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Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 26 and 27, 2011

PERFORMANCE TEST
July 26, 2011

Use GRAY covered book for your answer to the Performance Test.

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FILE

**OFFICE OF THE DISTRICT ATTORNEY
MADISON COUNTY, PENNSYLVANIA
Suite 400, Madison County Judicial Center
Madison, Pennsylvania 19999-9999**

M E M O R A N D U M

TO: Applicant
FROM: Hamilton Phish, District Attorney
DATE: July 26, 2011
SUBJECT: Commonwealth v. George Gunsel; No. 2011-07-24-0001

George Gunsel was arrested by Sgt. Minor, a local borough police officer on July 24, 2011, and has been charged with (1) a violation of Borough of Madison Ordinance No. 1999-76, (2) Public Drunkenness - 18 Pa. C.S.A. § 5505, (3) Resisting Arrest -18 Pa. C.S.A § 5104, and (4) Possession of a Small Amount of Marihuana - 35 P.S. § 780-113(a)(31). I have been contacted by Mr. Gunsel's attorney who is seeking to have the charges dismissed on the basis that there is insufficient evidence to support the charges and the arrest of Mr. Gunsel was unlawful. Mr. Gunsel's attorney has stated that continuing the prosecution would be harassment and a violation of Mr. Gunsel's civil rights for which he will seek relief if the charges are not dismissed. Mr. Gunsel is reputed to be a member of an organized crime gang, so I would like to prosecute him if it seems reasonably likely that I can obtain one or more convictions.

Your assignment is to prepare a memorandum to me discussing the proper disposition of this case, identifying yourself only by the title of Assistant District Attorney (ADA), and analyzing whether the admissible evidence contained in the file will support a conviction of any of the charged offenses. Since I am familiar with the police report, it will not be necessary to state the facts separately, but you should include the relevant facts in your analysis of each offense with which Mr. Gunsel has been charged.

In preparing your memorandum, discuss the four offenses with which Mr. Gunsel has been charged in the order in which they are listed above, applying the law to the facts related to each of the offenses. You should have a separate heading for each of the charged offenses, and in analyzing each offense identify the elements of the offense, and determine whether there is sufficient evidence to support each element of the offense setting forth the reasoning supporting your determination. Finish with a short one sentence conclusion at the end of each offense as to whether you think I can successfully prosecute that offense and the reason why or why not. Although you should cite to relevant authority, it is not necessary to use a full, formal citation form (*i.e.*, Bluebook format is not required).

The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment.

**BOROUGH OF MADISON POLICE DEPARTMENT
ARREST REPORT**

Date: July 24, 2011
Filed By: Sergeant M. Minor, MBPD
Perpetrator(s): George Gunsel, 1313 Verdant Lane, Madison
Location: 1313 Verdant Lane, Madison

On 7/24/2011, at 0930 hours, the undersigned was dispatched by 911 Operator No. 24 to 1313 Verdant Lane, Madison, to investigate an alleged violation of Madison Ordinance No. 1999-76, which had been reported by an anonymous caller. When approaching the premises, the undersigned noticed that the lawn appeared to have been freshly cut, and there were numerous grass clippings in the street next to the curb.

I proceeded to 1313 Verdant Lane, Madison. Upon knocking on the door and identifying myself as a police officer, an adult male wearing shorts and a t-shirt opened the door, but did not step out on to the porch. He asked me what I wanted. I told him to come out into his yard where I could see him clearly. After ascertaining that he was George Gunsel, the owner and occupier of the premises, I asked him how the grass clippings came to be in the street. He replied: "God put them there." At this point, I noticed that Mr. Gunsel's breath smelled strongly of beer, his eyes were bloodshot, his speech was slurred, and he was unsteady on his feet.

I then directed him to accompany me to the sidewalk in front of his house. While standing on the sidewalk, I pointed to the grass clippings on the street and I asked him directly if he was responsible for the clippings in the street, whereupon he became loud and abusive and stated: "Why don't you go catch a criminal instead of bothering people in their homes?"

