Montana Law Review

Volume 45
Issue 2 *Summer 1984*

Article 9

July 1984

Criminal Procedure

Jacqueline Nichols Terrell
University of Montana School of Law

CRIMINAL PROCEDURE

Jacqueline Nichols Terrell

I. Introduction

Recent United States Supreme Court decisions in the field of criminal procedure make it clear that state law in this area is recovering some of the status it has lost over the last three decades. Given the Supreme Court's current reluctance to extend the rights of criminal defendants under federal law, prosecutors and defense attorneys are likely to find themselves arguing more state procedural and constitutional law in the future. Whatever direction the development of the law takes in Montana, one thing is clear: state cases will assume a new importance as precedents. This survey examines selected cases in the field of criminal procedure decided by the Montana Supreme Court in 1983 and early 1984.

II. Search and Seizure

A. *Probable Cause*

Under the fourth amendment,[1] a finding of probable cause is prerequisite to a magistrate's issuance of a search or arrest warrant. Recently, the United States Supreme Court in *Illinois v.*

1. U.S. Const. amend. IV.

Gates[2] repudiated the technicalities presented by the previously required *Aguilar-Spinelli* test,[3] and adopted instead a "totality of circumstances" test. The Montana Supreme Court, in *State v. Erler*,[4] analyzed the *Aguilar-Spinelli* and *Gates* tests and applied both to the case.

In the past, courts applied the two-pronged *Aguilar-Spinelli* test when determining probable cause based solely on an informant's information. That test required the authority requesting the warrant to inform the magistrate of (1) some of the underlying circumstances supporting the informant's credibility, and (2) some of the underlying circumstances providing a basis for the informant's conclusions.[5] Over time, this two-prong test was perceived as being encumbered with numerous "separate and independent requirements to be rigidly exacted in every case."[6] The "totality of circumstances" test was adopted in *Gates* to reestablish a more traditional, common-sense approach to determining probable cause. Under *Gates*, the *Aguilar-Spinelli* factors are still considered, but the magistrate issuing the warrant is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[7]

In *Erler* law enforcement officers received a tip from an informant who had provided reliable information three times in the past. The informant described a car of a certain make with a specific license number that would be making a trip into Lewis and Clark County with drugs. Officers corroborated the informant's tip by subsequent investigation. Based on the corroborated information, officers obtained a search warrant, and the resulting search produced cash, marijuana, drug paraphernalia, and other controlled substances. Holding that the search was valid under both the *Aguilar-Spinelli* test and the *Gates* test, the court implied that *Gates* may be the appropriate standard for future determinations of probable cause.[8]

---

2. 103 S. Ct. 2317 (1983).
3. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).
4. ___ Mont. ___, 672 P.2d 624 (1983).
5. *Aguilar*, 378 U.S. at 114.
6. *Gates*, 103 S. Ct. at 2327-28.
7. *Id.* at 2332.
8. *Erler*, ___ Mont. at ___, 672 P.2d at 627.

B. *Expectation of Privacy*

To give rise to fourth amendment protections, a search must intrude upon a person's justifiable or reasonable expectation of privacy. Generally, a person has no expectation of privacy in objects or activities held out to the public.[9] In *State v. Bennett*,[10] the supreme court further restricted a person's justifiable or reasonable expectation of privacy by approving the use of a spotting scope to enhance a law enforcement officer's natural senses.

The defendant in *Bennett* was convicted for criminal possession of dangerous drugs. On appeal he sought to suppress evidence of his cultivation of marijuana in an open field surrounded by corn and a barbed wire fence. The arresting officer saw the marijuana with the aid of a spotting scope while standing on the county road adjoining the field. The court held that the defendant had no justifiable expectation of privacy because he had voluntarily exposed the marijuana to public view by growing it in an open field.[11] Further, the defendant's subjective expectation of privacy, based on planting corn around the marijuana, was not one society would recognize as reasonable; therefore there was no search or seizure within the fourth amendment.[12]

In deciding *Bennett*, the Montana court adopted the test from the recently decided *United States v. Knotts*.[13] In *Knotts* the Court stated, "Visual surveillance from public places . . . adjoining [defendant's] premises would have sufficed to reveal all of these facts to the police. . . . Nothing in the Fourth Amendment prohibited the police from augmenting [their] sensory faculties . . . with such enhancement as science and technology afforded them in this case."[14] The *Bennett* court found the spotting scope to be one such acceptable enhancement of an officer's sensory faculties.[15]

C. *Custodial Arrests*

There is a growing body of authority supporting the view that use of full custodial arrests should be more limited, with an increased use of summonses and notices to appear. Montana appeared to be following that trend with decisions disapproving the

---

9. Katz v. United States, 389 U.S. 347, 350-53 (1967).
10. ___ Mont. ___, 666 P.2d 747 (1983).
11. *Id.* at ___, 666 P.2d at 750.
12. *Id.*
13. 103 S. Ct. 1081 (1983) (holding that the use of a "beeper" to track automobiles did not constitute a search under the fourth amendment).
14. *Id.* at 1086.
15. *Bennett*, ___ Mont. at ___, 666 P.2d at 749.

use of full custodial arrests[16] and suppressing evidence seized incident to full custodial arrest when less intrusive means were available.[17] The court grounded these decisions on the state constitutional protection of privacy in Montana.[18] In *State v. Wood*,[19] however, the court signaled that its support for limiting the use of full custodial arrests was not unqualified and that custodial arrests may be reasonable for all but minor traffic-related misdemeanors.

