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State of Franklin v. McLain

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State of Franklin v. McLain

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Selmer & Pierce, LLP
Attorneys at Law
412 Yahara Place
Centralia, Franklin 33703

M E M O R A N D U M

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

We have been appointed by the court to represent Brian McLain, who is indigent. The State of Franklin has charged McLain with three felony counts: possession of methamphetamine with intent to distribute, possession of equipment to manufacture methamphetamine, and manufacture of methamphetamine. The evidentiary hearing on our motion to suppress concluded yesterday. The judge wants our post-hearing brief before the end of the week.

I have attached the relevant portions of the transcript from the evidentiary hearing. Please draft the argument section of our brief. We need to make the case that Officer Simon had no reasonable suspicion that would justify the stop of McLain's vehicle on the night in question.

In addition to the motion to suppress, I've moved to dismiss Count Two of the criminal complaint, possession of equipment to manufacture methamphetamine, on the ground that it is a lesser-included offense of Count Three, manufacture of methamphetamine. Please draft that argument as well.

Do not prepare a separate statement of facts; I will draft it. However, for both of our arguments, be sure to provide detailed discussion and analysis, incorporating the relevant facts and addressing the applicable legal authorities. Be sure to anticipate and respond to the State's likely arguments.

STATE OF FRANKLIN
DISTRICT COURT FOR BARNES COUNTY

State of Franklin,	)	
Plaintiff,	)	**CRIMINAL COMPLAINT**
	)	
v.	)	**Case No. 09-CR-522**
	)	
Brian McLain,	)	
Defendant.	)	
	)	

The State of Franklin, County of Barnes, by District Attorney Sarah Russell, hereby alleges as follows:

1. Count One. That on October 5, 2009, the defendant, Brian McLain, did knowingly possess more than 15 grams but less than 100 grams of methamphetamine, a controlled substance, in the City of Centralia, County of Barnes, Franklin, with intent to distribute or deliver, in violation of the Franklin Criminal Code § 42.

2. Count Two. That on October 5, 2009, the defendant, Brian McLain, did possess equipment or supplies with the intent to manufacture methamphetamine, a controlled substance, in the City of Centralia, County of Barnes, Franklin, in violation of the Franklin Criminal Code § 43.

3. Count Three. That on October 5, 2009, the defendant, Brian McLain, was knowingly engaged in the manufacture of methamphetamine, a controlled substance, in the City of Centralia, County of Barnes, Franklin, in violation of the Franklin Criminal Code § 51.

November 17, 2009

Sarah Russell

Sarah Russell
Barnes County District Attorney
State of Franklin

STATE OF FRANKLIN
DISTRICT COURT FOR BARNES COUNTY

State of Franklin,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 09-CR-522**
	)	
Brian McLain,	)	
Defendant.	)	

MOTION TO SUPPRESS EVIDENCE
AND TO DISMISS COUNT TWO OF THE COMPLAINT

Defendant Brian McLain, by and through his attorney, Marcia Pierce of Selmer & Pierce, LLP, moves the Court as follows:

1. To suppress all evidence obtained as a result of the search of his vehicle and a shed located in an alley next to 1230 8th Street, Centralia, Franklin, on October 5, 2009, on the ground that the investigating officer lacked reasonable suspicion to stop the defendant's vehicle and, as a result, both the stop and the subsequent search violated the defendant's Fourth Amendment rights under the United States Constitution. *See State v. Montel* (Franklin Ct. App. 2003).

2. To dismiss Count Two of the criminal complaint as multiplicitous. The charge of "Possession of Equipment or Supplies with the Intent to Manufacture Methamphetamine," Fr. Crim. Code § 43, is a lesser-included offense of Count Three of the complaint, "Manufacture of Methamphetamine," Fr. Crim. Code § 51. Prosecution of both charges is, therefore, multiplicitous and violates the defendant's right not to be put in jeopardy of life and limb twice for the same offense as guaranteed by the double jeopardy and due process provisions of the United States Constitution. *See State v. Decker* (Franklin Sup. Ct. 2005).

Dated: February 2, 2010

Respectfully submitted,

Marcia Pierce

Marcia Pierce
Selmer & Pierce, LLP
Counsel for Defendant

Transcript of Call to Centralia Police Department CrimeStoppers Hotline

October 5, 2009, 10:22 p.m.

