## ESSAY QUESTION NO. 8

**Answer this question in booklet No. 8**

David lived in Kenai, Alaska and wanted to go snow machining on Moose Trail because it was a beautiful, sunny day. David decided to use his neighbor Victor's snow machine even though Victor had never given him permission to use the machine before. Victor was out of town, but David knew that Victor kept the keys to the snow machine in the shed. David put on his red jacket, put a bottle of whiskey in his pocket and took Victor's snow machine for the day.

Around noon on the same day, the Kenai Police received a report that two snow machiners wearing black jackets were riding recklessly on Moose Trail. Some hours later, Officer Smith drove his patrol car out to the trailhead and saw Victor's snow machine stopped nearby. David was lying on his back on the snow machine, facing the sun with his eyes closed. The engine was off, but the key was still in the ignition switch. Officers Smith parked his car in front of the snow machine and turned on his overhead lights.

Officer Smith walked over to David, stood beside the snow machine, and said, "Hello". David didn't respond, so Officer Smith grabbed David's shoulder and shook him. Without opening his eyes, David swung his arm, knocking the officer's hand away. Officer Smith stepped back and dropped his hand to his baton because he was afraid that David might start swinging. But David then opened his eyes, saw the officer and sat up quietly.

Officer Smith noted that David's eyes were bloodshot and watery and that he had the odor of alcohol on or about his person. Officer Smith asked him his name, and David responded, slurring his words. Officer Smith then had David perform the field sobriety tests, which David failed. Officer Smith arrested David and took him to jail.

1. David files a motion to suppress alleging that Officer Smith's contact with him was improper. Discuss the arguments that the state would make to justify Officer Smith's conduct.

2. Discuss any criminal offenses with which David could be charged.

**GRADERS' GUIDE**
*** * * QUESTION NO. 8 * * ***
**CRIMINAL LAW**

## I. The State's Arguments Against David's Motion to Suppress – 60%

Article I, section 14 of the Alaska Constitution prohibits unreasonable searches and seizures. Evidence obtained from an unconstitutional seizure is inadmissible. *Hartman v. State, Dept. of Admin., Div. of Motor Vehicles*, 152 P.3d 1118, 1122 (Alaska 2007).

### A. The Seizure

There are three types of contacts between police and private citizens: generalized requests for information, investigatory stops, and arrests. *Howard v. State*, 664 P.2d 603, 608 (Alaska App. 1983). An investigatory stop must be supported by reasonable suspicion, while a generalized request for information, such as an on-the-scene investigation, does not. *Id.* This question raises the issue of the dividing line between a generalized encounter an investigatory stop.

An encounter between a police officer and a citizen becomes a type of seizure called an investigatory stop when, in light of the totality of the circumstances, a reasonable person would not feel free to leave. *Ozhuwan v. State*, 786 P.2d 918, 920 (Alaska App. 1990). In *Ozhuwan*, a police officer saw two cars positioned driver's door to driver's door near a boat launch at night. *Id.* The officer partially blocked the exit by positioning his patrol car between the cars and the exit to the boat launch area. *Id.* He then turned on his high beam headlights and his overhead red lights. *Id.* The court of appeals concluded that a seizure occurred because a reasonable person would not feel free to leave under these circumstances.

The facts in the question are similar to, but not exactly the same as, those in *Ozhuwan*. Officer Smith pulled up to the trailhead and parked his patrol car in front of the snow machine with his overhead lights on. Officer Smith's action made it more difficult for David to leave. And the use of the overhead lights is indicative of a traffic stop. Under these circumstances a court could conclude that a reasonable person would not feel free to leave.

### B. Reasonable Suspicion

The Alaska Supreme Court has held that an investigatory stop is reasonable when the officer has a reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred. *State v. Miller*, 207 P.3d 541, 544 (Alaska 2009). An inchoate suspicion or

hunch is not sufficient to justify a stop. *Id.* The officer must be able to point to specific and articulable facts justifying the stop. *Id.* When reviewing a stop, a court must consider the officer's experience as well as all of the circumstances known to the officer. *Id.* The supreme court first announced this standard in *Coleman v. State*, 553 P.2d 40 (Alaska 1976).

