

Question 1

Bank was robbed at 1 p.m. by a man who brandished a shotgun and spoke with a distinctive accent. The teller gave the robber packets of marked currency, which the robber put into a briefcase. At 3:30 p.m., the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

The officer approached Dave with his service revolver drawn but pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery. The officer said to Dave: "I know you're the one who robbed the bank. Where's the shotgun?" Dave then pointed to a nearby trash container in which he had concealed the shotgun, saying: "I knew all along that I'd be caught."

Dave was charged with robbery. He has chosen not to testify at trial. He has, however, moved to be allowed to read aloud a newspaper article, to be selected by the judge, without being sworn as a witness or subjected to cross-examination, in order to demonstrate that he has no accent. He has also moved to exclude from evidence the money found in the briefcase, his statement to the officer, and the shotgun.

How should the court rule on Dave's motions regarding the following items, and on what theory or theories should it rest:

1. Dave's reading aloud of a newspaper article? Discuss.
2. The currency? Discuss.
3. Dave's statement to the officer? Discuss.
4. The shotgun? Discuss.

Answer A to Question 1

1)

This question raises issues involving Dave's rights under the 4th Amendment and 5th Amendment.

Dave's Reading Aloud of a Newspaper Article

A criminal defendant may be required to give a voice sample. This does not violate a defendant's right against self-incrimination.

A criminal defendant is allowed to submit evidence that will prove that he could not or did not commit the crime. Here, the alleged robber spoke with a distinctive accent. Dave seeks to read a newspaper article to the jury in order to show that he was not the robber because he does not have an accent. The key issue, however, is whether Dave may do this given that he does not want to be sworn in as a witness or subjected to cross-examination. By doing so, Dave is denying the prosecution the right to cross-examine him and to test whether he is being truthful. It is possible for Dave to fake an accent or to have taken voice lessons to change this previous accent. All of these are factors that the prosecution should be permitted to test on cross-examination. Because the prosecution will not be given the right to cross-examine Dave, Dave's request to read to the jury should be denied.

THE CURRENCY

The 4th Amendment prohibits warrantless searches and seizures by a police officer in an area where a person has a reasonable expectation of privacy. The 4th Amendment applies to the states via incorporation into the 14th Amendment. Warrantless searches are permitted under certain circumstances.

State Action:

The 4th Amendment prohibits warrantless searches and seizures by a state actor. Here, the officer was conducting the search and seizure as a police officer and therefore state action is involved. In addition, the officer was searching Dave's briefcase - - an area where Dave had a reasonable expectation of privacy.

Search Incident to a Lawful Arrest

An officer does not need a search warrant if the search is done pursuant to a lawful arrest. Under this exception to the warrant requirement, an officer may search the person arrested and search the area within the person's immediate control if the officer suspects that the area would contain contraband or a weapon. In order for this exception to apply, the arrest

must have been lawful.

The officer arrested Dave after receiving a phone call from an anonymous caller stating that a man fitting Dave's description was carrying a sawed-off shotgun in a briefcase. An officer may arrest a person in public without a warrant if the officer has probable cause to believe that the person has committed a crime. A tip from an anonymous informant can be used as a basis for establishing probable cause if the officer reasonably believes that the tip is reliable. Here, the officer knew that a Bank was robbed at 1 p.m. by a man who had a shotgun. The officer received a tip at 3:30 saying that a man was standing at a corner with a sawed-off shotgun in a briefcase. The combination of the call, with the circumstances surrounding the Bank robbery are sufficient to give the officer probable cause to arrest Dave in public without a warrant.

Because the arrest was lawful, the officer could search Dave and the area within his immediate control if the officer suspects that the area would contain contraband or [a] weapon. Here, the officer suspected that the briefcase would have a sawed-off shotgun and it was within Dave's immediate control. Thus, the officer could search the briefcase. Any evidence found during this valid search could be admitted.

Plain View

Any evidence seen by an officer when the officer has a lawful right to search the area may be admitted. Here, the officer had a right to search Dave's briefcase under the exception to the warrant requirement for searches incident to a lawful arrest. Because the marked currency was in the officer's plain view during this search, the currency can be admitted as evidence against Dave.