Operator: CrimeStoppers Hotline. How may I direct your call?

Caller: Um, I'd like to report some criminal activity.

Operator: What is your location, sir?

Caller: I'm at the Oxford Street Shop-Mart. There's a guy here, and he's gotta be a meth dealer. I mean, he just bought two boxes of Sudafed cold medicine and some coffee filters, and I heard him ask the cashier if Shop-Mart had quit selling engine-starter fluid.

Operator: Can you describe this individual?

Caller: Well, he's kinda scuzzy looking, if you know what I mean. You know, shifty looking. He's a white guy, maybe mid-20s, with dark hair and one of those goatees. He's wearing jeans and a dark hooded sweatshirt.

Operator: I'll notify the officer on call. What is your name, sir?

Caller: Hey, I don't want to get involved. I don't need any grief. I just called because this guy is clearly up to something. He just left the store and is walking toward a red Jeep Cherokee in the parking lot.

Operator: Is there any other person with this individual?

Caller: Hey, I gotta go. I told you what I saw. [phone disconnected]

Excerpts from Suppression Hearing Transcript
February 22, 2010

Direct Examination of Officer Ted Simon by Assistant District Attorney Lynn Ridley

Q: Please state your name and occupation for the record.

A: Officer Ted Simon. I have been a police officer with the Centralia Police Department for 12 years, the last five in the narcotics division.

Q: Describe your training and experience in dealing with narcotics.

A: In addition to my five years in the division, I've attended Federal Bureau of Investigation courses every two years and have done additional training sponsored by the State of Franklin crime laboratory. I've been involved in over 200 narcotics arrests, including over 50 arrests for possession and manufacture of methamphetamine.

Q: Were you on duty on October 5, 2009?

A: Yes. I worked second shift, from 3 p.m. to 11 p.m.

Q: Sometime after 10 p.m. did you receive a call from dispatch?

A: Yes, at approximately 10:25 p.m. on October 5, I received a dispatch call indicating that a suspicious man had been seen at the Oxford Street Shop-Mart purchasing items that the caller said were used to make methamphetamine—coffee filters, two boxes of Sudafed cold medicine—and that the individual had also asked if engine-starter fluid was sold at Shop-Mart. Based on my experience and training, I know that all of those items are frequently used to manufacture methamphetamine; in fact, because of the increase in methamphetamine use, some stores, including Shop-Mart, won't let you buy more than two boxes of a cold medicine containing pseudoephedrine, such as Sudafed, at a time.

Q: Did the caller describe this suspicious individual?

A: Yes, I was informed by dispatch that the individual was a white male in his mid-20s dressed in jeans and a dark hooded sweatshirt. The caller also stated that the individual had dark hair and a goatee, and that he had been seen leaving the store and walking to a red Jeep Cherokee in the Shop-Mart parking lot.

Q: Did you take any action in response to this call?

A: Yes, I drove my squad car to the Shop-Mart, arriving at 10:28 p.m.—I had been only a few blocks away when I received the call.

Q: Did you find an individual matching the description there?

A: Not in the Shop-Mart parking lot. However, across Oxford Street, I saw a red Jeep Cherokee parked in front of Cullen's Food Emporium. There was no one in the vehicle, but after a minute I observed a white male with dark hair and a small beard, wearing jeans and a dark hooded sweatshirt, come out of Cullen's with a small paper bag in his hand. He got into the driver's seat of the red Jeep Cherokee.

Q: What happened next?

A: The individual appeared to be reaching over into the backseat, moving something around. He then started the vehicle and drove away. I followed him for a mile or so, until he stopped in front of an apartment building at 1230 8th Street. A man who had been sitting on the stoop stood up, walked over to the Jeep, and appeared to have a brief conversation with the driver. The Jeep Cherokee then pulled away from the curb and turned into the alley that runs between number 1230 and the next apartment building.

Q: What is the neighborhood like around 8th Street?

A: Well, in the last year we've seen an increase in calls and reports of criminal activity on 8th Street and the surrounding area. Only two months before we had busted a guy who had been growing marijuana plants in the basement of his apartment building on 8th Street, just a few blocks north of where the Jeep Cherokee stopped.

Q: Okay. Now, what did you do after the vehicle entered the alley?