We walked back to his porch and I then informed Mr. Gunsel that he was under arrest for violation of Madison Ordinance No. 1999-76, and for public drunkenness. Mr. Gunsel was directed to accompany the undersigned to the Madison P.D. The suspect then laughed at the undersigned, stepped back inside his house and attempted to close the door in the undersigned's face. The undersigned's right foot which I inserted in the doorjamb, was bruised when the door shut on it. This officer attempted to restrain Mr. Gunsel by grasping his arm, at which time Mr. Gunsel twisted out of my grasp, causing my hand to hit the door, spraining the index finger. Mr. Gunsel then submitted to arrest by this officer. The undersigned conducted a pat down search of Mr. Gunsel incident to the arrest and recovered from Mr. Gunsel's pocket a plastic sandwich bag containing a small amount of what appeared to be a dried green vegetative leafy substance with stems and seeds which the undersigned recognized to be marihuana and which the undersigned knows to be a controlled substance.

Supplemental Report (7/25/2011)

The State Police crime laboratory confirmed that the substance taken from Mr. Gunsel consisted of marihuana and weighed 10 grams.

Mr. Gunsel was charged with a violation of Borough of Madison Ordinance No. 1999-76, Public Drunkenness - 18 Pa. C.S.A. § 5505, Resisting Arrest - 18 Pa. C.S.A. §5104, and Possession of a Small Amount of Marihuana - 35 P.S. § 780-113(a)(31).

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LIBRARY

Ordinance:

Borough of Madison Ordinance No. 1999-76

It shall be a criminal summary offense punishable by a fine not to exceed \$100.00 or imprisonment for three (3) days, or both, for any person to deposit snow, ice, grass clippings, leaves or other vegetative or foreign matter into any borough street or the gutters adjacent thereto.

Statutes:

18 Pa. C.S.A. § 5104. Resisting arrest or other law enforcement

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa. C.S.A. § 5505. Public drunkenness and similar misconduct

A person is guilty of a summary offense if he appears in any public place manifestly under the influence of alcohol or a controlled substance . . . except those taken pursuant to the lawful order of a practitioner, as defined in the Controlled Substance, Drug, Device and Cosmetic Act, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

35 P.S. § 780-113. Prohibited acts; penalties

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

* * *

(31) Notwithstanding other subsections of this section, (i) the possession of a small amount of marihuana only for personal use; (ii) the possession of a small amount of marihuana with the intent to distribute it but not to sell it; or (iii) the distribution of a small amount of marihuana but not for sale. For purposes of this subsection, thirty (30) grams of marihuana or eight (8) grams of hashish shall be considered a small amount of marihuana.

* * *

(g) Any person who violates clause (31) of subsection (a) is guilty of a misdemeanor and upon conviction thereof shall be sentenced to imprisonment not exceeding thirty days, or to pay a fine not exceeding five hundred dollars (\$500), or both.

53 P.S. § 46121 Appointment, suspension, reduction, discharge, powers . . .

Borough council may . . . appoint . . . one or more suitable persons . . . as borough policemen, who shall . . . and may, within the Borough . . . without warrant and upon view, arrest, and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens or for violating any ordinance of the Borough for the violation of which a fine or penalty is imposed

Rules:

Pa. R. Crim. P. 109 Defect in Form, Content, or Procedure

A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

Pa. R. Crim. P. 400 Means of Instituting Proceedings in Summary Cases

Criminal proceedings in summary cases shall be instituted either by:

- (1) issuing a citation to the defendant; or
- (2) filing a citation; or
- (3) filing a complaint; or
- (4) arresting without a warrant when arrest is specifically authorized by law.

Supreme Court of Pennsylvania
COMMONWEALTH of Pennsylvania,
Appellant,

v.

Brian JACKSON, Appellee.

