

CONTINUING LEGAL EDUCATION

SPRING 2017

MAY 4, 2017

SEARCH AND SEIZURE LAW: UPDATE 2017

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RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW

By Hon. Barry Kamins

I. GENERAL FOURTH AMENDMENT PRINCIPLES

A. Probable Cause

1. There is probable cause to believe a defendant possessed a controlled substance based on

a. information that defendant met with a person believed to be trafficking in narcotics

and b. the hasty manner in which the defendant removed a bag from the trunk of the trafficker's vehicle.

People v. Joseph, 27 N.Y.3d 1009 (2016).

2. In establishing probable cause to arrest an occupant of an automobile for constructive possession of marihuana, the People must elicit testimony as to the defendant's physical proximity to the substance and whether that proximity rendered the substance readily accessible to him.

People v. Barkley, ___ Misc.3d ___, 2017 N.Y. Slip Op 27023 (Appellate Term, 2d Dept. 2017). *Cf. People v. Carter*, 60 A.D.3d 1103 (3d Dept. 2009).

B. Exclusionary Rule

1) The United States Supreme Court has held that the attenuation doctrine can apply where the intervening act is something other than an independent act of the defendant (*e.g.* consent to search or confession).

a. The doctrine can apply when the intervening act is the discovery of a valid arrest warrant.

b. Where an officer makes an illegal stop, runs a warrant check, discovers an outstanding warrant, and then searches incident to the arrest on the warrant, the exclusionary rule will not apply.

Utah v. Streiff, 579 U.S. ___, 136 S. Ct. 2056 (2016). *See People v. Vanterpool*, 4 Misc. 3d 137(A) App. Term, 1st Dept. 2004).

2) The exclusionary rule will not be applied when knowledge of the evidence is gained from a source independent of any unlawful conduct.

People v. Lopez, 139 A.D.3d 1381 (4th Dept. 2016).

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A. Right to Approach

1. A police officer has the right to approach an individual in a NYCHA building based on the building's history of trespass activity and the defendant's "panicked attempt" to avoid contact with the police upon their attempt to enter an elevator.

People v. Perez, 142 A.D.3d 410 (1st Dept. 2016).

2. Merely staring at a police officer in a high crime area while continuing to proceed on one's way, absent any indicia of nervousness, evasive behavior or other movements sufficient to arouse the officer's interest, is insufficient to justify an officer's approach under level one.

People v. Savage, 137 A.D.3d 1637 (4th Dept. 2016).

3. A police officer has the right to approach a pedestrian who uses a restricted roadway in violation of VTL §1156.

People v. Binet, ___ A.D.3d ___, 2017 N.Y. Slip Op 00848 (4th Dept. 2017).

B. Right to Conduct Common-Law Inquiry

1. A common-law inquiry can be triggered by a police officer's observation of an individual angrily yelling and cursing at someone

while aggressively waving bags with both hands-this will create a founded suspicion of criminal activity.

People v. Cabrera, 135 A.D.3d 412 (1st Dept. 2016).

2. During a common-law inquiry, the police may take the following action: a) ask to see a suspect's hands; b) grab a suspect's wrist; and c) pull back a sleeve of a sweater when the police feel a metal object underneath.

People v. Perez, 142 A.D.3d 410 (2d Dept. 2016).

3. During a lawful common-law inquiry, a police officer can ask a suspect if he has a weapon or "anything that would be of concern" to the officer; if the suspect answers in the affirmative and begins to reach for something, the officer can seize it as a protective measure.

People v. Cabrera, 135 A.D.3d 412 (1st Dept. 2016).

4. A police officer must have a founded suspicion of criminal activity to justify a request for consent to enter a residence.

People v. Hall. 51 Misc. 3d 1203(A) (County Ct. Monroe Co. 2016).

5. An individual's nervousness upon being confronted by the police does not give rise to a founded suspicion that criminal activity is afoot.

People v. Freeman, 144 A.D.3d 1650, 42 N.Y.S.3d 506 (4th Dept. 2016).

C. Right to Stop

1. The police may ask questions of a person they believe is a victim of a crime, but they may not seize him in order to do so.

People v. Coronado, 139 A.D.3d 452 (1st Dept. 2016).

2. A police officer can chase a suspect in order to issue a citation when the suspect has violated a municipal ordinance.

People v. Harris, ___ A.D.3d ___, 2017 N.Y. Slip OP 00806 (4th Dept. 2017).

III. ARRESTS

1. The police do not have to cross the threshold in order to violate *Payton*, if they engage in an “across the threshold arrest.”

