

May 2, 1983
Professor Reamey

Criminal Procedure - LW635
Sections B,C,D

FINAL EXAMINATION

1. This examination consists of a total of 5 pages of facts and concludes with instructions on what to do with these facts.
2. Since there is only one fact situation, the entire test period should be spent on these facts. Watch your time carefully and reserve sufficient time to deal with all of the issues raised by the facts. No additional time will be given, and the 3 hour limit will be strictly observed.
3. No questions may be asked during the examination period unless the question deals exclusively with administrative matters. No examinations may be taken from the testing room at any time for any reason.
4. Students may use Blue Books or any other normal writing paper for their answers. Social security numbers will be placed on each answer page unless a Blue Book is used. If a Blue Book is used, the social security number need appear only once on the book. No names should appear anywhere on the examination answer.
5. Students wishing to receive their grade may do so by leaving a post card or envelope with sufficient postage with Professor Reamey. The post card or envelope should have the name or social security number of the student and the student's section designation clearly indicated on its face. Grades will be mailed as soon as they are available. Please do not ask the secretary for grades. Students not leaving a post card or envelope will receive their grades when they are sent from the University.
6. All copies of the examination will be turned in with the answers. Students may leave as soon as they complete the examination.
7. Read the fact situation carefully. Answer only what is asked, but address each issue fully. Write legibly.

One afternoon, shortly after Dudley Doright began his shift as a Bustletown police officer, Morgan David, a wino who inhabited Dudley's beat, approached Officer Doright and offered to sell him some information about drug dealing. Since Dudley is a bright young police officer looking for a promotion, he promised Morgan two bottles of Night Train if the information was good. Morgan proceeded to tell Dudley that Ned Narco had moved into the neighborhood and had begun selling drugs. Morgan told Dudley that Ned could be found on the corner of Snow Avenue and Mary Jane Road most afternoons.

Dudley gave Morgan \$5 and drove to the corner where Ned was supposed to be found. When he arrived, he spotted a young man matching the general description of Ned talking to a known drug user. As Dudley watched, the suspect got into a car and drove away. Dudley followed him to the bus station where the suspect stopped the car and went in. As Dudley watched, the young man opened a coin-operated locker and removed a package wrapped in plain brown paper and tied with string. Dudley approached and said, "Hold it a minute, partner. What's in the package?" The suspect replied, "What are you hassling me for?" Dudley said, "This is my beat and nobody sells dope in my beat. What's your name?" At this, the suspect turned and started to walk away. Dudley grabbed him by the arm and pushed him against the lockers, handcuffing him as he did so. Dudley then asked for identification again, and when he received no response, he pulled the suspect's

billfold out of his pocket and looked at the driver's license. The handcuffed suspect, very distraught, began yelling, "I want my lawyer." Dudley then patted down the pants of the suspect now identified by his license as Ned Narco and felt a hard cylindrical object in Ned's pocket. Dudley pulled it out and discovered a closed cigar tube which he opened to find marijuana inside. Dudley then read Ned his rights and turned him over to P. I. Magnum, a back-up officer who had just arrived to transport Ned to the station. Dudley retrieved the package that had been dropped in the scuffle and opened it, finding about a pound of marijuana inside.

Dudley called a wrecker to impound Ned's car parked outside the bus station. He used a key found in Ned's pocket when he was searched by Officer Magnum to open the door of the car while waiting for the wrecker. Finding nothing of value in view, Dudley then unlocked and opened the console between the seats to discover a vial of what he believed to be cocaine along with a little black book. He then opened the trunk to find a zippered brown leather case. When he opened the case, he found a sawed-off shotgun. Just after this discovery, the wrecker arrived and towed the car to the pound.