Opinion

A Philadelphia police officer observed appellee among a group of men throwing dice on the street. The officer suspected the men were gambling, in violation of Philadelphia City Code §10-612 (2). He approached, but appellee fled, despite the officer's instructions to stop. The officer pursued appellee and attempted to apprehend him, but appellee punched the officer in the face and chest several times and got away. The officer gave chase and caught appellee again, but appellee kned the officer in the groin, knocking him to the ground. While the officer was down, appellee tried to take the officer's gun-with his hands on the gun, appellee threatened, "You're done," but was unable to remove the gun. The officer eventually forced appellee to the ground and arrested him. Appellee was convicted and sentenced for aggravated assault on a police officer, simple assault, recklessly endangering another person, and resisting arrest.

Appellee filed an appeal, . . . challenging the sufficiency of the evidence

for his recklessly endangering another person and resisting arrest convictions.

* * *

The Superior Court affirmed his recklessly endangering another person conviction but reversed the resisting arrest conviction. The court found that because the officer did not observe appellee rolling dice for money, he lacked probable cause to arrest appellee for gambling (citation omitted). Therefore, the court found the underlying arrest for gambling was unlawful; an unlawful arrest will not support a resisting arrest charge.

We granted allowance of appeal to determine:

Where a defendant's assault on a police officer occurs as the result of the officer's attempt to unlawfully arrest him, whether that assault may give rise to a lawful arrest, the resistance of which will support a charge of resisting arrest under 18 Pa. C.S.A. § 5104.

* * *

The Commonwealth argues . . .that *Commonwealth v. Biagini*, 540 Pa. 22, 655 A.2d 48 (1995) compels the conclusion that where a defendant commits a crime during an attempted arrest, illegal for want of probable cause, that new crime allows a lawful arrest of the defendant. Appellee

argues the resistance of the initial unlawful arrest was a continuous course of conduct that could not be divided into different parts to create probable cause for a lawful arrest.

A lawful arrest is an element of the crime of resisting arrest. . . . (citation omitted). Thus, to be convicted of resisting arrest, the underlying arrest must be lawful. *Biagini*, at 497. In the present context, the lawfulness of an arrest depends on the existence of probable cause to arrest the defendant. *Id.*

In *Biagini*, we addressed whether a defendant who is arrested without probable cause could be prosecuted for crimes he committed in response to an officer's attempt to unlawfully arrest him. The co-defendants in *Biagini* argued that because the initial encounter with the police was an unlawful arrest, all additional charges arising from that arrest were invalid. *Id.* We disagreed and stated individuals do not have a right to resist arrest even when they believe the arrest is unlawful. (citations omitted). Thus, individuals are not justified in resisting arrest and cannot avoid being prosecuted for their actions in resisting and assaulting police officers. *Biagini*, at 493. Therefore, we upheld the co-defendants' convictions for aggravated assault although the underlying arrest was unlawful. *Id.*

However, we concluded the co-defendants' convictions for resisting arrest could not stand since "[t]he language of the statute is quite clear and unambiguous; in order to be convicted of resisting arrest, the underlying *arrest* must be lawful." *Id.*, at 497 (citation omitted) (emphasis in original). Thus, because a lawful arrest is an element of resisting arrest, a conviction for that crime cannot be sustained where that arrest is found to be unlawful. *Id.*

Here, assuming an unlawful initial arrest, the initial resistance would support only assault charges, not a resisting arrest charge. However, after appellee fled and the officer caught him, appellee punched the officer several times, and fled again. At that point, the officer had probable cause to arrest appellee for that assault. The officer chased appellee and arrested him after the violent struggle described above; this arrest was lawful because the officer had probable cause to arrest him for assault, and appellee's struggle constituted resisting arrest.