The defendant in *Wood* was arrested at his home for issuing bad checks. In two separate two-week periods, the defendant issued thirteen checks, totalling $231.76, which were returned to the payees for insufficient funds in the defendant's account. The payees never contacted the defendant. A justice of the peace issued a warrant for the defendant's arrest although there had been no prior efforts to secure his appearance. The arrest warrant provided for a reasonable bond, but the officer made no offer to accept bond; nor was a summons or notice to appear issued in lieu of the warrant for full custodial arrest. During the defendant's booking at the police station, officers made a full search of the defendant and discovered one gram of hashish in his possession. The defendant pleaded guilty to the bad check charges.

The trial court, relying on *State v. Carlson*,[20] suppressed the drug evidence, finding that it was obtained by an unconstitutional invasion of privacy and that the state had failed to show a compelling interest for using such an intrusive procedure.[21] In *Carlson*, the court suppressed evidence of more serious drug-related offenses observed by officers when they came to the defendant's home early in the morning to arrest him for failing to appear on two traffic citations that had never been mailed to him. The *Carlson* court emphasized that there was no prior justification for an intrusion into the privacy of the defendant when a search was not necessary to insure that he would not obtain a weapon, destroy evidence of the crimes with which he was charged, or escape, and when several less intrusive alternative means of securing the defendant's appearance were available.[22] *Wood* presented a similar factual situation.

---

16. State v. Jetty, 176 Mont. 519, 579 P.2d 1228 (1978) (full custodial arrest for a minor traffic violation unreasonable).

17. State v. Carlson, ___ Mont. ___, 644 P.2d 498 (1982).

18. MONT. CONST. art. II, § 10. For a lengthy discussion of the state constitutional provision, see State v. Hyem, ___ Mont. ___, 630 P.2d 202 (1981).

19. ___ Mont. ___, 666 P.2d 753 (1983).

20. ___ Mont. ___, 644 P.2d 498 (1982).

21. *Wood*, ___ Mont. at ___, 666 P.2d at 754.

22. *Carlson*, ___ Mont. at ___, 644 P.2d at 504-05.

Stressing that the underlying offense in *Wood* was a felony, the supreme court reversed the trial court's order suppressing the evidence and held that the full custody arrest of the defendant was not an unconstitutional invasion of privacy.[23] The court stated that apprehending felons is a compelling state interest and ruled that felony arrests supported by warrants are proper.[24] The court then explicitly limited its *Carlson* holding, that a full custodial arrest is unreasonable when there is no exigency justifying such intrusive means, to traffic-related misdemeanor cases. *State v. Jetty*,[25] relied on in *Carlson* and also involving a minor traffic offense, presumably is similarly limited, indicating that full custody arrests may always be appropriate for offenses other than minor traffic violations.

III. Privilege Against Self-Incrimination

A. *Custodial Interrogation*

A *Miranda* warning is required only if questions are asked during custodial interrogation.[26] Whether police conduct amounted to custodial interrogation is thus often critical for determining the admissibility of evidence. Custodial interrogation generally is found when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[27] In *State v. Lapp*[28] the Montana court adopted a more precise test for determining the parameters of this definition.

Lapp was convicted of negligent homicide following a two-car collision in which the driver of the other vehicle died. Following the accident, the defendant was taken to the hospital before the highway patrol arrived. When the investigating officer completed his work at the accident scene, he went to the hospital and interviewed the defendant in the emergency room in the presence of two nurses. The officer did not read the defendant his *Miranda* warning, nor did he place the defendant under arrest. He asked the defendant only his name, birthdate, and whether he had been driving. In response, the defendant gave the officer his name and birthdate, stated that he was the driver, that the accident was "all his fault," and that "they could do anything they wanted to" with

23. *Wood*, ___ Mont. at ___, 666 P.2d at 754.
24. *Id.* at ___, 666 P.2d at 755.
25. 176 Mont. 519, 579 P.2d 1228 (1978).
26. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
27. *Id.*
28. ___ Mont. ___, 658 P.2d 400 (1983).

him.[29] These statements were admitted into evidence at trial. On appeal, the defendant argued that the statements were inadmissible because they were made during a custodial interrogation and were not preceded by a *Miranda* warning.

