to respondent Johnson, the back-seat passenger, whose behavior and clothing caused Trevizo to question him. After learning that Johnson was from a town with a Crips gang and that he had been in prison, Trevizo asked him to get out of the car in order to question him further out of the hearing of the front-seat passenger. Trevizo asked Johnson about his gang affiliation. Because the officer suspected that Johnson was armed, she patted him down for safety when he exited the car. During the patdown, she felt the butt of a gun. At that point, Johnson began to struggle, and Trevizo handcuffed him. Johnson was charged with possession of a weapon by a prohibited possessor. The trial court denied Johnson's motion to suppress the evidence, concluding that the stop was lawful and that Trevizo had cause to suspect Johnson was armed and dangerous. Johnson was convicted, and the Arizona Court of Appeals reversed. While recognizing that Johnson was lawfully seized, the court found that, prior to the frisk, the detention had evolved into a consensual conversation about his gang affiliation in that the officer's questioning went beyond the original purpose of the stop. Trevizo, the court therefore concluded, had no right to pat Johnson down even if she had reason to suspect he was armed and dangerous.

HELD: Officer Trevizo's patdown of Johnson did not violate the Fourth Amendment's prohibition on unreasonable searches and seizures. The Court noted that it had previously held that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver and/or passengers to get out of the vehicle without violating the Fourth Amendment. Other decisions have established that a driver or passenger, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver might be armed and dangerous. Further, the Court concluded that an officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the duration of the stop.

Arizona v. Johnson (January 26, 2009)
http://supct.law.cornell.edu/supct/pdf/07-1122P.ZO

Fourth Amendment – Exclusionary Rule

Mistaken Belief Invokes Good Faith Exception

When police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the Exclusionary Rule does not apply.

FACTS: Officers in one county arrested petitioner Herring based on a warrant listed in a neighboring county's outstanding warrant database. A search incident to that arrest yielded drugs and a gun. It was then revealed that the warrant had been recalled months earlier, though this information had never been entered into the database. Herring was indicted on federal gun and drug possession charges and moved to suppress the evidence on the ground that his initial arrest had been illegal. Assuming that there was a Fourth Amendment violation in the arrest of Herring, the District Court concluded that the Exclusionary Rule did not apply and denied the motion to suppress. The Eleventh Circuit affirmed, finding that the arresting officers were innocent of any wrongdoing, and that the neighboring county's failure to update the records was merely negligent.

HELD: The U.S. Supreme Court concluded that the evidence was admissible under the good-faith rule of United States v. Leon.

DISCUSSION: Under Leon, the Exclusionary Rule does not apply if police acted in objectively reasonable reliance on an invalid warrant. Here, the police reasonably relied on what turned out to be mistaken information in a neighboring county's outstanding database. The Court noted that the extent to which the Exclusionary Rule is justified by its deterrent effect varies with the degree of law enforcement culpability. Indeed, the Court said, the abuses that gave rise to the rule in the first place featured intentional conduct by the police that was patently unconstitutional. The adoption of the Exclusionary Rule was for the sole purpose of deterring such police abuses. The conduct in this case was not so culpable on the part of the police as to require exclusion.

Herring v. United States (January 14, 2009)
http://supct.law.cornell.edu/supct/pdf/07-513P.ZO

Sixth Amendment – Right to Counsel

Automatic Right to Legal Counsel Overruled

Michigan v. Jackson, which essentially provided for an automatic assertion of the Sixth Amendment right to counsel at arraignment or a similar proceeding, is overruled. The rule was *meant to prevent police from badgering a defendant into changing his or her mind about the right to counsel once invoked, but a defendant who never asked for counsel has not yet made up his mind, and questioning him under Miranda does not violate the Sixth Amendment right to counsel.*.

FACTS: At a preliminary hearing required by state law, Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under *Miranda*, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim's widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. Affirming, the State Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan* v. *Jackson*, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The court reasoned that *Jackson*'s protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

HELD: *Michigan* v. *Jackson,* which essentially provided for an automatic assertion of the Sixth Amendment right to counsel at arraignment or a similar proceeding, is overruled.

DISCUSSION: The Court determined that the rule of *Jackson* has proved unworkable, and that fact in and of itself is a traditional ground for overruling it. The Court noted that even without *Jackson,* few badgering-induced waivers, if any, would be admitted at trial because the Court has taken other substantial measures to exclude involuntary statements, including the requirement that under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. It remains that under another previous case, *Edwards,* once a defendant has invoked his *Miranda* right to legal counsel, interrogation must stop; and, under *Minnick*, no subsequent interrogation may take place until counsel is present. The Court reasoned that these three layers of protection (*Miranda, Edwards,* and *Minnick*) are sufficient. The Court, in overruling *Jackson,* concluded that the cost of applying *Jackson*'s rule is that crimes can go unsolved and criminals unpunished when uncoerced confessions are excluded and when officers are deterred from even trying to obtain confessions.

Montejo v. Louisiana (May 26, 2009)
http://supct.law.cornell.edu/supct/pdf/07-1529P.ZO

First Circuit Court of Appeals

Fourth Amendment – Use of Deadly Force – Maine Case

OFFICERS LEGALLY JUSTIFIED IN SHOOTING

The officers were entitled to qualified immunity on the Fourth Amendment claims, including the shooting. It could not be said that the officers' actions were so deficient that no reasonable officer would have done the same. As for departmental liability, assuming a constitutional violation occurred, the evidence did not allow a finding of a policy, custom, practice, or deliberate indifference by the sheriff or the county in order to establish supervisory liability.

FACTS: Between 1996 and 2000, Daniel Bennett suffered various psychological problems for which he was taking prescribed medication. In November 1999, Bennett stopped taking his medication. During the course of Bennett's illness, the police had been summoned to his home on various occasions. Those police interventions resulted in Bennett being safely transported to a mental care facility each time. The events giving rise to the present appeal took place on January 21, 2000. On that morning Bennett walked from Buckfield to his grandmother's house in Sumner (Bedard residence), a distance of between 10 and 15 miles, in the snow wearing only slippers. Upon his arrival, he beat a stray dog to death. Though the Estate asserts that his family did not perceive Bennett to be a threat, Bennett's grandmother Isabel became concerned and attempted to call his mother, Arlene. When Arlene could not be reached, Isabel called Bennett's sister, Laurie. Laurie eventually contacted Arlene, who said she would go to the Bedard residence. Laurie nonetheless remained concerned and called her cousin Derrick Laughton, to request that he go to the Bedard residence immediately; he agreed to do so. Laurie then called her husband at work and told his employer that there was an emergency. Laurie's husband also went to the Bedard residence.