Dudley returned to the police station with the evidence and had Ned booked for felony possession of marijuana, possession of cocaine, and possession of a prohibited weapon. Dudley then took his reports and evidence upstairs to "Trick" Dacy, a crack detective. "Trick" was especially interested in the

black book which appeared to be a record of drug transactions. After discussing the case with Inspector Fenwick, Trick decided to talk to Ned about the book. He went to Ned's cell and introduced himself. He told Ned he had gone to school with Ned's brother (which was a lie) and that he didn't care about what Ned was charged with; he just wanted to talk about the book. If Ned would give Trick information about drug dealing, Trick promised to write the District Attorney a letter about Ned's cooperation. Ned said, "Well, I think I ought to talk to a lawyer first, but let me think about it." After several hours, Trick went back to Ned's cell and Ned, seeing him coming, said, "I guess I'll give you what you want." He then told Trick that his supplier of Maui wowie was Don Ho-boy, and that Don sold dope from his house on Space Street. Ned told Trick he hadn't been to the house for two weeks, but that he had seen a pound of cocaine there the last time he was at the house.

Using this information, Trick obtained a search warrant for the Space St. house and went there with Dudley Dorigt. When they drove up, they saw a man working in the yard. They told him they were police officers, and he told them he was Elbert Evans, a border in the house. Trick told him to go in the house while they searched it. After Elbert was inside, Dudley frisked him and felt a hard object like a small vial. He retrieved it and discovered a glass bottle containing what appeared to be cocaine. Elbert was arrested for possession of

cocaine. As he was being handcuffed, he said to Trick, "Why do you want to mess with me over a little coke? Don isn't even here; he's visiting some friends at 456 Ash Street."

The search of the Space St. house revealed no other cocaine, but a small amount of marijuana was found in the room in which Don lived. Based on this, Dudley and Trick obtained an arrest warrant for Don for misdemeanor possession of marijuana.

Dudley and Trick then went to the Ash St. residence and knocked on the door. Finley Farkle, the owner, came to the door and said, "What do you want?" The officers identified themselves and said, "We have a warrant for Don Ho-boy and we know he's here. Do you want to let us in?" Finley stepped back from the door and they walked in, looking through the house. Lying on the nightstand in the bedroom was a marijuana cigarette. When Trick noticed this, he placed Finley under arrest for possession of marijuana, a misdemeanor punishable by 6 months imprisonment and/or a \$1000 fine. They didn't find Don.

The next day, Trick and Dudley were driving by Don's house on Space Street when they saw him at the mailbox. Don also saw them and ran for the door. They followed, breaking down the door and tackling Don just as he was about to flush a bag of cocaine down the toilet. In a search of the house, amphetamines were found in Don's dresser. He was arrested for possession of marijuana, amphetamines, and cocaine and taken to jail.

Subsequently, the following things happened:

1. Dudley found out that the car Ned had been driving at the bus station was registered to Gertrude Gerkin. Dudley arrested Gertrude for possession of cocaine and possession of a prohibited weapon.

2. Finley was unable to post bond and was held in County Jail for six months before his trial. He was tried without a lawyer and fined \$1000.

3. Trick forgot to write the District Attorney a letter on Ned's behalf.

4. The District Attorney moved to revoke Elbert's probation on a prior conviction. Elbert asked for a lawyer at the revocation hearing but the judge refused to appoint one.

5. Don asked for an appointed lawyer so he could have a preliminary hearing, and the judge agreed to appoint the same one appointed to represent Ned. Don said, "No, thanks."

6. Ned, Don, Finley and Gertrude were all convicted on everything with which they were charged. Elbert's probation was revoked and he was sent to jail; the cocaine charges against him are still pending. All of these people are indigent and all ask for appointed counsel to appeal their dispositions. Should counsel be appointed? If counsel is appointed, what would counsel for each argue on behalf of his client?

1. Ned.

Ned is entitled to have counsel appointed for his appeal, as are all these indigent defendants, if their appeals are granted. A state is required to furnish counsel if an offense is automatically appealed or if one is granted. Beyond this first appeal, there is no absolute right to counsel, though it has been argued that there should be since lower courts are bound by precedent; thus there can only be meaningful review of lower decisions in policy making courts like a state or the federal Supreme Court.

