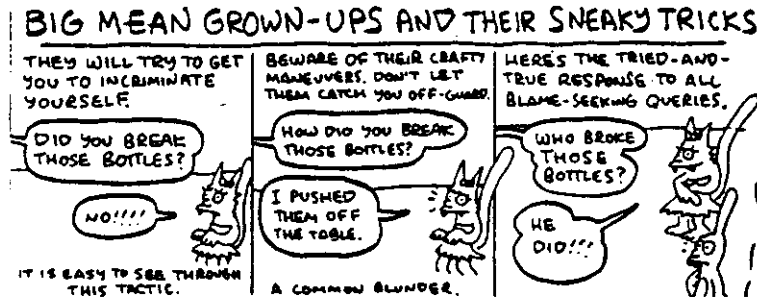


CRIMINAL PROCEDURE
SECTION B

Final Examination
May 8, 1987

Two and ½ Hours
1:00-3:30

THIS EXAMINATION MUST BE RETURNED WITH YOUR BLUEBOOKS



OPEN BOOK

Instructions

The two problems are of equal weight. Budget your time accordingly.

Answer all the questions reasonably raised in each problem even though your resolution of a prior issue in the same problem may technically make decision of other issues immaterial. If you believe that you need more facts than are presented to adequately resolve an issue, indicate specifically what facts you believe you need and why.

Specific citations to cases are welcome but not as a substitute for thinking, i.e. do not use citations instead of clearly stating the relevant point of law.

I (75 minutes)

Consider the following set of facts:

"The apartment in question is seven steps below ground level, and has a private entrance not in common with other residences in the building. The defendant [, Fred Shorty,] stayed in the apartment from time to time. The defendant claimed that he was renting the apartment, although the utility bills came to one of the defendant's girlfriends, and the defendant did not have a key to the apartment at the time of his arrest. Three informants . . . reported to the police that the

defendant was selling cocaine from the apartment. The informants described the defendant as a black male, in his late thirties, and 5'10" in height. The police were also told that the defendant drove an orange Volkswagen Beetle, which the police had seen in the area.

"The informants described a simple procedure the defendant used to advise his potential customers that he had cocaine to sell. Day or night, if the porch light was on, the defendant had cocaine for sale. If the porch light was off, the defendant did not have cocaine for sale. Sporadic surveillance of the apartment confirmed the informants' reports. When the porch light was on, even during the daytime, the police officers observed many visitors to the apartment. When the porch light was off, the apartment was quiet.

"In June 1985, Detective Barnhill executed a search warrant on the apartment, but found no drugs. On January 27, 1986, in the afternoon, Detectives Barnhill and Fortunato drove by the apartment in an unmarked police car. As they approached the apartment, they saw an individual near the apartment who matched the defendant's description. The individual was watching the detectives, and when they came to a stop sign in front of the building, they noticed that the individual was continuously looking over his shoulder, and appeared nervous as he walked down the stairway to the apartment. When he got to the bottom of the stairwell, he continued to watch the police as they proceeded down the street. According to detective Barnhill, the individual appeared to be playing a 'cat and mouse' game with them, because his head would disappear and then reappear to watch their car.

"The detectives turned their car around, parked, walked across the lawn to the apartment, and met the defendant coming out of the stairwell. The detectives advised the defendant that they were police officers, and the defendant replied, 'yeah, I know, I'm always on the lookout for you guys.' The defendant told the detectives that he was locked out of the apartment, and that he was waiting for his girlfriend to let him in. The

defendant was asked for identification, and he produced a driver's license.

"Detective Fortunato took the defendant's driver's license, and ran a radio check on the defendant to determine whether he was wanted. At the same time, Detective Barnhill went down the stairwell, rang the doorbell, and found that no one was at home. At the bottom of the stairwell, he saw a worn piece of carpeting, approximately two feet square, covering a concrete drain. Detective Barnhill lifted the carpet and found a plastic bag containing white folded paper which, in the detective's opinion, was of a type used to package cocaine. Barnhill asked the defendant what the packet contained and he responded that he didn't know because it wasn't his. "When I sell dope," he added, "I provide much better packaging than that." The defendant was then arrested and the contents of the packet were subsequently analyzed. The analysis confirmed the detective's suspicion that the substance in the folded paper was cocaine. The defendant was charged with possession of a controlled substance."

Cf. People v. Shorty, 731 P.2d 679 (Colo. 1987).

(1) Finding too few criminals in the Pittsburgh area to prosecute, you have moved to Colorado which is full of criminals and become an assistant district attorney. You have been assigned the prosecution of Fred Shorty. You have learned that you will have to respond to a suppression motion which will be brought by Shorty's attorney (who graduated from Duquesne) seeking to suppress the cocaine and Shorty's statements to the police. What tenable grounds do you anticipate will be raised in support of Shorty's suppression motion? What are your arguments in opposition? Who is likely to win? Why?

(2) Congratulations! Having obtained the convictions of many of Colorado's scurviest citizens, you've been promoted to Deputy District Attorney in charge of appeals. Now suppose that Shorty's attorney decided not to file the suppression motion discussed in Question (1). Suppose further that Shorty was convicted of drug possession after trial. Shorty now argues on appeal that his attorney was ineffective for not filing such a motion. What is your response? Will you win? Why or why not?