Upon Arlene's arrival at the house, she found Isabel, Laughton, and Laughton's father there. Arlene tried speaking to Bennett, but he replied "leave me the fuck alone, I don't want to kill you, too." Arlene then called 911 and stated "[Bennett] just told me to get out of there, he's going to kill me, so I came out here to call you." Arlene also told the dispatcher that Bennett had killed a dog with a bat; that he was not taking his prescribed medication; that there were firearms inside the Bedard residence that were either non-functional or the location of which was unknown to Bennett; and that they "need somebody right away."

The 911 operator contacted the Oxford County Sheriff's Department at approximately 2:00 p.m. Deputy Sheriff Christopher Wainwright was the first officer to arrive at the scene. Wainwright had been told that Bennett had beaten a dog to death with a baseball bat, had threatened family members, and that there was a rifle and a shotgun present in the Bedard residence. He thereupon requested that a perimeter be established around the residence and that a Maine state police unit, as well as Deputy Sheriff Matthew Baker and an area game warden, also respond. Wainwright and State Police Trooper Timothy Turner entered the Bedard residence simultaneously. They spoke to the family members gathered in the kitchen and were shown the door leading through the living room to the

back of the house where Bennett was located. Wainwright and Turner notified the family members that they had to evacuate. The family did so against their wishes. Isabel insisted that they keep the wood fires going inside the house lest the water pipes freeze and burst in the extremely cold weather. Wainwright and Turner accompanied the family to Laurie's residence nearby. As they were leaving, Bennett momentarily emerged from the back of the house and yelled "get the fuck out!"

Sheriff's Captain James Miclon arrived on the scene shortly thereafter and became the ranking officer. He ordered Turner and Wainwright to return to the house and assume a defensive position until the State Police tactical team arrived. Chief Deputy James Davis subsequently arrived on the scene, became the ranking officer, and confirmed these orders. Wainwright and Turner, along with Deputy Sheriff Matthew Baker, re-entered the Bedard residence at approximately 3:10 p.m. and took positions in the kitchen. Baker brought with him a department-issue shotgun which he later exchanged for a lighter "long gun," an AR-15 belonging to Wainwright. As the tactical team assembled outside, Wainwright, Turner, and Baker took turns monitoring the doorway that led through the living room to where Bennett was located. At that point, the officers believed that Bennett had to be taken into protective custody and transferred to a psychiatric facility.

Captain Miclon contacted the District Attorney's office and sought a warrant, but was refused for lack of probable cause. In an effort to secure additional information, Miclon visited Laurie's house to speak to the assembled Bedard family members. While there, both he and Laurie tried to contact Bennett by phone but were unsuccessful. The family members then prepared two diagrams of the Bedard residence indicating the location of the firearms, and Arlene again informed Miclon that Bennett did not know where the guns were and that the only functional firearm was a single-shot breach-loader. Back at the Bedard residence, Wainwright identified himself from the kitchen and tried communicating with Bennett but was unsuccessful. Thereafter, Bennett emerged from the back of the house and entered the living room briefly on two occasions. On one of those occasions, Bennett surprised Baker by saying "oh shit" and Baker responded by pointing the AR-15 at him and ordering him to put his hands up. When Bennett did so, he was clutching a roll of toilet paper. After both such instances, Bennett retreated peacefully towards the back part of the house.

On his third foray, however, Bennett entered the living room without warning and aimed a single-shot breach-loader shotgun at Baker, to which Baker responded by yelling "Danny, drop the gun, drop the gun." Bennett nonetheless fired and Baker responded with five rounds from the AR-15. Wainwright also fired a full 13-shot magazine from his 40-caliber handgun and then reloaded. Turner did not fire because he was behind a wall that obstructed his view. After reloading, Wainwright walked into the living room and fired two or three more shots at Bennett, who had fallen behind the sofa. Members of the Sheriff's Office and State Police rushed the Bedard residence. A State Police sergeant performed CPR on Bennett, and Bennett was transported to a hospital at 4:20 p.m. He was pronounced dead at 5:20 p.m. Bennett had been hit by the AR-15 five times, resulting in two through-and-through wounds in the left arm, a wound to the left shoulder, and Bennett's left pinky finger being shot off. The 40-caliber handgun produced two wounds, one to the head and the other to the chest.

HELD: The officers were entitled to summary judgment. The officers' actions were not so deficient that no reasonable officer in their position would have made the same choices under these circumstances.

DISCUSSION: In the Fourth Amendment context, the use of deadly force is not excessive if an objectively reasonable officer in the same circumstances would have believed that an individual posed a 'threat of serious physical harm either to the officer or others. Moreover, whether an officer's use of force is reasonable must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. In this case, reasonable officers in Wainwright and Baker's position, faced with an armed mentally ill man, who had already shot at them once, could reasonably believe that they were faced with imminent and grave physical harm that justified resort to deadly force.

The fact that officers Wainwright and Baker fired multiple shots at Bennett, and might even have reloaded their weapons, does not change the assessment. The actions of an officer who continues to fire at a suspect after he falls to the ground cannot be found "unreasonable" because the officer failed to perfectly calibrate the amount of force required to protect himself or herself. Wainwright, in the context of this tense and dangerous situation, could have reasonably believed that Bennett posed a continuing threat, and that his own safety and the safety of the other officers required him to keep firing. An objectively reasonable officer in their situation could have felt at risk of serious bodily harm and believed deadly force to be necessary and lawful, and that is sufficient to legitimize the officers' use of deadly force.

Bennett v. Wainwright (November 26, 2008)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=072169&exact=1

Fourth Amendment – Excessive Force – Maine Case

TASER USE EXCESSIVE FOR CIRCUMSTANCES

The arrestee was not engaging in a serious offense which itself would justify the use of force under the Fourth Amendment. The arrestee was largely compliant and the officers did not appear to treat him as a threat during the encounter. When considering whether it was reasonable for the officer to fire his Taser, the jury could have turned to testimony about the strong incapacitating effect of the Taser and the fact that the police department considered the Taser just below deadly force in its "continuum" of force.