Whether a *Miranda* warning is required turns on when questioning is initiated by law enforcement officers, and whether it is then a custodial interrogation. In *Oregon v. Mathiason*[30] the United States Supreme Court interpreted the language "otherwise deprived of his freedom in any significant way" to mean that a warning is required only when there has been "such a restriction on a person's freedom as to render him 'in custody.' "[31] The Montana court adopted this interpretation in 1981, in *State v. Graves*.[32]

In *Lapp*, the supreme court addressed the degree of restriction on a defendant's freedom that finally renders him "in custody" and adopted the determining factors set out in a Maryland case.[33] The factors include (1) place of interrogation, (2) time of interrogation, (3) persons present during interrogation, (4) whether *Miranda* warnings were gratuitously given, (5) the length and mood of the interrogation, and (6) whether the defendant was arrested following the interrogation.[34] Applying these factors to *Lapp* and noting that the majority of cases involving in-hospital questioning do not amount to a significant deprivation of freedom,[35] the court held that the defendant in this case was not in custody at the time of questioning and, therefore, the failure to give a *Miranda* warning did not make the defendant's statements inadmissible.[36] The factors provide a more precise foundation for a custody status sometimes difficult to define.

---

29. *Id.* at ___, 658 P.2d at 402.

30. 429 U.S. 492 (1977).

31. *Id.* at 495.

32. ___ Mont. ___, 622 P.2d 203, 207 (1981). *See also* State v. Dupre, ___ Mont. ___, 650 P.2d 1381, 1384 (1982).

33. Cummings v. State, 27 Md. App. 361, 341 A.2d 294 (1975).

34. *Lapp*, ___ Mont. at ___, 658 P.2d at 403 (citing *Cummings*, 27 Md. App. at 369-79, 341 A.2d at 300-05).

The court also addressed the problem of "investigative focus." The defendant had argued, relying on Escobedo v. Illinois, 378 U.S. 478 (1964), that the interrogation had gone from an investigatory stage to an accusatory stage by the time he was questioned in the hospital. The Montana court rejected this distinction in determining whether there had been "custodial interrogation."

35. ___ Mont. at ___, 658 P.2d at 403.

36. *Id.* at ___, 658 P.2d at 402.

B. *Implied Consent to Blood Alcohol Tests*

1. *Constitutionality*

Driving under the influence of alcohol or drugs in Montana gives rise to civil and criminal liability and subjects a defendant to a number of specific rules, including the driver's implied consent to chemical tests of his blood, breath, or urine to determine blood alcohol levels.[37] In a case with potentially far-reaching constitutional implications, the court settled the constitutionality of the implied consent statute.

The two *Jackson* cases (*Jackson I*[38] and *Jackson II*[39]) involved the fourth arrest of the defendant for driving under the influence. At the police station the defendant was asked to take a breathalyzer test, to which, by statute, he was presumed to have consented.[40] The defendant refused to take the test. Police recorded this refusal and various coordination tests on videotape, and seized and suspended the defendant's driver's license, again in accordance with statute.[41] The defendant was charged with driving under the influence of alcohol.

At trial, the district court suppressed all evidence relating to the defendant's refusal to take the breathalyzer test and the consequent license suspension on the ground that the implied consent statutes permitting introduction of this type of evidence[42] were unconstitutional. In *Jackson I* the supreme court affirmed the order of the district court, ruling that a defendant's refusal was testimonial evidence and that admission of the refusal into evidence would violate his privilege against self-incrimination.[43] The state petitioned by writ of certiorari for review of this issue by the United States Supreme Court. The Supreme Court vacated the Montana court judgment[44] and remanded the case for further consideration in light of its decision in *South Dakota v. Neville*.[45]

In *Neville* the Supreme Court analyzed a South Dakota statute[46] substantially similar to Montana's implied consent statutes.

---

37. MONT. CODE ANN. § 61-8-402 (1983).
38. State v. Jackson, 195 Mont. 185, 637 P.2d 1 (1981) [hereinafter cited as *Jackson I*].
39. State v. Jackson, ___ Mont. ___, 672 P.2d 255 (1983) [hereinafter cited as *Jackson II*].
40. MONT. CODE ANN. § 61-8-402(1) (1983).
41. MONT. CODE ANN. § 61-8-402(3) (1981) (amended 1983).
42. MONT. CODE ANN. § 61-8-404(2) (1983).
43. *Jackson I*, 195 Mont. 185, 637 P.2d 1.
44. Montana v. Jackson, 103 S. Ct. 1418 (1983).
45. 103 S. Ct. 916 (1983).
46. S.D. CODIFIED LAWS ANN. § 32-23-10.1 (Supp. 1983).

The Court held that fifth amendment protections against self-incrimination do not prohibit admission into evidence of a person's refusal to take a blood alcohol sobriety test under South Dakota law.[47] The court reasoned that a defendant's refusal in response to a lawful request to take the test is not coerced, and that if the request to take the test is legitimate, it is no less legitimate if the request is refused. Therefore the Court concluded that it is not fundamentally unfair to use the defendant's refusal as evidence of his guilt.[48]

In light of *Neville*, the issues in *Jackson II* then became whether *Jackson I* was based on federal or state constitutional grounds, or both, and if not based on state grounds, whether the decision was overruled by *Neville*.[49] The Montana court found that *Jackson I* was based on federal decisions interpreting federal fifth amendment protection and that references to the Montana Constitution were interdependent with references to the federal Constitution.[50] Because it interpreted Montana's privilege against self-incrimination[51] to be substantially the same as the federal privilege, the Montana court found no basis for a broader interpretation in *Jackson II* and held that the defendant's refusal to submit to a chemical sobriety test was admissible into evidence as provided for by the Montana statute.