The first thing that Ned's counsel should argue is the invalidity of his arrest. While Morgan David's information was insufficient alone to give rise to probable cause, it was sufficient, as hearsay to support the officer's reasonable suspicion of Ned's activity. The hearsay could have effectively given rise to facts and circumstances sufficient for a reasonably prudent officer of like experience (young) to believe Ned is or is about to sell drugs. Officer Dudley could proceed on the reasonable suspicion and detain Dudley to confirm or deny his suspicions, but no more. Morgan David's information, without more was insufficient for Dudley to use as probable cause to arrest Ned. Probable cause consists of sufficient facts and circumstances such that would cause the officer, as a reasonably prudent person to believe a crime is being or has been committed by the suspect. For an informant's information to sufficiently give rise to the probable cause necessary for arrest, the informant must be proven reliable. This is usually done by establishing the number of times he has provided good information before and there is no evidence of that determination here. Secondly, the information given to the officer must be corroborated, which was also not done here. While there has been a case holding that a sufficient verification of description amounted to verification, that case dealt with an exact physical description, including clothing, as well as the location of the individual in a train station, carrying a specifically described bag, on one of two speci-

fied dates, and is thus distinguished from the matchup of a general description, as occurred here. Finally, the better view is that the corroboration should be of criminal activity, and not physical characteristics.

Dudley also did not have a reasonable suspicion of his own on which to base his stop-detention of Ned. Though he saw Ned talking to a known drug user, this does not give rise to any basis for suspecting criminal activity; Ned was behaving no differently than any pedestrian on the street. Had Dudley seen an exchange or transaction between the two, he may have had a basis for the suspicion. Finally, removing the brown paper wrapped package from the bus station locker could arguably be a basis for reasonable suspicion, based on experience Dudley may have had with drug activities - had he seen people receive drugs in similar sizes and shapes at the bus station before?, etc. This is the only possible basis Dudley may have had, and it is a pretty tenuous link to illicit activities, otherwise his initial stop of Ned is bad, and an officer cannot stop an individual with no reasonable suspicion or probable cause, then find probable cause and arrest. Without a good stop, the later arrest was invalid. In any case, Dudley, if he had reasonable suspicion, could only detain Ned for a short period of time - long enough to confirm or deny his suspicions. His seizure of Ned, the handcuffing without probable cause to arrest was a 4th amendment violation. Ned was justified in a reasonable belief that he was not free to go. Another violation occurred when Ned's wallet was taken from him, and when the cigar tube was taken from him. The only justification for the patdown was if Dudley feared for his safety and was checking for weapons. Unless the cigar tube was something weapon-like Dudley was unjustified in removing it from Ned's pocket, although if it could have been a weapon, Dudley would have been able to examine its contents and the evidence would have been admissible.

Since Ned's package was retrieved from a locked receptacle, wrapped in paper and tied with string, Dudley violated his expectations of privacy in

opening it. A warrant was necessary to make this search good, and since Ned's initial detention was bad, the subsequent frisk, then search of his person and then of this package were all bad. There was no probable cause to show, a warrant could not have been obtained from a neutral, detached magistrate.

Dudley's "inventory" search of Ned's car was also invalid. To be good, such a search must be based on two factors: 1) the legal impoundment of the vehicle, and an inventory that is either the standard operating procedure of the police station, or done because of valuables in plain view in the car. There cannot be an investigatory motive for the search.

There is no reason to support the legal impoundment of Ned's car - no evidence to show it was illegally parked or impeding traffic, or the standard operating procedure to impound the arrestee's vehicle. If this last was perhaps the reason, the impoundment alone is not good enough. Dudley's apparent investigatory motive invalidates the search. There were no valuables in view, and Dudley violated Ned's expectation of privacy in the locked console. If the purpose of an inventory is to protect the driver and the police from having property in the car stolen, it is unreasonable to unlock the console to check for property. Some jurisdictions allow the trunk to be opened, but some, like Texas do not, unless it is unlocked or incapable of being locked. Dudley's looking in the trunk again violates both Ned's expectation of privacy in the locked trunk and the purpose of a inventory search.

