

Question 4

One summer afternoon, Officer Prowl saw Dan, wearing a fully buttoned-up heavy winter coat, running down the street. Officer Prowl ordered Dan to stop. Dan complied. As Officer Prowl began to pat down Dan's outer clothing, a car radio fell out from underneath. Officer Prowl arrested Dan and took him to the police station.

At the police station, Officer Query met with Dan and began asking him questions about the radio. Dan stated that he did not want to talk. Officer Query responded that, if Dan chose to remain silent, he could not tell the District Attorney that Dan was cooperative. Dan immediately confessed that he stole the radio.

Dan was charged with larceny. He retained Calvin as his attorney. He told Calvin that he was going to testify falsely at trial that the radio had been given to him as a gift. Calvin informed Dan that he would make sure he never testified.

Calvin filed motions for the following orders: (1) suppressing the radio as evidence; (2) suppressing Dan's confession to Officer Query under *Miranda* for any use at trial; and (3) prohibiting Dan from testifying at trial.

At a hearing on the motions a week before trial, Dan, in response to Calvin's motion for an order prohibiting him from testifying, stated: "I want to represent myself."

1. How should the court rule on each of Calvin's motions? Discuss.
2. How should the court rule on Dan's request to represent himself? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Ruling on Calvin's Motions

Motion to Suppress the Radio as Evidence

Fourth Amendment Protections

The Fourth Amendment, incorporated to the states through the Fourteenth Amendment, protects individuals against unreasonable searches and seizures of their person, home, and personal effects. A seizure occurs when an individual's freedom of movement is limited by an officer such that the person would not feel free to leave the officer's presence. A search occurs when an officer gathers information in which the individual has a reasonable expectation of privacy, such as a physical search of the person's body, a search of the person's home, or eavesdropping on private conversations through wiretapping. However, if the officer is in a location in which he is entitled to be, he may observe the person's conduct or identify contraband that is within plain view, since people do not have a reasonable expectation of privacy for things they disclose to the public, such as speaking on a public street. The general standard for reasonableness to affect a search or seizure is probable cause, although lesser standards apply in certain circumstances, as discussed below. The Fourth Amendment generally requires that police officers obtain a search warrant before searching a person and an arrest warrant before an arrest to ensure that the probable cause standard is met.

Terry Stop

Under the Supreme Court decision in Terry, an officer may stop and search an individual based on less than probable cause. A "Terry stop" is a reasonable search under the Fourth Amendment when two conditions are satisfied. First, the officer must have reasonable suspicion, based on specific and articulable facts, that the individual is engaged in criminal activity in order to stop the person. The officer may then question the individual. In order to search the person, the officer must have reasonable

suspicion, based on specific and articulable facts, that the person is armed. This is reasonable because if the person is armed, the officer is in possible danger.

Seizure

A seizure occurs when an officer restricts the freedom of movement of a suspect such that the individual would not be free to leave the officer's presence. The court will take into account all of the circumstances, including the officer's language and tone and the setting in which the confrontation took place. However, merely being in a physically confined area (such as a bus) will not make the officer's interaction with a person into a seizure. If the officer orders the individual to stop, the seizure does not occur until the person complies with the officer's instructions and his movement is actually restrained.

Here, Officer Prowl ordered Dan to stop while he was running down the street. He did not approach Dan and ask him to voluntarily speak with him. Rather, ordering "stop" would be interpreted by a reasonable person to be a use of police authority to restrain Dan's movement such that Dan could be subject to penalty if he refused. Dan complied with Prowl's order and actually stopped. Thus, a seizure occurred.

Reasonable Suspicion to Stop

The seizure of Dan will be reasonable under the Fourth Amendment, per Terry, if Prowl had reasonable suspicion to stop Dan. In order to satisfy the Fourth Amendment, Officer Prowl must have reasonable suspicion that Dan is engaged in criminal activity. This must be more than a mere hunch or an anonymous tip that the officer has no reason to trust. The officer must be able to identify specific facts that demonstrate objectively the reasonable suspicion to stop the person.