Appellee's argument the incident was only one criminal episode is unpersuasive. Even if it is one episode, committing a new crime during the episode can serve as the basis for probable cause to arrest appellee. Clearly appellee could be

prosecuted for other crimes he committed while resisting an unlawful arrest (citation omitted), his new criminal activity would establish cause to arrest him, lawfully, for these new crimes. The initial illegality does not give the arrestee a free pass to commit new offenses without responsibility. Neither does that initial illegality “poison the tree,” preventing lawful police conduct thereafter—the new crimes are new trees, planted by appellee, and the fruit that grows from them is not automatically tainted by the initial lack of probable cause.

Appellee’s arrest, based on probable cause he committed assault on the officer while resisting the unlawful arrest, was a lawful arrest that appellee was not justified in resisting. We hold on the facts of this case, where a defendant’s assault on a police officer occurs as the result of the officer’s attempt to unlawfully arrest him, that assault would justify a subsequent lawful arrest, the temporally distinct resistance of which will support a charge of resisting arrest under 18 Pa.C.S. § 5104.

* * *

Since the officer had probable cause to arrest appellee after appellee punched the officer several times, viewing the evidence in the light most favorable to the Commonwealth, it is clear there was

sufficient evidence to convict appellee of resisting arrest.

Order reversed. Jurisdiction relinquished.

Superior Court of Pennsylvania
COMMONWEALTH of Pennsylvania

v.

George Anthony RAINEY, a/k/a
Theodore George Rainey, Appellant.

Opinion

This is an appeal from the judgment of sentence entered against appellant for resisting arrest. (footnote omitted)

* * *

The sole question raised is the sufficiency of the evidence to sustain the conviction.

* * *

Reading the evidence in the light most favorable to the Commonwealth the facts established at trial are these. Inebriated after a night of heavy drinking, appellant sought refuge at the home of a friend, Fletcher Duncan. Unknown to appellant Duncan had shortly before moved. Upon arriving at his friend's former residence, appellant entered and found the apartment vacant. Obligated by the call of nature and the effects of too much drinking, appellant proceeded to the bathroom. The sound of the toilet flushing awakened the inhabitant of the second floor apartment, who then called the police. A short time thereafter, Officer Hockley of the Harrisburg Police Department entered and found appellant

lying on the floor. Officer Hockley roused the appellant and placed him under arrest.

* * *

Officer Brown entered the apartment and placed appellant against the wall for frisking. He then escorted appellant to a waiting police van. . . . The walk to the van was uneventful but once reaching it, appellant attempted to run away. Officer Brown pursued and grabbed appellant by the sleeve of his coat. Appellant began to shake himself violently, to wiggle and squirm in an attempt to free himself of the officer's grasp. Corporal Neubaum arrived on the scene and proceeded to strike appellant on the head with his nightstick, inflicting a wound which later required six stitches. Even after the blow to his head, appellant continued his aforesaid conduct. Officer Brown then grabbed appellant by the throat choking him to such an extent that he was obliged to release his grip lest appellant succumb for lack of air. While choking appellant Officer Brown struck his knee against the curb, slightly reinjuring the joint, which had then only recently been operated upon. Finally, Officer Hockley came to the assistance of Officer Brown and Corporal Neubaum. The three then subdued appellant and handcuffed him. By their own testimony, Officers Brown and Hockley admitted that at no time

during the fracas did appellant strike, push or kick anyone, but merely attempted to squirm, wiggle, twist and shake his way free of their grasp. Officer Brown's fall came about as a result of his attempt to hold onto appellant's throat and not through any aggressive act on the appellant's part.

* * *

. . . [O]ur Section 5104 mirrors Section 208.31 of the Model Penal Code. The comment to Section 208.31 reads in part: "Resistance to arrest is one of the commonest forms of obstructing the execution of the law. We deal with it specifically . . . because we wish to confine the offense to forcible resistance that involves some substantial danger to the person."

