

ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

Victor was out walking in Anchorage when a tall white man approached him. Without warning, the man pointed a small black gun at Victor and commanded, "Give me everything you have!" Victor gave the man his wallet and his cell phone. The man stuffed these items inside his jacket and ran to a nearby dark-colored SUV, where he got into the passenger side before it sped off. Victor was unable to make out the SUV's license plate number, but called the police and described the tall white man, as well as the SUV, which he thought may have been a black or dark blue Ford Explorer. Victor also told the police that he thought he'd seen something tied or clipped onto the top of the SUV's antenna.

About two hours later, an Anchorage police officer patrolling a different area of the city watched as a black Ford Explorer drove past her. She noted a ribbon tied to the Explorer's antenna, thought of the reported robbery of Victor, and pulled the Explorer over. Inside the Explorer were a female driver and a white male passenger. The officer noted the strong odor of marijuana coming from inside the Explorer and saw that the male was smoking a marijuana "joint."

Upon the officer's request, the couple got out of the Explorer, the man carrying a jacket with him. The officer informed the man that he was under arrest for robbery and proceeded to search his person as well as the jacket he was carrying. In the jacket pockets, the officer found a wallet, a cell phone, and a small black gun. Inside the wallet, the officer found Victor's driver's license and credit cards. The man, later identified as Denny, was charged with the robbery of Victor.

1. Denny files a motion to suppress and dismiss, arguing that the police officer acted improperly when she stopped the Explorer in which Denny was a passenger. Applying Alaska law, discuss the arguments in support of and against the validity of the stop.
2. Assume for purposes of this question that the court has upheld the police officer's stop of the Explorer. Denny files an additional motion arguing that the items found in Denny's jacket should be suppressed as the fruits of an improper warrantless search. Applying Alaska law, should the court grant the motion? Why or why not?



GRADER'S GUIDE

*** QUESTION NO. 9 ***

SUBJECT: CRIMINAL LAW

1. Denny files a motion to suppress and dismiss, arguing that the police officer acted improperly when she stopped the Explorer in which Denny was a passenger. Applying Alaska law, discuss the arguments in support of and against the validity of the stop.

(35 points)

The validity of the stop hinges on whether the police officer had reasonable suspicion to stop the Explorer for any involvement in the robbery. While the prosecution would attempt to establish that the officer reasonably suspected that the Explorer, and its occupants, were involved in the robbery of Victor, there may not be enough specific facts linking this Explorer to the SUV used in the robbery to constitute reasonable suspicion under Alaska law.

The Coleman Standard – Reasonable Suspicion of Imminent Public Danger or Serious Harm

Under Alaska law, an investigative stop is permitted where an officer “has a reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred[.]” *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976). Reasonable suspicion consists of “specific and articulable facts which, taken together with [the] rational inferences from those facts, reasonably warrants the intrusion [in question].” *Coleman*, 553 P.2d at 45. In determining the legality of a stop, a court balances the seriousness of the suspected crime, recency of that crime, and strength of the officer’s suspicion against the intrusiveness of the stop. *Adams v. State*, 103 P.3d 908, 910 (Alaska App. 2004); *State v. G.B.*, 769 P.2d 452, 455-56 (Alaska App. 1989). A well-founded suspicion that a crime is in progress or has just been completed may justify a stop even though the crime itself is not a particularly serious one. Conversely, a crime that is a more serious threat to public safety may provide sufficient basis for a stop based on reasonable suspicion even after considerable time has passed. *Hays v. State*, 850 P.2d 651, 652 (Alaska App. 1993). Police cannot base an investigatory stop on generalized suspicion. *Metzker v. State*, 658 P.2d 147, 150 (Alaska App. 1983).

Here, the facts known to the officer at the time of the stop may not rise to the level of reasonable suspicion. While the robbery of Victor at gunpoint falls on the serious end of the spectrum of criminal activity, the robbery occurred about two hours before the officer’s stop of the Explorer in a different part of Anchorage. Moreover, the facts connecting this vehicle with the robbery are

not all that specific. Victor was able to describe the SUV involved in the robbery as possibly being a black or dark blue Ford Explorer, and the vehicle spotted by the officer in this case is a black Ford Explorer; however, dark-colored Ford Explorers and dark-colored SUVs generally are not uncommon vehicles. The ribbon tied to the antenna of the Explorer may be a more specific link to the SUV used in fleeing the robbery. One might argue that given the seriousness of the offense in question, the ribbon tied to the antenna of a dark SUV (arguably consistent with Victor's observation) provides a specific enough connection to give the officer reasonable suspicion. On the other hand, one could argue that the ribbon tied to the Explorer's antenna does not specifically match Victor's observation of "something" tied or clipped to the top of the antenna on the vehicle involved in the robbery. One could also argue that it is not uncommon to find objects of various sorts attached or tied to people's antennas. Given the distance in time and place from the scene of the robbery and the commonness of the vehicle stopped, the facts, taken together, may not constitute reasonable suspicion.

2. Assume for purposes of this question that the court upheld the police officer's stop of the Explorer. Denny files an additional motion arguing that the items found in Denny's jacket should be suppressed as the fruits of an improper warrantless search. Applying Alaska law, should the court grant the motion? Why or why not?

(65 points)

Denny's defense motion attacks the officer's warrantless search of both the jacket Denny was holding and the wallet found within that jacket. In response to Denny's motion, the prosecution will successfully argue that the officer's search of Denny, yielding the gun, cell phone, and wallet (and the contents of the wallet) was a proper search incident to arrest. The court thus should not suppress the items of evidence found in Denny's jacket.