A: I activated the squad car's lights and turned into the alley behind the Jeep Cherokee. The Cherokee came to a complete stop. I got out of the squad car and approached the vehicle. There was only the driver in the vehicle. I asked him for his driver's license so I could identify him. He took his license out of his wallet and gave it to me.

Q: Did you then identify the driver by his driver's license?

A: Yes, the name on the license was Brian McLain and the photo matched the driver.

Q: Do you see the driver, Brian McLain, in the courtroom today?

A: Yes, he is seated at the near side of the defense table.

Q: Let the record indicate that the witness has identified the defendant, Brian McLain.

Court: So noted.

Q: What happened next?

A: He demanded to know why I had stopped his vehicle. I responded that I had reason to believe that he had been purchasing items used in the manufacture of methamphetamine and I requested consent to search his vehicle.

Q: How did the defendant respond to that request?

A: He was angry and said, "Go ahead, I don't have anything to hide." He then made some derogatory comments to the effect that the police should be out catching "the real criminals." A search of his vehicle revealed a paper bag in the backseat like the one I had seen him carrying when he left Cullen's Food Emporium. Inside it was a box containing 50 matchbooks. I also found a plastic Shop-Mart bag containing a receipt dated October 5, 2009, coffee filters, a package of coffee, and two boxes of Sudafed cold tablets. Each box contained 20 tablets. In the glove box I found a plastic baggie containing what appeared to be one marijuana cigarette.

Q: What did you do then?

A: I informed the defendant that I was placing him under arrest. I handcuffed him, read him the Miranda warnings, and transported him to the Centralia West Side Police Station for booking. I found $320 in cash in his wallet. During questioning, the defendant directed us to a shed behind the building at 1230 8th Street where we found what is commonly referred to as a "meth lab": apparatus used to remove the pseudoephedrine in cold tablets and produce methamphetamine for sale to drug users. The defendant's meth lab contained equipment and materials used in producing methamphetamine, some of which showed recent use. Also, we found a glass beaker holding 18 grams of a whitish powder. Testing by the Franklin Crime Lab found it to be street-grade methamphetamine.

Q: Do you have an opinion, based on your training and experience, as to the street value of 18 grams of methamphetamine?

A: Yes, based on my experience, about $2,500.

Q: Based on your experience, is this an amount that would be kept for personal use only?

A: Absolutely not. It's more than 150 sales.

Assistant District Attorney Ridley: Thank you. No further questions.

Cross-Examination by Attorney Marcia Pierce

Q: Officer, had you responded to reports of criminal activity at the Oxford Street Shop-Mart before?

A: Sure, it's a busy place. I respond to a call there about once a month.

Q: And hadn't all those calls, before the night of October 5, 2009, been reports of shoplifting and, let me see here, three reports of vandalism?

A: Yes, that sounds accurate.

Q: So this was the first time you'd had a report of someone purchasing items for the manufacture of methamphetamine at that Shop-Mart store?

A: Yes, it was.

Q: Those other calls, for shoplifting and vandalism, were all made by individuals identifying themselves as either a Shop-Mart manager or an employee, weren't they?

A: Yes, they were.

Q: But the individual making the call to CrimeStoppers on October 5th didn't leave his name or otherwise identify himself, did he?

A: No, he didn't.

Q: When you reached the Shop-Mart just five minutes after you were dispatched, did you look for the person who made the report?

A: No, I was looking for the red Jeep Cherokee.

Q: Buying coffee filters is not illegal, is it?

A: No.

Q: Nor is buying cold medicine?

A: No.

Q: What about asking a store employee if the store stocks engine-starter fluid?

A: No, that's not illegal.

Q: Did the anonymous CrimeStoppers caller mention that, in addition to the coffee filters, the defendant purchased a package of coffee at the same time?

A: No, that wasn't in the report I received.

Q: Does the Shop-Mart sell food?

A: Well, it sells some snack items.

Q: But it's not a grocery store that sells meat and fresh produce, is it?

A: No, it's mainly a convenience store.

Q: So there wouldn't be anything unusual about someone stopping by the Shop-Mart and then going to Cullen's Food Emporium to buy groceries, would there?

A: No, I suppose not.

Q: Franklin law doesn't prohibit an individual from buying more than two boxes of Sudafed cold medicine, does it?

A: No, it doesn't.

Q: So it's only a Shop-Mart policy to allow a maximum purchase of two boxes at a time, isn't it?

