

CONTINUING LEGAL EDUCATION

Spring 2011

June 13, 2011

2011 Update in Search and Seizure Law

HON. BARRY KAMINS



SPONSORED BY:

APPELLATE DIVISION, FIRST AND SECOND JUDICIAL DEPARTMENTS

CO-SPONSORED BY:

**THE ASSIGNED COUNSEL PLAN OF THE CITY OF NEW YORK AND
NEW YORK STATE DEFENDERS ASSOCIATION**

RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW

By Hon. Barry Kamins

I. GENERAL FOURTH AMENDMENT PRINCIPLES

A. Probable Cause

1) Probable cause will not be established when:

- a. there is no indicia of criminal activity beyond the defendant's presence in the vicinity of the crime scene;**
- b. there is no detailed description of the perpetrator;**
- c. there is no evidence that the defendant matched the general description given by the victim except for race and height; and**
- d. there is no evidence that the defendant was the only individual in the vicinity of the crime scene.**

People v. Bradshaw, 76 A.D.3d 566 (2d Dept. 2010).

2) Probable cause must be measured by an objective standard - whether a reasonable person with the officer's expertise would have probable cause for the arrest.

People v. Crane, 26 Misc.3d 134(A)

(App. Term, 9th & 10th Jud. Dist. 2010).

3) An arrest based upon hearsay information, e.g. information from a confidential informant, will be illegal if it does not satisfy both prongs of Aguilar-Spinelli.

People v. Voner, 74 A.D.3d 1371, (2d Dept. 2010).

- 4) To establish probable cause, a police officer's general police experience and training permits the inference that he could identify marijuana even though the officer did not specifically testify as to his experience and training regarding marijuana.

People v. Tsouristakis, ___ A.D.3d ___, 2011 N.Y. Slip Op 02141 (1st Dept. 2011).

- 5) When a motorist is in possession of another person's driver's license, there is no probable cause to arrest the motorist for criminal impersonation when:

- a) the police do not ask the motorist to produce a driver's license; and
- b) the motorist does not offer the other person's license as his own.

People v. Omowale, ___ A.D.3d ___, 2011 N.Y. Slip Op 03348 (1st Dept. 2011).

B. Exclusionary Rule

DMV records are not suppressible as fruit of an unlawful stop of a vehicle; the governmental records are compiled independently of the motorist's arrest and the only link between the stop and the records is that the police learned the defendant's name and identity.

People v. Tolentino, 14 N.Y.3d 382 (2010), cert. granted 11/15/10 and cert petition later dismissed as improvidently granted.

C. Attenuation

- 1) **Voluntary consent to search can attenuate the taint of prior illegal police conduct when:**
 - a) **the consent is volunteered and not given upon the request of the police**
 - b) **the person giving the consent is not the subject of the police action**
 - c) **there is no evidence that the illegal entry was undertaken for the purpose of obtaining the consent; and**
 - d) **the police misconduct was not so flagrantly intrusive on personal privacy that its taint can't be dissipated.**

Matter of Leroy M., ___ N.Y.3d ___, 2011 N.Y. Slip Op 01068.

- 2) **Attenuation will occur when a confession is the product of an independently obtained statement from a witness and not the result of illegal detention of the defendant.**

People v. Bradford, 15 N.Y.3d 329 (2010).

- 3) **When a police officer engages in unlawful conduct and a defendant reacts by an immediate and spontaneous physical response that is proportionate, the officer's illegal conduct will not be attenuated and the exclusionary rule will apply. However, when the response is calculated and disproportionate to the officer's conduct, the illegality will be attenuated and the exclusionary rule will not be applied.**

People v. Holland, 74 A.D.3d 520 (1st Dept. 2010).

Cf. People v. Brown, ___ A.D.3d ___, 2011 N.Y. Slip Op 02066

(1st Dept. 2011) (no attenuation when defendant's act is in response to lawful police conduct).

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A. Right to Approach

The right to approach under level one may not be predicated merely on the fact that the area is a high crime area.

In Re Michael E., ___ A.D.3d ___, 2011 N.Y. Slip Op 03728 (1st Dept. 2011); People v. Miles, ___ A.D. 3d ___, 2011 N.Y. Slip Op 02035 (2d Dept. 2011).

