Question 6

Dan worked at a church. One day a woman came to the church, told Dan she wanted to donate some property to the church, and handed him an old book and a handgun.

Dan had originally intended to deliver both the book and the gun to the church's administrators, but he changed his mind and delivered only the book. He put the gun on the front seat of his car.

The next day, as he was driving, Dan was stopped by a police officer at a sobriety checkpoint at which officers stopped all cars and asked their drivers to exit briefly before going on their way. The police officer explained the procedure and asked, "Would you please exit the vehicle?"

Believing he had no choice, Dan said, "Okay."

After Dan got out of his car, the police officer observed the gun on the front seat and asked Dan if he was the owner. Dan answered, "No. I stole the gun. But I was planning to give it back."

Dan is charged with theft and moves to suppress the gun and his statement to the police officer under the Fourth Amendment to the United States Constitution and Miranda v. Arizona.

1. Is Dan likely to prevail on his motion? Discuss.

2. If Dan does not prevail on his motion, is he likely to be convicted at trial? Discuss.

ANSWER A TO QUESTION 6

1. **Is Dan ("D") likely to prevail on his motion?**

A. On Fourth Amendment Grounds. The Fourth Amendment protects the citizenry from unreasonable searches and seizures by the government. Thus violations require government action. They also require that the search or seizure be unreasonable, something that may be an issue for D. A search is a violation of a reasonable expectation of property; a seizure is an instance in which a person does not feel "free to leave" based on governmental presence. Generally, for a search to be reasonable, there must be a warrant. A warrant is granted by a neutral judge and must be based on articulable facts shown in an affidavit and must be reasonable and particular in terms of scope and time. In this case, there was no warrant to search D's car or to seize D. Thus, the search and seizure is presumptively unreasonable, subject to certain exceptions. One important exception is the checkpoint search; another such exception is consent. As an initial matter, a person must have standing to challenge the search. Because Dan was driving his own car, he will have standing.

i) The Checkpoint Search: Warrantless, even suspicionless, road checkpoints have been upheld by the Supreme Court under certain circumstances. First, the search must be supported by the justification of highway safety - including prevention of DUI, etc. Second, the checkpoints must be administered in such a way that officer discretion is very limited. This means that an officer must go through a protocol driven method of stopping the cars - i.e., either every car, or one of every ten cars, etc. The officer may not stop whatever car he subjectively thinks looks criminal. Third, the search must be reasonable in scope - it must not exceed the degree necessary to check for whatever the search is aimed at.

Here, it does appear that the checkpoint search is aimed at a valid justification - a sobriety checkpoint. This has been expressly held as constitutional by the Supreme Court. However, there are some other issues. For one, all cars are being stopped. While this is not presumptively unreasonable, it will be an issue, as it basically allows a

policeman to stop and seize every single person driving down the expressway. Secondly, the police required D to step out of his car. Under Supreme Court precedent, police only have been allowed to stop people. If sobriety or another criminal violation seem likely, then the people can be asked to exit their car. Because of the stopping of every car, and the demand that the drivers exit the car, this may be found to be an unreasonably long stop than what is necessary to meet the highway safety justification.

Conclusion: There is a chance that this checkpoint too far exceeds permissible protocol based on Supreme Court precedent. However, it is a close call. I will consider this to be a reasonable and permissible warrantless search, though the court may be convinced otherwise.

ii) Consent to Search: A person may validly waive his right to be free from unreasonable search and seizure by giving consent. Because it is likely that the stop and seizure was permissible up until the time that D was removed from his car, his consent to get out of the car would completely remove any potential objection to the search and seizure. The question will be whether the consent was freely and voluntarily given. Courts have found that when police attempt to search a person's house on the basis of consent, they do not have to tell that person that he or she has the right to refuse consent. This does not remove the "voluntary" aspect of consent. Here, Dan subjectively thought that he had no choice, but he still consented to getting out of the car. Assuming that the court would apply the consent rule used in home searches to a car search, this consent should be found to be voluntarily given.

