Recent Court Decisions Relevant to Maine Law Enforcement Officers

United States Supreme Court
U.S. Court of Appeals for the First Circuit
Maine Supreme Judicial Court

2023 CASE LAW UPDATE

Dirigo Safety, LLC

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Preparers' Note

The preparer of this document reviewed the published decisions of the United States Supreme Court, the U.S. Court of Appeals for the First Circuit, and the Maine Supreme Judicial Court Sitting as the Law Court as they relate to criminal procedure for the period September 2022 through August 2023. The document contains summaries of cases of general interest and relevance to Maine law enforcement officers. Accordingly, this document is not a listing of all decisions of the three appellate courts.

The summaries are those of the preparer and do not represent the legal opinions or advice of Dirigo Safety, LLC.

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

Questions, suggestions, or other comments?

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United States Supreme Court

First Amendment: Threatening Communications vs. Protected Speech

Counterman v. Colorado

Decided June 27, 2023

https://www.supremecourt.gov/opinions/22pdf/22-138_43j7.pdf

Issue: Whether the threatening conduct constituted protected speech under the First Amendment or were "true threats" for which there is potential criminal liability.

Facts: From 2014 to 2016, Billy Counterman sent hundreds of Facebook messages to C.W., a local singer and musician. The two had never met, and C.W. did not respond. In fact, she tried repeatedly to block him, but Counterman created a new Facebook account and resumed contacting her. Several of his messages envisioned violent harm befalling her. Counterman's messages put C.W. in fear and upended her daily existence: she stopped walking alone, declined social engagements, and canceled some of her performances. C.W. eventually contacted the authorities. The State charged Counterman under a Colorado statute making it unlawful to repeatedly make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress and in fact causes that person to suffer serious emotional distress. Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and could not form the basis for criminal prosecution. The trial court rejected his argument under an objective standard, finding that a reasonable person would consider the messages threatening. Counterman appealed, arguing that the First Amendment required the State to show not only that his statements were objectively threatening, but also that he was aware of their threatening character. The Colorado Court of Appeals disagreed and affirmed his conviction. The Colorado Supreme Court denied review. Counterman appealed to the U.S. Supreme Court.

Held: The U.S. Supreme Court vacated the conviction on First Amendment grounds and remanded the case, ruling that the State must prove that the defendant had some subjective understanding of the threatening nature of the statements. However, the Court said that the First Amendment requires nothing more than a showing of recklessness. The Court said that a recklessness standard, *i.e.,* a showing that a person consciously disregarded a substantial and unjustifiable risk that the person's conduct would cause harm to another, is the appropriate *mens rea*. The Court acknowledged that while the existence of a true threat depends not on the mental state of the author, but on what the statement conveys to the person on the receiving end, the First Amendment still demands a subjective mental state requirement shielding some threats from liability because bans on speech have the potential to chill or deter speech outside their boundaries. An important tool to prevent that outcome is to condition liability on the State's showing of a culpable mental state, in this case, recklessness.

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U.S. Court of Appeals for the First Circuit

Fourth Amendment: Terry Seizure and Stop & Frisk

U.S. v. Harrington

Decided December 28, 2022

http://media.ca1.uscourts.gov/pdf.opinions/22-1067P-01A.pdf

Issue: Whether the initial detention and the subsequent stop-and-frisk were constitutional.

