MULTISTATE PERFORMANCE TEST
FEBRUARY 2010

The MPT Question administered by the State Board of Law Examiners for the February 2010 Maryland bar examination was State of Franklin v. McLain. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the "point sheet" describing the issues and the discussion expected in a successful response to the MPT Question. The "point sheet" is analogous to the Board's Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the "point sheet" on the Board's website. However, the NCBE does offer the MPT Question and "point sheet" for sale on its website.

Materials for an unsuccessful applicant: An applicant who was unsuccessful on the February 2010 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the "point sheet" for the February 2010 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is July 6, 2010.

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MULTISTATE PERFORMANCE TEST

REPRESENTATIVE ANSWER 1

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ARGUMENTS FOR BRIEF

To: Marcia Pierce, Esq.
From: Associate Attorney
Date: February 23, 2010
Re: State v. Brian McLain

1. Officer Simon Had No Reasonable Suspicion That Would Justify the Stop of McLain's Vehicle

Officer Simon had no reasonable suspicion that would justify the stop of Brian McLain's vehicle and as a result, both the stop and the subsequent search violated the d4efendan'ts Fourth Amendment rights under the U.S. Constitution. The Fourth Amendment protects individuals from unreasonable searches and seizures. Police may have the right to sop and interrogate persons reasonably suspected of criminal conduct. Police may make a brief investigatory stop if they have reasonable suspicion that criminal activity is afoot. Such stops by the police are called "Terry stops" after the leading case, Terry v. Ohio, 392 U.S. 1 (1968). The test if whether the officers have "a reasonable suspicion, grounded in specific and articulable facts, that the person is involved in criminal activity" at the time. This includes looking at the totality of the circumstances and determining whether there was reasonable suspicion enabling police officers to engage in a search. There are various elements to consider in this test.

(1) Source of Tips

First, we must consider where the initial suspicion of the police arose. A tip from a source known to police, especially one who has provided information in the past may be sufficient to warrant a Terry stop according to State v. Montel. However, here, the call to Centralia Police

Department was an anonymous tip from one that the police had no idea of. State may argue that in cases such as State v. Grayson a completely anonymous tip was nonetheless considered sufficient grounds for a reasonable suspicion. In Grayson however, the anonymous caller seemed to have a certain knowledge of the operations of the defendant. The informant was able to predict the future actions of the defendant with precise accuracy. That Grayson would be leaving a certain apartment building at a certain time in a certain vehicle with a broken tail-light. The

caller was also informed about what motel Grayson would be traveling to and what he would be carrying with him. This anonymous tip had inside information which is not the case here thus differentiated from our case. Additionally, in Grayson, the court agreed still that there must be independent police work to corroborate the anonymous tip to confirm reasonableness of suspicion.

(2) Separate Investigations of the police to Corroborate

Second, as in our case where there is an anonymous tip, there must be individual police work aside from the initial tip that corroborates the tip to add to the totality of circumstances. In state v. Montel, the Court ruled that the police did not have reasonable suspicion because "in the end, the police had little more reason to suspect Montel of specific criminal activity when they stopped him than they did before receiving the hearsay tip." This means that the police did not have any extra information to have suspicion against Montel. Here, the separate investigation of McLain's vehicle did not render anything more than what would have been known without the tip. Had the police searched the car, the finding of Sudafed and coffee filters and coffee would not render reasonable suspicion upon McLain.

(3) Whether Tip was Reliable in its Assertion of Illegality

Third, State v. Montel (Franklin Court of Appeal 2003) has ruled that an anonymous tip, as is the case here, must not only be corroborated by investigations but must be "reliable in its assertion of illegality." Here, the call that the police received described the individual that who was allegedly Brian McLain, but is not reliable in its assertion of illegality. The illegality was simply that he "has gotta be a meth dealer" since he bought two boxes of Sudafed and coffee filters. It is not illegal to buy Sudafed in the State of Franklin, in fact it is not illegal to buy more than two boxes of Sudafed if need be. It is also not illegal to buy coffee filters and therefore it seems that the assertion of illegality included in the anonymous phone call is not reliable.

(3) The Rate of the Relevant Crime in the Area Searched

In State v. Sneed (Franklin ct. App. 1999) one of the elements in helping with finding "specific and articulable facts" was whether the area where the search occurred is an area with a high crime rate as pertaining to the crime that is relevant in the current case. In Sneed, the Court

found there was no reasonable suspicion to stop the defendant simply on untested confidential information that defendant was involved in a heroin dealing when there was no testimony to state that the area "was known for drug trafficking or that there had been short term traffic to the house. According to Officer Ted Simon who has been involved in 200 narcotics arrests, 1230 8th Street is not in an area where there was reasonable suspicion of meth manufacturing. In fact, Officer Simon states in Suppression Hearing that this was the first meth operation discovered on 8th Street.

2. Count two of Possession of Equipment to Manufacture Methamphetamine Should be Dismissed As a Lesser-included Offense of Count Three

A case that arose from the Franklin Supreme Court in 2005, State v. Decker, provides the relevant law in determining when one offense is considered a "lesser-included offense" so as to validate dismissal of the lesser-included offense in light of being charged with the greater offense. If each of the two Counts includes at least one element that is not in the other offense, the alleged lesser defense cannot be dismissed since the lesser defense includes within it an element that is not in the 'greater' defense.

