

## Chapter 141

### Search Warrants; Search of Person; Interception of Communications

#### 141.010 to 141.200

##### NOTES OF DECISIONS

See cases under Ore. Const. Art. I, §9.

#### 141.010

##### NOTES OF DECISIONS

Objects observed at the time of arrest during a search (without a warrant) reasonable as to space, time, and intensity may be seized if such objects could lawfully have been seized under a search warrant. *State v. Chinn*, (1962) 231 Or 259, 373 P2d 392; *State v. Cook*, (1966) 242 Or 509, 411 P2d 78; *State v. Elk*, (1968) 249 Or 614, 439 P2d 1011.

To challenge a search warrant on appeal, it and any other papers essential to a decision must be included in the record. *State v. Cameron*, (1969) 1 Or App 247, 461 P2d 529.

**FURTHER CITATIONS:** *Smith v. McDuffee*, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947; *State v. Howell*, (1964) 238 Or 251, 393 P2d 158; *State v. Brown*, (1969) 1 Or App 322, 461 P2d 836, Sup Ct review denied.

**LAW REVIEW CITATIONS:** 3 OLR 179; 43 OLR 333-349.

#### 141.020

##### NOTES OF DECISIONS

A proceeding for search of premises for personal property being in invitum, the statute authorizing it is to be strictly construed; no presumptions of regularity are to be invoked in aid of the process when an officer undertakes to justify under it. *Smith v. McDuffee*, (1914) 72 Or 276, 284, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

The affidavit for a search warrant is not required to be filed with the clerk of the district court by the judge before he may have authority to issue the search warrant. *Siverson v. Olson*, (1935) 149 Or 323, 40 P2d 65.

**FURTHER CITATIONS:** *State v. Monteith*, (1970) 4 Or App 90, 477 P2d 224.

**ATTY. GEN. OPINIONS:** Disposition by sheriff of property seized, 1920-22, p 97.

**LAW REVIEW CITATIONS:** 18 OLR 265.

#### 141.030

##### NOTES OF DECISIONS

A search warrant may be based on hearsay but there must be in the affidavit a substantial basis for crediting the hearsay. *State v. Dunavant*, (1968) 250 Or 570, 441 P2d 1; *State v. Flores*, (1968) 251 Or 628, 447 P2d 387.

Affidavit set forth facts sufficient to establish the reliability of the informant. *State v. Evans*, (1970) 1 Or App 489, 463 P2d 378, Sup Ct review denied; *State v. Skinner*, (1971) 5 Or App 259, 483 P2d 87.

Affidavit supporting issuance of search warrant was sufficient. *State v. Miller*, (1970) 2 Or App 87, 465 P2d 894, Sup Ct review denied; *State v. Skinner*, (1971) 5 Or App 259, 483 P2d 87; *State v. Rutherford*, (1970) 4 Or App 164, 477 P2d 911, Sup Ct review denied.

Notice of the taking of the affidavit need not be given to the adverse party. *State v. Quartier*, (1925) 114 Or 657, 236 P 746.

Affidavits on information and belief or merely alleging conclusions of law are insufficient. *Id.*

The determination of the existence of probable cause for the search is a judicial function. *State v. McDaniel*, (1925) 115 Or 187, 231 P 965, 237 P 373.

A justice of the peace acts without jurisdiction where he issues a search warrant without probable cause shown by affidavit. *Shaw v. Moon*, (1926) 117 Or 558, 245 P 318, 45 ALR 600.

An affidavit deals only with probable cause, not with clear and convincing evidence. *State v. Oland*, (1968) 250 Or 431, 441 P2d 607.

The recital of illegally obtained evidence, if any, in the affidavit, does not invalidate the warrant, provided the other information in the affidavit shows probable cause. *State v. Albertson*, (1969) 1 Or App 486, 462 P2d 458, Sup Ct review denied.

The requirement of probable cause may be satisfied by hearsay information if (1) the affidavit sets forth sufficient underlying circumstances to enable the magistrate independently to judge the validity of the informant's conclusions, and (2) if the affiant supports his claim that informant was credible or his information reliable. *State v. Dinney*, (1969) 1 Or App 473, 462 P2d 698, Sup Ct review denied.

