

*CONTINUING LEGAL EDUCATION*

*WINTER/SPRING 2014*

*MARCH 20, 2014*

*SEARCH AND SEIZURE LAW: 2014 UPDATE*

*HON. BARRY KAMINS*



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RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW

By Hon. Barry Kamins

I. GENERAL FOURTH AMENDMENT PRINCIPLES

A. Probable Cause

1) An arrest that is based upon probable cause is constitutional under the Fourth Amendment, even though it may violate a state statute.

U.S. v. Bernacet, 724 F3d 269 (2d Cir 2013).

See also People v. Dyla, 142 AD2d 423 (2d Dept. 1988).

2) Even if the police are incorrect in their assessment of the particular crime that gives them grounds to conduct a search, where the facts create probable cause to arrest, a search will be permissible.

People v. Reid, 104 AD3d 58 (1<sup>st</sup> Dept. 2013).

3) In determining whether a dog's alert constitutes probable cause to search, courts must apply a totality of circumstances test, rather than a rigid evidentiary based set of criteria.

Florida v. Harris, \_\_\_ US \_\_\_, 133 S Ct 1050 (2013).

4) There is no probable cause to arrest for:

a) the sale of drugs; or

b) an attempt to sell drugs

when there is no bona fide offer to sell nor does the defendant commit any acts that carry the

venture forward within close proximity to an actual sale.

Gonzalez v. City of Schenectady, 728 F3d 149 (2d Cir. 2013).

- 5) Even under a totality of circumstances test there is no probable cause to arrest for the sale of drugs despite the observations of experienced police officers who conclude that a drug transaction had taken place when:
- a) there is no telltale sign of narcotics; and
  - b) there is no exchange of currency.

People v. Lee, 110 AD3d 1482 (4<sup>th</sup> Dept. 2013).

B. Exclusionary Rule

Although a Fourth Amendment violation does not, by itself justify suppression of evidence in a civil deportation proceeding, an "egregious" violation of the Fourth Amendment would require suppression; the violation does not need to involve a form of physical threat or trespass before it can rise to that level.

Cotzójay v. Holder, 725 F3d 172 (2d Cir 2013);

INS v. Lopez-Mendoza, 486 US 1032 (1984).

C. Attenuation

Although an illegal arrest was made, followed by a lineup identification, the taint of the illegality was sufficiently attenuated by an intervening event in which the arresting officer acquired probable cause for the arrest.

People v. Jones, 21 NY3d 449 (2013).

D. Standing

- 1) A person who uses a cell phone has no reasonable expectation of privacy with respect to the phone's location and, therefore, has no standing to suppress evidence obtained as a result of the "pinging" of the cell phone.

People v. Moorer, 39 Misc3d 603, 959 NYS2d 868 (County Court, Monroe Co. 2013). See also In re US for Historical Cell Site Data, 2013 WL 3914484 (5<sup>th</sup> Cir July 30, 2013).

- 2) Although the defendant resided in his own bedroom in his grandmother's apartment, he failed to establish a reasonable expectation of privacy in a guest bedroom in which a gun was recovered.

People v. Leach, 21 NY3d 969 (2013).

- 3) Under certain circumstances, the rear yard of a home may fall within the home's curtilage, thus creating a reasonable expectation of privacy of the homeowner.

People v. Theodore, \_\_\_ AD3d \_\_\_, 2014 NY Slip Op 01025 (2d Dept. 2014).

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A) Right to Approach

- 1) The police may not approach an individual inside or outside a trespass affidavit building merely because the person has entered or exited or is present near a trespass affidavit building. The police must have an independent objective credible reason to do so.

Ligon v. City of New York, et al., \_\_\_ F.Supp2d \_\_\_, 2013 WL 3502127 (SDNY 2013).

- 2) Police may not approach an individual in a NYCHA building despite the fact that upon observing the police, the defendant displays abrupt, halting and furtive movements.

People v. Johnson, 109 AD3d 449 (1<sup>st</sup> Dept. 2013).

