

Question 5

Harriet was on her porch when Don walked up, pointed a gun at her, and said, "You're coming with me." Believing it was a toy gun, Harriet said, "Go on home," and Don left.

While walking home, Don had to pass through a police checkpoint for contraband. Officer Otis patted down Don's clothing, found the gun, confiscated it, and released Don. Later, Officer Otis checked the serial number and located the registered owner, who said the gun had been stolen from him.

A month later, Officer Otis arrested Don for possession of stolen property, i.e., the gun. During a booking search, another officer found cocaine in Don's pocket.

Don was charged with possession of stolen property and possession of cocaine. He moved to suppress the gun and the cocaine, but the court denied the motion.

While in jail, Don drank some homemade wine. As a result, when he appeared in court with counsel, he was slurring his words. The court advised Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way. Don agreed and pleaded guilty. Subsequently, he made a motion to withdraw his guilty plea, but the court denied the motion.

1. Did the court properly deny Don's motion to suppress:
 - a. the gun? Discuss.
 - b. the cocaine? Discuss.
2. Did the court properly deny Don's motion to withdraw his guilty plea? Discuss.
3. If Don were charged with attempted kidnapping against Harriet, could he properly be convicted? Discuss.

Answer A to Question 5

1) Whether the Court Properly Denied Don's Motion to Suppress

A) The Gun

Officer Otis (O) discovered a gun on Don (D) while D was walking home and subsequently encountered a police checkpoint for contraband. Thus, whether the gun is admissible evidence depends on whether the checkpoint was constitutional. D will likely argue that the checkpoint violated his Fourth Amendment rights, which prohibits unreasonable searches and seizures.

The Checkpoint

All Fourth Amendment violations must come from the hands of the government. This is easily satisfied because the checkpoint at which the gun was discovered was a police checkpoint. However, the general rule is that for a checkpoint to be outside the scope of Fourth Amendment protection, the checkpoint must be conducted in a nondiscriminatory manner, and must be for purposes other than the police investigation of criminal activity. In this case, the checkpoint was likely conducted in a nondiscriminatory manner. A nondiscriminatory checkpoint generally checks every person who passes through or some other equal rule, such as every third person that passes through.

However, D will likely argue that the checkpoint is invalid because it directly relates to the investigation of criminal activity. The United States Supreme Court has held that a constitutional checkpoint only occurs when the underlying purpose is not criminal investigation. Such examples include DUI checkpoints being motivated by the state interest of safety on public roads, and informational checkpoints, to investigate the occurrence of an accident that happened in the area recently. In this case, the police checkpoint is specifically looking for contraband, i.e., illegal materials. While O may argue that the checkpoint's purpose of checking for contraband directly advances public safety, this argument will likely be rejected given the fact that it directly relates to criminal investigation. Thus, the checkpoint is unconstitutional.

Since D's gun was discovered through an unconstitutional police checkpoint, the court improperly denied D's motion to suppress the gun.

Terry Stop and Frisk

O may attempt to argue that the gun is a valid seizure because it was performed pursuant to a Terry stop and frisk. A stop and frisk allows an officer to pat down a suspect when the officer has a reasonable suspicion that the suspect may be armed and dangerous. In this case, O will argue that he had a reasonable suspicion that D could be armed, thus giving O the ability to pat down D's clothing, thus leading to a constitutional avenue towards discovery of the gun. However, this argument will likely fail because the Supreme Court has held that "reasonable suspicion" requires more than a "hunch," but instead a set of articulated facts that give rise to the notion that criminal activity is afoot. In this case, O had no suspicion because he was merely checking people at the police contraband checkpoint. In other words, O had less than a hunch, and thus no reasonable suspicion that would give rise to a constitutional stop and frisk.

Thus, as discussed above, the court improperly denied D's motion to suppress the gun.

B) The Cocaine

At the checkpoint, O seized the gun from D. O subsequently checked the serial number and located the registered owner of the gun, who said that the gun had been stolen from him. One month later, O arrested D for possession of stolen property. During a booking search at the police station, another officer found cocaine in D's pocket. Thus, the admissibility of the cocaine depends on whether the booking search was constitutional.