Facts: An anonymous caller reported witnessing two men exit and return to a vehicle and pass out in the vehicle. The area was commercial with a few apartments nearby and recognized as a high-volume area for crime and drug activity. An officer arrived on the scene, parked behind the vehicle, approached the driver's side, and saw the driver sleeping or passed out with his head down and his chin resting on his chest. About 30 seconds later, medical personnel arrived. When the driver awoke, he seemed lethargic with bloodshot eyes. The officer asked him to step out of the vehicle and observed that he had pinpoint pupils that looked "a little bit glassy." The officer inferred that the driver was under the influence of opioids or other narcotics. He conducted a frisk and spoke to the driver, who denied illegal activity and impairment. While speaking to the driver, the officer noted that medical personnel had engaged the passenger – Harrington – while he was still sitting in the vehicle. The officer observed that Harrington appeared lethargic, his eyes were half shut at one point, and he was swaying from side to side. When the officer asked him to step out of the vehicle, Harrington reached around inside the vehicle, including reaching between the seats near the center console area. Once Harrington finally exited, he continued to appear lethargic and moved very slowly. The officer requested that Harrington place his hands on top of his head. He placed one hand over his head but moved the other toward his pocket. The officer grabbed his noncompliant arm and placed it on top of his head to prevent him from reaching into his pocket, and began a frisk. As the officer ran his hand over the front of Harrington's waistband, he felt a large bulge that he believed to be a weapon. He asked Harrington to identify the object, and Harrington stated, "Drugs." The officer handcuffed Harrington and removed the bulge, which appeared to be a large bag containing four brown baggies and a brownish-tan substance. Based on his training and experience, the officer believed the substance to be either fentanyl or heroin. Harrington was arrested. It was later determined that the substance consisted of both fentanyl and heroin. Harrington moved to suppress the narcotics, arguing that the officer lacked the authority to detain him and to frisk him for weapons. The district court denied the motion, and Harrington appealed.

Held: The First Circuit Court of Appeals held that the totality of the circumstances indicated that there was a crime afoot, i.e., Harrington was involved in using or possessing illegal drugs, which supported reasonable suspicion for a *Terry* detention. The Court further concluded that the frisk for weapons was supported by reasonable suspicion that Harrington was armed and dangerous, based on multiple indications that he was under the influence of drugs, he delayed exiting and reached around inside the vehicle near the center console area, once out of the vehicle he placed only one hand on his head and moved the other toward a pocket, and the officer was in an area known for high drug use.

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Fourth Amendment: Standing, Reasonable Expectation of Privacy

U.S. v. John

Decided February 3, 2023
http://media.ca1.uscourts.gov/pdf.opinions/21-1862P-01A.pdf

Issue: Whether the defendant had a reasonable expectation of privacy in items seized from a container he had left in the home of his former domestic partner where he no longer lived and lacked permission to be.

Facts: Howard John pleaded guilty to being a felon in possession of a firearm while reserving his right to contest on appeal the district court's denial of his motion to suppress evidence that he possessed an AR-15 assault rifle and many rounds of ammunition. Law enforcement officers retrieved a container containing the firearm and ammunition after responding to the defendant's former partner's domestic disturbance call when the defendant entered the residence, assaulted her, and left her and the child wounded. John argued that he enjoyed both a subjective and objectively reasonable expectation of privacy in the contents of the case.

Held: John did not have an objectively reasonable expectation of privacy in the container because he did not have permission to be in his former partner's apartment, i.e., he was a trespasser.

Fourth Amendment: Vehicle Stop, Consent Search

U.S. v. Howard

Decided April 19, 2023
http://media.ca1.uscourts.gov/pdf.opinions/22-1111P-01A.pdf

Issue: Whether the police encounter with the defendant constituted a seizure under the Fourth Amendment, and whether the defendant gave voluntary consent to search her bag.

Facts: Troopers on the Maine Turnpike were investigating a crash of a vehicle in which Yolanda Howard was determined to have been a passenger. As the investigation continued, troopers suspected the vehicle contained illegal drugs. Howard consented to a search of her bag, which turned out to contain narcotics. Howard was arrested and later indicted and found guilty of possession with intent to distribute a mixture or substance containing fentanyl, cocaine, and cocaine base. Her motion to suppress the evidence was denied and Howard appealed, claiming that the troopers unreasonably prolonged the crash investigation and that she did not voluntarily consent to the search of her bag.