- 3) A police officer who is conducting a vertical patrol in a trespass affidavit building may approach an individual who is in a non-public lobby to ask minimally intrusive questions, based on the fact that the person is observed in the lobby.

People v. Barksdale, 110 AD3d 498 (1<sup>st</sup> Dept. 2013).

B. Common Law Right to Inquire

1) The Court of Appeals has applied DeBour to traffic stops.

a) After a traffic stop, a police officer may not ask a motorist if there are any weapons in the car without a founded suspicion of criminal activity.

People v. Garcia, 20 NY3d 317 (2012). See also People v. Carr, 103 AD3d 1194 (4<sup>th</sup> Dept. 2013).

1) Although mere "nervousness will not support the right to inquire, other aggravating factors will support a founded suspicion of criminal activity.

People v. Loretta, 107 AD3d 541 (1<sup>st</sup> Dept. 2013).

2) A mere inquiry about the ownership of a bag will only constitute a request for information, and will not constitute a common law inquiry.

People v. Ross, 106 AD3d 1194 (3d Dept. 2013).

C. Right To Stop

Reasonable suspicion to stop an individual cannot be based merely upon two anonymous 911 calls from the same caller, describing an Hispanic male, wearing a black hat and white tee shirt, who "has a gun", without other facts to establish sufficient indicia of reliability.

U.S. v. Freeman, 735 F3d 92 (2d Cir. 2013).

D. Stop and Frisk

1) New York City has violated the 4<sup>th</sup> Amendment rights of citizens under two theories:

- a) senior officials in the City and Police Department were deliberately indifferent to officers conducting unconstitutional stops and frisks; and
- b) the practices were so persistent and widespread as to practically have the force of law.

Floyd, et al. v. City of New York, \_\_\_ F.Supp2d, \_\_\_ 2013 WL 4046209 (SDNY 2013).

2) DeBour requires a "rigorous analysis" to justify a stop and frisk: there must be both a reasonable suspicion of a suspect's participation in a crime, and a reasonable fear that the officer is in danger of physical injury.

Matter of Darryl C., 98 AD3d 69, 947 NYS2d 483 (1<sup>st</sup> Dept 2012). (Note, however, that there is a line of cases permitting a frisk during a common law inquiry when the police reasonably fear that the suspect is armed (People v. Chin, 192 AD2d 413 (1<sup>st</sup> Dept. 1993); People v. Daniels, 190 AD2d 858 (2d Dept. 2003); People v. Robinson, 278 AD2d 808 (4<sup>th</sup> Dept. 2000)).

3. A number of recent appellate cases have found a stop and frisk to be unlawful:

- a) Where an officer makes a conclusory assertion that he was in fear for his safety and asserts vague concerns about

his presence in a bad neighborhood and the nervousness of a suspect.

Matter of Darryl C., 98 AD3d 69, 947 NYS2d 483

(1<sup>st</sup> Dept 2012).

- b) Where there was no objective indicia of criminality because there were plausible, non-criminal reasons for appellant's behavior.

Matter of Jaquan M., 97 AD3d 403, 948 NYS2d 51

(1<sup>st</sup> Dept 2012).

- c) Where there was no basis for the officer to fear for his safety because:
  - a) the suspect was suspected of only committing a non-violent crime;
  - b) the suspect complied with the police commands;
  - c) the suspect did not reach toward his pockets;
  - d) the police did not believe that the bulge in his pocket was a gun or a knife.

People v. Shuler, 98 AD3d 695 (2d Dept 2012); People v. Gerard, 94 AD3d 592 (1<sup>st</sup> Dept 2012).

- d) Where there is no evidence to support a conclusion that a motorist's refusal to exit a vehicle created a reasonable suspicion that the motorist was armed.

People v. Driscoll, 101 AD3d 1466 (3d Dept. 2012).

4) Flight as an escalating factor:

The circumstances of a case may indicate that a suspect recognized the police even where the officers were neither in uniform nor in a marked car; in these cases flight can contribute to a finding of reasonable suspicion.