2. *Scope*

The scope of the implied consent statutes was examined in *State v. Thompson*.[52] In *Thompson* the defendant was arrested at the scene of a two-car accident for driving under the influence of alcohol, and taken to a hospital where he refused to submit to a blood alcohol test. Following this refusal the passenger from the other vehicle died. On the advice of the county attorney, the arresting officer then informed the defendant that the implied consent provisions no longer applied because the case now involved negligent homicide. The blood sample was taken and analyzed.

At trial the district court denied a motion to suppress the

---

47. *Neville*, 103 S. Ct. at 922-23.

48. *Id.* at 923.

49. *Jackson II*, ___ Mont. at ___, 672 P.2d at 256.

50. *Id.* at ___, 672 P.2d at 258. *See also* State v. Armstrong, 170 Mont. 256, 552 P.2d 616 (1976) (holding that the state constitution provides no broader protection against self-incrimination than the federal constitution); State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977) (holding that the opinions of the United States Supreme Court define the maximum breadth of the privilege).

51. MONT. CONST. art. II, § 25.

52. ___ Mont. ___, 674 P.2d 1094 (1984).

blood sample made on the ground that the blood sample was taken in violation of the implied consent statute.[53] The court stated that the implied consent law did not apply to negligent homicide, that the sample had been taken in compliance with the federal and Montana Constitutions,[54] and that the taking of the sample did not constitute an unreasonable search and seizure.[55]

On appeal, the Montana Supreme Court analyzed the suppression in light of three factors:[56] (1) the plain language of the statute,[57] (2) the application of implied consent statutes in other jurisdictions, and (3) the insufficiency of license suspension as a penalty when death is involved. The court then affirmed the district court decision, holding that the implied consent statute does not apply to negligent homicide cases where the results of involuntary blood tests are admissible.[58]

IV. Prosecutorial Duty to Disclose Information

All jurisdictions provide for pretrial discovery of prosecution evidence under the sixth amendment requirement that a defendant be "informed of the nature and cause of the accusation" against him. Suppression of prosecution evidence is a violation of due process. The Montana law on suppression of evidence by the prosecution is stated in *State v. Craig*.[59] Only intentional or deliberate suppression is a per se violation of due process. The court will overturn a conviction where there has been passive or negligent suppression only if the suppression prejudices the defendant and is vital to his defense. Further, to support reversal, the evidence suppressed must be material to the guilt or punishment of

---

53. *Id.* at ___, 674 P.2d at 1095.

54. U.S. Const. amend. IV; Mont. Const. art. II, § 11.

55. *Thompson*, ___ Mont. at ___, 674 P.2d at 1095.

56. *Id.* at ___, 674 P.2d at 1096-97.

57. Mont. Code Ann. § 61-8-402(1) (1981) (amended 1983) provided in pertinent part:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent . . . to a chemical test . . . for the purpose of determining the alcoholic content of his blood *if arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of alcohol.* (emphasis added).

58. *Thompson*, ___ Mont. at ___, 674 P.2d at 1097. The defendant based his argument on State v. Morgan, ___ Mont. ___, 646 P.2d 1177 (1982), another negligent homicide case, where the court held that the defendant's injuries were serious enough to render him incapable of refusing the blood test even though he was still conscious. The *Thompson* court pointed out that the central issues in *Morgan* were whether the defendant was so incoherent that consent was unnecessary and whether proper procedures were followed. There was no issue of whether the provisions applied and the court did not rule on that question. *Thompson*, ___ Mont. at ___, 674 P.2d at 1096.

59. 169 Mont. 150, 545 P.2d 649 (1976).

the defendant, and it must be exculpatory.[60] These rules have been applied only to prosecutors. In *State v. Patterson*,[61] the court extended their application to suppression by investigators.

Patterson involved the conviction of the defendant for sexual intercourse without consent. Following the alleged rape, a police officer interviewed the defendant three times and prepared a summary report of his interviews. In the report, the officer stated, "[Defendant] told me that he had a lot of mental problems. That he tends to forget things yet he is certain that he was not responsible for the rape."[62] After the trial began, the prosecution learned that the investigator's interviews were more detailed than the report indicated, including statements by the defendant about his problems with "smoking and the devil," denials about incidents surrounding the rape, and references to his other mental problems.[63] The defendant appealed his conviction based on the prejudicial effect of the state's failure to provide the defense with a complete summary of the investigative interviews.[64] In concluding that had the defense been aware of the defendant's remarks about mental illness, the defendant might have pursued an insanity defense and, therefore, that the suppression was prejudicial,[65] the court extended to investigators the prosecutorial duty to disclose material or exculpatory evidence to the defense.

V. Guilty Pleas

Frequently a defendant's guilty plea is the result of a plea bargain. A court may not accept the guilty plea unless it is made voluntarily and understandingly,[66] because by pleading guilty, the defendant waives many valuable constitutional rights.[67] Negotiated pleas are valid, however, notwithstanding the inducement of promised leniency, as long as they conform to the voluntariness and understanding standards.[68] *State v. Cavanaugh*[69] and *State v.*

60. *Id.* at 153, 545 P.2d at 651.