In applying the *Coleman* standard, the supreme court considers four questions: (1) How serious was the alleged crime to which the officer was responding? (2) How immediate was the alleged crime to the investigative stop? (3) How strong was the officer's reasonable suspicion? And (4) How intrusive was the stop? *State v. Miller*, 207 P.3d 541, 544 (Alaska 2009); *see also State v. G.B.*, 769 P.2d 452, 455-56 (Alaska App. 1989).

(1) How serious was the alleged crime to which the officer was responding?

Officer Smith was responding to a reasonably serious offense. The police had received a report that two men were riding their snow machines recklessly. Although not as dangerous as cars, snow machines are motorized vehicles and there are numerous serious injuries every year resulting from snow machine accidents. This factor favors finding reasonable suspicion.

(2) How immediate was the alleged crime to the investigative stop?

In *Miller*, the supreme court held that a stop was "quite immediate" to a reported offense when an officer was on patrol in the area of the reported disturbance and was on scene within moments. In *Saltz v. State, Dept. of Admin., Div. of Motor Vehicles*, 126 P.3d 133, 137 (Alaska 2005), the court of appeals emphasized that a trooper spotted the suspect vehicle within a minute of receiving the report of a drunk driver. In contrast, in the question, the police received the report of the reckless snow machiners around noon. Yet, Officer Smith did not respond to the trailhead for a couple of hours. This factor works against a finding of reasonable suspicion because snow machines are mobile. The reckless snow machiners could very well have been long gone from the area by the time Officer Smith got there.

(3) How strong was the officer's reasonable suspicion?

Officer's Smith's suspicion was not particularly strong, but it might be sufficient. He received a dispatch that an anonymous caller had reported that there were two snow machiners in black jackets riding recklessly on Moose Trail. An officer may base an investigatory stop on a report from an informant so long as there is reason to believe that the informant is credible and a basis for concluding that the information was based on personal knowledge. *State v. Miller*, 207 P.3d 541, 548 (Alaska 2009). Information provided by an

anonymous caller will be sufficient if the tip has some indicia of reliability. In *Miller*, an anonymous caller reported a fight occurring between a man and a woman in a parking lot in front of a bar. *Id.* The caller described the man and woman and that they were getting into a white Subaru WRX. *Id.* The transcript of the call indicated that the caller was watching the fight as it occurred. *Id.* A police officer arrived on scene within moments and confirmed that a White Subaru WRX with more than one person in it was about to leave the parking lot. *Id.* The Alaska Supreme Court concluded that there were sufficient indicia of reliability. *Id.*

In the question, Officer Smith based his stop on an anonymous call. The call was different from the one in *Miller* because the facts in the question do not indicate that the caller had personal knowledge of the events. Similarly, Officer Smith's observations were not as corroborative of the report as the officer's observations in Miller. Officer Smith saw one man in a red jacket lying on a snow machine. He did not see two men in black jackets riding at all, much less recklessly. This factor works strongly against a finding of reasonable suspicion.

(4) How intrusive was the stop?

In *State v. Miller*, 207 P.3d 541, 549 (Alaska 2009), the police officer stopped a moving vehicle in a parking lot and conducted a brief interview of the occupants through the open window of the car. The court concluded that this stop was minimally intrusive. *Id.*

Officer Smith's action was arguably more ambiguous than the stop in *Miller*. Officer Smith pulled his patrol car up alongside of David and turned on his overhead lights. But he did not stop David while he was traveling from one point to another. These facts indicate the stop was minimally intrusive. On the other hand, Officer Smith woke David up by shaking him and Officer Smith dropped his hand to his baton after David knocked his hand away. This could be construed as a show of force and an implicit command to freeze. These facts raise the level of intrusiveness.

Overall, the factors probably do not support a finding of reasonable suspicion. The stop was not close in time to the reported harm and Officer Smith's information indicated that David was not one of the snow machiners creating the harm. These factors probably outweigh the seriousness of the harm and the minimally intrusive nature of the stop.