Here, Dan was running down the street wearing a fully buttoned-up heavy winter coat on a summer afternoon. It is objectively unusual to see someone wearing such a coat during the summer, and Prowl's experience would likely indicate to him that people use such coats to conceal contraband, such as stolen property or drugs. Further, Dan was running. Because of the coat, it would seem unlikely that Dan was running for exercise, since he would be overly hot during the summer.

Because these facts, taken together, indicate that Dan was acting objectively suspiciously, Prowl had reasonable suspicion to stop Dan.

Search

A search occurs when an officer infringes upon an individual's reasonable expectation of privacy. The individual's person is always an area in which the person has a reasonable expectation of privacy unless that expectation has been reduced for some reason, such as in prisoners and parolees. We do not have any indication that Dan was a parolee or on probation. Thus, when Officer Prowl patted Dan down, a search occurred.

Reasonable Suspicion to Perform Pat-Down

Under Terry, Prowl's search of Dan will be reasonable if he had reasonable articulable suspicion that Dan was armed. Although Dan's activity was objectively suspicious, he did not do anything and we have no indication that Prowl had prior knowledge that would make it objectively likely that Dan was actually armed. Prowl did not even speak with Dan after ordering him to stop, but immediately began a pat-down. Prowl would argue that Dan's bulky coat could easily have concealed a weapon, and Prowl's search was thus for self-protection. However, a physical search based on no independent facts suggesting that the person is armed is only reasonable following an arrest. Here, Dan was not arrested when Prowl performed the search.

Prowl's search of Dan was not based on reasonable articulable suspicion and was therefore a violation of Dan's Fourth Amendment rights.

Exclusion of Evidence

Evidence seized in violation of an individual's Fourth Amendment rights will generally be excluded in any subsequent criminal prosecution of that individual. The exclusionary rule operates as a deterrence mechanism to discourage police officers from committing constitutional violations. Although there are some circumstances in which the Supreme Court has concluded that the deterrent effect of the exclusionary rule is too inadequate to justify exclusion (such as knock-and-announce violations), the

exclusionary rule operates in the Terry stop circumstances. Any contraband that was discovered as a result of an illegal search subject to the exclusionary rule will be excluded from evidence.

Here, Prowl violated Dan's Fourth Amendment rights when he unreasonably searched Dan. Therefore, the court should order that the radio be suppressed.

Motion to Suppress Dan's Confession

Fourth Amendment

First, Dan would argue that the Fourth Amendment violation directly led to his confession, and thus the confession should be excluded under the "fruit of the poisonous tree" doctrine discussed above. However, the Fourth Amendment exclusionary rule operates to exclude physical evidence rather than statements. Thus, Dan's confession would not be excluded by the Fourth Amendment.

Fifth Amendment Protections

The Fifth Amendment right against self-incrimination protects suspects from being compelled to make statements against their own penal interests. The Supreme Court in *Miranda* interpreted this protection to require the police to effect certain warnings to individuals who are subject to custodial interrogation at the hands of police to offset the inherently compelling pressures of police interrogation.

Miranda Warnings

Police officers must give each suspect warnings about his rights once he is subject to custodial interrogation. The warnings must inform the suspect of his right to remain silent, his right to an attorney, and that the attorney will be provided for him if he cannot afford to pay.

Custodial

The "custodial" element is satisfied if the person is subject to police custody at the time of questioning. Once the individual is arrested, he is generally understood to be

in police custody. Even before an arrest, the suspect may be subject to custody if he is being restrained in a formal setting, such as a police station, and is not told that he is free to leave at any time. The suspect need not have been indicted or charged for the custody element to be satisfied.

Here, Dan had been arrested and taken to the police station, where Query began questioning him. Because Dan was in a formal setting and had actually been arrested, the custodial element is satisfied.

Interrogation

The "interrogation" element requires that the police actually be asking the defendant questions that would be reasonably likely to lead to an incriminating response. A question such as whether the suspect would like a drink of water or whether he was comfortable would not constitute interrogation.

Here, once Dan was in custody, Query began asking him questions specifically about the radio. Thus, Dan was being interrogated.

Because both elements of Miranda are satisfied here, Query violated Dan's Fifth Amendment right against self-incrimination by failing to read him Miranda warnings.

Dan's Statement That He Did Not Want to Talk

Once an officer has read the suspect his Miranda rights, any express invocation of those rights must be strictly honored by the officers, who must then stop interrogating the suspect.

