

CRIMINAL PROCEDURE
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On a clear, dry afternoon in Columbus, Ohio a Ford Tempo crashed a stoplight at the intersection of Main and High Streets and struck a Mercedes being lawfully driven by Larry Luckless. After impact, the Ford continued south on High Street and turned into Schiller Park about a mile down the road. The Mercedes remained in the intersection at the point of impact.

Shortly thereafter, two cruisers appeared at the intersection. One stayed at the scene and the other, after obtaining a description of the Ford Tempo, drove south on High Street in pursuit. As the cruiser approached the park, Officer Sleuth saw the Ford in a parking lot. He pulled in and saw a man speaking on a cellular phone. As he approached, the driver hung up the phone and waved to the officer. The officer immediately recognized the driver as county commissioner Jack Flak.

Officer Sleuth, observing the dent on the front of the car and now sure that Flak was in a hit-skip accident, questioned Flak concerning his involvement in the accident at Main and High. Flak answered affirmatively, noting he had panicked, left the scene and had unsuccessfully attempted to reach his attorney when Sleuth pulled into the park. Officer Sleuth told Flak he was under arrest for hit-skip.

Q1.Should Flak's statements to officer Sleuth be admitted in the state's case in chief against Flak assuming a timely motion to suppress?

Officer Sleuth placed Flak in the back of his cruiser. The officer then searched Flak's vehicle and found a loaded gun under the driver's seat and a bulletproof SWAT uniform in the trunk. Officer Sleuth then called for a tow truck and had Flak's car taken to the impoundment lot.

Q2.At Flak's subsequent trial for carrying a concealed weapon should the gun and vest be suppressed assuming a timely motion to suppress?

Flak was then transported to the county jail where he remained in the presence of Sleuth for the next four hours. No Miranda warnings were given. Flak remained silent during this period of time.

Q3.Can Flak's silence (he didn't request medical treatment nor indicate he was hurt) be used to impeach Flak when he testifies at trial that he didn't remember the accident and was in need of medical treatment and should have been taken to the hospital?

Meanwhile, at the scene of the accident, Officer Diligent directed Luckless to move his car to a nearby parking lot and began to fill out an accident report. As Luckless sat in his own car, Officer Diligent, as was his common practice, took Luckless's driver's license and social security

number and ran them through the police computer. A check determined that Luckless had to appear for a disorderly conduct charge two months earlier and there was an outstanding warrant for his arrest. Luckless was placed under arrest. After Luckless was placed in the back of the cruiser, a search of his Mercedes revealed cocaine and a book of drug transactions in the glove compartment.

Q.4 Must the items seized from Luckless's car be suppressed assuming a timely motion to suppress?

Luckless was taken to jail and purposely placed in a cell with Earfull, a jail informant. While Earfull was serving a sentence for drunk driving, he was also being paid a contingent fee of \$300.00 for every confession he obtained from jail inmates awaiting trial. Luckless initially refused to discuss his case with Earfull, but after being told that Earfull had a "super attorney" who only represented drug dealers, Luckless told Earfull that he had been dealing cocaine for years and asked for the attorney's name.

Q5. Are Luckless's statements to Earfull admissible assuming a timely motion to suppress?

The dealer's book and drugs were taken by Officer Diligent to the narcotics bureau. As a result, officers immediately went to Luckless' apartment. They were greeted at the door by Barbara Burgle who identified herself as the longtime and live-in girlfriend of Luckless. Burgle related that she hadn't heard from "Lucky" in a few days. When the officers pointed out that the window of the back door was broken, she related that she had forgotten her key and broke the window to let herself in. The officers requested permission to search the apartment for drugs. Burgle appeared shaken and readily agreed to the search, noting immediately that she didn't live at the apartment full-time and wasn't responsible for what the officers might find. A search of the apartment revealed a kilo of cocaine in a living room closet. Subsequent investigation revealed that Burgle was not a girlfriend of Luckless but was a former girlfriend who broke the window in order to enter and steal drugs.

Q6. Should the cocaine found in Luckless's apartment be admissible in his trial for cocaine possession assuming a timely motion to suppress?