Conclusion: Thus, the search for the gun was likely reasonable based on consent, regardless of whether or not it was legitimate based on checkpoint rules for the cops to remove him from his car.

iii) The Plain-View Doctrine: It appears, either because the entire checkpoint process was constitutional, or because D gave his consent to be moved from the car after a constitutionally permissible checkpoint stop, that the stop and seizure was constitutional

at the time Dan got out of the car. Thus, the police were constitutionally on solid ground when Dan was out of the car. The plain-view doctrine allows police who are legitimately in a place and see something criminal in plain-view to use that plain-view finding in court. The justification is that a person does not have a reasonable expectation of privacy in something the person lets the public see. Here, the gun will qualify under the plain-view doctrine. The police need not rely on any Terry type frisks of automobiles, or the automobile exception, because they do not apply. The gun was in plain-view, and to the extent that the officer "searched" the car by looking in the window, the plain-view exception applies.

iv) CONCLUSION: The search and seizure was reasonable and the gun should be admissible. The checkpoint rule may validate the entire process, but even if it doesn't then the checkpoint rule was at least legitimate up until the time D was asked to exit the car. Because he consented, there is no violation of the 4th amendment. The gun is admissible based on the plain-view doctrine.

B. Will D prevail on 5th Amendment Miranda Grounds? The 5th Amendment protects the right against self-incrimination. Miranda v. Arizona, a case based on this right, holds that a person's statements made cannot be used against him in court if the Miranda warning is not given. However, Miranda applies only to custodial interrogations, and not when a person is not in custody or voluntarily offers information. Miranda warnings include the right to remain silent, the right to counsel, the knowledge that counsel will be provided to a person, and the knowledge that anything said while in custody may be used against that person in court.

i) No Miranda Warnings were given. Here, the cops gave no warnings. Thus, D's statement is protected if it was made during a custodial interrogation.

a. Custodial. Custodial situations are those in which a reasonable, innocent person does not feel free to terminate the encounter and leave at will. Here, D was out of his car being asked in the company of some police. It seems up to this point to have been

a pretty friendly encounter, with the cops not showing much force or intimidation. Still, it's hard to say whether someone would reasonably feel at this point justified and correct in telling the police that this interview has to stop, and that the person is just going to drive away; especially before the sobriety check is performed. Thus, it's a close call. However, as D is out of his car, speaking to police, and about to be subject to a sobriety test, I would conclude that this is a custodial situation as a reasonable person would not feel free to terminate the questioning and leave.

b. Interrogation: An interrogative question is one that is reasonably likely to elicit an incriminating response. This is a pretty close call as well. On one hand, the officers had no indication that the gun was criminally possessed, and thus a mere question about it may not be enough to reasonably expect an incriminating response. On the other hand, if the gun was criminally possessed, then a truthful response would be incriminating. However, because the officer questioned D about the gun without any suspicion at all of it being stolen, I would find this to be a non-interrogative question. I.e., if they knew that there was a stolen gun around, and then they asked, that would be more likely to be an incriminating response. Here, this just seems like the officers inquiring about a gun in the car without any suspicion whatsoever. Thus, Dan's statement should be admissible. It also appears that even if he had denied the ownership of the gun, the bit about him admitting to the crime was completely volunteered. I.e., the cops did not ask him whether he stole the gun. They asked him if he owned it. Thus, D's answer could have been "No." Instead, and completely unprompted, D volunteered that he stole the gun.

ii) CONCLUSION: This was likely a custodial situation. The situation probably not interrogative, but it may have been. Even if it was not an interrogative scenario, D's statement that "I stole the gun" was not in response to any questioning by the police, and is voluntary and admissible. If it is found to be an custodial interrogative situation, the only part of the statement that will be inadmissible will be the answer to the policeman's question: "No."

2. **Which theft crime will D be convicted of?**

A. Theft crimes are specific intent crimes. This means that the thief must specifically intend the proscribed conduct - i.e., the thief must have the mens rea to permanently deprive the true owner of the object possession. Theft crimes include larceny (trespassory taking and carrying away of the personal property of another with intent to permanently deprive); larceny by false pretenses (larceny, plus getting actual title to the property by intentional and legitimate fraud); larceny by trick (larceny, but obtaining mere possession of the property by trick or deception); and embezzlement (the fraudulent conversion of the personal property of another by one legally in possession of that property).

B. No larceny crime lies: This will be an embezzlement, if it's anything. The reason is because the larceny crimes all require an intent to steal the item at the moment of possession. Here, Dan did not form the intent to keep the gun until he had already been in legitimate and lawful possession - as a courier for the church, and holding it for the church. The continuing trespass doctrine will not apply, because that applies to scenarios where a person has borrowed something against the owner's intent, but doesn't plan to steal it until later. That person is never in lawful possession. Because Dan's specific intent mens rea was not formed at the moment of possession of the gun, no larceny crime will lie.