II (75 minutes)

Agents Jim Sbakker & Tammy Sbakker of the Spittsburgh Police Department were assigned to watch for drug trafficking at the Spittsburgh Airport. Jim & Tammy observed Jessica Spahn get off a plane and felt that she met the criteria established in their local "drug courier profile," namely: (1) she arrived on a flight from Duluth, a known "source city" for drugs, (2) she was the last person off the plane, (3) she was wearing a loud, Hawaiian print shirt, (4) she was carrying a black velvet painting of Elvis Presley under one arm, (5) she was wearing black, wrap-around sunglasses, (6) she was nervous and scanning the passenger lounge area, and (7) the luggage identification tag on her black velvet painting listed only the name "Maureen Sreagan" and no address or phone number.

Jim & Tammy approached Jessica and asked her if they could ask her a couple of questions. Jessica, believing that Jim & Tammy were members of a politico-religious cult which she knew operated in the Airport selling carnations and "Nuke Jane Sfonda" bumper stickers, agreed to talk to them. Jim & Tammy learned from their questions that Jessica name was in fact "Jessica Spahn" and not "Maureen Sreagan" as was noted on her luggage tag. They then asked her if she was willing to undergo a strip search. Jessica, not yet realizing Jim & Tammy were police officers, thought this was a bit much to ask, even for a cult, and politely demurred. Jim & Tammy then identified themselves as police officers and asked to see her driver's license. Jessica gave them her license, saying she wasn't happy about turning it over, but since "I know I must respond to the lawful orders of the police," she let them see it. After taking down her home address from the license, Jessica was released.

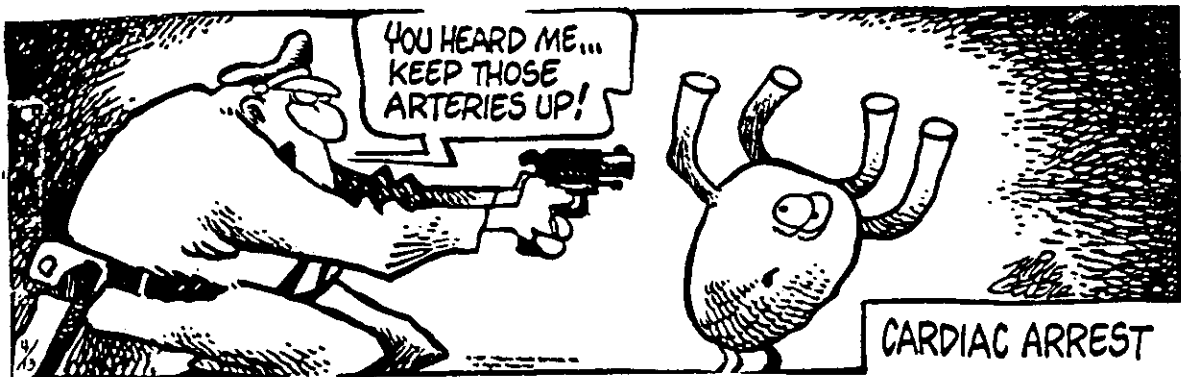
Jim & Tammy then called police headquarters, reported what had occurred, and requested that the address on Jessica's license be kept under surveillance. Officer Moral Roberts was immediately dispatched to stake out the house and he waited for Jessica Spahn to arrive. While waiting, Roberts was shocked to see Ollie Snorth, Robert Smcfarlane, and William Scasey arrive and enter the home because he knew that Snorth, Smcfarlane and Scasey were free on bond, having been indicted for smuggling drugs into this country in order to buy arms to send to the Scontras in Snicaragua.

Roberts quickly called for back-up officers. Twenty police officers arrived and surrounded the home. Roberts then called out through a bull-horn for Snorth, Smcfarlane and Scasey to come out of the house peaceably with their hands held up over their heads. Snorth yelled back: "You'll never take us alive. We will keep supplying the Contras until we die! And we have enough weapons in here to fight a small war." Smcfarlane yelled: "Whatever Oillie says, I go along with." Thereupon, gunfire erupted from the house.

After two minutes of trading gunshots, a white flag appeared, and all three emerged from the house. Roberts yelled to them: "Where are your guns?" Scasey responded: "We've flushed all our guns down the toilets. We had to give up. Those are real bullets you're shooting at us!" Police officers immediately moved into the house to secure it, discovering in the process two pounds of cocaine in a canister on a kitchen shelf, two bazookas sticking out of the toilets in both bathrooms, and a diary on a table beside the bed in the master bedroom. All of these items were taken back to the station house. A later reading of the diary which belonged to Jessica Spahn, revealed Jessica's role in smuggling drugs into the country and that one Mario Scuomo was the mastermind behind the plot to import drugs and export weaponry.

Spahn, Snorth, Smcfarlane, Scasey and Scuomo have all been indicted for conspiracy and unlawful possession of drugs and bazookas. You have been assigned by the Spittsburgh Public Defenders office to defend all of these defendants (all claim to be indigent). What likelihood of success do you have with respect to a motion to suppress the drugs, the bazookas, the diary, and the various statements which were made during and after the gun fight?

Professor Burkoff



(Is this an arrest or a seizure?)