In light of the comments to the Model Penal Code and the evidence adduced at trial, we cannot say that the Commonwealth proved beyond a reasonable doubt all the elements of the crime of resisting arrest. Appellant's actions in attempting to escape were no more than efforts "to shake off the policeman's detaining arm." Appellant neither struck, nor struck out at the arresting officers; nor did he kick or push them. At most this was a "minor scuffle" incident to an arrest. While it may be that appellant's conduct

was disorderly (18 Pa.C.S. s 5503), his intoxication public (18 Pa.C.S. s 5505), and his trespass criminal (18 Pa.C.S. s 3503), the evidence in the case is insufficient to convict appellant of resisting arrest as that crime is defined by Section 5104 of the Crimes Code.

* * *

Superior Court of Pennsylvania
COMMONWEALTH of Pennsylvania,

v.

Robert A. MEYER, Appellant

Opinion

Robert A. Meyer has appealed from the lower court's affirmance of his conviction by a magistrate, of the summary offense of public drunkenness. The central issue for our determination is whether, under the facts presented, appellant's conduct constituted public drunkenness within the statutory definition of the offense. The lower court found that appellant's conduct constituted public drunkenness and that his arrest for that offense was proper. We reverse.

* * *

The facts are as follows. On August 7, 1978, at approximately 10:30 p. m., appellant . . . entered V.F.W. Post 118 in Millvale, Pennsylvania. He had been a member of the V.F.W. for approximately thirty-five years. He sat down and ordered a Pepsi-Cola from the stewardess, Mrs. Mueller, placing a dollar bill on the bar for the drink, which was collected by Mrs. Mueller, who thereafter placed his change on the bar. While she was on the telephone, Mrs. Mueller heard Mr. Meyer complain loudly that he had been overcharged. She testified that she had overcharged him a nickel.

. . . [A]ppellant and Mrs. Mueller exchanged angry words, and . . . Mrs. Mueller

then asked her husband, the Commander of the club, to call the police.

. . . [D]uring the dispute, appellant became very loud and abusive. A few minutes later, two Millvale police officers arrived. Both officers testified that upon entering the club, they approached Mr. Meyer and told him he was going to have to leave. After speaking to him for a few minutes, they escorted him outside. Once outside, appellant was put into a police car and taken to the police station, where he was placed in a cell.

18 Pa.C.S. s 5505 states:

A person is guilty of a summary offense if he appears in any public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

Appellant argues that he was not manifestly under the influence of alcohol to the degree that he was a danger to himself or to other persons or property, or to the degree that he annoyed persons in his vicinity. He further contends that the V.F.W. Post is not a "public place."

The Commonwealth contends, however, and the court below found, that appellant was arrested outside the Post, which, it argues, may be considered a "public place."

. . . [O]ur first task, therefore, is to construe the meaning of "public place" within the context of the statute, in order to determine

whether this element of the offense was established by the Commonwealth.

Section 5505 does not define “public place.” The term does appear, however, in two places in the Crimes Code. . . . Section 5902(f) defines it as “any place to which the public or any substantial group thereof has access.” The ordinary meaning of “access” is: “the right to enter or make use of;” “the state or quality of being easy to enter.”(footnotes omitted)

Section 5503(c) defines public places as, inter alia, “any premises which are open to the public.”

We find that V.F.W. Post 118 is a private club which is not “open to the public.” On cross-examination, the stewardess testified that in order to use the premises, one must be a member or a guest of a member. . . . It therefore cannot be said here that the public at large has the right to enter V.F.W. Post 118 or make use of its facilities, nor can it be said that V.F.W. Post 118 is “easy to enter” when the individual attempting entry is not a member or the guest of a member. The same applies to the area outside the Post in this case. Although the general public may be permitted to enter the area outside the building itself, from the street, we do not find that such an area fits within the concept of “public place.” Our finding is based in part on the category of “public places” contained in the disorderly conduct section which includes highways, transport facilities, schools, prisons

and neighborhoods. There are no Pennsylvania cases holding a private club to be a public place for the purposes of this or any other section of the Pennsylvania Crimes Code.

However, even if we find that even if the area outside the Post may be considered a “public place,” we hold that it was error to find appellant guilty of public drunkenness under the facts of this case.