Held: The First Circuit Court of Appeals concluded that Howard's initial encounter with police was not a traffic stop, that any subsequent seizure of Howard – if one occurred at all – was supported by reasonable suspicion of drug trafficking, and that she voluntarily consented to the search of her bag at a point when she was not in custody. The Court noted that prior to asking for Howard's identification, the only interaction Howard initially had with the trooper was when he instructed her to stay out of the roadway for her own safety. Given the limited nature of the trooper's command and Howard's ability to otherwise move about freely, which she exercised by walking around the crash site from the moment the trooper arrived, no reasonable person in

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Howard's position would have believed that the officer was exercising his official authority to restrain her freedom of movement.

Fourth Amendment: Search Warrant, Probable Cause, Good Faith Exception

U.S. v. Sheehan

Decided June 8, 2023

http://media.ca1.uscourts.gov/pdf.opinions/21-1983P-01A.pdf

Issue: Whether the search warrant affidavit established probable cause of child pornography on the defendant's phone.

Facts: Massachusetts State Police investigated Sheehan for seven weeks on allegations that he sexually abused a child. Sheehan contacted a witness during the investigation, which led to the police obtaining a warrant to search his phone for evidence of identity fraud, unauthorized access to a computer, witness intimidation, and impersonation of a police officer. While searching the phone, the police found pictures they believed were evidence of child pornography and requested a second warrant. In that warrant application, the police said that they had seen pictures on the phone that were "images of prepubescent penises that lacked pubic hair." The warrant was granted, and the police found three videos on Sheehan's phone of Sheehan sexually abusing a child. Federal prosecutors charged Sheehan with three counts of sexual exploitation of children. After his motion to suppress the evidence was denied, he pleaded guilty and was sentenced to 45 years in prison. Sheehan argued on appeal that the second warrant was unsupported by probable cause because the application neither attached a copy of the images to which the search was directed nor described them with sufficient detail to establish that they were pornographic.

Held: The Court concluded that the search warrant failed to establish probable cause that child pornography would be found on Sheehan's phone. The statement that the phone contained "images of prepubescent penises that lacked pubic hair" was at best conclusory in nature with no accompanying explanation or details. Accordingly, the evidence of sexual exploitation found on the phone was suppressed and Sheehan's conviction was vacated. The Court noted that child nudity alone does not make an image pornographic; the images must be lewd or lascivious. The Court further concluded that the good faith exception to the exclusionary rule was inapplicable in that the probable cause was so deficient that "no officer could reasonably rely upon it."

Fourth Amendment: Probable Cause, Collective Knowledge Doctrine

U.S. v. Balser

Decided June 16, 2023

http://media.ca1.uscourts.gov/pdf.opinions/21-1813P-01A.pdf

Issue: Whether and when a police officer, admittedly lacking his own probable cause, may seize and search a car at the direction of another officer.

Facts: Balser was pulled over by a New Hampshire police officer following a suspected drug buy upon the request of a DEA agent who asserted that there was probable cause for a search of the vehicle for illegal drugs. The officer searched the vehicle and found about a kilogram of cocaine. Balser moved to suppress the evidence, arguing that the officer could not act solely on the DEA agent's probable cause.

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Held: The Court concluded that there was probable cause to seize and search Balser's vehicle and, under the collective knowledge doctrine, the DEA agent's directive to the officer was sufficient to attribute or impute the agent's probable cause to the officer. Under the doctrine, probable cause is evaluated by examining the collective information known to the police at the time of an arrest or search, not merely the personal knowledge of the arresting or searching officer. Accordingly, if the police knowledge is sufficient in its totality to establish probable cause, an individual officer's actions in making a warrantless arrest or search upon orders to do so will be justified, even though that officer does not personally have all the information on which probable cause is based.

Fourth Amendment: Qualified Immunity

Punksy v. City of Portland (Maine)

Decided November 29, 2022v
http://media.ca1.uscourts.gov/pdf.opinions/21-2007P-01A.pdf

Issue: Whether officers leaving a suspect standing in socks in freezing temperatures for 26 minutes while they investigated a domestic violence incident in which he was involved violated his constitutional rights.