61. ___ Mont. ___, 662 P.2d 291 (1983).

62. *Id.* at ___, 662 P.2d at 292.

63. *Id.*

64. *Id.* at ___, 662 P.2d at 293.

65. *Id.*

66. Brady v. United States, 397 U.S. 742 (1970). *See also* Mont. Code Ann. § 46-12-204 (1983).

67. These rights include the right to counsel, the privilege against self-incrimination, the right to a jury trial, and the right to confront and cross-examine witnesses. *See* Boykin v. Alabama, 395 U.S. 238 (1969); Yother v. State, 182 Mont. 351, 597 P.2d 79 (1979).

68. *Brady*, 397 U.S. at 749-55.

69. ___ Mont. ___, 673 P.2d 482 (1983).

Dinndorf[70] further refine the application of these requirements in Montana.

Because under state law the trial judge is not bound by the plea bargain, the defendant must be informed of the maximum penalty that may be imposed as a result of his plea.[71] In *State v. Cavanaugh* the defendant pleaded guilty to aggravated kidnapping and aggravated assault in exchange for the dismissal of two other felony charges. The court sentenced the defendant to the maximum penalty on each offense with no eligibility for parole or supervised release (formerly prisoner furlough). As part of the plea bargain, the defendant had been informed of the length of the sentences but not the ineligibility for parole or supervised release. The supreme court held that because of the failure to inform the defendant of the parole and supervised release restrictions, the defendant's plea had not been entered voluntarily and understandingly, and he must be allowed to withdraw it.[72] Here the defendant was informed of the maximum penalties that could be imposed, but not the full consequence of his plea, and therefore the plea bargain he thought he entered into was not the plea bargain accepted by the court.

The court based its holding on the express terms of the statute, which provides that the court may restrict parole and supervised release eligibility on any sentence exceeding a year,[73] and on a fundamental fairness concept.[74] Noting that federal trial courts are required to allow a defendant to withdraw his plea if it is not accepted by the judge,[75] the court prospectively adopted the American Bar Association standards relating to guilty pleas[76] and rule 11(e)(4) of the federal rules of criminal procedure[77] to "require the trial judge, who accepts a plea but rejects any other portion of the plea bargain, to afford the defendant the opportunity to withdraw his guilty plea and enter a plea of not guilty."[78]

The Montana court has cited and approved the United States Supreme Court holding in *Santobello v. New York*[79] that when a

---

70. ___ Mont. ___, 658 P.2d 372 (1983).

71. MONT. CODE ANN. § 46-16-105(1)(b) (1983).

72. ___ Mont. at ___, 673 P.2d at 484.

73. *Id. See* MONT. CODE ANN. § 46-18-202 (1983).

74. *Cavanaugh*, ___ Mont. at ___, 673 P.2d at 485.

75. *Id.* at ___, 673 P.2d at 484.

76. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE §§ 3.3(b), 4.1(c) (1974).

77. FED. R. CRIM. P. 11(e)(4).

78. *Cavanaugh*, ___ Mont. at ___, 673 P.2d at 485.

79. 404 U.S. 257 (1971). *See, e.g.*, State v. Allen, ___ Mont. ___, 645 P.2d 380 (1981); State v. Brown, ___ Mont. ___, 629 P.2d 777 (1981); State v. McKenzie, 186 Mont. 481,

defendant enters a plea of guilty in exchange for a prosecutor's sentence recommendation and the prosecutor does not abide by the agreement, the defendant must be allowed to withdraw his plea. In *State v. Dinndorf*[80] the defendant had an oral agreement with the county attorney for no sentence recommendation in exchange for the defendant's guilty plea. At the hearing to enter the plea, the county attorney recommended a ten-year sentence, in violation of his previous agreement. The district court sentenced the defendant, over his counsel's objections, in accordance with the county attorney's recommendation. The trial judge denied the defendant's motion to withdraw the plea on the basis that the parties had not followed that court's procedure, which required that a plea bargain be placed on the record.[81] Specifically repudiating a Second Circuit holding that "off the record" promises of a prosecutor are a nullity and unenforceable in light of state policy to recognize only those pleas on the record,[82] the Montana Supreme Court held, in accordance with *Santobello*, that oral plea agreements are enforceable under general contract principles and that the defendant should have been allowed to withdraw his plea if the agreement was breached.[83]

VI. "Other Crimes" Evidence

As in other jurisdictions, in Montana evidence of other crimes, wrongs, or acts committed by a person is inadmissible to show the character of that person and that he acted in conformity with his character.[84] "Other crimes" evidence, however, is admissible to prove a specific contested issue such as motive, opportunity, intent, plan or preparation, knowledge, or identity.[85] In *State v. Just*,[86] a 1979 case, the supreme court held that as a prerequisite to admitting evidence of other crimes the trial court must consider:

---

608 P.2d 428 (1980).

80. ___ Mont. ___, 658 P.2d 372 (1983).

81. *Id.* at ___, 658 P.2d at 373. District court policy in the 18th Judicial District was that attorneys from both sides and the defendant should meet with the court reporter and enter the plea bargain on the record. There was no record in this case.