A: Yes, that's true.

Q: Isn't it true that two boxes, containing a total of 40 tablets, would not be enough to produce any significant quantity of methamphetamine?

A: By itself, maybe.

Q: Did the defendant ever exceed the speed limit or violate any motor vehicle law during the entire time that you followed him?

A: No, not that I could observe.

Q: You stated that two months before you arrested the defendant, your department arrested a man for growing marijuana in his apartment building on 8th Street, right?

A: Correct.

Q: But you had never arrested an individual on 8th Street for maintaining a meth lab before?

A: No, that was the first meth operation we discovered on 8th Street.

Q: You also arrested my client for possession of marijuana?

A: Yes.

Q: And you were wrong about that?

A: The Crime Lab tests came back negative for marijuana.

Atty. Pierce: Thank you. No further questions.

Redirect by Assistant District Attorney Ridley

Q: Have you had any reports of criminal activity that originated from the Oxford Street Shop-Mart that turned out to be erroneous?

A: No. Since I've been assigned to this beat, every report I've received in regard to that Shop-Mart has resulted in a criminal report being filed or an arrest.

Attorney Ridley: Thank you.

Court: The witness is excused.

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FRANKLIN CRIMINAL CODE

§ 42. Possession with intent to distribute or deliver methamphetamine

(1) Except as authorized by this chapter, it is unlawful for any person to knowingly possess, with intent to distribute, a controlled substance, to wit, methamphetamine. Intent under this subsection may be demonstrated by, *inter alia*, evidence of the quantity and monetary value of the substances possessed, the possession of paraphernalia used in the distribution of controlled substances, and the activities or statements of the person in possession of the controlled substance prior to and after the alleged violation.

(a) If a person knowingly possesses, with intent to distribute, 15 or more grams but less than 100 grams of methamphetamine, the person is guilty of a felony.

§ 43. Possession of equipment or supplies with intent to manufacture methamphetamine

(1) No person shall knowingly possess equipment or chemicals, or both, for the purpose of manufacturing a controlled substance, to wit, methamphetamine. . . .

(b) A person who commits an offense under this section is guilty of a felony.

§ 44. Possession of precursor chemicals for methamphetamine production

(1) It is unlawful for any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or their salts, isomers, or salts of isomers with intent to use the product to manufacture a controlled substance, to wit, methamphetamine. . . .

§ 51. Manufacture of methamphetamine

(1) It is unlawful for any person to knowingly manufacture methamphetamine. "Manufacture" means to produce, compound, convert, or process 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. Any person who violates this subsection is subject to the following penalties: …

(b) A person who manufactures 15 or more grams but less than 100 grams of methamphetamine is guilty of a felony.

State v. Montel

Franklin Court of Appeal (2003)

We granted the state leave to appeal an interlocutory order granting the defendant's motion to suppress evidence obtained by police as the result of a *Terry* stop.

Responding to reports of gunfire at 220 North Street, Franklin City Police, led by Officer Tom Kane, spoke with Sam Barber, who told them that two men had shot at him through a fence while he was in his yard. He said he did not see the shooters, but a witness told police he had seen a white Mazda speed away shortly after the shots were fired. Officer Kane knew that Barber was a gang member and that his gang and a rival gang were involved in recent shootings.

Later that day, Officer Kane asked Barber if he had any further information about the shooting. Barber said that he had nothing to add about his own shooting, but that he did have information about another shooting that same day. Barber said that his cousin told him that she witnessed gunfire on Elm Street, in the same neighborhood, and that the shots came from two cars, a white Mazda and a blue Honda with license plate SAO905. Barber refused to give police his cousin's name or any information about her.

Using the license number, Officer Kane learned that the Honda belonged to Ray Montel, who Kane knew had recently been arrested in a nearby town on a firearms charge, and who was also known to be a member of the rival gang. The police were unable to locate Montel that evening, and did not find any evidence of the Elm Street shooting, such as bullet damage or spent shell casings. Nor were there any calls to 911 to report the shooting. A week passed with no further investigation of the Elm Street shooting. Then, Officer Kane and his partner saw Montel drive by. They stopped the car and questioned Montel, who denied any knowledge of either shooting. The officers found two guns in the car, and Montel was charged with various firearms offenses.