Facts: Several officers responded to a domestic violence call at a residence flagged from previous calls for firearms Upon arrival, the officers observed two males, Steven Punsky and his son, brawling on the kitchen floor. Steven Punsky was bleeding from the face. An officer ordered him to get off his son and to lie down. However, Mr. Punsky was noncompliant, verbally aggressive, and threatening to the officers. An officer persuaded him to step outside of the house to talk. It was a cold night, around zero degrees Fahrenheit at 9:00 p.m. and there was snow on the ground. Mr. Punsky was wearing socks, a long-sleeved shirt, and shorts. Within a minute of stepping outside, officers offered him shoes that he refused to accept. In the meantime, inside the house, officers interviewed Mr. Punsky's wife and son. The wife validated that there were firearms inside the house and that she hid them. She also told the officers that Mr. Punsky had been drinking, and the son said that he fought his dad to defend his mother after Mr. Punsky poked her. About nine minutes after Mr. Punsky was escorted outside, a paramedic arrived and evaluated him for injuries. Mr. Punsky stated that he was fine and felt no pain whatsoever. Moreover, the paramedic also offered him shoes, which he said he did not want and that he did not care about the cold. The paramedic additionally offered to take him to the ambulance, but he declined, stating again that he was fine. The paramedic asked Mr. Punsky questions to elicit whether he was oriented in space and time. He determined that Mr. Punsky was competent, aware of his surroundings, and had decision-making capability. Mr. Punsky started walking towards his house when officers told him to back up since by then they had determined that he was the primary aggressor in the fight with his son. The officers arrested him and, once again, he began to threaten the officers. As the officers awaited the arrival of an arrest wagon, Mr. Punksy remained confrontational and verbally combative. Concerned about Mr. Punsky's incessant refusal to put on shoes, officers placed a pair of sneakers next to him, but he declined to put them on. The officers' version of what transpired was supported by body camera audio and video, in which they offered Mr. Punsky footwear at least eight times throughout the interaction. The officers did not consider bringing Mr. Punsky back into the house because his aggressive behavior posed a safety concern not only for the officers but also for the wife and son.

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Moreover, the arrest wagon arrived at the scene quickly, rendering unnecessary any attempt to bring Mr. Punsky into the house. Mr. Punsky was taken to a hospital for further evaluation. Upon discharge, he was taken to the Cumberland County Jail and charged with domestic assault. Despite making no complaints about the cold or pain in either foot, Mr. Punsky sustained frostbite and injuries to both feet.

Mr. Punsky sued the individual officers, as well as the chief of police, which included § 1983 claims of excessive force and supervisory liability. The District Court granted a summary judgment motion filed by the defendants. Mr. Punsky appealed.

Held: The First Circuit Court of Appeals decided that under the particular circumstances, a reasonable officer could have not concluded that keeping Mr. Punsky standing with socks in cold temperatures was unlawful, especially after offering him footwear multiple times. The Court concluded that any reasonable officer would have objectively believed that his or her actions did not violate Mr. Punsky's constitutional rights. The officers were thus entitled to qualified immunity.

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Maine Supreme Judicial Court

Maine Rules of Evidence: Lay Opinion

State v. Gibb

Decided January 12, 2023
https://www.courts.maine.gov/courts/sjc/lawcourt/2023/23me004.pdf

Issue: Whether the victim's voice identification of the defendant was admissible under the Maine Rules of Evidence.

Facts: Brandon Gibb appealed from convictions for various criminal offenses based on his actions toward a female human resources staffer after she terminated his employment. Gibb's principal argument was that the trial court erred in allowing the victim to identify him as the individual telephoning her because her lay opinion testimony lacked the foundational admissibility requirements. There were several occasions when the victim had interacted with Gibb both in person and over the telephone.

Held: The Court affirmed the judgment and clarified that the standard governing voice identification is a low bar, i.e., a layperson may identify a person's voice based on having heard that person's voice on at least one other occasion under circumstances connecting the voice with the person.