FACTS: At around noon on July 20, 2005, Parker and his girlfriend went boating. While on the boat, Parker consumed "3 or 4" 16-ounce cups of a cocktail of ginger ale and whiskey. At around 7:00 PM, Parker docked his boat in the marina and proceeded to drive his girlfriend home. While driving home, Parker passed Gerrish, who was serving a warrant with Officer Jeffrey Caldwell. Gerrish observed Parker's vehicle, visually estimated that Parker was speeding, pursued Parker, and effected a traffic stop. When Gerrish turned on his police lights, a video camera began recording. The video recording did not include audio. This recording indicates the time of the stop to be approximately 7:49 PM. Gerrish asked Parker for his license and registration and noticed signs of

intoxication. Parker admitted to Gerrish that he had three or four drinks. At trial, Parker did not dispute that he was intoxicated at the time of the stop. Gerrish ordered Parker to exit the vehicle, and Parker complied. Gerrish and Parker moved behind Parker's vehicle, in direct view of the video camera. Parker cooperated with Gerrish through a number of sobriety tests, which Gerrish found indicated that Parker was intoxicated. In one test, Gerrish asked Parker to stand on his left foot. Gerrish demonstrated the procedure a number of times. Parker attempted the test but eventually began hopping, lost his balance, spun around, placed his hands on his vehicle, and said, "[D]o what you got to do." Parker expected to be arrested and Gerrish understood that Parker was giving himself up for arrest. At this point, approximately 7:57 PM on the video recording, Gerrish had been questioning Parker for approximately seven minutes.

Caldwell arrived on the scene during earlier tests, but was not initially within view of the video camera. Caldwell testified that his badge was on display and that he did not intervene in Gerrish's interview of Parker. But Parker testified that Caldwell's badge was not on display at first and that he did not learn until later in the encounter that Caldwell was a police officer. Parker further testified that Caldwell made intimidating gestures at Parker, shouted at Parker, and led Parker to be confused at some of Gerrish's instructions. Specifically, Parker testified that after he turned to place his hands on his truck, Caldwell was being "boisterous" and ordered him to turn back around. Gerrish also ordered Parker to turn around. Parker complied by turning back around, but admits that as he turned back to face the officers, he gave Caldwell the finger and said, "I don't even know who the fuck you are." Parker then crossed his arms in front of his chest. Parker also admits that he earlier said, "Fuck you," to Caldwell as he was placing his hands on the back of the truck. Though Gerrish had already decided he would arrest Parker regardless, Gerrish asked Parker to rate his own intoxication on a ten point scale. Gerrish then attempted to physically uncross Parker's arms and place him under arrest. Gerrish readied his handcuffs while grabbing Parker's arm, which was still crossed in front of his chest. Gerrish tried to move Parker's arm, but Parker resisted. Parker testified that he didn't hear Gerrish at that time as he was distracted by Caldwell.

Gerrish then stepped back, drew his Taser, and ordered Parker to turn around and place his hands behind his back. Parker complied, turned around, and clasped his right wrist with his left hand. Gerrish handed his handcuffs to Caldwell, who had recently entered the range of the video recorder. As Caldwell approached Parker, Parker told Caldwell that he was not afraid of him. Caldwell testified that he stepped back and was concerned there would be a struggle. But Caldwell then proceeded to cuff Parker's left wrist in two seconds. Caldwell then ordered Parker to release his own clasped right wrist. At first, Parker did not comply. Police Sergeant Todd Bernard, an officer who arrived on the scene, and Caldwell testified that Parker was warned that he would be "tased" if he did not comply. Parker testified that he never heard a warning. Caldwell then applied force to Parker's right hand in an effort to get Parker to release his wrist.

Parker testified that at this point he released his grip and was then shot with the Taser. Caldwell testified that Parker let go of his right wrist, and then Parker's right hand moved as if Parker was attempting to escape or attack. Caldwell testified that he then grabbed the right arm. Gerrish testified that he saw Parker's hand release, but the rest of Parker's

right arm was obscured by Caldwell. Nonetheless, Gerrish and Caldwell both testified that Parker dipped his shoulder and began to swing his right arm up. Gerrish testified that he saw Caldwell, "dip forward and appear to come up on his tiptoes as if he was being pulled off balance." At this point, Gerrish fired his Taser. Gerrish did not verbally announce the use of his Taser as is recommended. Caldwell was surprised by Gerrish's use of the Taser. Caldwell testified that approximately one second elapsed between when Parker released his grip and when Gerrish fired the Taser. On cross examination, Gerrish agreed that nothing Parker did prior to this instant "either in themselves or even in collectivity" justified the use of the Taser. Rather, Gerrish explained that he fired the Taser when he "saw a threat to Officer Caldwell" and "reacted."

The video recording reveals that approximately six seconds elapsed between the cuffing of the left hand and the firing of the Taser, during which time Caldwell was attempting to cuff Parker's right hand. Though Parker's right arm is obscured behind Caldwell in the video, Gerrish maintains on appeal that Parker's "dramatic" move is evident from the video recording. But the video recording shows only minimal movement by Parker at this key moment. In fact, Caldwell admitted that the movement he described Parker making just before he was shot with the Taser is not clearly visible on the video. The video does show some movement by Caldwell just before Gerrish fired the Taser. But, the video does not clearly reveal a "dramatic" move by Parker before Gerrish fired the Taser.

At the time that Gerrish fired the Taser, there were three officers on the scene. Bernard arrived on the scene approximately five to ten seconds before Gerrish fired the Taser. Gerrish was aware of Bernard's presence before he fired his Taser. Bernard also drew his Taser. Bernard did not fire his Taser, but explained that he had assumed a backup role to that of Gerrish. The parties did not dispute that Parker was unarmed and never assaulted or attempted to assault the officers on the scene. Gerrish also testified that Parker became increasingly frustrated as the encounter progressed. Parker did not dispute that at times he flexed his muscles and made gestures that were defiant.

At trial, the parties also elicited evidence regarding police procedures. The South Portland Police Department trained its officers in the use of the Taser, and listed the Taser just below deadly force on its use of force continuum. Department policy requires officers to use the least amount of reasonable force necessary to take someone in to custody. When asked on cross examination if having Bernard apply "soft hand control" to complete the cuffing should have been the first resort instead of the Taser, Gerrish replied, "In a perfect world, yes, it would have been." Gerrish later clarified that he viewed the Taser as appropriate since soft hand control had failed and the Taser and other control techniques existed to avoid a dangerous knock-down fight.