82. Siegel v. State, 691 F.2d 620 (2d Cir. 1982).

83. *Dinndorf*, ___ Mont. at ___, 658 P.2d at 374. Practitioners should also note Hanson v. Risley, ___ F. Supp. ___, 40 St. Rptr. 2100 (D. Mont. 1983), in which the federal district court held that admissions during the negotiation of a guilty plea later withdrawn were not admissible for impeachment purposes where they were induced by promises of leniency. Mont. R. Evid. 410 provides that on the record admissions in withdrawn guilty pleas may be used for impeachment.

84. Mont. R. Evid. 404(b).

85. *Id. See, e.g.*, State v. Jensen, 153 Mont. 233, 455 P.2d 631 (1969).

86. 184 Mont. 262, 602 P.2d 957 (1979).

(1) similarity of the crimes or acts; (2) nearness in time; (3) tendency of the crimes or acts to establish a common scheme, plan, or system; and (4) whether the probative value of the evidence outweighs the prejudice to the defendant.[87] The court also required a strict notice procedure to inform a defendant of the state's intention to present evidence of other crimes.[88] Two recent cases indicate that the *Just* standard may be eroding.

In *State v. Smith*[89] the defendant was convicted of burglary, forgery, and solicitation for encouraging his accomplice to deliver the forged checks. The series of criminal acts began in Spokane, Washington, where the defendant and his accomplice stole purses from which they obtained credit cards to use as identification. The two then drove to Missoula where they stole blank payroll checks, a check protector, and cash, and rented a typewriter they did not return. After cashing the forged checks, they returned to Spokane.

On appeal, the defendant objected to the evidence of the purse and typewriter thefts as other crimes evidence improperly admitted under the *Just* standard.[90] The supreme court held that the state did not need to meet the *Just* standard in this case.[91] Although not committed simultaneously with the crimes charged, the court reasoned that the thefts of the purse and typewriter were not wholly independent but were "inseparably related to the common general scheme of the defendant to engage in [the criminal acts charged]" and were "explanatory of his method and purpose."[92] The court relied on an earlier case,[93] holding that the theft of credit cards, which were in a truck at the time it was stolen by the defendant, was inseparably related to the theft of the truck and, therefore, was not excluded as other crimes evidence.[94]

In *State v. Gillham*,[95] the court considered a different aspect of the admissibility of evidence of a series of acts leading up to an offense. Convicted of attempted deliberate homicide, the defendant objected to evidence of both criminal and noncriminal acts as being improperly admitted because it was other crimes evidence subject to the notice provisions of *Just*. Again the court reasoned

87. *Id.* at 268-69, 602 P.2d at 961.
88. *Id.*
89. ___ Mont. ___, 670 P.2d 96 (1983).
90. *Id.* at ___, 670 P.2d at 98.
91. *Id.* at ___, 670 P.2d at 99.
92. *Id.*
93. State v. Trombley, ___ Mont. ___, 620 P.2d 367 (1980).
94. *But see* State v. Gray, ___ Mont. ___, 643 P.2d 233 (1982) (holding that consecutive acts of vandalism on a single vehicle to defraud the insurer were not "inseparably related").
95. ___ Mont. ___, 670 P.2d 544 (1983).

that the *Just* requirements did not apply because none of the acts were "wholly independent" and all were inseparably related to the crime charged. The court also noted that the state is entitled to present the entire corpus delicti of the crime, and that this rule overrides the *Just* requirements. Because Gillham's acts provided an explanatory context for the crime, they were admissible as part of the corpus delicti as well.[96] In a cautionary note, however, the court urged that the *Just* rule be liberally applied to assure fairness and to protect the defendant from unfair surprise or double punishment.[97]

The problem with *Smith* and *Gillham* is that the court, by finding that the acts were "inseparably related" to the crimes charged, removed the evidence from the "other crimes" category, but then ruled on the evidence's admissibility in the "other crimes" terms of *Just* and rule 404(b).[98] These cases leave unclear whether the evidence was in fact not "other crimes" evidence and, therefore, not subject to the *Just* standard, or whether the evidence was "other crimes" evidence admissible under new judicial exceptions. The rulings are further complicated by the fact that in holding that some series of acts *are* subject to the *Just* standard[99] and that other similar series of acts *are not*,[100] the court seemingly has looked both ways in determining when a given act is "inseparably related" to the crime charged.

VII. Double Jeopardy

The state's right of appeal in criminal cases is narrowly defined by statute.[101] One instance in which appeal is allowed is when a court order or judgment results in dismissal of a case.[102] If that dismissal substantially effects an acquittal, however, the state may not appeal, because of the double jeopardy protections of the federal and Montana Constitutions.[103] An acquittal is a court's ruling that amounts to a resolution, correct or not, of some or all of the factual issues connected with the offense charged.[104] In *State v.*

96. *Id.* at ____, 670 P.2d at 549-50.

97. *Id.* at ____, 670 P.2d at 550.

98. Mont. R. Evid. 404(b).

99. *See supra* note 94.

100. *See supra* text accompanying notes 89-94.

101. Mont. Code Ann. § 46-20-103 (1983).

102. *Id.* § 46-20-103(2)(a).