B. Common Law Right to Inquire

1) The observation by police that the occupants of a vehicle, stopped for a VTL violation, are “acting nervous”, does not provide the police with a founded suspicion of criminal activity. Thus the police cannot ask a motorist if there are any weapons in the car.

People v. Garcia, ___ A.D.3d ___, 2011 N.Y. Slip Op 03306 (1st Dept. 2011). Cf. People v. Rodriguez, ___ A.D.3d ___, 2011 N.Y. Slip Op 00546 (1st Dept. 2011).

2) An anonymous tip giving a description of the location and clothing worn by an individual, pointing a BB gun and placing it in a bag, will provide a founded suspicion of criminal activity; this justifies asking the individual if he has a gun in the bag. Matter of Dominique W., ___ A.D.3d ___, 2011 N.Y. Slip Op 04384 (1st Dept. 2011).

C. Reasonable Suspicion

1) With respect to gravity knives:

a. A police officer must have reasonable suspicion to believe that an object is a gravity knife based upon:

a) training or experience

AND/OR

b) observable identifiable characteristics of the knife.

People v. Bannon, ___ N.Y.3d ___, 2011 N.Y. Slip Op 03676 (Ct. Of Appeals, 2011). See also, People v. Mendez, 68 A.D.3d 662 (1st Dept. 2009); People v. Herrera, 76 A.D.3d 891 (1st Dept. 2010).

2) A number of recent appellate cases have found reasonable suspicion to be lacking in a variety of scenarios:

a. an individual merely reaches for his waistband;

People v. Riddick, 70 A.D.3d 1421, 894 N.Y.S.2d 260 (4th Dept. 2010).

b. an individual is merely standing in a high crime area;

People v. Riddick, 70 A.D.3d 1421, 894 N.Y.S.2d 260 (4th Dept. 2010).

c. an individual is in the company of someone the police suspect has committed a crime; People v. Dean,

73 A.D.3d 801 (2d Dept. 2010).

d. an individual merely walking away with friends from a building after the police heard a shot in an unidentified location in the building. People v. Smalls, ___ A.D.3d ___, 2011 N.Y. Slip Op 03639 (2d Dept. 2011).

3) A frisk will not be justified when there is no evidence that:

1. the defendant acted furtively;
2. the defendant reached toward his waistband; or
3. there was a bulge in the defendant's waistband

People v. Mais, 71 A.D.3d 1163 (2d Dept. 2010). Cf. People v. Lopez, 71 A.D.3d 1518, 896 N.Y.S.2d 701 (4th Dept. 2010).

4) An anonymous tip will justify a stop if it corroborates both the identity and criminal conduct of the target.

People v. Argyris, ___ Misc.3d ___ (Sup. Ct., Queens Co. 2010) 7/6/10 NYLJ, p. 18

Cf. People v. Rios, 27 Misc.3d 963, 898 N.Y.S.2d 797 (Sup. Ct., Kings Co. 2010).

5) When an individual is seen running, and the flight is not in response to any encounter with the police, unless the police have reasonable suspicion that the defendant has committed a crime, they cannot chase him.

People v. Pirrillo, 78 A.D.3d 1424, 911 N.Y.S.2d 272 (3d Dept. 2010).

- 6) **Reasonable suspicion can be established by the manner in which a suspect is observed holding a bag, e.g. as if he were placing his fingers on a handgun inside the bag.**

**People v. Washington, 81 A.D.3d 991, 917 N.Y.S.2d 255
(2d Dept. 2011).**

III. ARRESTS

1. a. The police may enter a suspect's home without a warrant when sufficient exigent circumstances justify the entry, e.g.:
 - 1) the police have a strong reason to believe that the suspect is in the premises being entered; and
 - 2) a person exits the apartment who appears in distress.
- b. However, when the police learn the identity of a suspect and have probable cause to arrest, as more time passes, it becomes more prudent to apply for an arrest warrant before going to the suspect's home to effect the arrest.

People v. McBride, 14 N.Y.3d 440 (2010).