HELD: The Court determined the facts supported the jury's conclusion that Gerrish's use of the Taser was not reasonable under the circumstances. The seriousness of the offense weighed in favor of Parker. Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault. Further, since Parker complied with Gerrish's requests and exited the vehicle voluntarily, he no longer posed a threat of driving while intoxicated. Though the offense of resisting arrest

could certainly pose a risk to an arresting officer, the evidence presented to the jury could allow it to find that Parker was not meaningfully engaged in this offense.

DISCUSSION: Even to the extent Parker initially resisted releasing his hands for cuffing, a jury could find this resistance *de minimis* in light of the circumstances. Caldwell's attempt to get Parker to release his hand lasted only a few seconds. Parker testified that he released his hand and was then immediately shot with the Taser. Gerrish and Caldwell testified that Parker made a "dramatic" move, which pulled Caldwell off balance, leading them to fear an attack or attempted escape. But, considering Parker's testimony and the videotape, a reasonable jury could conclude that Parker made no "dramatic" threatening move. Thus, the evidence supports the conclusion that Parker was not engaging in a serious offense which itself would justify the use of force.
The jury could reasonably have concluded that Parker did not pose an immediate threat to the safety of the officers. Gerrish contends that he had only a second to evaluate Parker's arm movement and decide that Caldwell was threatened. The Court determined that in this case the seven-minute encounter demonstrated that Parker was largely compliant. The officers did not treat Parker as a threat during the encounter. And, a jury could have concluded that Parker simply released his hand and did not raise his arm as Caldwell was cuffing him.

That Parker was earlier insolent or frustrated does not change this conclusion. As Gerrish acknowledged, a reasonable officer would not discharge his Taser simply because of insolence. The Court noted that in some circumstances defiance and insolence might reasonably be seen as a factor which suggests a threat to the officer. But, in this case, Parker was largely compliant and twice gave himself up for arrest to the officers. Further, as Gerrish admitted, that Parker earlier harassed or resisted the officers does not justify the later use of the Taser. Considering all of this evidence, the jury could reasonably have concluded that Parker did not pose an immediate threat. Finally, a jury could have found that Parker was not actively resisting or attempting to flee. The jury could reasonably have concluded that under such circumstances, Parker presented no significant "active resistance" or threat.

Parker v. Gerrish (November 5, 2008)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=081045

Fifth Amendment – Miranda – Maine Case

STATEMENTS VIOLATED MIRANDA

Defendant was subjected to custodial interrogation before being given his Miranda warnings. A statement is not rendered admissible under Miranda simply because it is not made in response to a "particular question." The entire course of conduct of the officers must be examined to determine whether the statement was in response to unlawful questioning under Miranda.

FACTS: On the morning of July 13, 2004, Lewiston police officer Michael Lacombe responded to a call from Mark Hoener, who had reported the theft of a RG twenty-two caliber pistol from his residence. Hoener suspected his stepson, Tyler Mancuso.

Lacombe and Trevor Campbell, another Lewiston police officer who had arrived in response to Lacombe's request for assistance, confronted and arrested Mancuso, who admitted to stealing the pistol from his stepfather and reported that he traded the stolen gun for $100 worth of crack cocaine to an individual known as "Scooby." Mancuso gave Campbell a physical description of the individual. Campbell recognized Mancuso's physical description and the nickname Scooby as that of David Jackson, whom Campbell had previously encountered. Campbell telephoned the police station and learned that Jackson was on state probation from an earlier conviction. Campbell contacted Pauline Gudas, Jackson's parole officer, who informed him that, as a condition of Jackson's parole, his residence could be subjected to random searches for weapons or alcohol. Gudas also told Campbell that Jackson had a number of previous convictions, and that Jackson was currently staying at the apartment residence of Pamela Belanger.

Later that morning, Campbell and his partner, Chris Clifford, led a group of officers, including Lacombe and Gudas, to Belanger's apartment. In all, at least eight officers went to the apartment. Once the officers arrived on the scene, Campbell knocked on the door, which Belanger answered. Campbell saw Jackson standing several feet behind Belanger. He noticed that Jackson's attire and appearance fit Mancuso's description of the individual who bought the gun. Campbell asked Jackson to step out of the apartment so that he could pat him down for weapons. He then described to Jackson the circumstances concerning the stolen gun and the earlier encounter with Mancuso. He explained to Jackson that he (Jackson) fit Mancuso's description of the buyer, and that he and the other officers were there to locate the stolen firearm. He questioned Jackson as to his "involvement" with the stolen gun. Attempting to elicit Jackson's cooperation, Campbell pressed Jackson on his involvement with the gun. He did not threaten Jackson, but he hinted that Jackson's cooperation might be met with leniency. Lacombe recalled that the "nature of the conversation" with Jackson was that "[w]e were there looking for a firearm so the conversation was to find this - - these firearms that we were looking for." At this point, Jackson apparently stated that he might know where the gun was located, and that he could retrieve it if the officers would just give him a few hours. Campbell, not willing to allow Jackson an opportunity to escape or to retrieve a deadly weapon, replied that Jackson was not permitted to leave.

Frustrated with Jackson's refusal to cooperate, Campbell decided to give Jackson time to think about revealing the location of the gun. He left Jackson in the presence of the other officers, including Clifford, and entered the apartment to speak with Belanger, who at that point was speaking with Gudas in the kitchen. Campbell explained to Belanger why he and the other officers were there, and asked Belanger to consent to a search of her apartment. Belanger agreed to allow Campbell and the other officers to search her apartment, and signed a valid search consent form. According to Belanger, this took no more than "five or ten minutes." With the consent form in hand, Campbell, instead of initiating his search, returned to Jackson and the other officers on the landing and declared out loud that he now had consent to search the apartment. According to Campbell, he did so with the intention of giving Jackson "a chance to possibly come clean." It is not clear from the record whether the officers further questioned Jackson at this point. In any event, Jackson told Campbell that he had lied earlier and informed him that the gun was hidden in a cereal box in the kitchen refrigerator. Campbell searched the

refrigerator, found the stolen gun and another gun on the bottom shelf in a box of Fruity Pebbles, and placed Jackson under arrest.

The officers escorted Jackson in a marked police cruiser to the Lewiston police station and, later that morning, brought him to an interrogation room. Campbell and Clifford – the same two officers who had questioned Jackson earlier at the apartment – met Jackson in the interrogation room. Campbell read Jackson his Miranda rights, and Jackson signed a valid waiver of those rights before he made additional incriminating statements. Campbell and Clifford then began interrogating Jackson about his involvement with the stolen gun. Here, Jackson admitted that he received the gun from Mancuso but insisted that he obtained the gun for cash, and not for drugs. He also denied knowing that the gun was stolen.