### C. The Caretaker Function

The court of appeals has held that "otherwise intrusive police conduct may be acceptable when there is a legitimate reason to be concerned for the welfare of a motorist." *Ozhuwan v. State*, 786 P.2d 918, 922 (Alaska App. 1990). The officer must be aware of specific circumstances that support a reasonable belief that the person needs assistance. *Id.* But there is not necessarily any need for evidence of an "imminent public danger". The appellate courts have not decided whether *Coleman*'s requirement of "imminent public danger" is also a requirement for a welfare check. *Weil v. State*, 249 P.3d 300, 302 (Alaska App. 2011). In *Weil*, the court of appeals concluded that a trooper was justified in stopping a man riding a four-wheeler with his dog on a 20-foot lead. The driver was approaching a busy road and the trooper was afraid that the long lead would cause traffic to swerve if the four-wheeler crossed the busy road. The court said that it did not have to decide whether "imminent public danger" was a requirement of a welfare check because the four-wheel driver's conduct did pose an imminent public harm. And in *Howell v. State*, 115 P.3d 587, 590 (Alaska App. 2005), the court of appeals upheld a welfare check when a police officer saw a car parked in a car wash parking lot at 3:00 am. The driver of the car was hunched over the wheel with his jacket pulled over his head.

A court could come down either way on whether Officer Smith's contact with David was a proper welfare check. On one hand, David was stretched out on the back of a snow machine. He could have been injured or sick. This is similar to the officer's need to check on the hunched over driver in *Howell*. On the other hand, David was parked at trailhead in the middle of the day and it was sunny out. And David was facing the sun. These circumstances distinguish this situation from *Howell*. It is far less unusual to expect a snow machiner to rest briefly in the sun during a hard day's riding.

If a court were to conclude that *Coleman*'s "imminent public danger" requirement applied to welfare checks, then the court would be less likely to find the stop reasonable. In contrast to the four-wheeler driver in *Weil*, David was not putting anyone else in harm's way with his action. And as noted above, the circumstances were not as strongly suggestive of a problem as those in *Howell*.

## II. Criminal Offenses With Which David Could Be Charged – 40%

### A. Vehicle Theft

Vehicle Theft in the Second Degree, AS 11.46.365, prohibits a person from driving, towing, or taking the propelled vehicle of another if the person has no right to do so or no reasonable belief that he had a right to do so. David took Victor's snow machine for the day. He did not ask Victor for permission

because Victor was out of town. And Victor had never given him permission to to use it before. These facts suggest that David either knew or should have known that he didn't have any right to take the snow machine.

David would not be liable for Vehicle Theft in the First Degree because the vehicle was a snow machine, not a "car, truck, motorcycle, motor home, bus, aircraft, or watercraft" and because he did not cause $500 worth of damage to the snow machine. AS 11.46.360 (a).

David's only took the snow machine for a day. This fact precludes a theft charge under Alaska's general theft (or larceny) statutes, AS 11.46.120-150, because theft requires the intent to permanently deprive another of their property. AS 11.46.100(1), 11.46.990(8).

**B. Assault in the Fourth Degree**

A person commits Assault in the Fourth Degree, AS 11.41.230, by recklessly causing physical injury to another person or recklessly placing another in fear of imminent physical injury. "Physical injury" means pain or an impairment of physical condition. AS 11.81.900(b)(46).

Officer Smith could potentially charge David under both theories based on David's action of swinging his arm and knocking Officer Smith's hand away. The first theory is weaker because the facts do not explicitly say that Officer Smith felt pain. It is possible to infer that he felt pain, though, based on his reaction. Officer Smith stepped back and dropped his hand to his baton. This could reasonable imply that he felt some minimum pain from the blow, or he wouldn't have reacted defensively. The second theory is stronger because the facts provide that Officer Smith stepped back and put his hand on his baton because he was afraid that David would come up swinging. This indicates that he was afraid of getting hit and suffering pain.

To prove that David acted recklessly in swinging his hand, the state would have to show that he consciously disregarded a substantial and unjustifiable risk that the result will occur: in this case, that Officer Smith would feel pain or be placed in immanent fear of physical injury. AS 11.81.900(a)(3). The risk must be of such a nature that disregarding constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Because a reasonable person would not likely swing his arm to knock away a police officer's hand, David's conduct probably constitutes a gross deviation from the standard of conduct.

