ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

Alex and Barry were driving together through Anchorage in Alex's car. Alex drove while Barry sat in the front passenger seat. An Anchorage police officer noticed that Alex was speeding and pulled his car over to issue a speeding citation. As the officer approached Alex's car, he thought that he saw Barry tucking something into his jacket pocket.

Upon contacting Alex and Barry, the officer ran their identifying information through dispatch. Dispatch informed the officer that Alex had an outstanding felony arrest warrant for armed robbery. Alex's record also contained a warning that he was violent and likely to be armed. There was no similar information about Barry.

The officer asked Alex to step out of the vehicle. He performed a pat search for weapons and found no weapons on Alex's person. The officer then asked Barry to step out of the vehicle, and he performed a pat search for weapons on Barry. While performing this pat search, the officer could feel through the cloth of Barry's right jacket pocket the unique contours of a large, rock-like substance. The officer asked Barry what the substance in his pocket was. Barry replied that it was "crack," and the officer seized the rock of what he confirmed was crack cocaine. Alex was arrested on the felony robbery warrant, and Barry was arrested and charged for possession of crack cocaine.

Barry moves to suppress the drugs found on his person, arguing that: 1) the police officer had no reason to perform a pat search of his person; and 2) even if a pat search was authorized, the officer's search went beyond the scope of an appropriate pat search.

1. Discuss the strengths and weaknesses of Barry's argument that the police officer had no reason to perform a pat search of his person.

2. Discuss the strengths and weaknesses of Barry's argument that even if a pat search was authorized, the officer's search went beyond the scope of an appropriate pat search.

GRADER'S GUIDE

***** QUESTION NO. 4 *****

SUBJECT: CRIMINAL LAW

Barry moves to suppress the drugs found on his person, arguing that: 1) the police officer had no reason to perform a pat search of his person; and 2) even if a pat search was authorized, the officer's search went beyond the scope of an appropriate pat search. Discuss the strengths and weaknesses of each of Barry's arguments.

1. The Pat Search of Barry (60 points)

Barry's first argument is that the officer did not have specific articulable facts supporting a pat search of Barry's person for weapons. The United States Supreme Court has recognized that a pat-down search for weapons is justified in certain circumstances by police officers' need to protect themselves and nearby bystanders. *Terry v. Ohio*, 392 U.S. 1 (1968). Such a search is limited in scope to a search reasonably designed to discover guns, knives, or other hidden instruments that could be used to assault a police officer. *Id.* at 29. Alaska courts have held that officers performing a traffic stop may conduct a limited protective search for weapons if they have a reasonable suspicion that the occupants of the vehicle may be armed. *Uptegraft v. State*, 621 P.2d 5, 9 n.7 (Alaska 1980); *Dunbar v. State*, 677 P.2d 1275, 1277 (Alaska App. 1984). Moreover, if circumstances give rise to a reasonable apprehension of danger, an officer may conduct a pat-down search even though there may be no specific facts indicating that a particular suspect is armed. *Wilburn v. State*, 816 P.2d 907, 911-12 (Alaska App. 1991).

Here, the officer had sufficient reason to perform a pat search of Alex's person for weapons. The officer received information from dispatch specifying not only that Alex was wanted on a warrant for a violent felony crime (a robbery involving a firearm), but also that he was a violent person who was likely to be armed. An officer in this situation "need not be absolutely certain that the individual [in question] is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392, U.S. at 27; *Free v. State*, 614 P.2d 1374, 1378 (Alaska 1980). The officer's reasonable belief may be based on his own personal observations or those of a reliable third party. *Free*, 614 P.2d at 1378. Here, while information recorded on an individual's record may not always be accurate, the Anchorage Police Department's dispatch would be considered a reliable third party with regard to the information it imparted to the officer about Alex.

While the officer had sufficient reason to pat search Alex's person for weapons, that reason does not necessarily serve as a basis for searching Barry. Some federal courts, including the Ninth Circuit, adhere to the "automatic companion" rule, effectively holding that "[a]ll companions of [an] arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subject to the cursory 'pat-down' reasonably necessary to assure that they are unarmed." *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971). Under this federal standard, the police officer could pat search Barry for weapons merely because he was a "companion" of Alex, sitting next to Alex in Alex's car.

Alaska courts, however, have explicitly refused to adopt the "automatic companion" rule. Instead, Alaska courts have adopted an approach that looks to the totality of the circumstances surrounding an officer's contact with a subject. The Alaska Court of Appeals quoted LaFave's treatise on search and seizure in describing circumstances relevant to the need to pat search a "companion":

Among the relevant circumstances in making an assessment of the apparent danger are the nature of the crime for which the arrest was made, the nature of the association between the companion and the arrestee, the time and place of the arrest, the number of officers who are present as compared to the number of arrestees and companions, and whether the companion has a "suspicious bulge" in his clothing or has made any menacing movements. It would also appear to be of some significance that the companion was with the arrestee in a car or in premises or that he intruded himself into the arrest situation . . . .