United States v. Allen, 813 F. 3d 76 (2d Cir. 2016). *See also, People v. Garvin*, 130 A.D.3d 644 (2d Dept. 2016), (*leave granted*).

2. When the police have an arrest warrant for A, and enter the premises of B to arrest A, the fact that they do not also have a search warrant for B’s premises does not violate A’s Fourth Amendment rights.

United States v. Bohannon, 824 F. 3d 242 (2d Cir. 2016).

3. One area of the “home” that is protected for purposes of *Payton* is the “curtilage”; when the police enter a defendant’s fenced-in rear yard, they have improperly entered the curtilage of the defendant’s home.

People v. Avinger, 140 A.D.3d 895 (2d Dept. 2016).

IV. Search Warrants and Exceptions to the Warrant Requirement

A. Searches and Search Warrants

1. A person arrested for a drunk driving charge cannot be required to take a blood test unless the police obtain a search warrant.

a. No warrant is required for conducting a breath test, pursuant to a search incident to an arrest.

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (2016).
See also, People v. Shaw, 72 N.Y.2d 1032 (1988) (no constitutional right to refuse to take a breathalyzer test).

2. A person cannot be charged criminally for refusing to take a blood test following an arrest on a drunk driving charge.

a. A person *can* be criminally charged for refusing to take a breath test.

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (2016).

3. Where a search warrant authorizes the seizure of “any computer and/or storage device capable of maintaining records pertaining to illicit controlled substances,” the police may seize a cell phone even though a cell phone was not specified; the language is sufficiently particular to permit a cell phone to be seized.

People v. Victor, 139 A.D.3d 1102 (3d Dept. 2016).

4. The Government's retention of a defendant's computer records for two-and-a-half years after executing a warrant was reasonable where the agents acted in good faith even though the retention of the records implicates Fourth Amendment concerns.

United States v. Ganius, 824 F.3d 199 (2d Cir. 2016).

5. There is no authority under the Criminal Procedure Law to take an interlocutory appeal to the Appellate Division or Court of Appeals from an order:

(a) denying a motion to quash or vacate a search warrant;

or (b) denying a motion to compel disclosure of an affidavit in support of a search warrant application.

Matter of 381 Search Warrants Directed to Facebook, ___ N.Y.3d ___, 2017 N.Y. Slip Op 002586 (2017).

6. A search warrant will be defective if:

a) it contains no specific allegations that tie a residence to the evidence sought.

People v Moxley, 137 A.D.3d 1655 (4th Dept. 2016).

b) it fails to include a search of a shed in a backyard.

People v. Velez, 138 A.D.3d 1041 (2d Dept. 2016).

c) it authorizes a general search of an electronic device without linking the evidence sought and the criminal activity supported by probable cause.

People v. English, 52 Misc. 3d 318, 2016 N.Y. Slip Op 26113 (Sup. Ct. Bronx Co. 2016).

B. Exceptions to the Requirement of a Search Warrant

1. Search Incident to an Arrest

a. Traditional Searches

1. The People fail to establish exigent circumstances when:

a. A police officer does not claim that a search of a briefcase was conducted out of a concern for his safety or to prevent the defendant from destroying evidence.

People v. Houston, 143 A.D.3d 737 (2d Dept. 2016); *People v. Hinton*, 2017 N.Y. Slip Op 01989 (1st Dept. 2017).

b. The defendant is handcuffed, his duffle bag is a distance away in the same room, the police previously searched the residence and found no drugs and the

defendant denied that there was contraband in the bag.

People v. Ortiz, 141 A.D.3d 872 (3d Dept. 2016).

c. The facts do not objectively support a reasonable belief that the defendant's bag contained either a weapon or destructible evidence.

People v. Anderson, 143 A.D.3d 713 (2d Dept. 2016).

b. Body Cavity Searches

A visual inspection of the inside of a suspect's underwear constitutes a strip search and must be based on reasonable suspicion.

People v. Tisdale, 140 A.D.3d 1759 (4th Dept. 2016); *People v. Smith*, 134 A.D.3d 1453 (4th Dept. 2015).

2. Exigent Circumstances

a) Emergency Doctrine

The emergency doctrine exception will not be applied when:

a. A search is conducted after an emergency has abated.

People v. Williams, ___ A.D.3d ___, 2017 N.Y. Slip Op 00329 (2d Dept. 2017).

b. The facts do not support an objectively reasonable belief that there was an emergency at hand requiring the immediate assistance of the police in order to protect life or property.