People v. Pitman, 102 AD3d 595 (1<sup>st</sup> Dept. 2013); People v. Lacy, 104 AD3d 422, (1<sup>st</sup> Dept 2013). See also People v. Pines, 281 AD2d 311 (1<sup>st</sup> Dept 2001); People v. Randolph, 278 AD2d 52 (1<sup>st</sup> Dept 2000).

### III. ARRESTS

1. When a suspect merely answers a knock on the front door by the police, he does not cross the "threshold" of his home under Payton v. New York and the police may not arrest him, even if they have probable cause, without an arrest warrant. People v. Gonzales, 111 AD3d 147, 972 NYS2d 642 (2d Dept. 2013).
2. In arresting the defendant at his fiancée's apartment, the police exceeded the scope of a protective sweep when they searched the fiancée's purse and recovered a handgun. People v. Isaacs, 101 AD3d 1152 (2d Dept. 2012).

IV. SEARCH WARRANTS AND EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Searches and Search Warrants

- 1) Using a trained police dog to explore a home's curtilage in the hope of discovering incriminating evidence constitutes a search.

Florida v. Jardines, 133 S Ct 1409 (2013). Cf.

People v. Dunn, 77 NY2d 19 (1990)

- 2) When the police make an arrest supported by probable cause to arrest for a "serious" offense they may, as part of the booking procedure, take and analyze a cheek swab of the arrestee's DNA; this constitutes a reasonable search pursuant to the Fourth Amendment.

Maryland v. King, 569 U.S. \_\_\_, 133 S Ct 1958 (2013).

Cf. Executive Law 995(7) - DNA samples can only be taken in New York from defendants convicted of a crime.

- 3) The continued vitality of a search warrant is not tied to the pendency of a prosecution but, instead, to the predicate for its issuance; thus, a search after a case is terminated may still be valid pursuant to the warrant. People v. DeProspero, 20 NY3d 527 (2013).

- 4) A search warrant to search a computer found in a target's home may be issued even though it is based upon an affidavit only alleging that illicit images were transmitted by cell phone because there is a reasonable likelihood that the

police will find evidence in different forms and on different devices.

People v. Vanness, 106 AD3d 1265 (3d Dept. 2013).

- 5) Although a clause in a search warrant, authorizing the search of "any person present" was invalid, the warrant was still valid because it permitted the police to lawfully enter the premises and the contraband was seized because of actions taken by the defendant and not pursuant to the "any person present" provision.

People v. Allen, 101 AD3d 1491 (3d Dept. 2012).

- 6) Prior to Weaver, the attachment of a GPS device to a vehicle, without obtaining a warrant, will not result in the suppression of evidence where:
- a) the device was functional for only two days;
  - b) the device did not track the defendant continuously; and
  - c) the police did not rely solely on the device to locate the defendant.

People v. Lewis, 102 AD3d 505 (1<sup>st</sup> Dept. 2013) (leave granted); People v. Weaver, 12 NY3d 433 (2009).

- 7) If the name of the issuing court is not stated on a search warrant, any property seized pursuant to the warrant must be suppressed.

People v. Gavazzi, 20 NY3d 907 (2012).

- 8) When executing a search warrant, the police cannot seize individuals beyond the immediate vicinity of the premises in question.

Bailey v. United States, 133 US 1031 (2013).

- 9) In assessing whether a search warrant was issued based upon probable cause, if the police officer's affidavit fails to establish an informant's reliability, the court must examine the transcript of the informant's examination by the issuing judge.

People v. Chisholm, 21 NY3d 990 (2013).

B. Exceptions to the Requirement of a Search Warrant

1) Emergency Searches

- a) In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

Missouri v. McNeely, \_\_\_ US \_\_\_, 133 S. Ct. 1552 (2013).

- b) Exigent circumstances did not exist to permit entry into premises despite a reasonable belief that contraband was inside a residence.