103. U.S. Const. amend. V; Mont. Const. art. 2, § 25. *See* State v. Hagerud, 174 Mont. 361, 366-67, 570 P.2d 1131, 1134-35 (1977).

104. *See* State v. Cool, 174 Mont. 99, 101, 568 P.2d 567, 568 (1977).

Greenwalt[105] the court addressed the question whether a dismissal for insufficient evidence constitutes an acquittal.

The defendants in *Greenwalt* were charged with the theft of several calves, most belonging to non-Indians living on the Crow reservation. One calf, however, belonged to an enrolled member of the Crow tribe. The court dismissed the count relating to the theft of the Indian's calf, on the ground that the state has no jurisdiction to prosecute a non-Indian for an offense against an Indian in Indian country. The defendants moved for dismissal of the remaining charges against them, based on the assertion that the state could not present sufficient evidence to prove the defendant's unauthorized control of the calves for more than seventy-two hours as required by statute.[106] The motion was granted and the charges were dismissed. The state appealed the dismissal.

The supreme court held that the dismissal for insufficient evidence did effectively resolve the factual issues connected with the offense charged and was, therefore, an acquittal protected from appeal by the fifth amendment double jeopardy prohibition.[107] The court, however, specifically excluded the theft of the Indian's calf from this holding, notwithstanding identical factual circumstances, because that count had been dismissed on jurisdictional rather than factual grounds.[108]

In addition to protecting defendants from multiple prosecutions for a single offense, the double jeopardy prohibition protects defendants from multiple punishments for one offense.[109] In *State v. Wells*[110] the defendant challenged his convictions and separate sentences for aggravated burglary, aggravated assault, and attempted sexual intercourse without consent, asserting that the offenses of aggravated burglary and aggravated assault were merged and that his conviction for each was double jeopardy.[111] The defendant had attacked a twelve-year-old girl, who was sleeping in her grandparents' home. In the course of the attack defendant choked the girl, hit her on the head with the handle of his knife causing her to lose consciousness, and stabbed her in the back six times. In challenging the convictions, the defendant argued that his use of

105. ___ Mont. ___, 663 P.2d 1178 (1983).

106. MONT. CODE ANN. § 81-4-217(1) (1981) (amended 1983). The current statute requires unauthorized control for 24 hours.

107. *Greenwalt*, ___ Mont. at ___, 663 P.2d at 1181.

108. *Id.* at ___, 663 P.2d at 1181-82.

109. *See* North Carolina v. Pearce, 395 U.S. 711, 717-19 (1969); Blockburger v. United States, 284 U.S. 299 (1932); State v. Close, ___ Mont. ___, 623 P.2d 940, 949 (1981).

110. ___ Mont. ___, 658 P.2d 381 (1983).

111. *Id.* at ___, 658 P.2d at 388.

the knife was the same aggravating factor in each offense.

Using a *Blockburger*[112] analysis, the supreme court reaffirmed the rule that where the same act or transaction is a violation of two separate statutes, the determination of whether there are two offenses or one turns on whether each statute requires the proof of a fact not required by the other.[113] This analysis must be based on the requirements of the statutes, and not on the facts of the individual case.[114]

Stating that historically it has consistently regarded burglary as an offense distinct from any other offense, the court looked at the statutes and held that the offenses of aggravated burglary and aggravated assault were not merged.[115] The court then analyzed the determinative elements of each offense in relation to the facts of this case. The elements of aggravated burglary[116] are the entry and unlawful remaining in an occupied structure, an intent to commit some other felony while in the occupied structure, and the infliction of bodily injury on another person. For aggravated assault[117] the elements are the infliction of bodily injury on someone with a weapon, or the creation of reasonable apprehension of serious bodily injury with a weapon. Each offense requires proof of a factual element not required by the other.

The court next considered whether the defendant's use of a knife was a common factor raising both offenses to the aggravated level. It found that the defendant committed the aggravated burglary when he entered and remained unlawfully in the girl's room with the intent to commit aggravated assault and injured her by choking and knocking her out. He committed aggravated assault either by stabbing the girl or threatening her with the knife. Because the defendant's use of the knife was not necessarily the aggravating factor in each offense, and the offenses of aggravated burglary and aggravated assault were not merged, the court held that this defendant had not been placed in double jeopardy.[118]

VIII. SENTENCING

Sentencing is, to the defendant at least, one of the most criti-

112. Blockburger v. United States, 284 U.S. 299 (1932).

113. *Wells*, ___ Mont. at ___, 658 P.2d at 388-89.

114. State v. Ritchson, ___ Mont. ___, 630 P.2d 234, 237 (1981); State v. Close, ___ Mont. ___, 623 P.2d 940, 950 (1981). *See also* Survey, *Criminal Procedure*, MONT. L. REV. 279, 291-94 (1982).

115. *Wells*, ___ Mont. at ___, 658 P.2d at 389.

116. MONT. CODE ANN. § 45-6-204(2) (1983).

117. *Id.* § 45-5-202.