People v. Ringel, ___ A.D.3d ___, 2016 N.Y. Slip Op 0887 (2d Dept. 2016) *Cf. People v. May*, 135 A.D.3d 548 (1st Dept. 2016) (emergency doctrine applied where police were facing danger that a victim of a shooting was in an apartment).

b) Exigent Circumstances Involving Threat to Law Enforcement and Confidential Informants

Law enforcement officers were justified in engaging in a warrantless "pinging" of a suspect's cell phone based on a reasonable fear that the defendant would cause imminent harm to undercover officer.

U.S. v. Carabello, ___ F. 3d ___ (2d Cir. 2016).

c) Protective Sweeps

A protective sweep may not be expanded into an immediately adjoining area in a residence unless the police have articulable facts upon which to believe there is a person in that area who may pose a danger.

People v. Harris, 141 A.D.3d 1024 (3d Dept. 2016).

4. **Plain View Doctrine**

The police may not seize evidence under the plain view doctrine when it is not immediately apparent that an object, *i.e.* a suspect's clothing, is incriminating in nature or constitutes evidence of a crime.

People v. Sanders, 26 N.Y.3d 773 (2016).

5. **Consent**

a. The People fail to establish the voluntariness of a consent to (1) enter a residence and (2) search a residence where among other factors, the defendant signed a consent form when:

(1) it was signed by the defendant while his hands were handcuffed behind his back;

(2) it was not read to the defendant;

(3) the officer never sought any assurance from the defendant that he had read it.

People v. Freeman, ___ N.Y.3d ___, 2017 N.Y. Slip Op 02090 (2017).

b. The People fail to establish the voluntariness of a consent to search a car when the only witness they call is a police officer who testifies that he interviewed the

consenting party at the police station but was unfamiliar with the details of that party's detention or arrest prior to the time the police officer interviewed him.

People v. Kendrick, ___ A.D.3d ___, 2017 N.Y. Slip Op 00870 (4th Dept. 2017).

6. Administrative Search

A statutory and regulatory framework that requires pawnbrokers and secondhand dealers to permit inspections by the police and requires them to record transactions, constitutes a valid administrative search because it is designed to primarily protect customers and not to uncover evidence of criminality.

Collateral Loanbrokers Associations of New York v. City of New York, ___ A.D.3d ___, 2017 N.Y. Slip Op 00953 (1st Dept. 2017).

IV. Automobiles

A. Automobile Stops

1. An automobile stop is valid if based upon a cell phone tip that

a. was anonymous (although possible traceable) and accompanied by several indicia of reliability including that it was in the form of a present sense impression.

People v. Arias, 142 A.D.3d 874 (1st Dept. 2016).

b. was from an identified citizen informant.

People v. Wisniewski, ___ A.D.3d ___, 2017 N.Y. Slip Op 00844 (4th Dept. 2017).

2. Stopping any vehicle with a temporary inspection sticker based on idle curiosity as to the sticker's validity, is unlawful.

People v. Driscoll, ___ A.D.3d ___, 2016 N.Y. Slip Op 08902 (3d Dept. 2016).

3. Once an automobile is validly stopped for a VTL violation, pursuant to a level one request for basic information, a police officer may ask an occupant who appears nervous why he or she is nervous.

People v. Williams, 144 A.D.3d 1636 (4th Dept. 2016).

4. Once an officer has a credible reason for approaching a stopped vehicle, he or she may, under a level one request for basic information, ask the driver for a license, registration and insurance card.

People v. Karagoz, 143 A.D.3d 912 (2d Dept. 2016).

5. After a valid automobile stop has been made and the driver is arrested for a suspended registration, any further detention of a passenger is unlawful unless the police can demonstrate that the passenger posed a safety concern.

People v. Porter, 136 A.D.3d 1344 (4th Dept. 2016).

6. A founded suspicion of criminal activity will justify:

(a) an extension of a VTL stop beyond its initial justification;

and (b) a canine sniff of the vehicle's exterior.

People v. Banks, ___ A.D.3d ___, 2017 N.Y. Slip Op 01916 (3d Dept. 2017).

B. Automobile Searches

1. Automobile Exception

(a) A search will be justified when, under a totality of circumstances, the police have probable cause to believe an automobile contains contraband.

People v. RaghnaI, 135 A.D.3d 1168 (3d Dept. 2016).

(b) Under this exception, the police have the right to search a wallet where there is probable cause to believe the automobile contains marijuana and the officer testifies that he has previously found marijuana secreted in wallets.