Four hours after arriving at the county jail, Flak was taken to an interrogation room. Prior to Det. Trick entering the interrogation room, Trick had been contacted by Flak's attorney, James Larry. Larry had received an anonymous call notifying him that Flak had been arrested. He immediately called the jail in order to advise Flak not to make a statement until he arrived. Larry's call was diverted to Detective Trick who informed Larry that Flak was presently in the cafeteria and would not be questioned until Larry arrived. Immediately after he hung up, Detective Trick went to the interrogation room and carefully read Flak his Miranda rights. Flak waived his Miranda rights and stated that he owned the gun and the bulletproof SWAT uniform in the trunk.

Q7. Should Flak's statement to Trick regarding ownership of the gun and vest be suppressed assuming a timely motion to suppress?

After acknowledging ownership of the gun and SWAT uniform, Flak stated that he had better speak to his attorney before continuing the interview. All questioning then ceased.

Subsequently Larry arrived at the jail, consulted with his client for a considerable period of time and left. A new detective, Detective Spy, then had Flak brought back to the interrogation room and began to discuss a shooting that had occurred earlier in the evening by a person described as dressed in "full Ninja attire." Prior to the questioning, Flak was re-Mirandized, stated that he understood his rights and signed a rights waiver. Flak then admitted that he had been involved in a shooting at his girlfriend's apartment while wearing his SWAT uniform but had been accosted by a man in her apartment and that the shooting was in self defense. He related that the actual gun used in the shooting was hidden behind his house.

Q8.Are Flak's statements to Spy admissible in the state's case in chief assuming a timely motion to suppress?

Detectives immediately went to Flak's house and found a gun in a plowed field behind Flak's house.

Q9.Should the gun found behind Flak's house be suppressed assuming a timely motion to suppress?

That evening, Luckless was charged with possession with intent to distribute cocaine. Flak was charged with carrying a "concealed weapon and felonious assault. Flak and Luckless posted bond, were released from the county jail and appeared for their initial appearance the next day. Luckless pled not guilty and requested a jury trial. When Flak's case was called, Flak approached the bench and informed the judge that his attorney hadn't arrived yet. The judge, noting that Flak was not in custody, continued Flak's case for a preliminary hearing. Unbeknownst to Flak, a witness, Myopic, who believed she had seen a man leaving Flak's girlfriend's house after hearing gunshots, was seated by detectives with other members of the public in the back of the courtroom and identified Flak as the man when he approached the bench.

Q10.At Flak's trial for felonious assault may Myopic testify that she picked Flak out of a crowded courtroom over Flak's timely motion to suppress?

Luckless left court and attempted to find the "super attorney" described by Earfull. No such attorney existed. Shortly thereafter, detectives were informed of a rumor on the streets that there was a "contract" put out on the life of Earfull by a cocaine dealer. Suspecting Luckless, the police found Luckless in a restaurant and asked to speak to him about the contract. Luckless stated that he had heard from "other cocaine dealers that there was a contract out on Earfull" but that he "only approved of the contract and did not pay any money to have it done."

Q11.If Luckless is subsequently indicted for conspiring to kill Earfull may his statements to the police in the bar be admitted against him over his timely motion to suppress? May they be used in the drug case?

The narcotics investigation of Luckless continued. Detectives discovered that Barbara Burgle lived in the same apartment complex as Luckless. They also received an anonymous call from a "neighbor" that Burgle was extremely concerned that she would be arrested for breaking into the home of Luckless and was worried that the police would think she was hooked again on drugs. Burgle had a prior conviction for drug possession and a conviction for drug trafficking for which she was on probation. The police incorporated their knowledge concerning Burgle into an affidavit in support of a search warrant and requested permission to search Burgle's apartment. The magistrate issued the warrant and a search of Burgle's apartment ensued. Police discovered drug paraphernalia and charged her accordingly. Burgle's probation officer also moved to revoke her probation based upon the discovery at her apartment.

Q12. Did the police lawfully seize the items from Burgle's apartment?

Q13. Is Burgle entitled to an appointed attorney at her probation revocation hearing?

While on the way to jail one of the arresting officers told her that it would go easier on her if she would provide evidence against her drug supplier. Knowing that her real supplier would kill her if she informed on her, Burgle told the officer that she bought her drugs from Nebish and agreed to provide evidence against him. Burgle had met Nebish at a drug rehabilitation program where both were drying out. Burgle met Nebish at a bar and told him that she desperately needed drugs and had no one else to turn to. Nebish said he was clean and did not have any. She insisted that her life was a wreck and that if he could only get her a little cocaine she would go back to rehabilitation as soon as she got by her current crisis. After an hour of crying and begging, Nebish told her that the bartender, Server, could usually be counted on for some cocaine and introduced Burgle to Server. When Server sold 10 grams of cocaine to Burgle, the police came in and arrested Nebish and Server.