Booking Search

As discussed above, the Fourth Amendment protects against unreasonable searches and seizures. The Supreme Court, however, has held that administrative searches, such as routine booking searches performed for safety and to ensure that suspects' personal items are not lost, are not subject to the Fourth Amendment. Thus, the prosecution will likely argue that the cocaine was properly found and confiscated.

However, D will argue that the cocaine should be suppressed because the booking search was based on an arrest founded on probable cause from an illegal search, i.e., the checkpoint discussed above.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine precludes the admission of evidence that was lawfully seized based on prior unconstitutional acts. As discussed above, D will argue that the gun which led to his arrest and subsequent booking search was unconstitutional, and therefore the cocaine is a fruit of the poisonous tree. In response, the prosecution will likely argue that the cocaine is admissible under the independent source and inevitable discovery doctrines.

The independent source doctrine makes evidence admissible because the police had an alternative, constitutional, avenue towards its discovery. This argument is likely to fail. The only avenue the police have to D's cocaine is from a booking search based on an arrest founded on probable cause from an illegal search. There is no other source. While O may argue that his independent source is his research of the serial number and discussion with the registered owner, such an argument is likely to fail because O would not have performed those actions without the illegally confiscated gun. Thus the independent source doctrine does not apply.

The inevitable discovery doctrine makes evidence admissible because the police authorities would have eventually discovered the evidence through their investigation anyway. The argument is also likely to fail for the same reason that the independent source doctrine, discussed above, will fail: the only route towards the cocaine that O had was from a gun that was from the fruit of an illegal search.

Thus, the cocaine is the fruit of a poisonous tree, and should be suppressed unless the prosecution can show that the taint associated with the illegal search is attenuated.

Attenuation of Taint

The attenuation of taint doctrine will admit improperly seized evidence if the police can show factors that have led to the attenuation of the taint. In this case, O will argue that, despite the fact that the gun was discovered at a police checkpoint, the probable cause for the arrest was for stolen property. Specifically, it was O's investigation into the serial number of the gun and discussion with the true registered owner of the gun which led to the probable cause to arrest D for stolen property. Prior to this attenuation, the gun was merely the product of an illegal search, but now the gun is evidence in a claim of stolen property by the registered owner. Furthermore, O will argue that an entire month passed by, thus indicating that the illegal search was not the main motivating factor in D's ultimate arrest for stolen property. A court would likely agree.

Thus, the court properly admitted the cocaine discovered in the booking search because, although the arrest was based on a gun discovered in an illegal search, there was a sufficient attenuation of the taint of that illegal search to support probable cause to [sic] for D's arrest for stolen property.

2) Whether the Court Properly Denied Don's Motion to Withdraw His Guilty Plea

Whether the court denied D's motion to withdraw his guilty plea depends on: (1) whether D's initial guilty plea was knowing and voluntary, and (2) whether proper formalities were followed when D entered his guilty plea.

D's Guilty Plea and Voluntary Intoxication

The general rule is that a defendant's plea of guilty must be knowing and voluntary. In this case, D drank homemade wine and as a result, he was slurring his words. This indicates that, even if counsel and the court advised him of the nature of his rights, it is likely that D lacked capacity to understand the material details associated with a guilty plea and subsequently D could not have made a knowing and voluntary guilty plea.

Formalities to Enter a Guilty Plea

For a guilty plea to hold up under appellate review, at the time the defendant enters a guilty plea, the judge must inform the defendant: (1) the maximum possible sentence; (2) the mandatory minimum sentence; (3) that he has a right to a jury trial, and; (4) that

he has a right to plead not guilty. All of this information and dialogue must be on the record.

In this case, none of these formalities were followed. Instead, the court merely advised D that if he waived his right to a trial, the court would take his guilty plea and let him go on his way. Thus, although the court somewhat advised D regarding his right to a jury trial, it is clear that the court failed to inform D of the maximum possible sentence, the mandatory minimum, and that he has the right to plead not guilty.

Thus, the court improperly denied D's motion to withdraw his guilty plea because: (1) it is highly unlikely that D lacked capacity through voluntary intoxication to making a knowing and voluntary guilty plea, and (2) the court failed to follow constitutionally required formalities for accepting and entering a guilty plea.

