

**FEBRUARY 2001 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Criminal Law

QUESTION

Duce and Cody were arrested for an armed robbery. Duce was taken to the police station, where she was interrogated without Miranda warnings. After three hours of questioning, a police officer asked Duce if she would consent to a search of her automobile. Duce consented, and a search of her car revealed a handgun and items stolen in the robbery, which were seized by the officers. When told what the officers found, Duce confessed to driving the getaway car in the robbery.

Cody, who did not know that Duce had confessed, then confessed and named Duce as the driver of the getaway car.

At their joint trial on a charge of robbery, Duce moved to exclude her confession from evidence based solely on the failure of the police to give her Miranda warnings. Based only on that violation, the court granted the motion to exclude her confession.

Duce also moved to exclude from evidence the handgun and the stolen items seized from her automobile, claiming that she was not aware that she had a right to refuse consent to search. The prosecutor conceded that the police had no authority to search the car absent consent, but asserted that Duce's consent was obtained without coercion. The court denied the motion, finding that the consent was voluntary.

The handgun and the stolen items seized from Duce's car were admitted into evidence at the joint trial of Duce and Cody over objections by each defendant. Cody's confession, redacted to eliminate any reference to Duce, was admitted into evidence against Cody.

At trial Duce testified, denying that she drove the getaway car and that she knew the handgun or the stolen items were in her car. She testified that she had loaned her car to Cody on the day of the robbery. In rebuttal the prosecutor called a police officer who testified, over objection by Duce, to the contents of Duce's confession and to the contents of Cody's complete unredacted confession implicating Duce as the driver of the getaway car.

Assume that in each instance all appropriate constitutional and evidentiary objections were made.

1. Did the court err in admitting the handgun and the stolen items seized from Duce's car against Duce and Cody? Discuss.
2. Did the court err in admitting the police officer's testimony about Duce's confession? Discuss.
3. Did the court err in admitting the police officer's testimony about Cody's complete unredacted confession? Discuss.

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ANSWER A

1. Handgun and Stolen Items Against Duce and Cody

Duce

The Fourth, Fifth, and Sixth Amendments apply to states by the Fourteenth Amendment. Under the Fourth Amendment, persons are to be free from unreasonable searches and seizures.

Government Action

The Fourth Amendment as incorporated into the Fourteenth Amendment only applies to unreasonable searches and seizures conducted by government actors. Here the police were government actors and therefore the Fourth Amendment applies to Duce.

Standing

In order for a defendant to challenge the constitutionality of a search and seizure he [or she] must have a reasonable expectation of privacy regarding the area searched or the items seized. Generally, one's body, premises where they live, property they own or if they are an overnight guest are examples of where there is a reasonable expectation of privacy. Here Duce had a reasonable expectation of privacy regarding the search of her automobile because it is her property.

Search Warrant

To obtain a search warrant, the police must have probable cause, specify the location and items to be searched and seized and be signed by a neutral magistrate. Because the police did not obtain a warrant to search Duce's car, the warrantless search must fall under one of the exceptions.

Consent

A warrantless search is valid if consent to a search is given voluntarily and intelligently by someone with apparent authority to give consent. Here Duce had authority to give consent because the car was hers. Duce may argue that her consent was not voluntary because she was not told she had a right to refuse consent.

The voluntary and intelligent requirement does not require that the party giving consent be informed of her right to refuse consent. Therefore because Duce was not told she could refuse does not automatically render her consent involuntary or unintelligent.

Next Duce may argue that her consent was involuntary because it was obtained during the course of an interrogation that was not preceded by Miranda warnings. Duce may argue that

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not being informed of her right to counsel or to remain silent led to her giving consent to a query that would elicit an incriminating response from her. This argument is not likely to succeed because the request to search a car is not likely to elicit an incriminating statement from the defendant, only incriminating non-testimonial evidence that is not protected by the Fifth Amendment.

Automobile Exception

In the event that the consent is deemed invalid, the police may argue that the fruits of the search are admissible under the automobile exception. A warrant is not required to search an automobile where there is probable cause that there are seizable items or contraband in the car. The police may search anywhere in the car that could reasonably contain the contraband.

