

in, or a written opinion should there be any material difference between us.

The particular questions which you have raised are as follows:

"(1) May a game warden make a search of lockers to discover whether big game meat is stored therein in violation of the fish and game laws?

"(2) Must the tag provided by Section 3685, Revised Codes of Montana, 1935, be attached to considerable portions of big game carcasses?

"(3) Interpretations of the words, 'by hook and line in hand or rod in hand.'

As to question (1) I desire to present the following:

The Fourth Amendment to the Constitution of the United States provides:

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

Section 7, Article III of the Constitution of the State 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 in writing."

The particular provisions of Section 3659, Revised Codes of Montana, 1935, in question here provides:

". . . 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 a search warrant, to search any tent not used as a residence, boat, car, automobile, or other vehicle, box, locker, basket, creel, crate, gamebag,

Opinion No. 183.

Fish and Game—Game Warden—Fish and Game Licenses—Licenses—Sheriff—Laws, Fish and Game.

Held: An officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed.

March 3, 1944.

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

Dear Mr. Roe:

You have submitted an opinion upon which you desire my concurrence there-

or other packages 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 . . ."

In *State ex rel. Wong You v. District Court of the Thirteenth Judicial District in and for Yellowstone County, et al.*, 106 Mont. 347, 78 Pac. (2nd) 353, it was held:

"An officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed, 'probable cause' being the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief.

"An arrest made without a warrant, and likewise a search and seizure without a warrant, is illegal, and therefore unreasonable, when it is made upon mere suspicion or belief unsupported by facts, circumstances, or credible information calculated to produce such belief."

And again under *State ex rel. Brown v. District Court*, 72 Mont. 213, 232 Pac. 201, it was held:

"An officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed."

Quoting from *State ex rel. Neville v. Mullen*, 63 Mont. 50, 207 Pac. 634, 636, we find the following language:

"Reverting to our premise that the sheriff may arrest without a warrant upon such state of facts as would justify the issuance of a warrant, it becomes necessary to consider what circumstances will justify the issuance of a warrant, and the authorities are unanimous in holding that there must be probable cause. The terms 'probable cause' are variously defined, but

an analysis of the definitions will disclose that the difference, if any, is in the mode of expression, rather than in the substance. 'Probable cause' is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of.' *Burt v. Smith*, 181 N. Y. 1, 73 N. E. 495, 2 Ann. Cas. 576. 'Probable cause (for criminal prosecution) is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief.' *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082. 'It is not essential to probable cause, for an arrest . . . that the accuser believe that he has sufficient evidence to secure a conviction.' *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537, L. R. A. 1915D, 1. 'Probable cause does not depend on the actual state of the case in point of fact, for there may be probable cause for commencing a criminal prosecution against a party, although subsequent developments may show his absolute innocence.' *Mundal v. Minneapolis & St. L. R. Co.*, 92 Minn. 26, 99 N. W. 273 (100 N. W. 363). 'The expression "probable cause," as used in the Federal Constitution, referring to the issuance of warrants, means that there is a probability that a crime has been committed by the person named in the warrant.' *Ex parte Heacock*, 8 Cal. App. 420, 97 Pac. 77."

In *Burt v. Smith*, 181 N. Y. 1, 73 N. E. 495, 2 Ann. Cas. 576, quoted in the *Wong You* case, *supra*, we find the following:

"One may act upon what appears to be true, even if it turns out to be false, provided he believes it to be true and the appearances are sufficient to justify the belief as reasonable. Belief alone, however sincere, is not sufficient, for it must be founded on circumstances which make the belief reasonable. The same rule as applied to an arrest without warrant is stated in 5 C. J. 417, as follows: 'The reasonable and probable grounds that will justify an officer in arresting without a warrant one whom he suspects of felony must be such as would actuate a reasonable man acting in good faith. The rule is substantially

the same as that in regard to probable cause in actions for malicious prosecution, and there is no difference in its application between arrests for felonies and arrests for misdemeanors. The necessary elements of the grounds of suspicion are that the officer acts upon a belief in the person's guilt, based either upon facts or circumstances within the officer's own knowledge, or upon information imparted to him by reliable and credible third persons, provided there are no circumstances known to the officer sufficient to materially impeach the information received. It is not every idle and unreasonable charge which will justify an arrest. An arrest without a warrant is illegal when it is made upon mere suspicion or belief, unsupported by facts, circumstances, or credible information calculated to produce such suspicion or belief. See, also, 3 Words and Phrases, Second Series, 1224, et seq. and State ex rel. Sadler v. District Court, 70 Mont. 378, 225 Pac. 1000."

We must take the law as the law-makers have written it and as the courts have interpreted it. The authority to change the law is vested exclusively in the legislature.

Therefore, in the light of what has been hereinabove stated, it is my opinion that an officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed, "probable cause" being the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief. It is my further opinion that an arrest made without a warrant, and likewise a search and seizure without a warrant, is illegal, and therefore unreasonable, when it is made upon mere suspicion or belief unsupported by facts, circumstances, or credible information calculated to produce such belief.

As to question (2) which has to do with the following provisions of Section 3685, Revised Codes of Montana, 1935:

" . . . It shall be unlawful and a misdemeanor punishable, accordingly,

for anyone killing a deer or elk under said license, to fail or neglect to attach the tag, coupon or other marker so provided by said license to any deer or elk by them immediately after the same has been killed or to fail to keep said tag, coupon or other marker attached to said deer or elk or portions thereof while the same is possessed by him . . ."

we concur in the conclusion reached by you, and it is therefore my opinion that the provisions are applicable to the particular person killing the game only.

As to question (3) which has to do with the following provisions of Sections 3714 and 3694, Revised Codes of Montana, 1935, respectively:

"Every person who takes or catches fish in any of the waters of this state except with hook and line held in hand or pole held in hand . . . shall be guilty of a misdemeanor. . ."

"Game fish shall be taken only by angling, that is, by hook and line in hand or rod in hand . . ."

based upon the following statement of facts:

"A" was fishing with rod in hand and that upon observing the game warden approaching him, he placed the rod on the ground for the purpose of removing his license from his pocketbook and submitting it to the game warden."

we concur in the conclusion reached by you, to the effect that the game warden would have no right to arrest "A" for laying down his rod under the circumstances, and there would be no violation of the statutes. It is understood, however, that my opinion, like yours, is based strictly upon the statement of facts set out in this, and your opinion and none other, as the facts and circumstances in each case would control.

Sincerely yours,
R. V. BOTTOMLY
Attorney General