Exception to Warrant Requirement – Search Incident to Arrest Generally (35 out of 65 points) and the Container Doctrine Specifically (30 out of 65 points)

In this case, the officer who searched Denny's person and jacket did not have a warrant to conduct the search. A police search conducted without a warrant is illegal unless the search is justified under one of the recognized exceptions to the warrant requirement. *Crawford v. State*, 68 P.3d 1281, 1284 (Alaska App. 2003) (citing *Schraff v. State*, 544 P.2d 834, 838 (Alaska 1975)). One of the recognized exceptions to the warrant requirement is the search incident to arrest. *McCoy v. State*, 491 P.2d 127, 138 (Alaska 1971). When the police conduct a search incident to arrest, they may search the area within the arrestee's reach at the time the arrest was made. *Crawford*, 68 P.3d at 1284. This remains true even if the arrestee has been removed from the immediate

area, or has been restrained, or both, at the time the search is conducted. *Dunbar v. State*, 677 P.2d 1275, 1277 (Alaska App. 1984).

There are, however, special rules governing a police officer's authority to open and search closed containers that he or she finds within a suspect's reach. "If the container is of the type 'immediately associated with the person' of the arrestee – for example, a purse or a jacket – then the officers can open and search it." *Crawford*, 68 P.3d at 1284. "As long as the search is confined within these limits, it is permissible for officers to open and inspect the contents of any closed containers found, unless, under the circumstances, it could not reasonably be believed that the container would yield a weapon or evidence of the crime for which the arrest was made." *Dunn v. State*, 653 P.2d 1071, 1082 (Alaska App. 1982). If the closed container in question is not of the type "immediately associated with the person," then the officers can open and search the container only if they have reason to believe that it contains a weapon or evidence of the crime for which the person has been arrested. *Crawford*, 68 P.3d at 1284.

Here, the officer announced that she was arresting Denny for the earlier robbery committed against Victor. While it is true that the officer may not yet have had the probable cause necessary to arrest Denny for that offense – as the links thus far established between Denny and that crime were fairly generalized – the officer did have probable cause to believe that Denny possessed and had used marijuana, an arrestable misdemeanor offense. Although the officer announced that the arrest was for robbery, the fact that probable cause supported an arrest for drug use and possession can be used to justify the search incident to arrest in this case.

The Court of Appeals has determined that when the police have probable cause to arrest a defendant for an offense, evidence of which can be concealed on the person, the police may conduct the search for evidence even though the defendant was arrested for another offense. *Baxter v. State*, 17 P.3d 19, 26 (Alaska App. 2003). The authority to search stems from the lawful arrest, or probable cause to arrest, not from the officer's subjective intent. *McGuire v. State*, 70 P.3d 1114, 1116-17 (Alaska App. 2003); *see also Hamilton v. State*, 59 P.3d 760, 764 (Alaska App. 2002) (prosecution may rely upon after-the-fact justification for investigative stop so long as facts known to police at time of stop establish legal foundation for justification); *Beauvois v. State*, 837 P.2d 1118, 1121 n.1 (Alaska App. 1992) (officer's subjective intent in conducting investigative stop is irrelevant; only question is whether stop was objectively justified).

After arresting Denny, the officer searched both Denny's person and the jacket that he carried with him. The jacket was within Denny's reach throughout the stop and at the time of arrest. Under the Court of Appeals' analysis of

containers, Denny's jacket might be considered a container of sorts, but if so, it was a container immediately associated with Denny's person. Indeed, Denny carried the jacket out of the vehicle with him, associating himself even more closely with the jacket. Moreover, the jacket could easily have been used to conceal a weapon – as was true in this case – as well as further evidence of drug possession. The jacket was thus subject to search, and the gun, cell phone, and wallet must remain admissible as evidence. Even without the probable cause to search for evidence of drug possession, a protective pat search for weapons would support admission of the gun found in Denny's jacket. *Free v. State*, 614 P.2d 1374, 1378 (Alaska 1980).

One could raise a similar question with respect to whether the officer could open up the wallet found in Denny's jacket. Through opening the wallet, the officer was able to see the robbery victim's – Victor's – driver's license and credit cards. A court would likely uphold the officer's search of the wallet as a lawful search incident to arrest under the same reasoning that applied to Denny's jacket. The wallet is an item easily associated with Denny's person. It was contained within the jacket that Denny carried on his person when he got out of the Ford Explorer. Additionally, although the wallet could not likely have been used to conceal a typical weapon – and there are no facts here suggesting reason to believe that Denny was using or carrying an atypical weapon – the wallet was capable of concealing additional evidence of drug possession. *See Baxter*, 77 P.3d 19 (Alaska App. 2003). The Court in this case should thus rule that the items found by the officer in Denny's jacket, including the identifying items within the wallet, are admissible. The Court should deny the defense motion on these grounds.

Note Addressing *Ravin* and *Noy*

The defense would not likely invoke the right to privacy recognized in *Ravin v. State*, 537 P.2d 494 (Alaska 1975) and *Noy v. State*, 83 P.3d 545 (Alaska App. 2003) as a basis for the motion to suppress in this case. Any applicant who raises that issue should recognize that the privacy right addressed in *Ravin* and *Noy* is expressly limited to the right to privacy in one's home. *See, e.g., Ravin*, 537 P.2d at 511; *Noy*, 83 P.3d at 547. Denny's possession and/or use of marijuana in this case falls outside the confines of his home.