* * *

We find that the statute was enacted to deal with the problem of chronic alcoholics who voluntarily appear on our streets, in our parks, in our neighborhoods, on a routine basis, shouting and cursing at real or imagined foes, causing disruption and annoyance. It should not be used as the basis for arrest in a situation in which an intoxicated individual, who has not been shown to be a chronic alcoholic, is escorted by two policemen from a private place into an arguably public one. In order to be found guilty of public drunkenness, the accused must be in the “public place” voluntarily.

* * *

We find here that appellant’s appearance outside the V.F.W. Post was not “voluntary,” and therefore his conviction must be reversed. We would find the same even if the area outside the Post may rightfully be considered a “public place.”

* * *

Finally, we hold that the Commonwealth

did not prove beyond a reasonable doubt that appellant was “manifestly under the influence of alcohol....”

* * *

Although not binding on us, we find the case of *U.S. v. Crutchfield*, (citation omitted) to be persuasive in its statement that (Section 5505) is carefully drawn so as not to punish all forms of drunkenness but only drunkenness... to such a degree as to endanger the person himself or other persons or property or annoy persons in the vicinity...Id. at 702 (emphasis added)

* * *

Here, we find that the Commonwealth did not prove beyond a reasonable doubt that appellant was intoxicated to the degree required by the statute. Other than testimony to the effect that he was staggering a bit and that his breath smelled of alcohol, there is nothing in the record to support the Commonwealth’s contention that he was “manifestly under the influence of alcohol.” It must be remembered that for the Commonwealth’s argument to succeed, it must be shown that appellant was intoxicated to the requisite degree while he was outside the Post, in the so-called “public place.” Therefore, it must be shown that while appellant was outside the Post, he was intoxicated to such a degree that he might endanger himself or others or property, or annoy persons in his vicinity.

It appears from the record that the only

persons outside the Post at that point in time were the two officers, and there is no testimony indicating that they felt appellant might harm them or himself, especially since, as soon as they arrived outside, the officers put appellant in a squad car. The only persons in appellant’s vicinity to annoy were the two officers. Again it is our opinion that the statute was designed to protect the public from “manifestly drunk” persons who voluntarily go to public places where they are likely to harm or annoy the people likely to be found there. Since the only persons in appellant’s vicinity were the two officers who insisted that appellant accompany them outdoors, we hold that this element of the offense was not established here beyond a reasonable doubt.

* * *

Accordingly, we hold that appellant’s conduct . . . did not fit within the statute and that the Commonwealth failed to prove every element of the offense beyond a reasonable doubt.

Order reversed.

Supreme Court of Pennsylvania
COMMONWEALTH of Pennsylvania,

Appellant,

v.

Richard BULLERS, Appellee

OPINION

This appeal raises the issue of whether the authority of a police officer to arrest without a warrant extends to the summary offense of underage drinking when the defendant does not exhibit disorderly conduct, a breach of the peace, drunkenness or other irregular behavior. We affirm the decision of the Superior Court and find that warrantless arrests under such circumstances are not authorized.

The facts in the instant case are not in dispute. On April 5, 1990, upon reporting to work at 11:00 p.m., Sergeant Bryan Lee Parana of the Johnsonburg Borough Police Department became involved in the investigation of the theft of a vehicle owned by Richard Wolfe. Wolfe had notified the police around 10:00 p.m. that he had left his keys in his truck, with the doors unlocked, and that his truck was not where he had parked it. Wolfe further stated that he left a pistol, containing a loaded clip, between the seats of the truck. At about 11:45 p.m., a radio call came in from the St. Mary's Borough Police Department, indicating that a vehicle fitting the description of Wolfe's truck had been located in a cemetery in St. Mary's. Sergeant Parana arrived at the cemetery ten minutes later, determined that the truck was registered to

Wolfe, and noticed that the pistol was not in the vehicle.

