ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

At 3:00 a.m. Saturday morning a home owner called the Anchorage Police Department to notify officers about a house party taking place next door. The caller was concerned as some of the party goers appeared to be under the age of 21, were intoxicated and looked to be preparing to drive away. Two officers on patrol a few blocks away responded.

When the officers arrived they observed three individuals standing by an SUV. The officers observed that all three individuals appeared to be under the legal drinking age of 21 years old. One of the officers asked the three individuals who the owner of the vehicle was. Rob stated that he was the owner and driver of the SUV.

As the officer began talking to Rob, he observed signs of intoxication. Based on these observations, he asked the other two individuals, Steve and Dave, to please remain standing by the SUV. Steve complied, but Dave began walking away. The officer ordered Dave to wait by the SUV until he had an opportunity to talk with him. Dave ignored the command and ran down the street.

The second officer ordered Dave to stop and began chasing him down the street. She observed him reach into his coat pocket and discard a plastic baggie. As Dave was about to be apprehended, he pulled a knife out of his pocket and lunged at the second officer. Dave was quickly disarmed and placed under arrest.

The officers recovered the plastic baggie that Dave discarded. A field test of the contents tested positive for marijuana. A breath test confirmed that Dave had been drinking alcohol. A check of Dave's driver's license confirmed that he was under 21. The officers charged Dave with possession of marijuana, assault and minor in possession of alcohol. Dave filed a motion to suppress the marijuana and the evidence of his assault on the second officer.

1. Discuss whether the officers seized Dave at any time prior to his arrest and whether or not their action was lawful.

2. Assume the court finds that the officers illegally seized Dave when they ordered him to remain by the SUV, should the court suppress the marijuana and evidence of his assault?

GRADER'S GUIDE

***** QUESTION NO. 9 *****

SUBJECT: CRIMINAL LAW

1. **Discuss whether the officers seized Dave at any time prior to his arrest and whether or not the seizure was lawful.**

Seizure: (25 points)
The Fourth Amendment to the United State's Constitution protects against unreasonable search and seizure. For Fourth Amendment Purposes, a seizure occurs whenever a police officer engages in "a show of official authority such that a reasonable person would have believed that he [or she] is not free to leave." See Rogers-Dwight v. State, 899 P.2d 1389, 1390 (Alaska App. 1995), quoting Florida v. Royer, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983). In California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), the United States Supreme Court held that a "seizure" did not take place until the officer had the suspect within physical control.

Article I, Section 14 of the Alaska Constitution provides for "[t]he right of the people to be secure in their persons … and property … against unreasonable searches and seizures." Under Alaska law, a seizure occurs when an officer acts with a show of authority in which a reasonable person would believe that he was being ordered to stop and submit to questioning. The Alaska Supreme Court interprets this to mean that a seizure occurs even if the individual does not yield. See Joseph v. State,145 P.3d 595, 603 (Alaska App. 2006)., citing Castle v. State, 999 P.2d 169, 172 (Alaska App. 2000).

In Joseph, a police officer conducted an investigatory stop of two men who were reportedly smoking marijuana. After contacting one of the individuals, the second individual, Joseph, began walking away from the scene. The officer "called out for Joseph to stop, but Joseph continued walking away." See id. at 597. The Court of Appeals rejected the decision in Hodari D. and held that for purposes of the exclusionary rule, a seizure occurs when an officer employs a show of authority in an attempt to detain an individual. See id. at 605.

Under Alaska law, the court will find that a reasonable person would have believed that he/she was being ordered to stop when the officers ordered Dave to remain by the SUV. Dave was first asked to remain standing by the SUV, but was later ordered to remain by the SUV. The officer's show of authority in ordering Dave to remain by the SUV, although unsuccessful, will most likely constitute a seizure. Some test takers might recognize that under federal law, Dave was not "seized" until he was under the physical control of the officers. This argument, however, was rejected by the Court of Appeals in Joseph when

the Court noted that the decision in Hodari D. was inconsistent with Article I, Section 14 of the Alaska Constitution. See id. at 605.

Investigative Stop: (25 points)
The validity of the investigatory stop depends on whether or not the officers complied with the Fourth Amendment to the United States Constitution and Article I, section 14 of the Alaska Constitution.