Q14. What is the likelihood of Nebish asserting a successful defense of entrapment?

True to their word the police arranged for Burgle to remain on probation and she moved to the town of Morning Sun, population 3,000. Two weeks after moving to town Burgle was raped in her apartment. She described her assailant as white, blond hair, 6'5", 250 lbs. Burgle's lip was cut when she initially resisted the rapist and she is sure that some of her blood got on the rapist's clothing. The state police have narrowed their investigation to two subjects each of whom matches the description given by Burgle, each of whom has a prior history of assaultive behavior and each of whom meets the psychological profile of a rapist. Both men are quite similar in appearance and Burgle believes either one could have been the rapist. The state police put the foregoing information in an affidavit for a search warrant and seek a warrant to search each suspect's home for blood stained clothing.

Q15. Should the search warrant be issued?

Meanwhile the threat against Earfull turned out to be more than a rumor for Earfull was found shot to death in his apartment. Through careful police work probable cause was developed to believe that Moe, Curly, and Shep., three former cellmates of Earfull had conspired together to

kill Earfull with Curly being the actual shooter. The police went to Curly's house without a warrant to arrest him. They knocked on his door and were denied permission to enter by his friend. When they saw Curly through the doorway they pushed past his friend, arrested him, gave his full Miranda warnings and then asked him why he killed Earfull. Curly responded, "He sold us out." Later at the stationhouse he was again given Miranda warnings and signed a complete statement of his role in the murder of Earfull.

Q16. Must either of the statements made by Curly be suppressed assuming a timely motion to suppress?

As a result of Curly's confession indictments are returned charging Noe, Curly & Shep with the murder of Earfull. The death penalty is sought against Curly under a statute that provides for capital punishment when 3 or more people conspire to kill someone and that person is actually killed. Albert Awful has been hired to represent Curly. Unbeknownst to Awful the U.S. Supreme Court had decided a case 6 months before Curly's trial holding an identical capital punishment scheme unconstitutional because the state could not show why a conspiracy of 3 or more was more dangerous than a conspiracy of 2 people. Awful never raised the issue and Curly was convicted and sentenced to death. Several years later, as his execution date was approaching, Curly hired a new lawyer, Diligent, to review his case. Diligent moved for postconviction relief on the grounds that Awful was incompetent. The state countered by saying that the U.S. Supreme Court had just reversed its earlier decision and now the state could execute for conspiracies of three or more.

Q17. How should the court rule on Curly's request for postconviction relief?

After further investigation, the police discovered that Luckless is the owner of the apartment building where he had been living. The prosecutor's office then filed a civil forfeiture case against the property. If the prosecutor's office is successful, it would take title to the property and could sell it. Luckless filed a claim to the property and filed a motion for appointment of counsel, noting, he was indigent. The prosecutor's office did not contest the claim of indigency, but asserted that there is no right to counsel for this type of civil proceeding.

Q18. Set forth Luckless' arguments for the right to counsel in civil forfeiture proceedings.

Barbara Burple couldn't take the stress of her situation any longer. After spending hours in a local saloon, she left in her car and promptly ran off the road and into a ditch. She was seen by a witness driving erratically and, after the accident, departing on foot in an apparently inebriated condition.

The witness directed the police to Burple's apartment minutes after the accident. The police entered and arrested Burple for drunk driving. At the station she took a breath test and registered .20 (twice the legal limit) for alcohol on her breath. Assume the State of Ohio recently amended its drunk driving laws to provide that the first offense for driving while intoxicated is a noncriminal, civil offense carrying only a monetary penalty and no jail time.

Q19: Is the breath test taken, by the police admissible at her trial?

During the voir dire at Shep's trial for murder, a jury of eight women and four men were called as potential jurors. Shep's attorney used all four peremptory challenges to strike the men from the panel on the assumption that women would be less likely to vote for the death penalty than men. The prosecutor objected.

Q20: Should the trial judge permit or disallow the exercise of the peremptory challenges?