Here the police may argue that they had probable cause to arrest Duce for the armed robbery. If the police can show, for example, that Duce's car was the getaway car, then probable cause to search for the gun and other contraband or instrumentalities of the crime may be established to search the car without a warrant. Thus, the items would be admissible under this exception.

Search Incident to Arrest

A search incident to arrest is probably not a strong basis for searching the car without a warrant. Where the defendant is arrested based on probable cause, the police may search the wingspan area of the defendant. Here the search took place at least three hours after Duce was arrested, and therefore the search is not "incident" to the arrest of Duce.

The evidence is probably admissible under consent exception and possibly the automobile exception. The court did not err in admitting the evidence against Cody.

Cody

The evidence would probably be admissible against Cody because Cody did not have a reasonable expectation of privacy with regards to the search of Duce's car.

A defendant may have standing to challenge a search if it is their property that is being searched and/or seized or if they were lawfully present at the time of the search. Here the car does not belong to Cody and he was not present at the time the police searched the car. Therefore Cody does not have standing to challenge the search based on Fourth Amendment grounds and the evidence is admissible against him.

2. Officer's Testimony about Duce's Confession

Under the Fifth Amendment, the defendant has the privilege against self-incrimination. Therefore, prior to any custodial interrogation the defendant must be given the Miranda

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warnings. An interrogation is defined as a statement or conduct made that is reasonably likely to elicit an incriminating response from the answerer. Custody is defined as a seizure of the body where a reasonable person would not feel free to leave. Evidence obtained in violation of constitutional rights must be excluded under the exclusionary rule at the trial of the defendant.

Here Duce was in custody because he was arrested. Therefore, a reasonable person who is arrested would not feel free to leave. A waiver of Miranda rights must be knowing, voluntary and intelligent. Here Duce was never given her Miranda warnings, so no waiver could have taken place. The officer's statement to Duce that the handgun and other stolen items were found in Duce's car was reasonably likely to elicit an incriminating statement from Duce. On balance, because of the officer's failure to give Miranda warnings the statements made by Duce during the three hours of interrogation and her confession must be excluded under the exclusionary rule as a violation of Duce's Fifth Amendment rights.

However, an otherwise voluntary confession given in violation of the Miranda warnings is admissible to impeach the defendant. Here Duce's statement about driving the getaway car was used to rebut Duce's testimony that she did not drive the getaway car. Because the statement is being used to impeach Duce's testimony and not in the prosecution's case in chief, the confession is admissible. The court did not err in admitting the confession for impeachment purposes.

3. Cody's Unredacted Confession

Under the Sixth Amendment, the defendant has a constitutional right to confront witnesses. A co-defendant's confession is admissible only if the statements inculcating the other party are redacted or if the co-defendant is subject to cross-examination. Here, Cody's statement was used to impeach Duce's testimony that she was not the driver of the getaway car. It is also being introduced as hearsay evidence, as an out-of-court statement to prove the truth of the matter asserted. Because Duce has a right to confront her witnesses, she must be permitted to cross-examine Cody, or Cody's statement must be redacted.

The statements of a third party may not be used to impeach the testimony of the defendant-witness, unless the third party is subject to cross-examination.

As a co-defendant, Cody is not required to testify and may invoke his Fifth Amendment right against self-incrimination. Therefore if Cody does not take the stand, Cody cannot be subject to cross-examination.

The hearsay exception of statements against penal interest does not apply here because Cody's statement that Duce drove the getaway car does not burden his penal interest. Even if it did, where such statements inculcate another party, there must be corroborating evidence.

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ANSWER B

This question raises issues of the validity of searches and seizures under the Fourth Amendment and the rights against self-incrimination under the Fifth Amendment. Evidence issues also arise. The Fourth and Fifth Amendments to the Constitution are applicable to the states by virtue of the Fourteenth Amendment.

Admission of Handguns and Stolen Items from Duce's Car

The issue is whether the police search of Duce's car and seizure of evidence from it was permitted under the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment.