3) Whether Don May Properly Be Convicted of the Attempted Kidnapping of Harriet

Whether D may be convicted of attempting to kidnap Harriet depends on whether D committed the criminal act ("actus reus") simultaneously with the requisite mental intent ("mens rea").

Mens Rea

Since the jurisdiction is not identified, this analysis presumes that the common law is applied. Under the common law, a crime may either be a general intent crime or a specific intent crime. While there is no clear-cut rule delineating the two, suffice to say that a general intent crime requires a lower mental threshold, while a specific intent crime requires a higher threshold of mental acknowledgment, such as purposefully engaging in the crime or knowing the likely outcome of the defendant's acts.

In this case, kidnapping is a general intent crime. However, if D were charged with attempted kidnapping, it would be a specific intent crime. The inchoate crime of attempt requires that the defendant have the specific intent to commit the crime. Thus, to be properly convicted a jury must find that D specifically intended to kidnap Harriet (H). It is likely that D intended to kidnap Harriet, as he pointed a real gun at her and said, "You're coming with me." While one act (pointing the gun) or the other (saying "You're

coming with me”) alone may be insufficient to establish that D had the mens rea to effectuate a kidnapping, both acts together make it highly likely that D intended to kidnap H. However, D will point out that after H told him to go home, D obliged and left. Thus, it is unclear whether D had the requisite mental state to commit an attempted kidnapping.

Thus, because it is unclear whether D had the requisite mental state to commit an attempted kidnapping, required under the inchoate crime of attempt, D may not have the requisite mens rea to [be] convicted of attempted kidnapping. However, specific intent may be indicated by the actions that D took to effectuate the kidnapping, discussed below.

Actus Reus

While the normal crime of kidnapping requires that D falsely imprison Harriet (H) and either move her location or conceal her presence from others for an extended period of time, since D is hypothetically being charged with attempted kidnapping, D need not go that far. Under the common law, to be convicted of an attempted crime the defendant must be in “dangerous proximity” of committing the crime, while in other jurisdictions the defendant need only take a “substantial step” towards the commission of the crime.

In this case, it is likely that D’s actions satisfy both the “dangerous proximity” and “substantial step” doctrines. Walking up to someone, pointing a gun at them, and saying “You’re coming with me” is within the dangerous proximity of committing the crime, as the defendant is face-to-face with the intended kidnapping victim coupled with the fact of oral communication threatening or coercing the intended victim. Likewise, the same actions are obviously a substantial step towards the commission of a kidnapping, as D has taken the time to approach H at her house, pull a gun on her, and coerce her to come with D, which would have the result of completing the kidnapping crime, i.e., by moving the victim.

Furthermore, these acts are extremely probative as to D’s mental state, as it is highly unlikely that someone who not only took a substantial step towards attempting a

kidnapping, but is also in the dangerous proximity of doing so, would have the requisite mental state to be convicted of attempt.

Thus, if D were charged with attempted kidnapping against H, D could properly be convicted for the reasons discussed above.

Answer B to Question 5

1a. Don's Motion to Suppress the Gun

Don's motion to suppress will be based on the argument that the confiscation of his gun was an impermissible search-and-seizure in violation of his Fourth Amendment rights.

Governmental Conduct

For Fourth Amendment rights to attach, the search-and-seizure must have been done by government actors. In this case, Otis stopped Don at a checkpoint, and was presumably on duty. Note that even if Otis had stopped and searched Don while he was off duty that would still be sufficient for governmental conduct.

Reasonable Expectation of Privacy

In addition, the Fourth Amendment also requires that the individual have a reasonable expectation of privacy in the items or place searched. Here, the gun was located in Don's clothing and on his person. The fact that the police had to pat down Don to find it alone evidences that he had a reasonable expectation of privacy. The fact the gun was stolen and that Don was not the proper owner is not sufficient to demonstrate that he lacked a reasonable expectation of privacy.

Warrant

Generally, 4th Amendment search requires a valid warrant, where there must be particularity and probable cause. Here, there was no warrant. Therefore, Otis cannot have been in good faith relying on the warrant even if it was defective, so an exception to the warrant requirement must apply.

