

It should be finally pointed out that, at this time, the legal authority of the department to actually contract for either a planner or a contest is limited to the precise amount of presently available funds, if any, which have been appropriated for this purpose.

073-43—March 5, 1973

#### AUTOMOBILES

#### LAW ENFORCEMENT OFFICER AUTHORITY TO IMPOUND AND INVENTORY AUTOMOBILE UPON ARREST OF OPERATOR—ADMISSIBILITY OF EVIDENCE OF CRIME DISCOVERED UPON INVENTORY

#### ATTORNEY GENERAL OPINIONS

#### LEGAL EFFECT

*To: R. W. Weitzenfeld, Manatee County Sheriff, Bradenton*

*Prepared by: A. S. Johnston, Assistant Attorney General*

#### QUESTIONS:

1. Does a law enforcement officer upon arresting the driver of an automobile have the authority to cause the towing and storage of a defendant's vehicle for safekeeping when there is no other alternative but to tow the vehicle and place it in safekeeping or leave it beside the road, subject to larceny and vandalism, due to the fact that the driver must be booked into jail?
2. Prior to the pickup and storage of the vehicle, may the officer inventory the vehicle for the protection of the owner, for the protection of the vehicle's operator, for the protection of the tow truck operator, as well as the protection of the arresting officer?
3. When it is the practice of the law enforcement agency to always inventory each and every vehicle towed in because of being unable to make other disposition of the vehicle and an inventory is conducted and contraband discovered, may the contraband legally be used against the defendant in a court of law?
4. What effect does the attorney general's opinion have at law?

#### SUMMARY:

The impounding of vehicles after the arrest of the operator may be required to protect the property of the suspect. The vehicle may be seized if there is probable cause to believe that it is being used in violation of certain specific statutes.

When the vehicle is impounded to protect the property, an inventory of the vehicle may be conducted to complete this protection. Additionally, an active search for contraband may be conducted when it is reasonably suspected.

Contraband found in the course of an inventory is admissible if the impoundment and inventory were necessary, and there is no evidence indicating that an intent to uncover incriminating evidence was the motivation for the inventory. When a search is conducted reasonably incident to an arrest or based upon probable cause to suspect contraband, any contraband found would be likewise admissible.

Attorney general opinions, while not binding on the courts, are

entitled to weight in construing Florida statutes and are guides for state executive and administrative officers in performing their official duties until superseded by judicial decisions.

AS TO QUESTION 1:

Although specific authority to have an automobile towed away has not been expressly provided by statute in Florida, such a practice has been justified, based on the duty of law enforcement officers to protect the property of an arrested suspect where reasonably required by the circumstances. *Godbee v. State*, 224 So.2d 441 (2 D.C.A. Fla., 1969).

Such authority is further indicated by the decisions of federal courts and the courts of other states.

Express recognition of the authority of officers to impound an automobile after arrest is clearly stated in *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967). In examining the propriety of police action in impounding the suspect's automobile, the court stated at 392:

Cotton having been validly arrested and taken to the police station, the officer would have been derelict in his duty if he had left the car unattended in a dark alley in the middle of the night. The police have as much a duty to protect the property of a suspect as they have to protect the property of the rest of us, and that is what they did in this case by towing the car to the police impound. They also had a duty to keep a record of the property that they had impounded so that it could be returned to the suspect or its owner in due course.

The necessity of having the car towed away would depend upon circumstances such as those you mention, *i.e.*, likelihood of vandalism or larceny which an abandoned car might invite.

Additional authority for seizure of an automobile is provided when there is probable cause to believe that the vehicle is being used in violation of certain state laws. Section 562.35, F. S., provides for the seizure and forfeiture of vehicles used in violation of the state beverage laws; §398.24, F. S. 1971, applies to violation of the Uniform Narcotic Drug Law of Florida. Section 404.09, F. S. 1971, authorizes seizure of vehicles being used in violation of Florida's Drug Abuse Law. Section 933.19, F. S., allows search and seizure of a vehicle used in transporting illegal liquors, drugs, or other contraband. All of these sections are governed by the test of probable cause rather than the duty of law enforcement officers to take reasonable steps to protect the property of arrested suspects.

AS TO QUESTION 2:

Authority to inventory the vehicle follows upon the authority to have the vehicle removed. *Godbee, supra*. Illustrations of the reasonable authority to conduct an inventory are provided in the excerpt from *Cotton v. United States*, quoted above in the answer to question 1, and in *Heffley v. State*, 423 P.2d 666, 668 (Nev. 1967):

The police officer, when there is just cause, has a duty not only to impound a car from a public highway for its own protection, but also to inventory the contents so that they may be safeguarded for the owner. Such practice is deemed necessary to defeat dishonest claims of theft of the car's contents and to protect the temporary storage bailee against false charges.

As with the authority to impound a vehicle, the authority derives from the duty to protect and safeguard the property.

When circumstances do not require that the vehicle be impounded (and therefore inventoried), §901.21, F. S., might authorize a search of the vehicle incident to a lawful arrest. The Florida Supreme Court has held that §901.21 allows

an incidental search of a vehicle which reasonably ensues after a legal arrest. *State v. Gustafson*, 258 So.2d 1 (Fla. 1972).