For the Fourth Amendment to be applicable, there must be state action and a reasonable expectation of privacy. Here, the state action requirement is met because the police conducted the search. Further, the expectation element is met because people have a reasonable expectation of privacy of the contents of their car.

Once it is established that the Fourth Amendment applies, the police must conduct the search pursuant to a warrant, or satisfy a warrantless search exception. Here, no warrant was obtained. However, the police may conduct warrantless searches based on a number of exceptions, including consent, incident to arrest, the automobile exception, plain view, stop and frisk, and hot pursuit/evanescent evidence.

Of these exceptions, only the consent exception is a possibility. The automobile exception only applies where police have probable cause to believe a car contains the fruits or instrumentalities of a crime. Here, the prosecutor conceded that this exception did not apply.

The consent exception applies where the police obtain a voluntary consent to search from a person with apparent authority over the property to be searched.

Here, the facts indicate that Duce was in custody for three hours under interrogation. However, there is nothing to indicate that the consent to the car search was coerced. Duce asserts that her consent was not voluntary because she was never told that she had the right to refuse to consent. However, the consent exception to the Fourth Amendment warrant requirement does not require that the person giving the consent be warned of their right to withhold consent. Accordingly, the seized items of evidence may be admitted at trial against Duce.

The evidence may also be admitted against Cody. As discussed above, for a Fourth Amendment right to attach to an individual, he or she must have an expectation of privacy that is reasonable. Because the car was owned by Duce, and not Cody, Cody has no reasonable expectation of privacy as to its contents and therefore has no standing to exclude the evidence.

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Accordingly, the court did not err in admitting the handgun and stolen items against Cody or Duce.

Testimony about Duce's Confession

The Fifth Amendment provides the right of an individual to not be forced to incriminate themselves. This right is applicable to the states by virtue of the Fourteenth Amendment.

This right attaches upon custodial interrogation by the police. In this context, the police are required to deliver a Miranda warning. The suspect then may remain silent or may ask for an attorney. Absent the delivery of the Miranda warning, the results of a custodial interrogation are not admissible.

Here, there is no question that Duce's Fifth Amendment rights were attacked. She was under arrest, and therefore will be considered to be in custody. Further, the facts state that she was interrogated and that no Miranda warning was given.

The police will argue that the break in the questioning halted the initial interrogation, and that Duce's confession to driving the getaway car was voluntary, and not the result of interrogation. The facts indicate that Duce made her confession after being told what the police found in her car. Accordingly, while Duce was still in custody, there is a significant question as to whether her confession was the result of interrogation.

This is a close position. However, in light of the break in the initial interrogation and the spontaneous nature of her confession, the court probably did not err in allowing it.

It is important to note that even if the court finds the confession was obtained in violation of Duce's Fifth Amendment rights, the confession could still be admitted to impeach Duce's denial as a prior inconsistent statement.

Hearsay Issue

Hearsay evidence is generally inadmissible. Hearsay is a statement by someone not on the stand offered for the truth of the matter asserted. Here, the police officer is testifying as to what Duce said, and the statement is being offered for its truth. Accordingly, under the traditional rule, this statement would not be allowed.

However, under the FRE, admissions by a party opponent are non-hearsay. Accordingly, the confession would be admissible.

Testimony about Cody's Unredacted Statement

In a criminal trial, a defendant has the right to confront adverse witnesses, under the Sixth Amendment. Accordingly, in joint-trials, a co-defendant's confession is generally not admissible

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unless one of three conditions are met. The confession must either be redacted to remove any reference to the other defendant, the confessing defendant must take the stand and be subject to cross-examination, or the confession may be admitted to rebut a claim of involuntary confession by the other defendant.

Because the confession of Cody was not redacted, Cody did not take the stand, and the purpose of the confession was to rebut Duce's claim that she was not driving the getaway car, the unredacted confession should not have been admitted into evidence. Accordingly, the court erred.

If the confession is otherwise admissible, it would be permitted under the FRE as a vicarious admission of a co-conspirator.