Checkpoint

Don will first argue that the confiscation of the gun was invalid because the checkpoint was not authorized by law. A valid checkpoint requires a neutral reason for stopping or selecting people for the checkpoint. For example, if the officers stop every third person that passes through the checkpoint, that would be a sufficiently neutral basis for the checkpoint. In this case, there is no specific evidence of an improper police purpose in stopping Don and the officer's actions are thus presumptively going to be valid.

A valid checkpoint also must address some legitimate government concern or interest. Again as an example, a checkpoint to stop drivers and watch for those that are driving under the influence is permissible because there is a valid interest in keeping dangerous drunk drivers off the road. Here, the checkpoint was to stop pedestrians carrying contraband. Don will argue that pedestrians, even if they are intoxicated, do not present inherently dangerous risks similar to that posed by drunk drivers.

In addition, Don will argue that while it may be permissible to stop pedestrians for specific reasons, there must be some sort of articulable purpose. Here, the officers are simply looking for contraband, which could be evidence of any offense. Officers are not allowed to stop every passerby without having any reason for the stop. Therefore, the checkpoint here is probably not valid absent some more articulable purpose.

Terry Stop and Frisk

A secondary justification to stop Don would be on the basis of a Terry stop. A Terry stop requires reasonable suspicion that the individual stopped either be dangerous or have some improper purpose. If the officer has reasonable suspicion necessary for the stop, if the officer also has reasonable suspicion that the suspect is dangerous, then the officer may pat down or frisk the individual to look for weapons. If during the patdown the officer by "plain feel" thinks an item is either a weapon or drugs, then the officer is allowed to seize the item.

In this case, there is no evidence that Officer Otis had reasonable suspicion to stop Don. Don was simply "walking home" and while [he] had a weapon, the weapon was in his clothing and there is no indication Otis saw the gun, saw a bulge in Don's clothing that could indicate he was armed, or some other reason that Don was acting suspiciously. Otis may point to the totality of the evidence here, that Don was leaving Harriet's after what might have been an attempted kidnapping, but even given this fact there is no indication from the way that Don was walking home that he had just tried to kidnap someone.

Therefore, the seizure of Don's gun was probably not valid under either the justification of a checkpoint or a Terry Stop and Frisk.

1b. Don's Motion to Suppress the Cocaine

Fourth Amendment Attachment

The search of Don that found the cocaine was done by a government official after Don had been arrested and Don had a reasonable expectation of privacy of items contained in his pocket. Therefore, 4th Amendment protections attach.

Booking Search

Don will first argue that the booking search was impermissible. A booking search is valid as long as it is conducted as a result of and in accordance with the regular practice of the police office. If so, the search does not require probable cause, nor does it require reasonable suspicion. In this case, the cocaine was found during a booking search of Don, in Don's pocket. Because there is no evidence of anything other than the fact that this was a routine booking search, the search-and-seizure was proper.

Fruit of the Poisonous Tree

Even though the booking search itself was valid, Don will argue that it is impermissible because the booking search only arose as the result of the impermissible search-and-seizure that led to the gun. The booking search was conducted after Officer Otis arrested Don for possession of stolen property in the gun found at the checkpoint search.

Evidence that is discovered through impermissibly tainted evidence is also invalid. In this case, because the gun was improperly seized, the prosecution will have to show some alternative means of acquiring the evidence. If the prosecution can show that they had an independent source for the evidence, would have inevitably discovered it anyway, or that the secondary evidence arose from intervening acts of free will by the defendant, then the evidence is valid anyway.

Independent Source

If the police can derive the evidence from an independent source, that will be sufficient to cleanse the taint of the impermissible evidence. In this case, the officers found the cocaine as a result of the booking search, which only arose directly from the seizure of

Don's gun. After the officers seized the gun, they checked the serial numbers and located the registered owner, who informed the officers that the gun had been stolen. The officers then followed up on the owner's statements and arrested Don for possession. There was thus only one source for the evidence that led to the cocaine, and that source was impermissibly tainted.