Jackson was charged with possession of a firearm as a felon in violation of federal law. Jackson moved to suppress the statements he made at the apartment and at the police station, as well as the physical evidence (the two guns) obtained at the apartment. With respect to the statements made at the apartment, Jackson argued that those statements were obtained in violation of Miranda. With respect to the guns, Jackson argued that they were obtained as a fruit of the illegally obtained statements. And with respect to the statements made at the police station, Jackson argued that those statements were tainted by the earlier improperly secured confession at the apartment.

HELD: The police subjected Jackson to custodial interrogation at the apartment in violation of Jackson's Fifth Amendment right and the statements were obtained in violation of Miranda. Jackson's false statement that the gun was elsewhere is even more clearly inadmissible. As to that statement, the officers' testimony indicates that that statement was made directly in response to questioning – specifically Campbell's asking Jackson of his involvement with the stolen firearm.

DISCUSSION: Were Jackson's statements at the apartment the result of custodial interrogation? There is no dispute that Jackson was never given Miranda warnings at any point prior to the questioning that took place at the police station – well after the encounter at the apartment. Custodial interrogation requires that the defendant was both "in custody" and subjected to "interrogation." Although Jackson was not formally placed under arrest before he made the statements, the government conceded that Jackson was in custody at the time that he made the incriminating statements. That leaves only the critical question of whether Jackson was subjected to interrogation. The U.S. Supreme Court has determined interrogation to be "either express questioning or its functional equivalent." Interrogation can be "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Regarding Jackson's statement that the gun was in a cereal box in the refrigerator, Jackson did not make the statement directly in response to Campbell's initial questioning. Instead, that statement was made only after Campbell returned to the landing and announced that he had Belanger's consent to search the apartment. The District Court held that Jackson's statement that the gun was in the refrigerator was voluntary and not the result of interrogation. The First Circuit Court, though, concluded that the District

Court applied an incorrect standard. A statement is not rendered admissible under Miranda simply because it is not made in response to a "particular question." The entire course of conduct of the officers must be examined to determine whether the statement was in response to unlawful questioning under Miranda.

While it is true that not all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation, this is not a case where the defendant's statement was clearly unresponsive to an officer's inquiries. Nor is it the case that Jackson simply blurted out the incriminating statement without prompting.

U.S. v. Jackson (October 8, 2008)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=072510

Fourth Amendment – Seizure

DEFENDANT NOT SEIZED WHEN QUESTIONED

Not every interaction between a police officer and a citizen constitutes a seizure triggering Fourth Amendment protections. No seizure occurs when police officers approach individuals on the street or in public places to ask questions.

FACTS: Officers were on a routine patrol in a high-crime area when they observed defendant walking alone down a street. Defendant saw the police car, lowered his head, began walking rapidly, and turned onto another street. When an officer asked to speak with defendant, he stopped walking, and handed the officer his identification. The officers exited the vehicle and asked defendant whether he had any weapons. Defendant responded that he had a gun in his pocket. The officers did not approach and question defendant in a manner that would have communicated to a reasonable person that he was not free to refuse to answer and walk away, because (1) they did not activate the siren or lights, (2) the questions were largely general and non-threatening, (3) they did not draw their guns or touch him until his incriminating statement, and (4) he produced his license voluntarily, not at the officers' request.

Ford moved to suppress the evidence seized in the warrantless search of his person, contending he was seized at the time the officers exited the vehicle in violation of his Fourth Amendment rights.

HELD: The defendant was not seized for purposes of the Fourth Amendment before he disclosed that he was in possession of a firearm.

DISCUSSION: This appeal primarily concerns the boundary delineating casual encounters with police, as when officers question persons in public places, from seizures requiring probable cause or articulable suspicion. Ford challenges the lower court's denial of his motion to suppress in which he argued the officers seized him before possessing the requisite reasonable suspicion. The Government concedes, and we accept for the purposes of this review, that the officers lacked the reasonable suspicion required for a seizure and that, if a seizure occurred, the handgun found on Ford's person must be suppressed as tainted fruit.

Not every interaction between a police officer and a citizen constitutes a seizure triggering Fourth Amendment protections. The lowest tier, which does not implicate the Fourth Amendment, involves minimally intrusive interactions such as when police officers approach individuals on the street or in public places to ask questions. If the encounter amounts to more than a minimally intrusive interaction, a seizure occurs, either a de facto arrest requiring probable cause or an investigative (or Terry) stop necessitating reasonable suspicion. The U.S. Supreme Court has adopted the standard that a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. To constitute seizure, this Circuit requires one's liberty be restrained by either physical force or an assertion of authority. Exchanges do not lose their consensual nature simply because people generally answer police officers' questions.

The inquiry in this case is not whether the officers could approach and question Ford, but, instead whether they did so in a manner that would have communicated to a reasonable person that he was not free to refuse to answer and walk away. To elucidate this test, the Supreme Court has provided circumstances that may indicate a seizure including (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) some physical touching of the person of the citizen, or (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

U.S. v. Ford (November 5, 2008)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=072613

Maine Supreme Judicial Court

Fourth Amendment – Justification for Field Sobriety Tests

EVIDENCE OF FIELD SOBRIETY UPHELD

An officer may undertake field sobriety testing, like any other investigatory stop, if at the time the officer has an articulable suspicion, objectively reasonable in light of all the circumstances, that the object of the action has committed or is about to commit a crime. In general, the only requirement the courts have imposed on the reasonable articulable suspicion standard is that an officer's suspicion be more than mere speculation or an unsubstantiated hunch.

FACTS: On October 21, 2007, at approximately 1:20 a.m., David Winchester, a Bucksport patrol officer, observed a vehicle drive by him with the muffler dragging. Winchester stopped the vehicle and, while speaking with the driver, Aimee King, smelled an alcoholic odor coming from her mouth and saw some "beer bottles or cans" in the vehicle. Winchester asked King if she had had any alcohol that evening, and she responded that she had consumed five beers while at band practice "not too long ago," but that she did not feel impaired. Winchester asked her to describe on a scale of one to ten the effects of the alcohol she had consumed, and King said, "a three." There was no other evidence of impairment in her appearance, or the manner in which she drove. The officer then administered field sobriety tests. King moved to suppress all of the evidence obtained as a result of the field sobriety testing, and a hearing was held in which Winchester, the sole witness, testified to the events of the night. The court granted the motion to suppress, finding that there had to be "some evidence not relating necessarily to consumption but relating to impairment" to establish a reasonable, articulable suspicion that would justify field sobriety testing. The State appealed.