People v. Coles, 105 AD3d 1360 (4<sup>th</sup> Dept. 2013)

2) Consent

- a) Although the consent of one occupant is insufficient to permit the police to search when another occupant is present and objects to the search, consent by one occupant will be sufficient when a non-consenting occupant has been

removed from the premises for reasons that are objectively reasonable.

Fernandez v. California, \_\_\_ US \_\_\_ (2014).

- b) The People fail to meet their heavy burden of establishing consent to permit the entry of the police by merely establishing that the defendant acquiesced to the entry of detectives who accompanied parole officers during a visit.

People v. Marcial, 109 AD3d 937 (2d Dept. 2013).

3) Plain View

A totality of circumstances can establish, by circumstantial evidence, that it was immediately apparent to a police officer that items were contraband or evidence of a crime.

People v. Taylor, 104 AD3d 431 (1<sup>st</sup> Dept 2013).

4) Search Incident to an Arrest

a) The People must establish:

- 1) the search is conducted contemporaneously with the arrest; and

- 2) the presence of exigent circumstances that arise from either:

- a) protecting the safety of the officer; or

- b) protecting evidence from destruction or concealment.

People v. Jiminez, \_\_\_ NY3d \_\_\_ (2014).

- b) A strip search can be conducted, incident to an arrest, if there is reasonable suspicion to believe that the arrestee is concealing evidence underneath clothing. Reasonable suspicion can be based upon:

- a) defendant's nervous or unusual conduct;
- b) an informant's tip; or
- c) circumstances of the arrest.

People v. Anderson, 104 AD3d 968 (3d Dept 2013).

- c) The police may conduct a search incident to arrest pursuant to an arrest for the commission of a Violation under the Penal Law.

People v. Gray, 41 Misc3d 133(A) (App Term, 1<sup>st</sup> Dist. 2013).

5) Workplace Exception

Pursuant to the "workplace" exception to the warrant requirement, the State may use a GPS device to monitor the movements of an employee. However, the placement of the device constitutes a

search and its use must be reasonable.

Matter of Cunningham v. NYS Dept. Of Labor, 21 NY3d 515 (2013); O'Connor v. Ortega, 480 US 709 (1987); Matter of Caruso v. Ward, 72 NY2d 432 (1988).

V. Automobiles

A. Automobile Stops

1. Probable cause to believe that the VTL has been violated provides an objectively reasonable basis for the police to stop a vehicle and there is no exception for infractions that are subjectively characterized as "de minimus".

People v. Peeler, 20 NY3d 447, 2013 NY Slip Op 01019 (2013).

2. Even if a police officer stops a vehicle for an offense for which there is no probable cause, the stop may still be valid if the officer observes other facts that provide probable cause to believe that a VTL violation has occurred.

People v. Carver, 41 Misc3d 853, 971 NYS2d 669 (Sup. Ct., Bronx Co. 2013).

3. The police can stop a vehicle when they reasonably suspect that a passenger is in possession of marijuana "in public view", a misdemeanor.

People v. Jasmin, 98 AD3d 525 (2d Dept 2012).

4. An irate passenger's act of "giving the finger", in and of itself, will not create reasonable suspicion to stop a vehicle.

Swartz v. Insogna, 704 F3d 105 (2d Cir 2013).

5. After a traffic stop, a police officer may not ask a motorist if there are any weapons

in the car without a founded suspicion of criminal activity.

People v. Garcia, 20 NY3d 317 (2012).

6. A vehicle checkpoint stop is impermissible if the primary purpose of the checkpoint is general crime control even if a secondary goal is promoting highway safety.

People v. Velez, 110 AD3d 449 (1<sup>st</sup> Dept. 2013).

B. Automobile Searches

1) Automobile Exception:

- a) There is no probable cause to search a vehicle where a police officer only detects the odor of marijuana emanating from a defendant's person after he exits the vehicle and where the officer neither smells any odor coming from inside the vehicle nor sees any smoke at any time.

People v. Smith, 98 AD3d 590 (2d Dept 2012).

- b) There is probable cause to search a vehicle for a weapon based upon the following:

- 1) a positive alert by a trained narcotic detection dog.