Stop & Frisk

An officer who has reasonable suspicion to believe that a person is engaged in criminal activity may stop the suspect and conduct a warrantless frisk for weapons. An officer may not look inside containers during a stop & frisk. Thus, this exception to the warrant requirement will not be a basis for admitting the currency.

DAVE'S STATEMENT TO THE OFFICER

The 5th Amendment privilege against self-incrimination applies when there is state action and a custodial interrogation of a person. It gives a defendant a right to refuse to give testimonial evidence that would result in self-incrimination.

State Action

As discussed above, the action of the police officer involves state action.

Custodial Interrogation

Under the 5th Amendment, an officer must read a suspect his Miranda rights before conducting a custodial interrogation. A person is in custody if he believes that he is not free to leave the officer's control. Here, the officer approached Dave with his service revolver drawn and handcuffed Dave. Under these circumstances, Dave was in custody because he was not free to leave the officer's control.

An interrogation is any communication by the police to the suspect that is likely to elicit a response. Before engaging in a custodial interrogation, the officer must read the suspect his Miranda rights, which involves the suspect's right to remain silent and the right to ask for counsel.

Here, the officer would argue that his statement to Dave "I know you're the one who robbed the bank. Where's the shotgun?" was not an interrogation and that Dave's response to this statement was a voluntary statement. A statement by a suspect that is blurted out is admissible. Dave, however, would argue that the officer's statement "I know you're the one who robbed the bank" is a statement likely to elicit a response and that Dave would not have said anything had he not been prompted by the officer's accusation. Dave would probably win on this argument because accusing a suspect who is in handcuffs of committing a crime is the type of statement likely to elicit a response.

As a result, Dave's statement to the officer cannot be admitted because Dave was not read his Miranda warnings prior to the interrogation. Dave's statement could be admitted for impeachment purposes if Dave takes the stand and could be admitted in a grand jury proceeding.

THE SHOTGUN

The admissibility of the shotgun also depends on an analysis of whether Dave's 5th Amendment privilege against self-incrimination was violated when the officer asked Dave where the shotgun was without reading Dave his Miranda rights.

As discussed above, state action was involved and Dave was in custody when the officer asked him where the shotgun was. If the question to Dave was improper, the shotgun cannot be admitted because it is the fruit of a poisonous tree.

Dave will argue that he pointed to the trash container as a result of the officer's interrogation and that he wouldn't have done so but for the officer's interrogation. The officer will argue that Dave's "pointing" to the trash is not testimonial and therefore the 5th Amendment does not apply. The 5th Amendment does not typically apply to conduct but it may apply if the conduct is testimonial in nature. Here, Dave's pointing to the shotgun could be considered testimonial in nature because Dave was telling the police the location of his weapon.

Courts, however, allow an officer to question a suspect about the location of the weapon without giving Miranda warnings if it is necessary because of exigent circumstances. In other words, if the officer thinks that there might be a weapon laying around that might pose an immediate danger to the public the officer can question the suspect immediately following the arrest and pre-Miranda as a means of securing the premises and protecting the public.

Here, the shotgun is probably admissible under this exception because the officer knew that there was a shotgun used in connection with the robbery and has reason to believe that Dave was connected with this robbery given the discovery of the marked bills. Thus, the officer could ask about the location of the gun to secure the premises.

Answer B to Question 1

1)

Dave's Reading Aloud the Newspaper Article

The Fifth Amendment protects against self-incrimination. Therefore, the prosecution cannot compel D to testify against his will. Furthermore, the Sixth Amendment allows an accused to confront his accusers. Here, D wants to read aloud a newspaper article of the judge's cho[o]sing to demonstrate that he does not have a distinctive accent, which is something that was described by the bank teller. D would like to do this without being sworn in or subject to cross-examination by the prosecution. The issues hinges [sic] on whether reading the statement aloud is testimonial in nature. If it is testimonial in nature than [sic] the judge will not allow Defendant to do this without being sworn in because he will be a witness.

Non-Testimonial

Here, Defendant wishes to demonstrate that he does not have an accent. The content of his speech is not testimonial in nature because he is not asserting his own thoughts, opinions, observations, or knowledge, which are things that a witness would do. Here, D is not making any statements of fact. The evidence is relevant to demonstrate that D doesn't have an accent, but it is only the sounds of his speech that matters [sic] and not the content. It is akin to showing tattoos, needle marks, or hair color. Therefore, reading a newspaper is sufficiently nontestimonial and D will be allowed to do this.

