

SEARCH WARRANTS: When same may be obtained.

September 7, 1936.

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Hon. W. C. Buford,  
Commissioner,  
Game & Fish Department,  
Jefferson City, Missouri.

Dear Sir:

This department acknowledges your letter and enclosure of September 1, 1936, wherein a request is made for an opinion on the following facts:

"There was 2 Deer killed near Centerville some time back, and Mont Parker, and Everett Mann were charged with having killed them. One Deer was a Doe, and the other a Buck.

"On last Tuesday the parties had a Preliminary hearing before C. M. Hilt-bridle, Justice of Peace, and he failed to bind them over.

"John R. Johnson assisted Joe Huett in this matter, and they both tell me that they had substantial evidence to warrant the Justice to bind them over, however the Justice failed to do this.

"The case tried was for killing the Doe. There is the same kind of a case against these parties for killing the Buck.

"I have advised them and the National Forest Authorities to let this matter rest, and take the Buck case up before a Grand Jury.

"I wish you would get an opinion from the Attorney-General as to whether or not a Search Warrant can be obtained against

the two parties charged, to get hold of 2 Guns they still have, and which the State thinks were used to kill these Deer."

Section 11 of Article II of the Constitution of Missouri provides that the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, thus:

"That 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, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Section 23 of Article II of the Constitution of Missouri provides, in part, that no person shall be compelled to testify against himself in a criminal cause, thus:

"That no person shall be compelled to testify against himself in a criminal cause, \* \* \*."

As above indicated, the Constitution prohibits an unreasonable search, and the court in the case of State v. Owens, 302 Mo. 348, 1. c. 357, in determining what was unreasonable, said:

"While the Fourth and Fifth Amendments to the Federal Constitution are not involved here, Sections 11 and 23, Article II of the Constitution of Missouri, are almost identical in purport and in language with those amendments, and the construction of them by the United States courts is important authority for us in construing the like sections of our State Constitution. Many cases of prosecutions for the violation of prohibition laws lately have received consideration by courts of various states with reference to the production of evidence obtained by illegal search of the person or the premises of the defendant, and these will be noticed.

"Whether a search is legal or illegal is not always determined by the presence or absence of a search warrant. The Constitution protects against an unreasonable search. A search may be unreasonable when made by an officer with a valid search warrant in his hands, or a search may be reasonable and entirely within the rights of an officer when he has no search warrant. Whether or not a search is reasonable is a judicial question. It is not within the power of the Legislature to enact a statute which will permit an unreasonable search. (People v. Milone, 195 N. Y. Supp. 488; People v. Case, 190 N. W. (Mich.) 289; United States v. Rembert, 284 Fed. 996; Lowry v. Rainwater, 70 Mo. 152, 1. c. 158-159.) In this connection several cases turn upon the alleged consent of the party to be searched. We think such cases usually strain a point to justify the search. If an officer appears at a person's home, and in his official character demands the privilege of searching the premises, the owner of the premises who yields peaceably and silently to the official demand is as much under constraint as if he had forcibly resisted official interference."

The same court cites and discusses the following United States Supreme Court case, thus:

"The rule is general that private papers, or property possessing evidential value only, obtained by government officers by means of illegal search, are not admissible in evidence against the person affected, whose premises were searched. This is the rule of the United States Supreme Court, and is followed almost universally by the inferior Federal courts and State appellate courts. This rule applies whether the evidence is procured by compelling the defendant to produce evidence against himself or whether it is discovered by means of an illegal search. \* \* \* \*

"The Attorney-General in his oral argument in Division admitted the correctness of the rule, but claimed it had no application here, because in this case the property taken was contraband and therefore not property at all; that defendant having no right to it as property could not ask to have the evidence suppressed. That last presents the precise question to be determined in this case.

"We will first consider cases arising in the United States Supreme Court. In *Boyd v. United States*, 116 U. S. 616, the defendant was charged with evading import duty on plate glass shipped into New York, and an order was made by the district judge requiring the claimant of the property to produce the invoice of the glass. The Supreme Court thus stated the question presented, l. c. 622:

"'Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws--is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the Fourth Amendment to the Constitution?'

"The court held it was unreasonable, and that the proceeding was also contrary to the Fifth Amendment to the Constitution which provides a man shall not be compelled to furnish evidence against himself. According to many of the courts the latter reason was entirely sufficient without a determination that it was contrary to the Fourth Amendment in regard to search and seizure. It will be noticed a warrant for the search, a court order, did not make it lawful."

Section 17 of Article II of the Missouri Constitution grants citizens the right to bear arms, and provides in part:

"That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question;  
\* \* \* \*"

September 7, 1936.

Again, in the case of State v. Richards, 334 Mo. 485, l. c. 494, the court in holding that a gun was not contraband and its possession unlawful per se, said:

"So far as the record discloses the revolver and the sheep skin coat taken were the private property of appellant. It was not contraband and its possession was not unlawful per se."

The guns or property sought to be obtained in this case are not contraband and their possession in the homes of the persons sought to be charged is not unlawful per se. As we have pointed out, the Constitution specifically provides that citizens may keep arms for the defense of their person, home and property.

The presence of a search warrant would not make the search legal. A search or seizure of the guns would constitute a compulsory production of the men's private property to be used against them and an "unreasonable search and seizure" within the meaning of the Fourth Amendment of the United States Constitution and Section 11 of Article II of the Missouri Constitution.

It would also constitute compelling the men to give evidence against themselves, which in criminal cases is condemned in the Fifth Amendment to the United States Constitution, and Section 23 of Article II of the Missouri Constitution.

From the foregoing, we are of the opinion that a search warrant may not be obtained against the two persons charged for the purpose of obtaining the guns which the State believes killed the deer.

Respectfully submitted,

WM. ORR SAWYERS,  
Assistant Attorney General.

APPROVED:

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JOHN W. HOFFMAN, Jr.,  
(Acting) Attorney General.

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