C. Embezzlement: Embezzlement is:

i) Fraudulent: I.e., wrongful. Here, D was supposed to deliver the gun to the church, but has kept the gun. Thus, he is in wrongful possession of the gun at the time the gun was found on him.

ii) Conversion: This means the intent to permanently deprive the owner (Church) of possession. This will be the major issue. Dan tells the cops he wanted to give the gun back; further we have no indication that he ever meant to keep the gun forever - maybe he just wanted to drive around with it for a little bit. Because this is a specific intent crime, the prosecution will have a tough job proving that Dan subjectively and

specifically intended to keep the gun forever when he decided to not turn it in. It is important to note that once he kept the gun with intent to steal it, the crime was complete - it doesn't matter if he later developed the intent to return it. The prosecution could point to the fact that he was driving around with it and didn't turn it in when he was supposed to, which may help; so will the statement that "I stole it." This will be the issue at trial, right now it looks only probably proven at best.

iii) Of the personal property of another: The woman gave the gun to the church. As such, the gun was the property of the church.

iv) By someone in legal possession: Dan worked for the church, and it was his job in this instance to deliver the gun to the church. Thus, he has legal possession of the gun when the woman gave it to him. She gave it to him thinking he was going to give it to the church, because he was an employee of the church. The church charged him with the duty of taking donations and delivering them to it. Thus, this possession was legal. It is akin to a bank manager stealing money that he or she is supposed to be counting.

D. CONCLUSION: Embezzlement may lie, but only if the prosecution can prove specific intent to steal the gun, which will be tough.

3. **General conclusion: Gun and statement ("I stole it.") admissible. Embezzlement if there is specific intent, which there likely is.**

ANSWER B TO QUESTION 6

1. **Motion to suppress**

The fourth amendment prohibits unreasonable searches and seizures by the state. Miranda v. Arizona requires that warnings be given to an individual subject to "custodial interrogation" in order to protect the individual's right to be protected from self-incrimination. This is clearly state action, so the issues here are whether the gun was seized pursuant to an unreasonable search or seizure, or whether the statement was obtained in the context of custodial interrogation.

Exclusionary Rule and Fruit of the poisonous tree doctrine

The exclusionary rule requires that a court exclude evidence seized pursuant to an unlawful search or seizure. The fruit of the poisonous tree doctrine also provides that evidence that is obtained as a result of an lawful search must also be excluded, subject to certain exceptions. The exclusionary rule also requires the suppression of statements obtained in violation of Miranda, although the fruit of the poisonous tree doctrine does not apply to Miranda. Here, if the gun was seized during an unlawful search or seizure, or if the statement was obtained in violation of Miranda, this evidence must be suppressed.

Gun

Expectation of privacy

An individual has standing to challenge a search or seizure when they have a reasonable expectation of privacy in the place or property being searched. When an individual knowingly exposes something to the public, he no longer has standing to challenge a search of it. In this case, Dan placed the gun on the front seat of his car. It is not clear if his windows were tinted, or if someone could see easily into the car and see the gun. However, typically an individual has an expectation of privacy as to the inside and contents of their car, so Dan probably has standing to challenge the search. He certainly has standing to challenge any detention of his person, which would constitute a seizure if a reasonable person would not feel free to leave.

Routine checkpoint

Routine sobriety checkpoints are not considered seizures under the 4th amendment, so long as they are administered in a nondiscretionary manner and do not detain individuals for an unreasonable period of time. In this case, the officers at the checkpoint were stopping all cars, and were asking all drivers to briefly exit before going on their way. As a result, this checkpoint was not a seizure of Dan or his car, and did not implicate the 4th amendment.

Consent

In addition, a search or seizure is not unreasonable if an individual consents to the search. Valid consent must be knowingly and voluntarily given. Whether an individual validly consented is determined objectively, and the court considers whether a reasonable police officer would believe that the individual consented to the search or seizure. In this case, the police officer explained the procedure and asked if Dan would exit the vehicle. As a result, Dan appears to be informed about the procedure and his consent was knowing. His consent was also voluntary because he said okay, and stepped out of the car. A reasonable police officer would consider this to be valid consent.

Plain-View

The plain-view doctrine provides that where a police officer has a right to be in the place that he is, any objects in plain view may be validly searched or seized if there is probable cause to believe that the objects are products or instrumentalities of a crime. In this case, the officer had the right to be in the place that he was, as discussed above, because he had the right to stop Dan pursuant to the nature of the checkpoint and Dan's consent. At this time, the gun was in plain-view. The officer then asked Dan if the gun was his, and he responded that it was stolen. At that time, the police officer had not yet searched or seized the gun because he had not touched it or moved it in any way. However, when Dan confessed that it was stolen, probable cause arose for the officer to seize it, and the seizure was therefore lawful under the plain view doctrine.