Montel moved to suppress all evidence gathered in connection with the stop of the car. The trial court granted the motion, holding that "once the tip of the Elm Street shooting proved unreliable, the officers' mere hunch that Montel was involved in criminal activity was not enough to establish a reasonable and articulable suspicion of criminal activity adequate to stop his car."

The sole issue on appeal is whether the police acted reasonably in stopping Montel and his passengers. Our review is *de novo*.

The Fourth Amendment protects individuals from unreasonable searches and seizures. Police, however, have the right to stop and interrogate persons reasonably suspected of criminal conduct. Police may make a brief investigatory stop if they have a reasonable suspicion that criminal activity may be afoot. Such stops by police are often called "*Terry* stops" after the leading case, *Terry v. Ohio*, 392 U.S. 1 (1968). The test is whether the officers have "a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity" at the time. *Id*. To determine whether the suspicion is reasonable, courts will look at the totality of the circumstances of each case.

A tip from a source known to police—especially one who has provided information in the past—may be sufficient, in and of itself, to warrant a *Terry* stop. But an anonymous tip is different; it must be corroborated, such as by investigation or independent police observation of unusually suspicious conduct, and must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

In *State v. Sneed* (Franklin Ct. App. 1999), the defendant was stopped after briefly visiting a house that police had under surveillance after receiving a tip from an untested confidential informant that heroin dealing was taking place there. We held that the police did not have reasonable suspicion to stop the defendant, noting that there was no testimony that the area was known for drug trafficking or that there had been short-term traffic to the house. The officers in *Sneed*, as here, based their stop solely on information received from an informant without having that information verified by independent investigation.

The state argues that the tip here was reliable because of the officers' interactions with Barber, and because Barber was able to report a crime supposedly witnessed by his cousin. But this is not a case involving a "personal observation" or "firsthand account" of a crime, as in those cases finding that the facts justified a *Terry* stop. The "tip" was hearsay. There was no way of knowing Barber's cousin's state of mind at the time she gave her information, or whether she could reliably and accurately relate events.

Most importantly, the police had specific reasons to doubt the veracity of the tip about the Elm Street shooting by the time they stopped Montel: no physical evidence of gunfire had been found, no 911 calls or other reports about the supposed shooting had been made, and the officers' investigation had not uncovered any other evidence that the shooting had occurred. In fact, the investigation undermined the tip's reliability. Officer Kane testified at the suppression hearing that it was "typical" for neighborhood shootings to be reported to 911, and for evidence such as "ballistics damage or shell casings" to be found in the area, or reported gunshot wounds. He said their investigation of the Elm Street shooting had found no such evidence.

As noted, when police stop someone in reliance on a tip, "reasonable suspicion" that a crime has been or is about to be committed "requires that the tip be reliable in its assertion of illegality." *J.L.*, 529 U.S. at 272. The license plate number provided a solid means of identifying Montel, but it did not corroborate the tip's assertion that he had been involved in a shooting on Elm Street. The fact that the area of Franklin City where Montel's car was stopped is a high-crime area did not warrant the stop. *See State v. Washington* (Franklin Ct. App. 1988). A person's mere presence in a high-crime area known for drug activity does not, by itself, justify a stop.

Because the tip relating to the identification of the cars had a relatively low degree of reliability, more information was necessary to establish the requisite quantum of suspicion. The tip, standing alone, was insufficient to provide reasonable suspicion for the officers' stop of the Montel vehicle.

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. They suspected him of being affiliated with a gang and knew of his recent arrest. And they knew that there had been gang violence in the neighborhood. But the government does not suggest that the police had information tying Montel personally to any of this violence. The only possible crime to which the police could tie Montel—the Elm Street shooting—was the one that appeared, in all likelihood, never to have occurred. The district court correctly suppressed the evidence derived from the stop.

Affirmed.

State v. Grayson
Franklin Court of Appeal (2007)

PER CURIAM. We granted Ron Grayson, the defendant in this drug-possession case, leave to appeal from an order denying his motion to suppress evidence obtained by police in the course of an investigatory stop. The facts are undisputed. An anonymous caller reported to police that Grayson would be leaving an apartment building at a particular time in a particular vehicle with a broken right taillight. The caller also said that Grayson would be traveling to a particular motel and would be carrying cocaine in a briefcase.