Here, Query should have read Dan his rights. Dan's explicit statement that he "did not want to talk" likely qualifies as an invocation of his right to remain silent. Because Query continued to interrogate Dan following Dan's express invocation of his right to remain silent, Query violated Dan's Fifth Amendment rights.

Exclusion of Statement under Fifth Amendment

The remedy for a Fifth Amendment violation is an exclusion of the improperly obtained confession. However, generally speaking, any physical fruits of the confession,

such as evidence seized in reliance on statements made in the confession (such as the location of contraband) are not excluded. Further, the statement may still be used to impeach the suspect if he were to testify in the criminal case.

Here, Dan confessed that he stole the radio. Because Dan's Fifth Amendment rights were violated, the statement should be excluded from the prosecution's case-in-chief, although it may still be used to impeach Dan.

Voluntariness

The Fifth and Fourteenth Amendments of the Constitution also protect individuals against compulsory statements. A statement is compulsory if it was made involuntarily. An involuntary statement could be made as a result of legal compulsion (such as a subpoena to testify before a grand jury) or by improper police tactics, such as physical violence, threats, or promises that the suspect will not be prosecuted if he confesses. Although Calvin did not move to suppress the statement on voluntariness grounds, Dan would be wise to do so, since exclusion on voluntariness grounds would prevent the statement from being used against Dan on cross-examination.

Here, Query told Dan that he "could not tell the District Attorney that Dan was cooperative" if he refused to speak. Although this statement does not explicitly promise Dan that he would not be prosecuted based on the statement, Dan would argue that Query suggested that he could guarantee different penal consequences based on whether Dan confessed. Query would say that he merely suggested a statement he could make to the prosecution, not that the prosecution would react in any specific way.

Because Query did not make any actual promise that Dan's penal outcome would be different, the statement was likely voluntarily made.

Exclusion of Statement for Voluntariness

If Dan's statement were involuntarily made, the statement itself would be excluded for all purposes, including impeachment. Further, any physical fruits of the statement would be excluded as well. Thus, because Dan wants to testify at trial, he should still argue that the statement was involuntary, even if this argument is likely to fail.

Motion to Prohibit Dan from Testifying

Defendant's Right to Testify

Each defendant has a constitutional right to testify in his own trial. Although an attorney has a professional ethical obligation to counsel his client not to lie on the stand, the lawyer cannot prevent the client from doing so. Under the ABA authorities, the attorney must seek to withdraw from the representation if he knows that the client intends to perjure himself. The court could then grant leave to withdraw, but may also decide that efficiency and justice require continued representation.

Thus, the court should rule against Calvin's motion to prevent Dan from testifying. However, it would be proper under the ABA rules for Calvin to seek to withdraw from representing Dan.

2. Dan's Request to Represent Himself

Sixth Amendment Protections

The Sixth Amendment right to counsel protects a criminal defendant's right to be represented by an attorney in all critical stages of prosecutory action by the state. The Sixth Amendment right includes the right to counsel of choice or to decline the right of representation if the defendant is competent to refuse.

Right of Self-Representation

The Sixth Amendment includes a right of self-representation. The court must grant the right if the defendant is competent.

Competence to Stand Trial

The general rule is that if the defendant is competent to stand trial, he will be found competent to represent himself. To be competent to stand trial, the defendant must understand the nature of the proceedings against him and be aware of the consequences of the proceedings.

Here, we have no facts suggesting that Dan has a mental defect that would affect his competence. Thus, the competency to stand trial is satisfied.

Competence for Self-Representation

The Supreme Court has stated that competence for the purpose of self-representation does not require the defendant to be legally sophisticated or be able to do an objectively good job representing himself. Although the Court has recognized that most defendants would be better served by counsel than by self-representation, the Sixth Amendment guarantee requires the court to allow the defendant to represent himself, regardless of whether the court finds that his action is in his own best interest.

Thus, although Dan does not appear to have any particular legal knowledge or skills, such knowledge is not required to trigger the constitutional right to self-representation. Therefore, the court must allow Dan to represent himself.