Even if the statements were elicited in the context of a Miranda violation (to be discussed below), because the poisonous tree doctrine does not apply to Miranda, and because the gun was in plain view, the seizure of the gun was still lawful.

Dan's motion to suppress the gun is likely to fail.

Statement

A statement is obtained in violation of Miranda where an individual is in custody, and an officer is interrogating the individual without first providing the appropriate Miranda warnings. Here, it is clear that the officer did not provide Miranda warnings, so the question is whether Dan was in custody and whether the police officers question as to whether Dan owned the gun constituted interrogation.

Custody

An individual is in custody for the purposes of Miranda where a reasonable person in his position would not feel free to leave and end the detention. However, the supreme court has specifically held that routine traffic stops did not constitute custody for the purposes of Miranda. In this case, therefore, the routine security checkpoint would not be considered custody for Miranda purposes. It does not matter that Dan thought that he had no choice, because the test is objective, and not subjective. When the police officer asked Dan if he would consent, it is also possible that a reasonable person in Dan's position would have interpreted this question as indicating that he was free to not consent.

Because Dan was not in custody at the time that he made the statement, it was not illicit in violation of Miranda and is admissible.

Interrogation

A police officer is considered to be interrogating an individual where his questions are reasonably likely to illicit incriminating statements. Here, the officer asked Dan if he was the owner of the gun. This question does not seem designed to lead to an incriminating statement, only to determine who was the owner of the gun. In

responding to the question, Dan would have been expected to give a simple yes or no. In the event of a non, probably a statement about who it belonged to would be expected. From the perspective of the officer, it probably seemed unlikely that this question would illicit a confession to the theft of the gun.

Because Dan was not being interrogated at the time he made the statement, it was not obtained in violation of Miranda for this reason as well. Dan's motion to suppress the statement is likely to fail.

2. **Likelihood of conviction**

Elements of theft

Larceny, or theft, is the taking or concealing of the property of another with the intent to permanently deprive the owner or rightful possessor of that property of the property. The issue here is whether Dan took property that belonged to the church, and whether he intended to permanently deprive the church of the gun.

Taking

A taking of the property of another occurs where the defendant physically moves the property of another, or conceals it on his person. In this case, although Dan may have had a right to possess the gun at the time that the woman handed it to him, it belonged to the Church as soon as the woman handed it over and told Dan that she wanted the Church to have it. Although Dan may have intended to give the gun to the church, a taking of the gun occurred when he did not give it to the church and instead placed it in his car. When he turned over the book and mislead the church as to the donation, his right of possession did not continue to exist and his action met the first element of larceny.

Intent to permanently deprive

A defendant need not have had the intent to permanently deprive the owner or rightful possessor at the time that the taking of the property occurred. It is enough that the intent to permanently deprive arose after the taking. In this case, it is not clear if

Dan had the intent to permanently deprive. It would appear that he did not intend to ever give the gun to the church when he gave them only the book and placed the gun in his car. This is circumstantial evidence of an intent to permanently deprive and may be sufficient to meet the requirements for this element. On the other hand, he also told the officer that he was planning on giving it back. If he merely later changed his mind about the gun, this would be irrelevant, because if he had the requisite intent even this would be enough. However, this statement could also be circumstantial evidence indicating that he never had the required intent. This is a question for the jury to decide, depending on whether they believe the defendant's statements.

Mistake of law

Dan appears to believe that he "stole the gun." His beliefs about the illegality of his actions are immaterial however. His statement would be relevant only to determine whether he had an intent to permanently deprive. This is because belief that one completed an unlawful act that is actually lawful does not render the act unlawful.

Embezzlement

Embezzlement is a type of theft, and is the taking of a piece of property that the defendant had a right to possess at the time of the taking. Therefore, even if Dan had a right to possess the gun at the time, Dan could still be convicted of embezzlement, as opposed to basic theft. This conviction would turn on whether the jury found that placing the gun in the car was sufficient to indicate that Dan intended to convert the Church's property into his own and permanently deprive the church of it.

Because Dan took a gun that he did not have a right to possess, and because circumstantial evidence indicates he intended to permanently deprive the church of the gun, he is likely to be convicted at trial for theft.