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that, consistent with the Fourth Amendment to the United States Constitution, police officers may briefly detain people to investigate a potential crime even though the officers do not have probable cause to make an arrest. The Supreme Court held that a brief investigative detention is justified if the police have an objectively reasonable suspicion of criminal activity. This requires that the police be able to point to specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.

Under Alaska law, a police officer may conduct an investigatory stop if the officer has reasonable suspicion that the person being stopped is committing or has just committed a crime involving imminent public danger or recent serious harm to persons or property. Colemen v. State, 553 P.2d 40, 43-47 (Alaska 1976); see also Goss v. State, 390 P.2d 220, 223-224 (Alaska 1964), cert. denied 379 U.S. 859, 85 S.Ct. 118, 13 L.Ed. 2nd 62 (1964), and Maze v. State, 425 P.2d 235 (Alaska 1967). The Coleman rule places greater restrictions on a police officer's authority to conduct an investigative stop than does federal law." Adams v. State, 103 P.3d 908, 910 (Alaska App. 2004).

Alaska courts apply a balancing test to determine if an officer had lawful grounds for conducting an investigatory stop. This balancing test results in the court considering the seriousness of the crime, "the necessity for the stop, and the imminence of the threat to public safety." See id. Additionally, courts must consider "the strength of an officer's reasonable suspicion and the actual intrusiveness of the investigatory stop." See id. A threat to public safety might not justify an investigative stop when there is no immediate threat of danger or when the circumstances would permit for additional investigation. Conversely, as the threat to public safety becomes more imminent and the opportunity for investigation diminishes, the same threat might justify a stop based on reasonable suspicion alone. See Joseph,145 P.3d at 599-600.

Reasonable suspicion that a person is committing or has committed a crime is not enough, by itself, to justify an investigative stop. Rather, the suspected crime must create an immediate danger to the public, or it must involve recent serious harm to persons or property. See Joseph, 145 P.3d at 598, citing Coleman, 553 P.2d at 46. In Joseph, the Court of Appeals overruled the

superior court's finding that the smoking of marijuana in public constituted an "imminent public danger" thus justifying an investigative stop. Alternatively, the Court of Appeals did find that the risk of imminent danger to the public exists justifying an investigatory stop when the police had "amply supported suspicion" that a person was transporting substantial quantities of illegal drugs for commercial purposes. See Joseph, 145 P.3d at 598, citing Pooley v. State, 705 P.2d 1293 (Alaska App. 1985).

Thus the issue to be analyzed is whether or not the facts known to the officers at the time gave rise to the level of reasonable suspicion satisfying the Coleman test and therefore justifying the seizure of Dave by the officers. The facts presented allow for argument with respect to whether or not the crime of minors consuming alcohol and driving is sufficient to constitute an imminent danger to public safety thus making the stop necessary. Applicants should also talk about the strength of the officers' reasonable suspicion and the overall intrusiveness of the stop. The officers received a report that a party had just disbanded and that some of the partygoers appear to be underage. The officers were also informed that some of these individuals appeared to be preparing to drive, a fact which the officers were able to visually verify.

The State could argue that drinking and driving is a serious crime that that constitutes an imminent danger to public safety and that this danger is increased when the driver is an underage minor. The State can further argue that there was an imminent threat to public safety and that there was no opportunity for additional investigation prior to conducting the investigatory stop. Finally, the State can point out that the officers' reasonable suspicion that minors were drinking and possibly preparing to drive was verified upon contacting Rob and that overall intrusiveness of the stop was minimal.

Alternatively, David can argue that the officers conducted an investigative stop prior to any of the minors actually driving. Dave can also argue that he was not the driver of the vehicle, so the rationale (i.e., the urgency) for the investigative stop is diminished. Finally, Dave could argue that he was attempting to walk away, not drive, when he was seized and thus there was no imminent danger to the public justifying the stop. The State could counter this argument by claiming that the drinking of alcohol by minors is a serious enough of a problem to constitute an imminent danger to public safety thus justifying the officers seizure of Dave.

The test taker's outcome with respect to the lawfulness of the investigative stop is not important as long as the issue is recognized along with the fact that the officer needs reasonable suspicion of an imminent danger to public safety to justify the stop. Some test takers will recognize that the Coleman standard is based upon the framework of Terry v. Ohio.