People v. Francois, 138 A.D.3d 1165 (3d Dept. 2016).

2. Inventory Search

A valid inventory search was conducted where the People introduced into evidence:

- a. The relevant patrol guide section;
- b. A handwritten list of items removed from the vehicle;
- and c. Property clerk invoices.

People v. Lee, 143 A.D.3d 626 (1st Dept. 2016).

3. **Community Caretaking Function**

The Court of Appeals has upheld the towing, impoundment and inventory search under a community caretaking function.

People v. Tardi, 28 N.Y.3d 1077 (2016).

V. Motions to Suppress and Suppression Hearings

1. A defendant is denied the effective assistance of counsel

a. when his attorney fails to move to reopen a suppression hearing based on trial testimony which materially contradicted testimony at the hearing and negated the People's theory of suppression.

People v. Kindell, 135 A.D.3d 423 (1st Dept. 2016). Cf. *People v. Gray*, 27 N.Y.3d 78 (2016).

2. A defendant is not denied the effective assistance of counsel when his attorney fails to file a suppression motion if

a. there was no colorable argument that could be made in support of the suppression issue;

and b. even if there was a colorable argument, the defendant cannot establish that the failure to raise the issue was not based on a strategy.

People v. Carver, 27 N.Y.3d 418 (2016); *People v. Bilal*, 27 N.Y.3d 961 (2016).

3. If a defendant receives "meaningful representation" at a suppression hearing, an appellate court will not engage in a "hindsight review" of counsel's performance to determine if counsel could have

conducted a more vigorous cross-examination.

People v. Parson, 27 N.Y.3d 1107 (2016).

4. A defendant was not denied the effective assistance of counsel when his attorney

a. waived his client's presence in the court's chambers where the court listened to a recording of a jail house call made by the defendant;

b. did not review the call himself but relied on the prosecutor's description of the call;

and c. failed to submit a post-hearing memorandum of law.

People v. Harris, ___ A.D.3d ___, 2017 N.Y. Slip Op 00806 (4th Dept. 2017).

5. It is error to deny a hearing when a defendant raises a factual dispute in raising the issues of

a. whether an investigator was able to identify child pornography files.

and b. whether the use of software prior to securing a warrant, constituted a search.

People v. Worrell, 138 A.D.3d 1154 (2d Dept. 2016).

6. The prosecution failed to sustain its burden of going forward with credible testimony when

a. A police officer was not credible on whether he smelled marijuana emanating from inside a vehicle and the officer had previously been found lacking in credibility by another judge.

People v. Simon, 51 Misc. 3d 1212(A) (Sup. Ct. Kings Co. 2016).

b. A police officer was not credible when testifying that he was able to observe marijuana in plain view inside an apartment as the officer stood in a hallway.

People v. Pendley, 51 Misc. 3d 1217 (Sup. Ct. Kings Co. 2016).

c. A police officer was not credible when testifying that he was able to observe a glassine envelope with a label and stamp on it through a partially open car window at 9:50 P.M.

People v. Duran, 51 Misc. 3d 1220(A) (Sup. Ct. Kings Co. 2016).

d. A police officer was not credible when he testified he was able to smell marijuana emanating from a car when the defendant was on his way to a drug program to be tested from drugs and he had been tested negative for drugs over a period of

two and one-half months.

People v. McManus, ___ Misc. 3d ___, Ind. No. 2526/15
(Sup. Ct. Kings Co. 2016).

7. A trial court commits error when it denies a defendant's application midtrial, for a hearing to suppress the fruits of a search warrant when the People belatedly provide the search warrant application which contains facts that raise a factual dispute.

People v. Samuel, 137 A.D.3d 1691 (4th Dept. 2016).

8. A *Darden* hearing is not necessary when probable cause is established by the observations of the police, independent of any information given by a confidential informant.

People v. Crooks, 27 N.Y.3d 609 (2016).

9. When a claim of ineffectiveness is raised and counsel articulates a strategy for not pursuing a suppression hearing, a court's inquiry will focus on whether such strategy was a product of a reasonably competent attorney.

People v. Zeh, 144 A.D.3d 1395 (3d Dept. 2016).

10. The fellow officer rule permits an arresting officer to testify that he made an arrest based on the inference that he heard a radio

transmission from an undercover officer providing information on where to go and whom to arrest.

People v. Vidro, ___ A.D.3d ___, 2017 N.Y. Slip Op 01975 (1st Dept. 2017).