Advisory Counsel

The court may require that the individual be assigned advisory counsel to assist him. The role of advisory counsel is to provide the defendant with legal advice and information, but advisory counsel is not allowed to make the strategic decisions that appointed or retained counsel may, such as choosing to call only certain witnesses (other than the defendant) or present certain evidence. The advisory counsel role serves as a layer of protection for a self-representing defendant in order to protect the integrity and efficiency of the judicial process.

Thus, although the court must allow Dan to represent himself, it could choose to appoint Calvin or another attorney as Dan's advisory counsel.

QUESTION 4: SELECTED ANSWER B

1. HOW SHOULD THE COURT RULE ON EACH OF CALVIN'S MOTIONS

(1) Suppressing the Radio as Evidence

Exclusionary Rule

Where evidence is obtained unlawfully under the Fourth, Fifth, or Sixth Amendments, that evidence is generally inadmissible against the accused. In *Mapp v. Ohio*, the Supreme Court held that the exclusionary rule is incorporated against the states. Moreover, under the fruit of the poisonous tree doctrine, all evidence obtained as a result of an invalid search or confession is also suppressed unless the government can prove (i) an independent basis; (ii) inevitable discovery; or (iii) an intervening act of free will.

Fourth Amendment Search and Seizure

The Fourth Amendment provides that a person be free from unreasonable searches and seizure of their persons, homes, papers, or effects. To that end, Dan (D) should be able to successfully argue that he was unlawfully seized and that the radio must be excluded as the fruit of an invalid seizure.

(1) State Action

The Fourth Amendment is only triggered by state action. Thus, a state or federal police officer or a private officer that has been deputized by the city or state must be the actor in order to render the Amendment applicable. Here, Officer Prowl (OP) appears to be a state police officer and hence the state action requirement is satisfied.

(2) Search / Seizure

A "seizure" occurs under the Fourth Amendment where the circumstances of the encounter are such that a reasonable person would not feel free to decline the encounter. A "search" under the Fourth Amendment only occurs where the D has a

reasonable expectation of privacy in the area and thing searched, or where there is a government intrusion into a constitutionally protected area.

Seizure. Here, D was ordered to stop by OP. A police officer may ask a person if they are willing to talk, at which point the person is free to decline and is not seized. However, where an officer commands a person to stop, their authority as a police officer is such that a reasonable person does not feel free to decline the encounter. Thus, D was seized by OP when he was commanded to stop and he did, in fact, stop.

Search. Here, D does not have a reasonable expectation of privacy in his movement on the streets. OP is free to follow him as much as he wants. However, D does have a reasonable expectation of privacy in the things he keeps out of public view, hidden under his coat. Merely stepping out onto the street does not render everything in D's possession "public." In this case, OP also intruded upon a constitutionally protected area, i.e., D's person. By patting down the outer clothing that D was wearing, OP intruded on his person and searched him under the Fourth Amendment.

Thus, if there is not a valid basis under the Constitution for this search and seizure, the evidence was obtained in violation of the Fourth Amendment and must be suppressed.

(3) Warrant Requirement

A search or seizure is generally unreasonable unless the police have a warrant, or an exception to the warrant requirement applies. A warrant must be founded on (i) probable cause; (ii) state with particularity the persons and places to be searched; and (iii) be executed in a valid manner. Where a warrant that is otherwise invalid is relied upon in good faith by the arresting officers, the search or seizure will be upheld as long as the warrant was not: (i) so lacking in probable cause or particularity as to render reliance unreasonable; (ii) obtained by fraud on the magistrate; or (iii) the magistrate was impartial.

Here, there was no warrant to arrest or search D. Thus, the search and seizure are unconstitutional unless an exception to the warrant requirement applies.

(4) Warrant Exceptions

Terry Stop. An officer may engage in what is known as a temporary "investigative detention" under the Supreme Court's Terry framework, provided the officer has reasonable suspicion of criminality on the part of the D which is based on "articulable facts."

Here, the only facts that are given is that D was running down the street one summer afternoon wearing a fully buttoned, heavy winter coat. The fact that it was summer and D was wearing a fully buttoned up winter coat is certainly suspicious. Indeed, a reasonable person would almost have to assume that the purpose of wearing such a coat would be to hide evidence of contraband. If it is warm outside, as it usually is in the summer, a coat would be unnecessary. On the other hand, D may live somewhere like San Francisco where summers can be quite cold; D may have had a cold or some condition that makes him cold; or D may have been training for a sporting event such as wrestling where people force themselves to sweat more. The Court has held that headlong flight from an officer after seeing the officer is evidence sufficient to help support reasonable suspicion, but merely running has never been held to be reasonable suspicion absent additional facts.