2. **Assume the court finds that the officers illegally seized Dave when they ordered him to remain by the SUV, should the court suppress the marijuana and evidence of his assault?**

Exclusionary Rule: (50 points)
The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. See U.S. v. Calandra, 414 U.S. 338, 347, 94 S.Ct. 613, 619 (1974). This prohibition applies as well to the fruits of the illegally seized evidence. See id.

Marijuana
Courts have upheld the admissibility of evidence of certain crimes involving sufficient free will that purges any taint of the illegal seizure. See Castle, 999 P.2d at 175, citing 3 WAYNE R. LAFAVE, CRIMINAL PROCEDURE, §9.4(f), at 380-81 (2nd ed. 1999). LaFave explains that incriminating admissions and attempts to dispose of incriminating objects are predictable consequences of illegal seizures and that admitting such evidence would encourage violations of the Fourth Amendment. On the other hand, attempted bribery and physical attacks on police officers are so infrequent and unpredictable, that admitting such evidence is not likely to encourage future illegal arrests and searches. See id. Thus courts should apply the exclusionary rule in a manner which will deter the police from committing future acts of misconduct, which will generally depend upon the facts of each case.

In Hodari D., the United States Supreme Court held that a seizure did not occur until the officer had the suspect within physical control. In following this reasoning, the United State's Supreme Court held that the exclusionary rule does not bar the admissibility of evidence obtained by police while a person is fleeing from an impending unlawful police detention. California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690. Justice Scalia declared that the holding of Hodari D. was consistent with the policy of the exclusionary, which is to deter police misconduct by depriving the government of evidence obtained through misconduct. See Hodari D., 499 U.S. at 627, 111 S.Ct. at 1551

The Alaska Court of Appeals, however, took the contrary position and ruled that with respect to a show of authority by police, a seizure occurs even though the subject does not yield. See Joseph, 145 P.3d at 597, 605. Thus under Alaska law, "[a]cts of abandonment prompted by unlawful police conduct are generally considered the tainted fruit of the illegality" and thus subject to the exclusionary rule. See Joseph, 145 P.3d at 601, citing Young v. State, 72 P.3d1250, 1255 (Alaska App. 2003).

Assault – Subsequent Crime (Castle)

In Napageak v. State, 729 P.2d 893 (Alaska App. 1986), the Court of Appeals held that evidence of assault on a police officer was not barred by the exclusionary rule despite the fact that the officer entered the defendant's home illegally but peaceably. See id. at 895, citing Elson v. State, 659 P.2d 1195, 1199-1202 (Alaska 1983). One of the justifications for admissibility is that the assault on the officer was not a predictable result of the illegal action by the police officer. See Castle, 999 P.2d at 175, citing 3 WAYNE R. LAFAVE, CRIMINAL PROCEDURE, §9.4(f), at 380-81 (2nd ed. 1999). A contrary result was reached in Castle, where the Court of Appeals noted that the defendant did not attack the officer, but rather ran down the street at 3:30 in the morning in an attempt to get away from the officer. See Castle, 999 P.2d at 177. The Court of Appeals held that the goal of the exclusionary rule would be "ill-served if the police could unlawfully seize (or try to seize) someone, only to later justify themselves by proving that the victim of this unlawful seizure" committed a defensive action that can fairly be characterized as having resulted from the illegal seizure. See id.

Conclusion

Test takers should reach the conclusion that under Alaska law, Dave was illegally seized by the officers when they ordered him to remain by the SUV. Dave's disposal of the marijuana in his pocket was a predictable consequence of the officers' illegal seizure and admitting such evidence would encourage other officers to violate the Fourth Amendment. Dave's act of assaulting the second officer, however, is an act that was arguably unpredictable. Dave might argue that assaults on officers is not that unpredictable in cases of drug trafficking, but the State could respond that the seizure was based on the officers' mistaken belief that an investigative stop was justified to investigate the crime of minors in possession of alcohol. Test takers should come to the conclusion that the marijuana will most likely be suppressed, but the evidence of Dave's assault will most likely be admissible against him at trial. Some test takers will also recognize the contrary federal holding in Hodari D. with respect to the admissibility of the apparently abandoned marijuana.