118. *Wells*, ___ Mont. at ___, 658 P.2d at 388, 391.

cal stages of the criminal process. Rehabilitation is a chief aim of the state in its correctional policy,[119] one that requires very individualized evaluation of defendants prior to sentencing. *State v. Bolt*[120] and *State v. Redding*[121] illustrate some of the difficulties encountered in reconciling legislative policy and defendants' rights.

When a defendant twenty-one years of age or younger receives his first conviction for criminal possession of dangerous drugs, he is presumed to be entitled to a deferred imposition of sentence.[122] In *Bolt* the court interpreted the application of this presumption to a youth convicted for the first time of criminal possession of dangerous drugs, but who had been previously convicted for nondrug-related felonies. The defendant, twenty years old, was convicted for possession of dangerous drugs while serving concurrent five-year sentences for burglary and criminal mischief. The trial court concluded that the defendant's prior felony convictions overrode the presumption[123] and did not defer imposition of the sentence for the drug offense.[124]

The supreme court, on appeal, looked to the purpose of the statute, which was to prevent ruining the future of a young offender, and concluded that that benefit could not be realized in the face of prior felony convictions.[125] The presumption is a disputable one and may be overcome by other evidence.[126] The court adopted the standards set out in an earlier case[127] to determine the sufficiency of evidence required to overcome the statutory presumption: (1) the record must disclose the evidence, (2) the evidence may be within or outside the proof of the crime, (3) the aggravating circumstances should be substantial evidence over and above the prima facie case, and (4) there must be hearings and a record disclosing the aggravating evidence in the absence of a voluntary waiver.[128]

The evidence in *Bolt* met this standard. The record disclosed that the defendant was an inmate at the Swan River Youth Forest Camp following felony convictions, thus satisfying factors (1) and (2). The confinement of the defendant at the time of the drug of-

119. MONT. CONST. art. II, § 28; MONT. CODE ANN. § 46-8-101 (1983).
120. ___ Mont. ___, 664 P.2d 322 (1983).
121. ___ Mont. ___, 675 P.2d 974 (1984).
122. MONT. CODE ANN. § 45-9-102(5) (1983).
123. *Id.*
124. ___ Mont. at ___, 664 P.2d at 323.
125. *Id.* at ___, 664 P.2d at 324.
126. *See* State v. Simtob, 154 Mont. 286, 291, 462 P.2d 873, 876 (1969).
127. Campus v. State, 157 Mont. 321, 483 P.2d 275 (1971).
128. *Bolt*, ___ Mont. at ___, 664 P.2d at 324 (citing *Campus*, 157 Mont. at 327, 483 P.2d at 279).

fense was an aggravating circumstance sufficient to satisfy factor (3). In satisfaction of factor (4), the court found that the defendant had an opportunity to rebut the evidence presented at his sentencing hearing and had failed to do so. The court, emphasizing that prior offenses need not be drug-related, held that the criteria were satisifed and affirmed the sentence of the trial court.[129]

The rule that judges may not consider out-of-court information in sentencing a defendant is well-established.[130] *State v. Redding*[131] sets a new standard for determining the undisclosed information that may not be considered in sentencing a defendant. In *Redding* the defendant was convicted of auto theft. Prior to sentencing, in a private conference with the probation officer who prepared the defendant's presentence report, the trial judge learned that the defendant had been involved in "problems with other cars" while awaiting sentencing. During the actual sentencing the judge indicated he knew of and had considered these other "problems" in arriving at the defendant's sentence.

On appeal, the court held that a district judge may not consider any undisclosed information revealed in a private conference with the presentence investigating officer prior to sentencing.[132] The court based its holding on its own prior rulings that a judge may not sentence based on private out-of-court information,[133] on due process guarantees of the federal and Montana Constitutions, and on fundamental fairness ideals embodied in the adversarial system. The new standard, to be applied prospectively, provides that any derogatory information that affects the defendant's interests should be called to the attention of the defendant, his attorney, and others acting on his behalf.[134]

---

129. ___ Mont. at ___, 664 P.2d at 325.

130. *See, e.g.*, State v. Baker, ___ Mont. ___, 667 P.2d 416 (1983); State v. Stewart, 175 Mont. 286, 573 P.2d 1138 (1977); State v. Osborn, 170 Mont. 480, 555 P.2d 509 (1979); Kuhl v. Dist. Court, 139 Mont. 536, 366 P.2d 347 (1961).

131. ___ Mont. ___, 675 P.2d 974 (1984).

132. *Id.* at ___, 675 P.2d at 976.

133. *See supra* note 130.

134. *Redding*, ___ Mont. at ___, 675 P.2d at 976. In a vigorous dissent, Justice Gulbrandson charged the majority with impliedly ruling MONT. CODE ANN. § 46-18-113 (1983) unconstitutional without referring to its outlined procedures. Noting the court's statement in *Stewart*, 175 Mont. at 305-06, 573 P.2d at 1149, that "rigid adherence to restrictive rules of evidence properly applicable at trial" should not be required in sentencing hearings, Justice Gulbrandson asserted that this restriction on presentence information likely would deprive some defendants of the individualized punishment that is the aim of Montana's sentencing statutes. *See* MONT. CODE ANN. § 46-18-101(2) (1983).