The opening of the zippered case is a violation of Ned's expectation of privacy in it. Such a case, similar to luggage, or in fact luggage is entitled to more constitutional protection as a repository of personal effects. It's zipper indicates that it's contents are private, and to open it violates (also) again, the purpose of the inventory search. Had the trunk been left locked there would be no reason for further intrusion.

Ned's 5th and 6th amendment interests were violated by Trick's interrogation. Trick's lies about his association with Ned's brother and his promise to write the D.A. are evidence of coercion. His statement that he wanted a lawyer was an inviolation of his right to counsel, and a per se invocation of his 5th amendment right to silence. This was violated when Trick went back to see Ned before an attorney was appointed for him and counselled with him. Even though Ned spoke to Trick and gave information before Trick spoke, the contact was initiated by Trick when he came to see Ned. This did not amount to a waiver of Ned's rights to counsel and silence. Such a waiver must be both knowing and voluntary, and there is sufficient evidence, under the totality of the circumstances that neither the waiver, nor the information given was voluntary. Ned was not adequately or sufficiently apprised of his Miranda rights. They were read to him once at the scene of his arrest where Ned was distraught - at no point did any officer ascertain that Ned understood his rights. He was questioned, some time later by an officer other than the one who Mirandized him, and this officer used coercive means to ingratiate himself with Ned. Based on this, it seems there was no implied waiver of Ned's rights, and certainly no express waiver. Ned asked for a lawyer and never got one, and did not initiate the contact with Trick.

Since Ned did not waive his right to an attorney, the question is the voluntariness of his statements about his source. The evidence of coercion, is strong, though there have been cases where the court apparently felt lies to the suspect were not important. This coercion must be weighed, along with evidence of Ned's emotional state, his background and experience and characteristics to determine if it was voluntary. His attorney would assert that it was not, in light of his emotional state, the coercive environment - custody in the police station and the coercive interrogation of Trick.

However, Ned's defense turns on the original seizure of his person, which was illegal. Though an illegal arrest alone won't vacate a conviction,

all the evidence obtained against Ned should have necessarily been excluded from his prosecution since it was seized, as was he, in violation of the 4th amendment.

2. Don

As above, Don is entitled to an attorney or his first appeal of right. Don's defense begins with the search warrant based on the information given by Ned. When (if) Ned's attorney shows this information was given involuntarily, and in violation of Ned's rights; this is the beginning of Don's defense.

Since the warrant, and subsequent finding of the marijuana springs from Ned's information, it is fruit of the poisonous tree, and cannot be used to prosecute Don. Don's other charges also spring from this ill-gotten evidence and should likewise be excluded from his trial.

Other defenses to bring up for Don include the means of his arrest. Even if the officers believed the warrant valid, and there were exigent circumstances present (evidenced by his attempts to destroy evidence) the entry into his house was permissible, but the subsequent search of the house was not. Incident to Don's arrest, the officers were entitled only to search Don and the area in his immediate control for destructible evidence or weapons. The amphetamines in his dresser were beyond the scope of this search, and thus not allowable as evidence.

Don had a right to appointed counsel at his preliminary hearing since his attorney could have demonstrated these basic flaws in the state's case at that time, and or cross examined witnesses and/ or addressed the question of bail. Don's declining to accept the same lawyer as Ned does not entitle him to automatic reversal at this stage as it would have at trial had the same lawyer been appointed for the two and objected to. At this stage, Don would have to demonstrate subsequent prejudice at trial for a reversal

on the right to counsel question.

3. Finley.

Finley's attorney at his first appeal of right may be able to argue that his arrest was also the fruit of Ned's involuntary statements. It may be more difficult to argue, however because the distance from that statement, coupled with the subsequent intervention of Elbert's statements may make the link so attenuated as to dissipate the taint. The basic argument remains, however, that Trick and Dudley would never have arrived at and searched Finley's house without the original statement.