People v. Boler, 106 AD3d 1119 (3d Dept. 2012).

- 2) an overheard conversation in which a defendant uses a code word for handgun.

People v. Green, 100 AD3d 654, 953 NYS2d 152 (2d Dept. 2012).

- 3) a CI's tip that there is a quantity of cocaine in a car.

People v. Anderson, 104 AD3d 968 (3d Dept. 2013).

- 4) A totality of circumstances  
People v. Thompson, 106 AD3d 1134,  
963 NYS2d 780 (3d Dept. 2013).

## 2. Inventory Search

- a) Before an inventory search is conducted, the police may impound a car without having to inquire whether the passenger of the car, who was not the registered owner of the car, was licensed to drive it.

People v. Walker, 20 NY3d 122 (2012).

- b) An inventory search is lawful if:
  - 1) the officer testifies that the procedure he followed was to use a "property clerk's invoice" form or a "voucher" to record the items removed from the vehicle during the inventory; and
  - 2) the officer lifts up a seat (but does not remove it) in order to remove items.

People v. Walker, 20 NY3d 122 (2013).

People v. Taylor, 92 AD3d 961, 940 NYS2d 103  
(2d Dept 2012).

- c) An otherwise lawful inventory search is valid even if the following occurs:
  - 1) the police return some items to a

family member who was called to the precinct by the defendant to retrieve property;

- 2) the police officer searches slightly askew seat panels because he knows that contraband is frequently hidden there.

People v. Padilla, 21 NY3d 268 (2013).

- d) A police officer may search the spare tire compartment in the trunk of a car as part of an inventory search.

People v. Ramirez, 103 AD3d 444 (1<sup>st</sup> Dept. 2013).

### 3. Consent Search

- a) A reasonable person would understand that even an open-ended consent to look in a vehicle for anything a police officer "should know about", would not permit the officer to read a piece of mail.

Winfield v. Trottier, 710 F3d 49 (2d Cir 2013).

### 4. Protective Search for Weapons During Investigative Stop

A limited search of an automobile to search for the proceeds of a crime, absent probable cause, is unlawful.

People v. Baksh, \_\_\_ AD3d \_\_\_, 977-407 (2d Dept. 2014). Cf. People v. Leach, \_\_\_ AD3d \_\_\_, 2014 NY Slip Op 01114 (1<sup>st</sup> Dept. 2014).

VI. Motion to Suppress and Suppression Hearings

1. Defense counsel was ineffective when he failed to make use of available evidence that would have established the inaccuracy of the police officer's testimony.

People v. Villegas, 98 AD3d 427 (1<sup>st</sup> Dept 2012).

2. When reviewing a claim that a trial court committed error in not reopening a suppression hearing, an appellate court can reject the argument if, under either the hearing or trial testimony, the defendant would not have been entitled to suppression.

People v. Davis, 103 AD3d 810, 2013 NY Slip Op 01091 (2d Dept. 2013).

3. A defendant is not entitled to a suppression hearing where the defendant is provided certain documents including an application for a search warrant but, in the affidavit in support of the suppression motion the defendant merely alleges that the arrest is unlawful because the arresting officer "did not have specific information" about the defendant when he approached the defendant.

People v. Battle, 109 AD3d 1155 (4<sup>th</sup> Dept. 2013).

4. Defense counsel was ineffective for making numerous errors in seeking suppression including:  
a) filing an affidavit in support of suppression alleging facts from a different case; and

b) failing to alert the suppression court that it had relied on the wrong facts when denying suppression.

People v. Clermont, \_\_\_ NY3d \_\_\_, 2013 NY Slip Op 06806 (2013).

5. A suppression court is precluded from reopening a suppression hearing to give the prosecution an opportunity to shore up its evidentiary or legal position absent a showing that it was deprived of a full and fair opportunity to be heard.

People v. Kevin B, \_\_\_ NY3d \_\_\_, 2013 NY Slip Op 07761 (2013).