Police proceeded to the apartment complex where they observed a vehicle matching the caller's description. They saw a man leave the apartment, carrying a backpack, and enter the vehicle and drive off. The officers followed the car as it took the most direct route to the motel reported by the caller. Police stopped the vehicle "just short" of the motel and, during a weapons search, discovered illegal drugs on the driver.

The law on the subject of the sufficiency of anonymous tips as supporting the "reasonable suspicion" necessary to make a valid investigative stop is well-known and need not be repeated here. *See State v. Montel* (Franklin Ct. App. 2003). The sole question here is whether the anonymous tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the stop. We consider it a close question. But we are satisfied that the stop was appropriate under the totality of the circumstances.

Although not every detail of the tipster's "story" was verified, the other information was sufficiently corroborated—in particular, the man left the apartment building described by the tipster, entered a vehicle matching the description provided by the tipster, and followed a route consistent with that predicted by the tipster. We believe these facts meet the "independent police corroboration" requirement and we therefore affirm the trial court's order.

Affirmed.

State v. Decker
Franklin Supreme Court (2005)

Defendant George Decker was charged with first-degree burglary and second-degree assault. He moved to dismiss the charges as multiplicitous, claiming that the latter charge is a lesser-included offense of the former. The court of appeal affirmed the district court's denial of Decker's motion to dismiss. We reverse.

The complaint charged that Decker entered a hotel room registered to his girlfriend, Mary Carls, through a locked door and without her permission. Once in the hotel room, Decker assaulted Carls. Hotel security caught Decker and detained him until he was arrested.

Where the same event or transaction gives rise to two statutory offenses, courts must determine if one constitutes a lesser-included offense of the other. This analysis begins with a comparison of the elements of both offenses, known as a "strict elements" test. 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. *Blockburger v. United States*, 284 U.S. 299 (1932). This test is codified in Franklin Criminal Code § 5(2). A lesser-included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser offense.

If, however, each of the offenses contains at least one element that the other does not, the test is not satisfied. *Id.* For example, in *State v. Jackson* (Fr. Ct. App. 1992), a crack cocaine pipe containing cocaine residue was found on the defendant. He was tried for possessing the cocaine inside the pipe in an amount less than five grams. He moved the court for a jury instruction on the lesser-included offense of possessing drug paraphernalia, rather than cocaine. The court denied the motion and the defendant was convicted for possessing cocaine. Affirming the district court's ruling, the court of appeal stated:

> Allied offenses of similar import are offenses the elements of which correspond to such a degree that the commission of one will result in the commission of the other. The elements of drug possession and possession of paraphernalia do not so correspond. One may be in possession of drugs, but not paraphernalia. One may possess paraphernalia without possessing

> drugs. The offenses are not therefore allied offenses of similar import because one offense may be committed without the other.

Here, our comparison begins with the elements of first-degree burglary, a violation of Franklin Criminal Code § 23. To extract the elements, we determine what the statute requires. Section 23 specifies that a burglary is committed when "a defendant knowingly enters an occupied structure with the intent to remain therein unlawfully with the intent to commit a crime of violence . . . including assault and causes serious bodily injury to that person." Thus we can define the elements in this case as the defendant (1) knowingly, (2) entered and remained unlawfully, (3) in a building or occupied structure, (4) with intent to cause bodily injury, and (5) causing serious bodily injury to that person.

The elements of second-degree assault, a violation of Franklin Criminal Code § 12, are that the defendant (1) with intent to cause bodily injury to another person, (2) caused serious bodily injury to that person.

Therefore, under § 23, the elements of burglary include the elements of assault. Thus, assault is a lesser-included offense of first-degree burglary. *See State v. Astor* (Fr. Ct. App. 1996) (to satisfy first-degree burglary, "the State must prove each and every element of the offense of assault and the fact-finder must determine . . . an assault was committed during the burglary"; if so, the same assault cannot constitute a separate offense). Although the elements of first-degree burglary include, in almost identical form, the elements of assault, Franklin case law does not require a strict textual comparison such that only where *all* the elements of the compared offenses coincide *exactly* will one offense be deemed a lesser-included offense of the greater. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are multiplicitous.

Because the elements of first-degree burglary necessarily include the elements of assault, assault is a lesser-included offense of first-degree burglary. We therefore conclude that it was error to deny the motion to dismiss.

Reversed.

INSTRUCTIONS

You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are taking the examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.