Finley's consent to the search was sufficient for the officers to enter. They asked to be let in and Finley let them. It was not necessary that he knew he could refuse. His attorney would argue, however, that Finley was acquiescing to the authority of the warrant, he did not assent, and he did not open the door for them. If his consent was no good, the officers had no legal right to be in place to see his marijuana cigarette, and if they had no right, the plain view doctrine is negated.

Finley had a right to counsel at his trial only if actual imprisonment was imposed. Since he was fined \$1,000, he was not denied the right to the assistance of counsel.

However, since he was arrested without a warrant, he had an absolute right to a preliminary hearing to determine probable cause, within a reasonable time. His attorney probably won't have trouble convincing the judge that 6 months without a probable cause determination was unreasonable.

4. Gertrude.

On Gertrude's first appeal of right, her basic problem is one of standing to challenge the illegal searches of the car that produced the evidence against her. Standing is determined by the legitimate expectations of privacy the individual may have in the premises searched or

or the thing seized. As the owner of the car, Gertrude probably has standing to challenge the search of the car. If it was hers, and she locked the console and the trunk, she exhibited an expectation of privacy in those parts of the car. However, when Gertrude loaned the car to Ned, and gave him the car keys, as well as the keys to the console and the trunk, she showed that she had a diminished expectation of privacy, at least as to Ned.

Gertrude's second problem is that even if she can establish that she had a legitimate expectation of privacy in the car, she did not have such an expectation in the property seized. If the property is such that it cannot be lawfully possessed, as the cocaine and the shotgun here, it may be that no one can exercise a legitimate expectation of privacy in it.

5. Elbert.

Elbert's attorney at his first appeal of right has several good arguments to make. His first argument is that Elbert's initial detention was more fruit of Ned's poisonous statement. On this basis the evidence turned up against him should be invalid, as should the detention itself.

Elbert's frisk should never have taken place though the officers (had the warrant been valid) could have detained him (an occupant) of the house on the authority of the warrant, the warrant was to search the house. With no independent reason to reasonably suspect Elbert would be dangerous, the frisk was invalid. And, had the frisk been valid, Dudley had no right to remove it from Elbert's pocket - a small vial cannot be used as a weapon. The purpose of such a frisk is only to take such steps as immediately necessary to insure the officer's safety.

Aside from these facts which show the arrest should never have taken place, there is the question of the revocation of Elbert's probation. Due

process requires that he be given a preliminary and a final hearing before revocation. Secondly, the judge incorrectly refused to appoint an attorney at the hearing. The right to counsel does not automatically attach to such hearings. It does attach in cases like this, where the case is so complex (beginning with Ned), that the probationer cannot adequately present his defense without an attorney.

FINAL NOTES

I don't know for sure, but maybe should mention:

- 1) other ways to make the wino's information reliable; had he never given Dudley information would be hard to do - he probably doesn't own his home, or have good credit or a steady employment history. ✓ Maybe an honorable discharge.
- 2) Ned, as driver of the car=possessor to the exclusion of others, and/or co-control with Gertrude should have standing to challenge the search, but may run into the same problem she will with the question of "lawfully possessing" the items seized. ✓
- 3) There is no question that Ned was custodially interrogated, per Miranda. He was arrested and jailed - custody; no reasonable belief he was free to leave. Trick wanted to talk about the book, and wanted information about drug dealing. This is interrogation= Trick should have known it would elicit a response from Ned. ✓
- 4) Although 4th Amendment violations won't invalidate a conviction necessary, there is no evidence obtained in any of these convictions would have been sufficient to convict, without the excluded evidence.
- 5) If Finley and/or Elbert's arrests were "sufficiently attenuated so as to dissipate the taint" of Ned's statements, the additional illegal searches and seizures are sufficient to reverse their convictions. ✓