But David may or may not have consciously disregarded the risk that his conduct would have the result that it did. David could have been asleep when Officer Smith shook him so that his action was instinctual rather than driven by thought. David's response on opening his eyes – sitting up quietly –

suggests that he was acting on instinct rather than deliberately knocking someone's hand away from his shoulder. On the other hand, David was probably intoxicated. He had bloodshot watery eyes and he had the odor of alcohol on or about his person. He also slurred his speech and failed the field sobriety tests. If David only swung his arm because he was too intoxicated to realize that he was swinging at an officer then he could still be found to have acted recklessly. "A person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk." AS 11.81.900(a)(3).

**C. Driving Under the Influence**

There are two ways to prove that someone was driving or operating a vehicle under the influence of alcohol. First, the state can show that the person was driving or operating the vehicle while impaired to the extent that the person could not operate the vehicle with the caution characteristic of a person of ordinary prudence who is not under the influence. *Molina v. State*, 186 P.3d 28, 29 (Alaska App. 2008). Second, the state can show that the person exceeded the .08 standard for alcohol in the blood. Only the first theory is relevant to the facts in the question because there is nothing to indicate that Officer Smith gave David a chemical test or what the results were if he did.

On the other hand, the facts indicate that David was intoxicated. As noted above, he had bloodshot, watery eyes and he had the odor of alcohol on or about his person. He also slurred his words and failed the field sobriety tests.

David was not driving the snow machine when Officer Smith encountered him. He was lying on the snow machine with his eyes closed. However, Alaska has a very broad definition of operating. If a person has control over the vehicle, including the ability to start it, then the person is operating the vehicle. *State, Dept. of Motor Vehicles v. Conley*, 754 P.2d 232 (Alaska 1988). David had control over the snow machine. He was in actual physical control because he was lying on the seat. He also had the ability to start it because the key was in the ignition.

**D. Burglary and Criminal Trespass**

A person commits Burglary in the Second Degree by entering or remaining unlawfully in a building with the intent to commit a crime in the building. AS 11.46.310. David entered the shed to take the keys to the snow machine. The definition of building includes all of its usual meanings. AS 11.81.900(b)(5). In *Austin v. State*, 883 P.2d 992, 993 (Alaska App. 1994), the court of appeals held that a freezer trailer used as a storage unit behind a bakery qualified as a building based on the definition of "building" in and on case law from jurisdiction with similar burglary statutes. A shed would qualify

as a building. As discussed above, Victor had never given David permission to ride the snow machine before. This fact indicates that David had the intent to commit the crime of vehicle theft when he entered the shed.

There is some ambiguity as to where the snow machine was stored. The facts indicate that the keys were in the shed but do not expressly state that the snow machine was there. If the snow machine was outside the shed, David could argue that he did not intend to commit a crime in the building because he intended to commit the crime outside the building. On the other hand, the state could argue that taking the keys was necessary to take the snow machine, so the "taking" of the snow machine began with the entry into the shed and the "taking" of the keys. If the snow machine was inside the shed, then David committed a Burglary in the Second Degree.

David did not commit Burglary in the First Degree because the building was not a dwelling. AS 11.46.300(a)(1). A person also commits Burglary in the First Degree if the person is armed with a firearm during the burglary, injures or threatens to injure someone, or uses or threatens to use a dangerous instrument during the burglary. AS 11.46.300(a)(2) There are no facts suggesting that any of these provisions apply.

A person commits Criminal Trespass in the First Degree by entering or remaining on land with the intent to commit a crime on the land. AS 11.46.320(a). Under the facts of this question, Criminal Trespass in the First Degree would be a lesser included offense of Burglary. The facts imply that David went on to Victor's land to take the snow machine. Nothing in the facts indicates that David had any reason to believe that his entry onto the land was lawful because Victor had never given him permission to take the snow machine before.

A person commits the crime of Criminal Trespass in the second Degree if the person enters or remains unlawfully in or upon premises. AS 11.46.330(a). "premises" is defined as a "real property and any building." As noted above, the shed qualifies as a building. Criminal Trespass in the Second Degree would, therefore, be another lesser included offense of the Burglary.