Nevertheless, given that D was running down the street and wearing a coat that was fully buttoned during the winter, a court would likely find that the officer had reasonable suspicion--but certainty not probable cause--to detain D for a short period of time to investigate the potential criminality.

Terry Search. An officer that has reasonable suspicion of criminality based on articulable facts may also conduct a Terry search of the D, provided he has reasonable grounds for believing that the D is armed and dangerous. A Terry search must be

limited to a pat-down of the outer clothing of the D, and must be limited to a search for weapons. In order to remove evidence that is not a weapon, the officer must have probable cause to believe the other evidence, e.g., drugs or a car stereo, is illegal.

Here, there is no real evidence that D is armed and dangerous. He was running wearing a coat, which--as discussed above--is sufficient to find reasonable suspicion that D just committed some type of theft offense and is trying to conceal the contraband in his coat. However, D will argue there is really no reason to believe that he was armed at this point. OP cannot simply claim he thinks D is armed because he seemed sketchy. On the other hand, OP might be able to convince a court that many theft offenses are committed with a weapon and hence that D could reasonably have been carrying a weapon. The fact that D was not actually carrying a weapon will not undermine this argument. While this is a close call, a court would likely permit OP to conduct a Terry search here.

The scope of the search seems permissible in this case, as OP merely patted down D's outer clothing. As he did so, a car radio fell out. The car radio is not a weapon, but may be admissible under the plain view doctrine, discussed below. In any event, the search and seizure itself was not unconstitutional.

Plain View. The Plain View doctrine applies where (i) the police have a right to be where they are viewing; and (ii) they see evidence and it is immediately apparent the evidence is contraband. Here, as discussed above, OP had the right to stop D under Terry, and hence he had a right to be where he was viewing the radio as it fell from D's coat. Moreover, it was immediately apparent to OP that the car radio was contraband. Indeed, D was running down the street, in a coat, in the summer, with a car radio hidden inside his coat. The radio was quite apparently stolen and hence admissible under the plain view doctrine.

Consent. While D has a constitutional right not to be searched or seized, the right is subject to waiver, i.e., the search or seizure is not unreasonable if D consents to the

search or seizure. Consent must be knowing and voluntary. However, it is not required that one know they have the right to decline the encounter.

Here, D is not likely to be deemed to have consented to either the seizure or the search by OP. Indeed, as discussed above, he was seized. A defendant is not deemed to consent when seized. Moreover, with respect to consent to search, OP just started patting down D's outer clothing. Consenting to questioning is not within the scope of consenting to search. Thus, even if D were deemed to consent to questioning he would not be deemed to consent to the search. In any event, the search and seizure are valid under Terry.

Conclusion

The evidence of the radio is admissible given that the search and seizure were valid under a Terry stop and frisk and the radio fell out of D's coat and was in plain view.

(2) Suppressing Dan's Confession to Officer Query

The Fifth Amendment protects a person from being compelled to be a witness against his or her self. Due to the inherent risks of coercion in police custodial interrogations, the Supreme Court has held that a defendant must be given Miranda warnings before any confessions by the defendant are admissible against the defendant, unless used to impeach.

Miranda Warnings

Miranda is triggered where the D is: (i) in custody; and (ii) interrogated.

Custody. For purposes of Miranda, custody is defined as a place where a reasonable person would not feel free to leave. Moreover, custody is assessed by looking to whether the situation involves the same inherently coercive pressures as stationhouse questioning.

Here, D was arrested and taken to a police station where he was then met by Officer Query (OQ). D had no ability to leave, and no reasonable person would feel free to leave in this situation. Moreover, this is stationhouse questioning, so the inherent pressures that Miranda is meant to protect against are at their pinnacle here. Thus, D is in custody.

Interrogation. Interrogation is defined as any line of questioning that a reasonable officer would find likely to illicit an incriminating response. Here, OQ was asking D questions about the radio. This is clearly questioning that is likely to generate an incriminating response. Thus, D was interrogated.