AS TO QUESTION 3:

The individual is protected by the fourth amendment from unreasonable searches. Thus, when a search is too remote in time and place to have been made as incidental to the arrest, then it will be found to have violated the test of reasonableness under the fourth amendment. *Preston v. United States*, 376 U.S. 364 (1964). *But see Chambers v. Maroney*, 399 U.S. 42 (1970), holding fruits of a noncontemporaneous search admissible. *See also Ackles v. State*, 270 So.2d 39 (4 D.C.A. Fla., 1972), for a recent statement of the law in Florida with regard to "probable cause" and search as "incident" to a lawful arrest.

A search, in the constitutional sense, however, implies some exploratory investigation. *See Fagundes v. United States*, 340 F.2d 673 (1st Cir. 1965). A proper inventory will not include this element of exploratory investigation. Thus, when there is a lawful arrest and when circumstances require an impoundment and subsequent inventory, any contraband found in the course of a routine inventory would be admissible as evidence. An exposition of the rationale behind such admissibility is provided by the Washington Supreme Court in *State v. Montague*, 438 P.2d 571 (Wash. 1968) at 574:

When, however, the facts indicate a lawful arrest, followed by an inventory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime will not be suppressed.

Case authority in Florida indicates the apparent view of courts in this state that an *inventory* is not a *search* in the constitutional sense of the word, and, consistent with the rationale of the language in the *Montague* opinion quoted above, Florida courts will admit evidence of crime obtained in a proper inventory search. *State v. Galloway*, 266 So.2d 53 (3 D.C.A. Fla., 1972); *Christian v. State*, 265 So.2d 83 (3 D.C.A. Fla., 1972); *State v. Ruggles*, 245 So.2d 692 (3 D.C.A. Fla., 1971); *Godbee v. State*, 224 So.2d 441 (2 D.C.A. Fla., 1969); *Knight v. State*, 212 So.2d 900 (3 D.C.A. Fla., 1968); and *State v. Holmes*, 256 So.2d 32 (2 D.C.A. Fla., 1972) (distinguishing an inventory search).

It should be noted, however, that a significant and potentially fatal distinction exists between an *inventory* search and an *exploratory* search. *See St. Clair v. State*, 232 A.2d 565 (Md. App. 1967); *Godbee, supra*. *See Urquhart v. State*, 261 So.2d 535 (2 D.C.A. Fla., 1971) for an excellent discussion of the jurisprudential aspects of the inventory search theory. There, in the opinion on rehearing, Judge Mann, District Judge, issued an appropriate warning to law enforcement officials:

[A]s an abstract matter of law, what is found . . . should not have any bearing on the determination of the question of whether the police had a right to impound the car and search it. That question is not yet fully explored, and before its clarification is complete some law enforcement officers may be embarrassed if they view the inventory search as a new excuse for not getting a search warrant. [*Cf. Courington v. State*, 74 So.2d 652 (Fla. 1954).]

Thus, as indicated by the opinions above, the admissibility of any evidence found is destroyed if the impoundment was unjustified or the search was intended to uncover incriminating evidence. Additionally, when there is reason to suspect contraband, a search may be justified by §933.19, F. S., and anything found would

be admissible based upon the reasonability of the search without regard to the necessity to impound.

AS TO QUESTION 4:

Your question regarding the effect of attorney general opinions is discussed at 3 Fla. Jur. *Attorney General* §7:

Although the opinions of the Attorney General have in no sense the effect of judicial utterances, in actual practice they are usually followed. His opinion, while not binding on the courts, is entitled to weight in construing the Florida statutes. And his official opinions as to the validity or invalidity of a statute are the guides for state executive and administrative officers in performing their official duties until superseded by judicial decisions.

073-44—March 5, 1973

STATE LANDS

TRANSFER OF TITLE FROM ST. AUGUSTINE HISTORICAL  
RESTORATION AND PRESERVATION COMMISSION  
TO BOARD OF TRUSTEES OF THE INTERNAL  
IMPROVEMENT TRUST FUND—JUDICIAL  
PROCEEDINGS APPROPRIATE

To: *Richard Stone, Secretary of State, Tallahassee*

Prepared by: *Rebecca Bowles Hawkins, Assistant Attorney General*

QUESTION:

Is the property known as "Government House" in St. Augustine excluded from the provisions of §253.03(1), F. S., and §28, Ch. 72-409, Laws of Florida, requiring transfer of title to state lands to the Board of Trustees of the Internal Improvement Trust Fund?

SUMMARY:

The question of whether "Government House" in St. Augustine is excluded from the provisions of §253.03(1), F. S., requiring conveyance of all state lands to the Board of Trustees of the Internal Improvement Trust Fund, is one of mixed law and fact that should be determined in appropriate judicial proceedings. Pending such a determination, the conveyance should not be made without the assurance of the Secretary of the Interior that he will not exercise any reversionary right, if any, activated by such a transfer.

Section 253.03(1), F. S., vests in the Board of Trustees of the Internal Improvement Trust Fund all lands "owned by, or which may hereafter inure to, the state or any of its agencies, departments, boards or commissions" with some exceptions referred to hereafter; and §253.03(6), *id.*, provides that "any board, commission, department or agency holding title to any state lands used for public purpose shall execute all instruments necessary to transfer such title to the said board of trustees . . . ." The exceptions referred to above include lands held by the state that must be devoted to a particular purpose, such as port authorities, navigation and drainage districts, and military reservations. The exception which may be applicable here refers to lands the conveyance of which "to the board of trustees of the internal improvement fund under this act would work a reversion from any other cause . . . ."

Quite obviously, one of the purposes of the legislature in excepting lands