No. 291

FISH AND GAME COMMISSION—SEARCHING MOTOR VEHICLES—OFFICERS, searches by

Held: 1. Fish and Game Commission cannot authorize employees to search cars without probable cause.
2. Probable cause depends upon facts in each case and cannot be construed to mean a mere matter of policy or suspicion but, on the contrary, must be actual and according to legal maxims.
3. After search, if nothing unlawful is found, it is the duty of the one making the search to restore the property in a courteous and efficient manner.

November 13, 1941.

Mr. Frank J. Roe
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Roe:

I have your letter in which you request my opinion on the following question:

> "Has the State Game Warden or any of his deputies or those acting for him the right under Montana statutes to search a car traveling upon a public highway, or to stop all cars at any given point at the intersection of public highways, and search them, and after doing so, and while conducting a search of such cars throw the contents which is in a trunk or other compartment of the car on the side of the road, causing the driver and passenger the trouble of picking them up and putting them back where they belong?"

The question submitted by you as above naturally divides itself into two divisions, viz: (a) That relating to search; and (b) that relating to the replacement of removed articles at the conclusion of search.

With regard to the first division of your question, Section 7, Article III of the Constitution of Montana provides:

> "The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing."

Our Court in the case of State ex rel. King v. District Court et al., 70 Mont. 191, at pages 196 and 197 has this to say about the rights of the people to be secure in their persons, papers, homes and effects from unreasonable searches and seizures, as enunciated by Section 7, Article III of the Constitution of Montana:

> "Substantially this provision is a reiteration of the fourth amendment. Thus it traces back to the determination of the framers of the national Constitution to place unmistakably in the fundamental law safeguards to protect the people from unreasonable searches and seizures, such as had been permitted under general warrants in the form of writs of assistance by the authority of the government in colonial times, by which there had been invasions of the homes and privacy of the citizens, and outrageous seizures of their private papers in support of real or imaginary charges against them. (Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524 (see, also, Rose's U. S. Notes); 24 R. C. L. 703.) 'Resistance to these practices,' said Mr. Justice Day in Weeks v. United States, 'had established

the principle which was enacted into the fundamental laws in the fourth amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers.' (Weeks v. United States, 232 U. S. 383, Ann. Cas. 1915C, 1177, L. R. A. 1915B, 834, 58 L. Ed. 652, 34 Sup. Ct. Rep. 34 (see, also, Rose's U. S. Notes). The erudite justice observed that the effect of the amendment is to forever secure the people, their persons, houses, and papers and effects against all unreasonable searches and seizures under the guise of law. The protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted with the enforcement of the law. The United States supreme court reaffirmed the doctrine of the Weeks Case in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182, Gouled v. United States, 255 U. S. 298, 65 L. Ed. 647, 41 Sup. Ct. Rep. 261, and Amos v. United States, 255 U. S. 313, 65 L. Ed. 654, 41 Sup. Ct. Rep. 266.

"This court, speaking through Mr. Chief Justice Brantly, followed and expressly approved it in State ex rel. Samlin v. District Court, 59 Mont. 600, 198 Pac. 362. We again express our adherence to it. We have considered with interest the opinions of able courts who by plausible but as we think specious reasoning have refused to follow the pronouncement of the supreme court of the United States on the subject. These courts while claiming admiration for the high and splendid principle of the constitutional mandate, refuse to put it into effect. That is not our idea of enforcing the law; it is mere lip service. Our idea is that every citizen of the republic, every agency of government, every officer of the nation or state, from the highest to the lowest, is charged with the preservation and enforcement of the fundamental law.

"Of course only unreasonable searches and seizures are prohibited. The constitutional provision was not designed to aid the lawbreaker. But every search and seizure which is not lawful and which is not conducted as the law prescribes is unreasonable. (State v. Wills, 91 W. Va. 659, 24 A. L. R. 1398, 114 S. E. 261.)"