HELD: The Court agreed with the State's argument that the officer had a reasonable, articulable suspicion that King might be impaired based on his initial observations of the smell of alcohol from King's mouth and King's admission that she had consumed five beers at band practice, as well as King's description of herself as a three when asked to rate how she felt on a scale of one to ten.

DISCUSSION: An officer may undertake field sobriety testing, like any other investigatory stop, if at the time the officer has an articulable suspicion, objectively reasonable in light of all the circumstances, that the object of the action has committed or is about to commit a crime. In general, the only requirement the courts have imposed on the reasonable articulable suspicion standard is that an officer's suspicion be more than mere speculation or an unsubstantiated hunch. In granting suppression in this case, the Superior Court emphasized the distinction between evidence of *impairment* and evidence of *consumption*. However, the Law Court noted that an officer does not need objective evidence of the impairment itself; rather, the officer "need only entertain a reasonable suspicion that impairment may exist. In this case, the court's findings established a reasonable, articulable suspicion that King had committed the crime of operating under the influence. The court found that the officer saw the vehicle drive by with its muffler

dragging at 1:20 in the morning; King admitted to drinking five beers during band practice "not too long ago"; the officer smelled an odor of alcohol from King and observed beer bottles or cans in the vehicle; and, although King stated that she was not impaired, she described herself as a "three," where "one" meant total sobriety. These findings establish, as a matter of law, an objectively reasonable suspicion that King might have been impaired.

State v. King (February 10, 2009)
http://www.courts.state.me.us/court_info/opinions/2009%20documents/09me14ki.pdf

Fourth Amendment – Exigent Circumstances

WARRANTLESS SEARCH OF HOME UPHELD

Officers had probable cause and exigent circumstances, justifying their search of the house without a warrant. The officers had sufficient personal knowledge to believe underage drinking was taking place inside the home. Not only did they see people who appeared to be under 21 moving from room to room and clearing bottles, but they heard defendant and one of his underage guests admit that minors had consumed alcohol inside the house.

FACTS: On September 13, 2007, two officers from the Windham Police Department responded to an address in Windham at about 11:50 p.m. in response to a complaint about a loud party. While standing outside of the residence, the officers watched through a large picture window as several people who appeared to be teenagers scurried to clear dark-colored bottles from tables and countertops. The officers noticed that some of the teenagers ducked under the window after they were spotted and one girl appeared to drop to the floor. As the officers approached the front door, they saw through window panels more young people running across the hall to another part of the house. The officers knocked on the door and rang the bell. Tyler Blackburn answered the door, identified himself, and told the officers that his father, who owned the house, was in the hospital. Blackburn was eighteen years old. The officers asked Blackburn if underage drinking was taking place in his house, and Blackburn replied that it was. A 16-year-old girl standing beside Blackburn also admitted to the officers that she had consumed one beer about an hour earlier while in the house.

As the officers proceeded to walk into the house, Blackburn told them that they could not enter. The officers responded by telling Blackburn that they had a right to enter because a crime was being committed and they did not want evidence to be destroyed. Once inside, one officer went to the basement where he found five teenagers, three of whom were hiding behind a hot water heater; the other officer went upstairs where he found six others. About half of Blackburn's guests admitted to drinking, and one of the young males appeared to be extremely intoxicated. The officers gathered the names and dates of birth of the individuals, and then issued a summons to Blackburn for furnishing a place for minors to consume alcohol.

Blackburn filed a motion to suppress, arguing that any evidence seized as a result of the officers' search should be suppressed because the police conducted the search without probable cause and without a warrant. In denying the motion, the District Court found that the State met its burden in demonstrating that the officers' warrantless entry was justified by the exigent circumstance of possible destruction of evidence. Blackburn appealed.

HELD: Because the warrantless search was supported by both probable cause and exigent circumstances, it was lawful.

DISCUSSION: In terms of probable cause, the officers had more than sufficient personal knowledge to believe that underage drinking was taking place inside the home. Not only did they see people who appeared to be under 21 years old scurrying from room to room and clearing bottles from tables, but they also heard Blackburn and one of his underage guests admit that minors had consumed alcohol inside the house. Based on these facts, any prudent person would believe that the house contained evidence – namely alcohol and/or empty bottles and people under 21 years old – of the crime of furnishing or allowing consumption of liquor by prohibited persons.

The second question is whether the officers were justified in their decision to search the home without a warrant due to exigent circumstances. In this case, the officers watched through the front picture window as teenagers attempted to clear bottles from their view. Subsequently, the officers obtained information directly from Blackburn that minors were and/or had been consuming alcohol in the house. These two officers were rightfully concerned that evidence could be removed, concealed, destroyed or otherwise lost if they waited to obtain a warrant. It was close to midnight; if the officers had taken the time to obtain a search warrant, Blackburn and his guests easily could have emptied any remaining alcohol from the bottles and found a way to conceal them. Exigent circumstances existed here.

The Court noted its recognition that the U.S. Supreme Court has placed a heavy burden on the State when it is attempting to justify a warrantless search of a person's home, and that a presumption of unreasonableness attaches to warrantless home entries that is more difficult to rebut when the government is investigating a minor offense. Blackburn was convicted of a Class D misdemeanor, a relatively minor crime. However, the Court said, the crime of allowing a minor to possess or consume liquor in a place under one's control can be elevated to a Class C felony if the consumption of alcohol by the minor in fact causes serious bodily injury to or death of the minor or any other individual. The officers did not know before entering Blackburn's home whether any of the individuals inside had consumed enough alcohol to cause serious bodily injury to themselves or others. Given what we know about the dangers of underage drinking, it was certainly a possibility. The fact that Blackburn ultimately was charged with a misdemeanor is irrelevant to the analysis of this case.

State v. Blackburn (December 4, 2008)
http://www.courts.state.me.us/court_info/opinions/2008%20documents/08me178bl.pdf

Fourth Amendment – Pretextual Administrative Search

ADMINISTRATIVE SEARCH CONSTITUTIONAL

Any argument that the administrative inspection was a pretext for an illegal criminal investigation by the MDEA is misplaced. Even if the inspection were conducted with the understanding that it might reveal criminal activity, the subjective motivations of the inspectors are not relevant to the inquiry.