Eldridge v. State, 848 P.2d 834, 837-38 (Alaska App. 1993) (quoting 3 Wayne R. LaFave, *Search and Seizure* s. 9.4(a), at 511-12 (2d ed. 1987)). Barry's strongest arguments will be that he was simply sitting in a car with the arrestee, Alex, in this case, and that that facts did not provide the officer with reason to believe that he presented a danger to the officer or to the surrounding public. Barry would argue that the officer had little to no specific information suggesting that Barry presented any sort of danger or that Barry might be armed. Moreover, the officer lacked any information about the nature of the association between Alex and Barry. Finally, there are no facts indicating that Barry's appearance suggested the presence of a weapon. While the officer saw Barry's hand move toward his pocket during his approach to the car, there is no indication of a bulge in Barry's clothing that might suggest a weapon; nor did Barry make any subsequent move toward his pocket that the officer could consider threatening.

The officer and prosecutor would argue on the other hand that, especially given the officer's observation of Barry concealing something that may have been a weapon in his pocket, the situation itself was sufficiently dangerous such that the officer reasonably needed to pat search both Alex and Barry. *See Wilburn*,

816 P.2d at 911-12. While the officer did not have information specific to Barry and did not know the nature of the association between Alex and Barry, he did know that Alex was suspected of committing a violent crime – a robbery – involving a weapon and was likely to pose a danger to him. He knew that the two were sitting together in a car, and he saw Barry move in such a way that might suggest Barry was concealing a weapon in his pocket. Moreover, the officer was alone and by himself attempting to control a situation involving two other people. He was outnumbered and thus had all the more reason to assure his safety by performing a pat search.

In answering this question, the examinee will have to weigh the officer's valid safety concerns against the lack of specific information indicating that Barry may be armed or may pose a danger to the officer and/or bystanders.

2. The Scope of the Pat Search (40 points)

Barry's second argument is that the officer's detection of a hard, rock-like substance while "patting" Barry's right jacket pocket, and the officer's subsequent questioning about the rock-like substance exceeded the scope of a lawful pat search. Barry will emphasize in his argument that a pat search should be limited to an intrusion designed to uncover weapons and that the hard, rock-like substance was not a weapon.

The officer, and prosecutor, could first respond that it may not be obvious that the hard, rock-like substance was not a weapon. Depending upon the size and nature of the substance, as well as the officer's experience with atypical weapons, the officer could have believed that this substance may be a weapon. Alaska courts have held an officer may further examine an unknown object felt during a pat search if the officer reasonably believes, based on "specific and articulable facts . . . taken together with rational inferences from those facts" that the object may be used as a weapon. *State v. Wagar*, 79 P.3d 644, 648 (Alaska 2003) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *Albers v. State*, 93 P.3d 473, 475-76 (Alaska App. 2004).

Given the question's reference, however, to the "unique contours" of the hard, rock-like substance in Barry's pocket, the officer would likely explain that he knew or suspected that this substance was not a weapon, but crack cocaine. If the officer had experience with such substances and could accurately differentiate the feel of such a substance from other objects, this would support the officer's assertion that he knew or suspected the substance to be crack cocaine.

In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the United States Supreme Court discussed the warrantless seizure of such contraband where, in the context of a pat search designed to detect objects that may be used as

weapons, an officer is able to detect with certainty an illegal substance based only upon the feel of that substance:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Id. at 375-76; *McGuire v. State*, 70 P.3d 1114, 1115-16 (Alaska App. 2003). While the Alaska appellate courts have not specifically adopted *Dickerson*'s "plain feel" doctrine, the Court of Appeals has recognized the doctrine and appeared to make use of it in *McGuire v. State*, *see supra*, and *Sellers v. State*, 1994 WL 16196661 (Alaska App. 1994). Here, there likely are not sufficient facts to support an assertion that the officer knew with certainty when he felt the substance in Barry's pocket that the substance was crack cocaine. If, however, the officer believed the substance to be contraband based upon its unique feel, the officer had an articulable suspicion that enabled him to ask Barry what this substance was. *McGuire*, 70 P.3d at 1116. (While the facts do not indicate that the officer manipulated the object in Barry's jacket pocket, examinees may highlight here that the officer's probing of the object through the cloth of Barry's jacket was appropriate only to the extent necessary to detect whether the object might be used as a weapon). When Barry responded that the substance was "crack cocaine," the officer had probable cause for an arrest, thus justifying a search of the pocket and seizure of the substance incident to arrest. *Id.*

Assuming, as this second part of the question does, that the officer could legally perform a pat search of Barry's person for weapons, the proper scope of the search depended upon the officer's experience and belief with respect to the feel of the crack cocaine in Barry's pocket. If the officer could articulate a belief that, based on the unique "feel" of the substance in Barry's pocket, that substance was contraband, his subsequent questioning of Barry with respect to that substance was proper under the law.