It is further said the constitutional immunity is not intended to furnish an asylum for violators of the law, but rather a protection against oppression. (Fitzpatrick v. State, 169 Ala. 1, 53 So. 1021; Peo v. Milone, 119 Misc. 22, 295 N. Y. S. 488.)

In these days of much travel, people regard the occupancy of their automobile in almost the identical manner as they do the occupancy of their homes. And because of this fact, the fundamental law, in my opinion, protects the people from unreasonable searches and seizures as far as their automobiles are concerned, as it does their homes—and the courts have recognized such to be the law. (56 C. J. Sec. 22, page 1165.)

Section 3659 of the Revised Codes of Montana, 1935, provides as follows:

". . . **they shall have authority to make a search, when they have reasonable cause to believe that any of the game, fish, birds, or quadrupeds, or any parts thereof, have been killed, captured, taken or possessed, in violation of the laws of this state,** and **without search warrant,** to search any tent not used as a residence, boat, car, **automobile,** or other vehicle, box, locker, basket, creel, crate, gamebag, or other package and the contents thereof to ascertain whether any of the provisions of the laws of this state or the rules and regulations of the fish and game commission for the protection, conservation or propagation of game and fish or game birds or fur-bearing animals have been violated, and **with a search warrant** to search and examine the contents of any dwelling house or other building . . ." (Emphasis mine.)

It will be noted this section gives the right to the deputy game warden to search without warrant an automobile, but only when he has reasonable cause to believe any of the game, fish, birds or quadrupeds, or any parts thereof, have been killed in violation of the law. Hence, before he may stop an automobile and search it without a warrant, the deputy must have reasonable cause to believe the driver or some occupant of the car has game, fish or birds in the car which have been killed in violation of the law. What is reasonable cause, of course, would depend upon the circumstances of each particular case. On this question, our Supreme Court in the case of State v. Monroe, reported in 83 Mont. 556, 274 Pac. 840, in speaking of the right of an officer to stop a car on the highway in the course of his search for a rum-runner, said in effect:

> "An officer in possession of information that the automobile of a rum runner contained intoxicating liquor does not empower him to stop and search every car traveling along the road watched by him, and where he unsuccessfully endeavors to stop the wrong car without probable cause for believing that the occupant was committing a felony and fires at it on faliure to stop, killing the driver, a verdict of guilty of manslaughter will not be disturbed on appeal."

Again our Court speaking on this subject states:

> "In this connection it is interesting to note the decision of Shaw, Chief Justice, in Bacon v. Towne, 4 Cush. (Mass.) 217 (a malicious prosecution case), as to probable cause. Justice Shaw stating therein that 'probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty.' (See, also, 22 Michigan Law Review, p. 695, and State ex rel. Kuhr v. District Court, 82 Mont. at page 519, 268 Pac. 501.)"
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> State v. Mullaney, 92 Mont. 553, 16 Pac. (2nd) 407.

In answering division one (1) of your question, it is my opinion the Fish and Game Department cannot—as a matter of policy or at random—direct its employees to search automobiles. Before such search can be made, there must be something more than just mere suspicion or official authority since probable cause must, of course, exist before and not after the search. (In re Lobosco, 11 F. (2nd) 892; Lawson v. U. S., 9 F. (2nd) 746; Jenkins v. State (Tex. Cr.), 32 S. W. (2nd) 848.) And it follows, since a search made without probable cause is unreasonable (State vs. Cascade County Eighth Jud. Dist., 70 Mont. 378, 255 Pac. 1000) it is therefore unlawful.

In answer to division two (2) of your question, it would appear to me equity, justice and good manners would require the person who made an ineffectual search to replace courteously the contents removed in as good a condition as is possible. It is understood, of course, that if the search was effectual the officer would be entitled to the contents and would be responsible for their safekeeping in the manner provided for by law in such cases.

Sincerely yours,

JOHN W. BONNER
Attorney General