**FURTHER CITATIONS:** *Nally v. Richmond*, (1922) 105 Or 462, 209 P 871; *Smith v. McDuffee*, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

**ATTY. GEN. OPINIONS:** Information necessary to swear out a search warrant, 1922-24, p 522, 1928-30, p 76.

**LAW REVIEW CITATIONS:** 3 OLR 179.

#### 141.040

##### NOTES OF DECISIONS

The affidavit for a search warrant is not required to be filed with the clerk of the district court by the judge before he may have authority to issue the warrant. *Siverson v. Olson*, (1935) 149 Or 323, 40 P2d 65.

#### 141.050

##### NOTES OF DECISIONS

This section is mandatory and a search warrant cannot be issued except upon proper cause shown by affidavit. *Nally v. Richmond*, (1922) 105 Or 462, 209 P 871.

"Depositions" as used in this section means affidavits. *State v. Quartier*, (1925) 114 Or 657, 236 P 746.

FURTHER CITATIONS: *State v. McDaniel*, (1925) 115 Or 87, 231 P 965, 237 P 373; *Shaw v. Moon*, (1926) 117 Or 558, 245 P 318; *State v. Dinney*, (1969) 1 Or App 473, 462 P2d 698, Sup Ct review denied.

141.060

## NOTES OF DECISIONS

A warrant for the search of premises for beef and hide of animals stolden from affiant is defective where it fails to describe any houses, buildings or real property to be examined or to designate the county in which the writ is to be executed. *Smith v. McDuffee*, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

FURTHER CITATIONS: *State v. Harris*, (1926) 119 Or 422, 249 P 1046; *State v. Muetzel*, (1927) 121 Or 561, 254 P 1010.

ATTY. GEN. OPINIONS: When a magistrate is justified in issuing a search warrant, 1922-24, p 522.

141.080

## NOTES OF DECISIONS

The recital in the search warrant as to the date on which a certain event was observed is not necessary to the warrant's efficacy. *State v. Monteith*, (1970) 4 Or App 90, 477 P2d 224.

141.090

CASE CITATIONS: *Smith v. McDuffee*, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

LAW REVIEW CITATIONS: 3 OLR 179.

141.110

## NOTES OF DECISIONS

See also cases under ORS 133.270

The officer had authority to enter the garage to search the car. *State v. Gulbrandson*, (1970) 2 Or App 511, 470 P2d 160.

Stealth and stratagems may be used by the police to gain entrance and, so long as no force is involved, the officers need not announce their authority and purpose. *State v. Monteith*, (1970) 4 Or App 90, 477 P2d 224.

FURTHER CITATIONS: *State v. Casey*, (1970) 4 Or App 243, 478 P2d 414.

141.130

CASE CITATIONS: *State v. Cortman*, (1968) 251 Or 566, 446 P2d 681.

141.150

## NOTES OF DECISIONS

In order for the defendant to have the benefit of a petition

to suppress evidence he must obtain a ruling of the court under this section on the legality of the seizure before the trial of the cause. *State v. Marcus*, (1970) 2 Or App 269, 467 P2d 121, Sup Ct review denied.

FURTHER CITATIONS: *State v. Fleet*, (1963) 234 Or 124, 380 P2d 634.

LAW REVIEW CITATIONS: 39 OLR 375.

141.160

## NOTES OF DECISIONS

While it is a general rule that the officer executing a search warrant has no right to seize any property other than that described in the warrant, this does not affect his duty, if lawfully on the premises, to seize property that is being then and there used as an instrumentality in the commission of a crime. *State v. Muetzel*, (1927) 121 Or 561, 254 P 1010.

FURTHER CITATIONS: *State v. Marcus*, (1970) 2 Or App 269, 467 P2d 121.

LAW REVIEW CITATIONS: 39 OLR 375.

141.180

## NOTES OF DECISIONS

A municipal judge is ex officio justice of the peace, and if need be, is authorized to enforce the statute. *Enloe v. Lawson*, (1934) 146 Or 621, 31 P2d 171.

ATTY. GEN. OPINIONS: Disposition of money retrieved from slot machines that were legally destroyed, 1942-44, p 50.

141.190

## NOTES OF DECISIONS

The word "depositions" as used in this section is interchangeable with affidavits. *State v. Quartier*, (1925) 114 Or 657, 236 P 746; *Siverson v. Olson*, (1935) 149 Or 323, 40 P2d 65.

FURTHER CITATIONS: *State v. Marcus*, (1970) 2 Or App 269, 467 P2d 121, Sup Ct review denied.

141.720 to 141.740

CASE CITATIONS: *State v. Cartwright*, (1966) 246 Or 120, 418 P2d 822.

141.720

ATTY. GEN. OPINIONS: Ex parte order in narcotics violation, 1960-62, p 136.