The prosecution may argue that this is testimonial because D can alter the way that he is speaking and if they were allowed to cross-examine him this would come to light in front of a jury that he was faking. This argument would fail because there is no content for the prosecution to cross-examine him on and they can sufficiently argue in closing that he may be faking or offer a witness to counter his assertion that he does not have an accent.

Dave will succeed because his reading the newspaper aloud is sufficiently nontestimonial and will[,] therefore, be admitted at trial.

The Currency

The Fourth Amendment, incorporated to the states via the Fourteenth Amendment, protects against unreasonable searches and seizures. In order to bring an action under the Fourth Amendment, the defendant must have standing and the action must be done by a government actor.

Standing

In order to have standing one must have a reasonable expectation of privacy in the items seized or search[ed]. Here, Defendant was seized and his briefcase searched. Therefore, since D had a reasonable expectation of privacy in himself and his briefcase he has standing.

Government Actor

A police officer is [a] government actor for the purposes of the Fourth Amendment.

Seizure of D

In order to arrest a person an officer must have a warrant based on probable cause signed by a neutral magistrate. Absent a warrant a search or seizure is per se invalid absent an exception. Here, there was no warrant for D's arrest.

Dave would argue that this was an illegal arrest and that the officer did not have probable cause based on this information first and foremost because of the amount of time passed between the robbery of the bank and the time that the officer contacted defendant two and half hours later. D would argue that it is unreasonable to think that a bank robber is going to just stand out in the middle of public [sic] with a gun two and a half hours later. Furthermore, D will argue that he was a man with a briefcase downtown, which is hardly a novel notion. Moreover, D will argue that the anonymous caller lacked any indicia of reliability and was not corroborated by anything other than the fact that D just happened to match the description of a man with a briefcase, but with no sawed-off shotgun. D will also point out that the bank teller described a shotgun whereas the anonymous calle[r] described a sawed-off shotgun, which are noticeably different. Therefore, D will argue that the officer had no probable cause to arrest D based on this information and therefore, the arrest was illegal.

The prosecution would like[ly] respond that the initial contact with D by the police officer was a detention based on reasonable articulable facts or if it rose to the level of an arrest that there was probable cause.

Detention based on Reasonable suspicion

The prosecution may argue that D was not arrested by [sic] merely stopped in order to investigate whether criminal activity was afoot. During a detention, an officer must have reasonable suspicion that criminal activity is afoot. Here, the officer had two basis [sic] as will be described in more detail below. The officer had the matching description of the bank robber with the briefcase and he had an anonymous caller who described D with a gun at the corner. Therefore, the officer had sufficient probable cause to contact D. The officer may detain a suspect long enough to investigate and determine if there is criminal

behavior or not. Here, the officer drew his weapon and handcuffed D because he believed that D had a gun based on the anonymous tip and the bank robbery information.

D will argue that this was an arrest and not merely a stop. D will argue that the officer approached him with a weapon drawn and handcuffed him and[,] therefore, it was an arrest because D was not free to leave.

The court will hold that this was a detention based on reasonable suspicion and was, therefore, not in violation of the Fourth Amendment.

Probable Cause

Moreover, the officer had probable cause to arrest D based on the information that he had. If an officer has probable cause to believe that someone has committed a felony they may arrest that person without a warrant as long as within 48 hours a magistrate makes a determination that there was probable cause for the arrest. If a person commits a misdemeanor it must be committed in the officer's presence for an arrest.

Here, the officer had reason to believe that D robbed a bank. Robbery is a felony under the law. The information that the officer had at the time that he contacted the defendant was that a bank was robbed at 1 pm, by a man with a shotgun who spoke with a distinctive accent. The robber had in his possession marked currency given to him by the teller which he put into a briefcase. The officer received a tip from an anonymous caller who described a man standing at a corner with a sawed-off shotgun in a briefcase. The officer arrived to [sic] the corner within minutes of the call, saw Dave there holding a briefcase and matching the description given by the anonymous caller.

The prosecution will argue that under the "totality of the circumstances" the officer's arrest was based on probable cause. Not only did the officer have reasonably articulable facts to contact D and investigate him to see if he had a weapon but also to arrest him in connection with the bank robbery. As the facts described above detail the officer had description of Defendant and just because minutes after the phone call he no longer had the weapon does not mean that the officer should just walk away without any investigation. The officer has a duty to investigate and determine if there is a safety issue and what is going on.