FACTS: Johnson operated an establishment known as the Village Pub in Parsonsfield. The pub operated on the ground floor of a colonial-style house, and the upper stories were used as Johnson's living space and storage. Johnson's business required a liquor license and was subject to regulation and inspection by representatives of the Liquor Licensing and Inspections Unit of the Department of Public Safety. In September 2004, an agent of the Maine Drug Enforcement Agency received information that marijuana was being cultivated on the premises of the Village Pub. In addition, there were allegations that Johnson had undertaken unauthorized renovations of the bathrooms at the pub that would have required approval from the Liquor Inspections Unit or the State Fire Marshal's Office or both. Following interagency discussions, the Liquor Inspections Unit, the Fire Marshal's office, and the MDEA agreed that a regulatory inspection of the tavern would be performed. An MDEA agent prepared a draft search warrant affidavit for use in the event that drugs were found during the inspection.

On the date of the inspection, five representatives of the Liquor Inspections Unit and the Fire Marshal's office met with MDEA agents before proceeding to inspect the premises. The MDEA agents waited outside during the inspection but were available to assist if the inspection revealed illegal drug activity. In the early evening, during regular business hours, one representative from the Liquor Inspections Unit and four from the Fire Marshal's office entered the pub. The inspectors toured the pub and the kitchen that served it. Eventually, marijuana leaves were found, not in the pub or kitchen, but on the third floor landing of the stairwell that connected the three floors of the building. This information was passed on to the MDEA agents, who then entered the building and secured the pub while another MDEA agent applied for a search warrant, which was issued. The agents conducted a search of all three floors of the premises. They seized evidence of marijuana cultivation, most of which was located in locked storage rooms on the third floor.

Johnson moved to suppress the evidence discovered in the upper floors. Johnson argued that the administrative inspection was undertaken as a pretext for a criminal search. Focusing on Johnson's pretext argument, the court entered a written judgment denying the motion. The court concluded that, although the Liquor Inspections Unit and the Fire Marshal's representatives would not have performed the regulatory inspection had not they been encouraged to do so by MDEA agents, the underlying purpose of the inspection, whether regulatory or investigative, was irrelevant, and the question was whether the search was reasonable under traditional Fourth Amendment analysis.

HELD: The administrative inspection was not illegal as a pretextual search, but it did exceed the permissible scope of an administrative inspection by extending to the third floor. As a result, defendant's Fourth Amendment rights were violated.

DISCUSSION: Johnson primarily challenged the liquor inspector's administrative inspection as being unreasonable because it was a pretext for conducting a criminal investigation. The Fourth Amendment allows reasonable statutory and regulatory inspections of closely regulated businesses for administrative purposes if those inspections are limited appropriately. Johnson argues, nonetheless, that the Fourth Amendment prohibits the government from using an administrative inspection for the purpose of gathering evidence in a criminal case. In evaluating a scheme that authorizes suspicionless administrative inspections, the United States Supreme Court has identified the objective program purpose of the regulatory scheme—not the intent of the inspecting agents—as guiding the determination of reasonableness under the Fourth Amendment. Thus, the program purpose of an unannounced, warrantless administrative inspection must be distinct from the general interest in crime control, regardless of individual officers' subjective intentions.

Accordingly, Johnson's argument that the inspection was a pretext for an illegal criminal investigation by the MDEA is misplaced. Even if the inspection were conducted with the understanding that it might reveal criminal activity, the subjective motivations of the inspectors are not relevant to the inquiry The proper test to apply is whether the pub is a closely regulated business under guidelines previously laid down by the U.S. Supreme Court.

State v. Johnson (January 13, 2009)
http://www.courts.state.me.us/court_info/opinions/2009%20documents/09me6jo.pdf

Fourth Amendment – Vehicle "Stop"

"STOP" OF PARKED VEHICLE LAWFUL

The officer's investigatory stop was justified by reasonable suspicion of a violation of the law and reasonable concern for health and safety.

FACTS: This case arises out of an arrest made by Officer Larry Fickett of the Presque Isle Police Department. While on patrol early in the morning, Fickett noticed a Mustang that appeared to be illegally parked. When he drove by the area again about ten minutes later, he noticed that the Mustang was gone. During his third patrol of the area another five minutes later, he noted that the Mustang had returned, that it appeared to be unoccupied, but that its brake lights were on. When he approached the car, Fickett saw an individual slumped down in the driver's seat. Fickett tapped the window to get the individual's attention. As the individual opened the door, Fickett noticed that the individual did not appear to be 21, and that there was an overwhelming smell of alcohol coming from the car. The individual soon identified himself as Daniel Warren.

The officer began questioning Warren, first asking him whether the Mustang had been under his control for at least the past hour, to which Warren responded that it had. When further questioned, Warren also responded that no one else had driven the Mustang that evening. The officer told Warren he smelled alcohol and asked him if he had been drinking; Warren said that he had not been drinking. The officer then asked Warren to

get out of the car and perform field sobriety tests, which Warren failed. Warren was arrested for OUI, and later refused to submit to a breathalyzer test.

Warren was charged with one count of criminal OUI (Class D); he pleaded not guilty and filed a motion to suppress all evidence gathered as a result of the officer's investigation of the stopped vehicle. In his motion, Warren cited the Fourth and Fifth Amendments, claiming that he had been subjected to unreasonable search and seizure and that his right to avoid self-incrimination had been violated.

Warren's counsel described the events of the evening during Fickett's patrol and then went on to say: The officer saw brake lights on, approached the vehicle and tapped on the window, asked Mr. Warren a series of questions at that point. Our contention here is simply that there's no showing of—of operation. The keys were not in the ignition. Mr. Warren didn't have the keys on his person, as far as we know. The car wasn't running. The officer didn't see the car going anywhere. The officer observed a person inside a car, and we think, based on that fact alone—really it's all we have here—that the subsequent questioning of Mr. Warren was not appropriate and [was] illegal.

The court granted Warren's motion, not based upon a determination that the stop was illegal, but based on a determination that Warren was seized at the moment the officer requested a field sobriety test. It held that Warren's performance on the field sobriety test should be suppressed because the officer did not then have probable cause to believe Warren had committed any crime. The court also suppressed Warren's statements at the police station, including his refusal to take a breath test, finding that he was not given proper warnings. Finally, the court concluded that Warren's statements at the scene should be suppressed because the State did not prove beyond a reasonable doubt that Warren's self-incriminating statements were made voluntarily. (Warren did not challenge at the suppression hearing the voluntariness of his statements, the admissibility of his refusal to submit to the breath test, or the legality of the field sobriety tests. He argued only that the officer's contact with him implicates the Fourth Amendment, and asserted that because there was no evidence of operation at the time that contact was made, the contact was illegal.