The felony of possessing equipment to manufacture Methamphetamine as according to the Franklin Criminal Code includes the following elements (1) knowing possession of equipment or chemicals, or both (2) for the purpose of manufacturing a controlled substance, to wit, methamphetamine. The Third count against McLain the manufacture of Meth includes the following elements (1) knowingly manufacture; meaning producing, compounding, converting, or processing methamphetamine, including to package or repackage the substance, either directly or indirectly by extraction from substances of natural origin or by means of chemical synthesis. Here, the greater offense of manufacturing meth. However, it can be argued that the act of manufacturing meth and being guilty of manufacturing requires inevitably the (1) knowing possession of equipment or chemicals or both (2) for the purpose of manufacturing meth since without the knowing possession of equipment or chemicals or both and without the purpose of manufacturing there can be no manufacture of meth. Additionally, Franklin law does not require a strict textual comparison that all the elements of the compared offenses coincide in order to deem one included in the other offense.

REPRESENTATIVE ANSWER 2

Did Officer Simon have reasonable suspicion that would justify the stop of McLain's vehicle?

The Fourth Amendment protects individuals from unreasonable searches and seizures. Franklin courts have recognized, however, that police have the right to stop persons reasonably suspected of criminal conduct if they have reasonable suspicion that criminal activity may be afoot. State v. Montel. In order for a police officer to have reasonable suspicion, the police officer must have specific and articulable facts necessary to form this suspicion. Id. Courts generally look to the totality of the circumstances in each case.

Here, the police officer was informed that criminal activity was going on at Shop Mart based on an anonymous tip. The Montel court has held that in order for a police officer to have reasonable suspicion of a party based on an anonymous tip, the officer must corroborate the tip. Here, the facts show that the anonymous informant gave detail as to Defendant's physical appearance. However, the Montel court has said that a tip' tendency to identify a person is not enough for reasonable suspicion.

Nevertheless, the State will argue that the anonymous caller appeared to have first-hand knowledge of what Defendant was buying, the car he was driving, and that he overheard Defendant asking the cashier if the shop sold engine-started fluid. The Court in State v. Grayson held that if the tipster's story is corroborated, then the tip can be considered reliable and this is sufficient to find reasonable suspicion in order to stop a suspect. Here, the State will argue that this was independently corroborated, as the officer went to the place where the tipster said to go and found the red Jeep Cherokee. However, the police officer did not find the Defendant in the shop Mart lot. Instead, he was across the street. This does not necessarily corroborate with what the tipster said.

Additionally, the Officer's testimony reveals that the street in which Defendant was found was a high-crime area. Nevertheless, courts in Franklin have held that the fact that a suspect is in a high-crime area is not enough to rise to reasonable suspicion. Montel. Moreover, in Montel, the court cites to State v. Sneed, in which a defendant was stopped after an officer received a tip about drug trafficking. The court in Sneed held that the officer did not have reasonable suspicion to stop the defendant because the area was not known for drug trafficking. Here, as in Sneed, the area where Defendant was stopped was not known for drug crimes. The Officer stated in his testimony that the only other crimes had been called in by Shop Mart employees for theft and vandalism. This is yet another factor to demonstrate that the Officer did not have reasonable suspicion to stop the Defendant.

Moreover, the Officer's testimony specifically states that the Defendant did not violate any traffic laws to warrant pulling him over. Also, the Defendant was in possession of nothing illegal, as he had merely purchased common items which are commonly found at a convenience store. In fact, the Defendant had even purchased coffee along with his coffee filters, another factor that would rebut the tip that he had been purchasing items to manufacture meth.

Overall, the tip standing alone in this case is not sufficient to rise to reasonable suspicion. As such, this court should find that the Officer did not have reasonable suspicion and should suppress all evidence obtained thereto.

Is Count Two of the Criminal Complaint a Lesser Included Offense of Count Three?

The analysis of whether the same event or transaction gives rise to two statutory offenses begins with a comparison of the elements of both offenses. State v. Decker. The court refers to this as a "strict elements" test. Id. The court in Decker further explains, "If the elements of the greater crime necessarily include the elements of the lesser crime, then the latter offense is a lesser-included offense and prosecution of both crimes violates double jeopardy." Id. This has been codified in Franklin Criminal Code Section 5(2) which says that a lesser- included offense is included in the greater offense if it is impossible to commit the greater offense without first having committed the lesser offense.

Here, the defendant has been indicted on both Count Two, possession of equipment or supplies with the intent to manufacture meth and Count Three, manufacture of meth. Count Two has four distinct elements: 1) knowingly, 2) possess, 3) equipment or chemicals or both, 4) for the purpose of manufacturing a controlled substances to wit meth. Count Three has two distinct elements: 1) knowingly, and 2) manufacture meth. Manufacturing within the meaning of this statute means to produce, compound, convert, or process meth, including packaging or repackaging of the substance. The Decker court has stated that Franklin case law does not require a strict textual comparison of the statutes. Decker. Taking this into account, it is clear that it is necessary for a party to possess the equipment and supplies in order to manufacture meth, as it cannot be manufactured without these products. This demonstrates that Count Two is indeed a lesser-included offense and is necessary in order for the greater-offense (Count Three) to occur.

The State, however, will argue that it is possible to possess equipment without manufacturing meth. As such, the State will try to prove that both Counts should remain. Nevertheless, it is only necessary that the offenses be so similar that the commission of one offense will necessarily result in the commission of the other. Therefore, despite the State's argument, Defendant's possession of the supplies to manufacture meth are necessary for him to actually manufacture the meth As such, this Court should find that Count Two and Count Three are multiplicitous, and the lesser-included offense, Count Two should be dismissed.