

ST. MARY'S UNIVERSITY LAW SCHOOL

Criminal Procedure - 6751 D&E
Professor Schmolesky

Final Exam
Spring, 1982

The following is a 3 hour open book Exam.

(The following events occurred in San Antonio, Texas and the prosecutions were for state offenses.)

Bob Miller, a clerk at a convenience store that had recently been robbed, observed someone who he "thought was the robber" enter a home at 3:00 p.m. on 4/1/82 in San Antonio, Texas. He called the police the next morning to inform them. Later that afternoon two police officers, without a search warrant, went to the home named by Miller. The officers knocked on the door. No one answered, but the officers heard a radio playing and they forced open the door. No one appeared to be in the home and the officers left. As the officers returned to their car, 2 men walked towards the house. One of the officers walked up to them and asked if they lived in the house. Alfred Aggie responded that he and his companion Fred Fink rented the 2 bedroom home, splitting the rent. The police officers asked if they could search the premises and Fink responded: "Sure, go ahead". Aggie punched Fink in the arm and said: "Fink you dummy, my dope and Larry's dope is in the house". Aggie turned to the officer and informed him that he refused to consent to a search. Fink, however, again gave his permission and both officers entered the home and began searching.

The officers discovered several ounces of marijuana in a kitchen cupboard. Although Aggie objected, one of the officers entered what Aggie said was his bedroom. In a dresser drawer the officer found a small bag of marijuana.

The other officer observed a suitcase in Fink's bedroom. The officer asked Fink if he could open it. Fink said: "It's not mine, it belongs to Larry Nomad, a friend of ours who is staying here this weekend. But I don't mind if you open it". The suitcase was locked, but Fink remembered that Nomad had left a key in a coat hanging in the closet. Fink retrieved the key and the officer opened the suitcase discovering a gun matching the description of the gun used in the robbery of the convenience store where Bob Miller worked.

The officers seized all of the marijuana and the gun and arrested Aggie (but not Fink). Aggie was placed in the squad car, told he was under arrest for possession of a controlled substance, and given a complete set of Miranda warnings. Aggie stated that he didn't want to say anything.

Ten (10) minutes later, the officers and Aggie arrived at the police station. A different officer, took Aggie to an interrogation room and stated:

"You have a right to remain silent, anything you say can be used against you and you can have an attorney here to talk with you before answering any questions. Understand?"

Aggie responded that he did understand and did not want to talk and that he wanted to call his family. The officer stated: "If you cooperate by confessing and helping us get Nomad, we'll see to it that you get only a misdemeanor conviction and a probated sentence". Aggie didn't understand what the officer meant, but after the words were explained to him, Aggie said that the marijuana in the house belonged to Nomad who frequently sold the substance.

Aggie admitted that he accepted marijuana from Nomad as a gift and that he kept some of it for his own use. Aggie also told the officer that Nomad was now at a home owned by his girlfriend and that Nomad planned to spend the night there with her.

Three squad cars were immediately dispatched to the address supplied by Aggie. One of the officers knocked on the door and identified himself as a police officer. A woman's voice asked: "What do you want?" "We are here to arrest Larry Nomad," the officer responded: "Do you have a warrant" the voice returned. "We don't need one we're here to arrest," was the reply. The door opened a few inches and several officers pushed into the house. Nomad was seated on the couch and offered no resistance as he was surrounded by six officers and handcuffed. One of the officers observed a wallet on a desk about 10 feet from Nomad. The officer opened the wallet and found Nomad's driver's license and a roll of marked currency that was later shown to be "bait money" taken from the convenience store.

Nomad was taken to the police station and placed in the same interrogation room with Aggie. Aggie had agreed to wear a transmitting device that would allow the police to overhear their conversation. When Aggie and Nomad were left alone, Nomad asked: "Do the cops know anything about the convenience store robbery that I pulled?"

Bob Miller, the convenience store clerk, was asked to come to the station to see if he could identify Nomad. Miller had previously been unable to make any identification when presented with an array of 8 photographs, two of which were pictures of Nomad and the other 6 were pictures of different individuals who resembled Nomad. Miller observed Nomad through a one-way mirror while he was being fingerprinted. Miller identified Nomad as the robber. Miller had described the robber immediately after the crime as someone about 6'2" and about 180 pounds with brown hair and eyes. On the day of his arrest, the police blotter noted that Nomad was 5'10", and weighed 155 lbs. and that he had blond hair, blue eyes and a beard.

Nomad and Aggie were taken before a magistrate and the same attorney was appointed to represent them. Aggie had agreed to continue to watch Nomad and report to the State. Aggie and Nomad participated in several joint meetings with their attorney. Aggie never provided any more information to the State.

Aggie and Nomad were tried separately. At Aggie's trial for possession of marijuana, the State introduced evidence of the marijuana found in Aggie's bedroom and the arresting officer testified to Aggie's statement to Fink outside of their house. Aggie testified in his own behalf that he never personally possessed any marijuana. On cross-examination, Aggie denied ever having admitted possessing marijuana, and the State then introduced Aggie's confession. Aggie was convicted of possession of less than 4 oz. of marijuana and given a 2 year probated sentence.

Aggie testified at Nomad's trial for possession of marijuana with intent to deliver and robbery that Nomad brought a large quantity of marijuana into his home and that Nomad had told him that he robbed a convenience store in order to buy more marijuana. On cross-examination, Nomad's attorney asked if anyone had ever made any promises to him in return for his testimony against Nomad. Aggie said no and the prosecutor declined an opportunity to question the witness further.

Bob Miller testified to the circumstances of the robbery stating that he saw the robber's face for two to three minutes in the brightly lit convenience store. Miller also testified to his identification of Nomad at the police station.

In addition to the testimony of Aggie and Miller the State introduced:

The gun taken from the suitcase and identified by Miller as similar to the gun used by the robber; Marijuana found in the kitchen of Aggie and Fink's home, marked bills taken from Nomad's wallet at the time of his arrest; and the testimony of a police officer who testified to Nomad's statement to Aggie at the police station that he overheard.

QUESTION:

You have been appointed to represent Nomad on appeal. What potential issues concerning the validity of Nomad's conviction do you see? Assume that any potential issue has been properly preserved for appeal. Write a memorandum discussing the potential claims and developing your argument on each issue. What problems do you see in establishing the claim? What arguments do you anticipate that the state will make? What is the likelihood of success? If the prediction of the outcome depends on additional facts, circumstances, or assumptions -- identify them.

Assume that you are a different attorney appointed to represent Aggie and answer the same questions for his appeal. You may combine your answer into a single essay discussing both cases if you wish.

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