As both elements of Miranda are met, D was required to receive Miranda warnings. OQ ought to have told him he had the right to remain silent; that anything he said could be used against him in court; that he had the right to an attorney; and that he had the right to have an attorney appointed if he could not afford one. Since D was not warned, his confession is inadmissible against him (unless it is used to impeach him).

Invoking Miranda

D was not warned, but in this case it even seems that he attempted to invoke his Miranda rights. To invoke the right to remain silent, the D must clearly and unequivocally indicate his intent to invoke. Here, D stated to OQ that he "did not want to talk." That may not use the word "remain silent" but no reasonable officer could think that "not want[ing] to talk" means anything other than remain silent. After having said that, OQ tried to coerce him into talking. This is not permitted. OQ must honor D's request and stop talking. By badgering him after he invoked, any later confession is in violation of Miranda. In this case, since D was not even Mirandized, his is irrelevant. However, even if D were Mirandized, the fact that OQ failed to honor his request to remain silent is a separate basis for excluding this statement.

Conclusion

The confession must be suppressed (except for purposes of impeachment). Thus, the court should grant the motion in part, subject to use for impeachment.

(3) Prohibiting Dan From Testifying At Trial

Constitutional Right to Testify in Defense

All defendants have a constitutional right to testify in their defense at a criminal trial. This right trumps any ethical obligation that Calvin (C) has to the court or the profession. Indeed, neither C nor the court can prohibit D from testifying in this situation.

[NOTE: The proper response by C would have been to inform D that he cannot testify falsely and persuade him to testify truthfully. If that failed, C should have tried to withdraw from the representation. If the court failed to allow him to do so, under the ABA C should have then informed the tribunal and allowed the tribunal to take the necessary steps. Under the California rules, no disclosure is permitted. Instead, C should have let D testify and questioned him up until the point he knew he was going to testify falsely, then, at that point, allow D to testify in the narrative and in no way rely upon D's narrative in closing. Under any ethical rule and the Constitution, the prohibition on D testifying is not permitted.]

Conclusion

The court should rule that D be permitted to testify, as a criminal defendant has a constitutional right to testify. The tribunal may take necessary steps to remedy the false testimony, such as requiring narrative testimony.

2. HOW SHOULD THE COURT RULE ON DAN'S MOTION TO REPRESENT HIMSELF

Faretta Motion

The right of a criminal defendant to be represented by counsel was held to require the right of self-representation in Faretta. Where a Faretta motion is timely made, and the court is satisfied that the defendant is competent enough to represent himself, the court is required to respect the dignity of the defendant and allow him to have the right to choose for himself and represent himself. A court may also appoint back-up counsel to assist (but not actually control) the representation, but that is not constitutionally required.

Competence. The Supreme Court recently held that a defendant may be competent to stand trial but nevertheless incompetent to represent himself.

In this case, we have very little information on whether D is capable of representing himself. It appears he was found competent to stand trial, or at least that no such hearing has been conducted to this point. Thus, given no facts indicating that D cannot represent himself, he would likely be deemed competent to stand trial. The judge would have to verify that D was able to understand the charges and the legal issues, but--again--there is nothing in the facts indicating D cannot handle this. The court would also look to the issues between D and C and use this as a further justification for allowing D to represent himself.

Timeliness. A court need not allow a defendant to represent himself if doing so would cause an undue delay in the case. The request must be timely.

Here, D made the request to represent himself after an attorney was appointed and various pretrial motions were made. Indeed, the motion came just a week before trial. To allow D to testify would likely require giving D extra time to prepare the case himself, which would mean that the trial would have to be pushed back. That would interfere with availability of witnesses and with the efficiency of the court and the ability for the prosecution to put on its case. D might also win sympathy from the fact C is not permitting him to put on his case. However, that is more of a reason to substitute

counsel than to let D represent himself. In this situation, D would need to show he was immediately prepared to go to trial. Delay of any sort would be sufficient to permit the court to deny his Faretta motion.

Conclusion

Although D is likely competent to represent himself, but the court is likely to deny the motion as untimely, given that the trial date is set for only one week from the date of the motion and given that D would likely need a good amount of time to fully prepare himself for trial.