HELD: The trial court should have addressed the legality of the initial investigatory stop in ruling on the motion. It did not do so. The Law Court vacated the suppression order because the stop was constitutionally permissible.

DISCUSSION: The facts establish, without dispute, that the officer noticed an illegally parked vehicle that apparently left and then returned to the same location. Upon its return, the vehicle appeared to be unoccupied but its brake lights were on. When the officer approached the vehicle, he saw a person slumped down in the driver's seat. At that point, the officer had specific articulable facts to warrant an investigatory stop based on reasonable suspicion to believe that a law may have been violated, and concern for the health and safety of the individual observed slumped in the driver's seat. As soon as the occupant lowered the car window, the officer smelled a strong odor of alcohol coming from the car and observed that the occupant appeared to be younger than 21, the legal age for consuming alcoholic beverages. Based on these observations, and on the officer's knowledge that the vehicle had recently been operated, the officer properly

inquired about the occupant's identity and the identity of the operator. That inquiry disclosed that Warren had been driving the vehicle at the time it had left and returned to the spot where it was observed. Inquiring whether an individual observed in a stopped vehicle has been driving is specifically contemplated and approved by the statutes governing enforcement of the operating under the influence laws. In addition, the officer in this case was inquiring about the operator's condition to determine if the officer needed to take further action to protect the health and safety of both the operator and the general public. Part of an officer's role as a public servant includes assisting those in distress and maintaining public safety. An officer who does not inquire into the risk an operator poses to himself or others on the road may be regarded as careless. From this investigatory stop, the officer learned that Warren had been the sole operator of the vehicle, smelled a strong odor of alcoholic beverages, and heard Warren's assertion that he had not been drinking. The officer then had reasonable suspicion that Warren had been operating the vehicle under the influence and, consistent with recognized practices in these circumstances, asked Warren to get out of the vehicle and perform field sobriety tests. A driver's performance on field sobriety tests informs an officer's determination as to whether or not there may be probable cause to arrest for operating under the influence of intoxicants. The results of such tests do not need to be preceded by *Miranda* warnings to be admissible evidence at a later trial. With these facts established without dispute, the officer's investigatory stop was justified by reasonable suspicion of a violation of the law and reasonable concern for health and safety.

State v. Warren (October 7, 2008)
http://www.courts.state.me.us/court_info/opinions/2008%20documents/08me154wa.pdf

Sixth Amendment – Confrontation Clause - Hearsay

CALL ADMISSIBLE AS REASONABLE SUSPICION

A statement made by a person out of court is not hearsay if it is introduced as evidence of probable cause or an articulable suspicion and not for the truth of the matter asserted.

FACTS: Vaughan's wife called the Windham Police and told a dispatcher that Vaughan was intoxicated and was headed to a store to buy more liquor. Officer Robert Hunt located and stopped Vaughan's vehicle. Vaughan was charged with OUI and violating conditions of release. The Cumberland County Superior Court granted Vaughan's motion to suppress all evidence obtained as a result of a vehicle stop on the ground that the Officer Hunt's testimony regarding the phone call was inadmissible hearsay. The State appealed.

HELD: The officer's testimony was not hearsay if it was introduced as evidence of an articulable suspicion.

DISCUSSION: At the suppression hearing, Vaughan argued that Officer Hunt's testimony concerning his conversation with the dispatcher was hearsay because it was offered to prove the truth of the matter. The State argued that evidence of the tip did not constitute hearsay because it was not offered to prove that Vaughan was driving while intoxicated, but to demonstrate that Officer Hunt had a reasonable, articulable suspicion

with which to stop Vaughan's vehicle. In the past, the Court has upheld the admission of indirect evidence of an underlying phone call or tip to establish that an officer had a reasonable, articulable suspicion to stop a vehicle. Nevertheless, Vaughan argued that the officer's testimony about the phone call constituted double hearsay rather than single hearsay, i.e., Officer Hunt received the information from the dispatcher, who received it from Vaughan's wife. However, the Court said, whether it was single or double hearsay is not the issue – the issue is rather whether the officer's suspicion was reasonable under the circumstances.

The Court also noted that it has held in the past that a tip – even an anonymous one – may be reliable if the information is corroborated by the officer. Corroboration in a case such as this one does not require the officer to observe any erratic driving or other illegal behavior. The corroboration can consist of the officer verifying details such as the physical description and location of the suspect. Here, Officer Hunt was given the make and model of Vaughan's vehicle and was told that the vehicle had temporary license plates. He was further informed that Vaughan was driving to the Hannaford store in North Windham. Within three or four minutes of receiving this information, Officer Hunt located a vehicle matching that description as it was leaving the Hannaford store.

State v. Vaughan (June 23, 2009)
http://www.courts.state.me.us/court_info/opinions/2009%20documents/09me63va.pdf

Fourth Amendment – Reasonable Suspicion – ATV Stops

SUSPICIONLESS ATV STOPS CONSTITUTIONAL

Because ATVs are designed, regulated, and primarily used for off-road recreation, and given the State's legitimate and substantial interest in its natural resources and the safety of all involved, operators have a limited expectation of privacy. The intrusiveness of the stops authorized by statute is minimal when compared with the State's legitimate and substantial interests in regulating ATVs.

McKeen, arrested for OUI after he was stopped on his ATV, challenged a state statute that permitted a game warden to stop any ATV without having to articulate a reasonable suspicion of a violation of law. McKeen challenged the constitutionality of the statute.

While the Law Court was considering the arguments, the Maine Legislature amended the statute, Title 12 M.R.S.A. §10353(2)(G), to require wardens to have a "reasonable and articulable suspicion to believe that a violation of law has taken place or is taking place" prior to stopping an ATV (P.L. 2009, ch. 389, § 1 (effective Sept. 12, 2009)). This amended version of the statute would have precluded McKeen's stop. The amendment is not retroactive, however.

HELD: The statute allowing stops of ATVs by game wardens without articulable suspicion as it existed at the time of McKeen's stop was constitutional.

State v. McKeen (August 11, 2009)
http://www.courts.state.me.us/court_info/opinions/2009%20documents/09me87mc.pdf