Inevitable Discovery

If the police can show that they would have inevitably discovered the cocaine that would also be sufficient to cleanse the taint of the seizure of the gun. Again, there is no evidence here that the officers would have discovered the cocaine without the information obtained from the gun. Without the gun, the officers probably never would have discovered the cocaine, and thus the inevitable discovery exception is inapplicable.

Intervening Acts of Free Will by Defendant

Finally, if the officers show that there had been some intervening act of free will by Don that led to the discovery of the cocaine that could lead to its admissibility as well. The prosecution will point out the fact that the police did not arrest Don for one month after the initial search, and they will thus argue that time was sufficient to clear the taint. This is probably the prosecution's best argument; however, it still fails to show any direct relationship to the evidence from anything other than the illegal search. Therefore, the cocaine will probably have to be excluded as well.

2. Don's Motion to Withdraw His Guilty Plea

Before a judge can accept the defendant's guilty plea, the judge must inform the defendant that the defendant has a right to plead not guilty and demand a trial. The judge must also inform the defendant of any mandatory minimums that will result from the guilty plea as well as the possible maximum penalty. The judge should also inform the defendant of his ability to secure an attorney or alternatively proceed per se. Finally, the judge must inform the defendant that all of this information and the defendant's plea itself must be on the record.

In this case, the judge did not do any of this. The court advised “Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way.” Don then pled guilty. The judge did not inform Don of the possible results of pleading guilty, nor did the judge tell him that his plea would be recorded. Arguably, the judge satisfactorily met the requirement of informing Don of his right to trial by telling him about his ability to waive it, but the judge still should have expressly stated his right, instead of simply discussing his ability to waive trial.

Furthermore, Don will point to the fact that the judge should have been aware of Don’s lack of capacity when making the decision. As a result of drinking wine in jail, Don “was slurring his words” when he went into court. The judge at this point should have been even more careful than normal to comply with the various requirements in taking a defendant’s guilty plea. However, the judge failed to meet these requirements. Therefore, the court improperly denied Don’s motion to withdraw his guilty plea.

3. Attempted Kidnapping

Kidnapping requires refraining a person’s ability to move or leave along with either concealment or movement of the person. Here, there was no actual kidnapping because even if Harriet’s ability to leave was briefly restrained by Don pointing the gun at her, because Harriet didn’t believe the gun was real and Don left, there was no concealment or movement.

Attempted kidnapping requires the specific intent to kidnap as well as a substantial step towards completion of the act. In this case, while there is no direct evidence of Don’s state of mind, his actions demonstrate that he probably had the requisite specific intent to kidnap. First, as evidenced by his later arrest, Don had brought a real gun with him, pointed it at Harriet and made a demand of her. This is all relevant to show Don’s state of mind, that he did intend the outcome he stated that she come with him. Furthermore, had Harriet believed that it was a real gun she probably would have gone with him, sufficient for kidnapping. Therefore, while more evidence would be helpful, there is a sufficient amount of evidence to conclude that Don had the requisite intent.

In addition to the specific intent to kidnap, Don must also have completed a substantial step towards completion of the kidnapping. This test is not the most restrictive. If Don had simply brought the gun to Harriet's home and at the point was arrested, the fact that he brought a gun with him that far would probably be a substantial step. Here, however, Don not only brought the gun, he pointed it at Harriet and made a demand. There was not much more left for Don to do. Don may point to the fact that the act itself was not completed, or the fact that Harriet was not scared, but neither of these outcomes is required for an attempt. Therefore, Don would be convicted of attempted kidnapping.

The minority rule would require not that Don completed a substantial step towards kidnapping but rather that Don was dangerously close to succeeding in kidnapping. Here, the acts of drawing the gun and demanding that Harriet come with him were probably sufficient to be dangerously close to success. Don will again raise the fact that Harriet did not come with him, and will have a better argument by pointing to the fact that Harriet was not in fact even scared of him, but again this argument goes to the result of the actual crime of kidnapping. Don had done everything required to complete the act besides Harriet acquiescing to his demand. Therefore, because Don had done everything he could besides trying to further convince Harriet the gun was real, he would probably be convicted even under the minority rule.