Fourth Amendment: Terry Stop, Field Sobriety Tests

State v. Wilcox

Decided January 26, 2023
https://www.courts.maine.gov/courts/sjc/lawcourt/2023/23me010.pdf

Issue: Whether the defendant was seized for purposes of the Fourth Amendment?

Facts: Wilcox was charged with operating under the influence and operating while his license was suspended. He moved to suppress all evidence obtained as a result of his interactions with the officer, including a claim that he was unlawfully seized based on an unreliable anonymous tip and was directed to perform field sobriety testing without being asked for his consent. The officer was dispatched to a 7-Eleven store at about 10:20 p.m. The dispatcher informed the officer of an anonymous report that a brown Honda had struck something and was now in the 7-Eleven parking lot, and the caller believed that the driver was intoxicated. The officer approached the brown Honda and found a man – later identified as Wilcox – crouched by the front driver's side of the car looking at the front tire. There was extensive damage to the driver's side of the vehicle. The trunk of the car was open. The officer asked Wilcox what was going on. When Wilcox did not respond and began to walk away toward the store with his hands in his pockets, the officer told him to stop, keep his hands out of his pockets, and come toward him. He walked toward the officer at the rear of his car, and the officer told him to have a seat on the rear of the trunk. The officer asked what had happened and where the accident had occurred, and Wilcox said that it had happened on the highway. He was disheveled and emotional and was slurring his speech as if his tongue were too large for his mouth. The officer asked Wilcox questions about his health and well-being, and Wilcox reported no injuries or ailments. The

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officer told Wilcox that he was going to conduct field sobriety tests. As a result of field sobriety testing, the officer conducted additional alcohol and drug testing. Based on the testimony and video recordings, the trial court found that, because the officer's observations were consistent with what the anonymous caller had said, the tip was sufficiently reliable for the officer to approach Wilcox. The court found that the officer located the car parked in a dark area at the identified convenience store, noticed damage to the car consistent with the report, and approached Wilcox in a friendly manner to ensure that he was okay and to see what had happened. The trial court concluded that Wilcox had not been seized until the officer asked him to complete field sobriety tests. Wilcox appealed.

Held: The Law Court considered the constitutionality of the (1) officer's initial detention of Wilcox for questioning, and (2) the officer's administration of field sobriety tests. The Court found that the trial court was wrong in concluding that there was no seizure when the officer by a show of authority ordered Wilcox to stop, remove his hands from his pockets, come toward the officer, and sit on the rear of Wilcox's vehicle trunk. However, the Court determined that the seizure was lawful based on reasonable suspicion of safety concerns in checking the welfare of Wilcox to determine if medical attention was needed. The Court pointed to precedence in stating that such an investigation of a reported crash can be as much a part of an officer's role as a community caretaker as it is central to an officer's task of ascertaining whether criminal conduct has occurred, is occurring, or is about to occur. The Court also found that the officer had a reasonable belief under the circumstances to believe that Wilcox was under the influence so as to justify subjecting Wilcox to field sobriety tests.

Statutory Interpretation: Gross Sexual Assault ("other official")

State v. Marquis

Decided March 2, 2023
https://www.courts.maine.gov/courts/sjc/lawcourt/2023/23me016.pdf

Issue: Whether the defendant was an "other official" having instructional, supervisory, or disciplinary authority over the student for purposes of gross sexual assault.

Facts: Marquis taught a driver's education course at a local high school. Although not part of the school staff, he enjoyed certain staff privileges, and the students in his class were bound by the school's code of conduct; if a student did something in violation of the code during a driver's education class, Marquis could report the violation to the school principal, who could then discipline the student. Marquis picked up the victim at school in the vehicle that he used for teaching students to drive, purportedly so that the victim could practice driving. Instead, Marquis drove her to a motel and engaged in a sexual act with her. Marquis was convicted of gross sexual assault. On appeal, he argued that the trial court interpreted the element of "other official" too broadly.

Held: The term "other official," for purposes of gross sexual assault, means a person like a teacher or a school employee and, in this case, the defendant, whom the school has empowered to exercise disciplinary, supervisory, or instructional authority over its students.

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