* * *

At approximately 2:45 a.m., Sergeant Parana, while driving in a fully marked police cruiser, found Bullers walking on Grant Street in Johnsonburg. Sergeant Parana knew Bullers from previous juvenile proceedings against him involving theft and improper use of vehicles. Bullers stopped upon Sergeant Parana's second request, and the officer left his vehicle and approached Bullers in order to ask him questions regarding the theft of Wolfe's truck. After engaging Bullers in conversation, Sergeant Parana detected the odor of beer on his breath. Knowing from previous experience with Bullers that he was nineteen years old, the officer arrested him for underage drinking, 18 Pa.C.S. § 6308.

Incident to the arrest, Sergeant Parana conducted a patdown search and discovered the following items: a pen; a house key; a brown, leather credit card holder; an envelope containing a key; loose change amounting to six dollars and eighty-eight cents; a single five dollar bill; and several rolls of coins in a red canvas bag. A later search at the station revealed Wolfe's loaded, holstered pistol hidden beneath Bullers's jacket, inside his belt and against his back. Bullers had no license or permit to carry a concealed firearm.

On August 28, 1990, Bullers was found

guilty by a jury of theft of a firearm, 18 Pa.C.S. § 3921, firearms not to be carried without a license, 18 Pa.C.S. § 6106(a), unauthorized use of an automobile, 18 Pa.C.S. § 3928(a), and receiving stolen property, 18 Pa.C.S. § 3925(a).

* * *

The Superior Court held that Bullers’s arrest was unlawful, since no authority exists for a warrantless arrest for the summary offense of underage drinking, and that the trial court erred by admitting the evidence which resulted therefrom. We granted allocatur . . . on the validity of the arrest issue

* * *

The rules governing procedure in summary criminal cases permit criminal proceedings to be instituted by one of the following methods: (a) issuing a citation to the defendant; (b) filing a citation; (c) filing a complaint; or (d) arresting without a warrant when arrest is specifically authorized by law. (citation omitted) It is therefore clear that statutory authorization was necessary for Bullers’s arrest for underage drinking. The legality of the arrest is relevant to the derivative question of whether a search incident to the arrest was permitted under the circumstances.

* * *

. . . [A] warrantless arrest for a summary offense may be authorized by another statute. The Commonwealth contends that authority can . . . be found within § 46121 of the Borough

Code.

§ 46121. Appointment suspension, reduction, discharge, powers; mayor to have control

Borough council may, subject to the civil service provisions of this act, if they be in effect at the time, appoint . . . one or more suitable persons . . . as *borough policemen*, who *shall and may*, within the borough or upon property owned or controlled by the borough . . . *without warrant and upon view, arrest, and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens or for violating any ordinance of the Borough for the violation of which a fine or penalty is imposed.* . . . 53 P.S. § 46121 (emphasis in original).

The Superior Court in *Commonwealth v. Williams*, (citation omitted), determined that § 46121 provides specific authorization to police officers to arrest for behavior encompassed within the statute. The Commonwealth argues that underage drinking falls within the statute because the hazards and dangers that may accompany it “tend to imperil the personal security” of citizens.

This argument is not persuasive. . . . Bullers was merely walking down the street

with the odor of beer on his breath. Surely it is a stretch of the imagination to find that this alone “tends to imperil the personal security” of Bullers and other persons in contact with him. We therefore hold that a violation of § 6308, unaccompanied by any disorderly conduct, a breach of the peace, or public drunkenness, does not fall within § 46121 of the Borough Code.

* * *

We have herein held that underage drinking without any disorderly conduct, a breach of the peace, or public drunkenness does not fall within 53 P.S. § 46121. Since statutory authority is necessary for Bullers’s arrest, and neither 18 Pa.C.S. § 6308(d) or 53 P.S. § 46121 provide such authorization, we hold that Bullers’s arrest was unlawful and the evidence found by the search pursuant thereto is inadmissible.

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Instructions

The performance test is designed to test an applicant's ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the answer book that has been provided. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.