Therefore, based on the totality of the circumstances the officer has probable cause to arrest Dave and the seizure of D was not unlawful.

Search of Briefcase

Here, the search of the briefcase also requires and [sic] warrant exception because there was no additional warrant to search the briefcase. D had a reasonable expectation of privacy in his briefcase because it was something that was closed and not open to public

view or scrutiny.

Probable Cause

As stated above the officer had probable cause to believe that Defendant was armed with a shotgun and therefore had sufficient probable cause to search the bag to ensure for his own safety and the safety of others where the gun was. During a detention an officer may “pat down” an individual if they believe the person may have a weapon. Here, the officer did believe that D had a weapon which was something that could have easily fit in the briefcase. Therefore, the search of the briefcase was lawful.

Search incident to Arrest

Furthermore, as stated earlier there was sufficient probable cause for a lawful arrest. In a search incident to a lawful arrest, the arrest must be lawful, and the officer can search the Defendant and anything within the “wingspan” of the suspect under Chimel. Here, D was holding the briefcase which was sufficiently in his wingspan. Therefore, the search of the briefcase was a lawful search incident to arrest.

Finding the Currency

Although the officer had probable cause to search the briefcase for a weapon, he saw the currency in plain view when he opened the briefcase. Something is in plain view in a place the officer may lawfully be and without the officer touching or moving it around.

Conclusion: The currency found in the briefcase will not be suppressed.

Dave’s Statements to the Officer

Miranda

Miranda protects against coerced confessions. It is a prophylactic [sic] measure designed to provide additional protection for the 5th Amendment, incorporated to the states through the 14th Amendment, against self-incrimination. According to Miranda, if a suspect is interrogated and in custody, he is to be warned of his right to remain silent, that anything that he says can be used against him, that he has a right to an attorney and if he can’t afford an attorney one will be appointed for him.

Here, Dave made two statements to the police officer and each needs to be analyzed separately to determine the admissibility. The first statement was when Dave pointed to the nearby trash can and the second is when he said “I knew all along that I’d be caught.”

Pointing to the trash can

Statements can be express or implied. An express statement is an oral statement. An

implied statement is one made with assertive conduct or by silence. Here, Dave pointed to the trash can in response to the Officer's question "Where's the shotgun?"

In custody

Custody occurs where the suspect is not free to leave. At this point Dave was handcuffed standing on a street corner. This is sufficiently in custody for Miranda.

Interrogation

Interrogation occurs where the officer asks questions in order to elicit a response. Here, the officer asked where the gun was and D pointed to the trash can. Therefore, this was interrogation.

Dave's argument will succeed because the conduct of pointing to the gun should be suppressed and inadmissible at trial.

"I knew all along that I'd be caught"

This was an express statement made by Dave after he pointed to the gun. As stated above Dave was in custody, but the difference with this statement is that it was a spontaneous statement. The officer did not ask D if he knew that he would be caught. He asked him where the gun was. The prosecution would argue that the [sic] D's statement was spontaneous and therefore, not a violation of Miranda and should be admissible. D would argue that this was a result of a custodial interrogation and the statement should not come in.

Dave's argument will fail because this was a spontaneous statement and is, therefore, admissible.

Shotgun

The shotgun was found as a result of D's pointing to where it was located and therefore D will argue that it is inadmissible as the result of a Miranda violation.

Fruit of the poisonous Tree

When there are violations of the Fourth Amendment the exclusionary rule helps to protect against unreasonable officer conduct by excluding the evidence. D would likely argue that as a result of his unmirandized statement the gun should be suppressed. This argument would likely fail because courts have not readily applied the fruits of the poisonous tree doctrine to evidence resulting from Miranda violations. Furthermore, under the doctrine of inevitable discovery the officers would have likely found the shotgun independent of D's pointing to it. Generally, when officers find the suspect of a crime who had only minutes before been seen with a weapon and now has no weapon to [sic] search the area around

where the defendant was found to see if he dumped the weapon.

Furthermore, D abandoned the gun before the officer even approached him so he had no expectation of privacy in the trash can.

Dave's argument will fail and the gun will be admissible.