2. A custodial arrest is an unreasonable response to the commission of a traffic infraction (cell phone violation) and the subsequent seizure of a vehicle and inventory search are unlawful.

People v. Abdul-Akim, 27 Misc.3d 1220(A), 910 N.Y.S.2d 764 (Sup. Ct., Kings Co. 2010).

3. In executing an arrest warrant for a named person, the police may use reasonable force to enter the premises when the police have a reasonable belief that the suspect is present and admittance is not allowed after the required notice is given.

People v. Paige, 77 A.D.3d 1193 (3d Dept. 2010).

IV. SEARCH WARRANTS AND EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Search Warrants

- 1) Probable cause to search a premises does not necessarily establish probable cause to search all persons present at the time of the warrant's execution. A search of the individuals must be supported by facts, in the officer's affidavit, that establish a substantial probability that any persons present at the warrant's execution will possess evidence of the crime, e.g., an informant observed:
 - a) drugs in open view;
 - b) scales and drug paraphernalia were visible;
 - c) persons observed were using drugs;
 - d) evidence that a premises is a "drug factory".

People v. Mothersell, 14 N.Y.3d 358 (2010). See also, People v. Taylor, 28 Misc.3d 1055, 905 N.Y.S.2d 853 (County Court, Chemung Co. 2010).

- 2) Probable cause to search a suspect's home can be based on the fact that a person who has committed a crime elsewhere will frequently choose to hide the proceeds of the crime at his home; thus, probable cause can exist despite the absence of direct evidence linking the criminal conduct to the home.

People v. Shaw, 23 Misc.3d 1132(A) (Rochester City Court, 2010).

- 3) If a search warrant does not authorize a nighttime, all hours execution, but a magistrate does authorize a “no knock” warrant, and the warrant is executed after 9 P.M., the failure to comply with the procedural requirements for obtaining a nighttime search warrant may not be fatal.

People v. Sherwood, 79 A.D.3d 1286, 915 N.Y.S.2d 171 (3d Dept. 2010).

- 4) An application for a search warrant to install a GPS device as part of a burglary investigation is sufficient if it establishes:
- a) the suspect’s prior criminal history for burglaries; and
 - b) information identifying him as being near the scene of a burglary and driving away, carrying a plastic bag.

People v. Wilson, ___ A.D.3d ___, 917 N.Y.S.2d 677 (2d Dept. 2011).

- 5) Information supplying probable cause for a warrant is not stale even when the police initially learned facts over a year before the execution of the warrant, when

there are more recent facts revealing ongoing criminal activity.

People v. Harris, ___ A.D.3d ___, 920 N.Y.S.2d 850 (3d Dept. 2011).

- 6) A search warrant will be invalid if it does not identify the issuing court and the signature of the issuing judge does not clarify the issue.

People v. Gavazzi, ___ A.D.3d ___, 2011 N.Y. Slip Op 03682 (3d Dept. 2011).

- 7) In assessing probable cause in support of a search warrant, a statement taken from a defendant in violation of Miranda should be disregarded.

People v. Wahhab, ___ A.D.3d ___ (2011 N.Y. Slip Op 04079, 2d Dept. 2011). Contra: U.S. v. Patterson, 812 F.2d 1188 (9th Cir. 1987); U.S. v. Morales, 788 F.2d 883 (2d Cir. 1986).

B. Exceptions to the Requirement of a Search Warrant

1) Exigent Circumstances

In determining whether the police have created exigent circumstances, one must determine whether the police have violated the 4th Amendment, or threatened to do so, prior to the exigency; if so, the exigency will be police-created and will not justify a warrantless search.

Kentucky v. King, ___ U.S. ___ (2011). Cf. People v. McBride, 14 N.Y.2d 440 (2010).

2) Bodily Examinations for Drugs

- a) The execution of an “all-persons-present” warrant does not, in and of itself, authorize the police to conduct a strip search or body cavity search of those present in the premises. There must be reasonable suspicion that a particular person has secreted contraband beneath his or her clothes or in a body cavity.

People v. Mothersell, 14 N.Y.3d 358 (2010).

Kelsey v. County of Schoharie, 567 F.3d 54 (2d Cir. 2009).

- b) Although a police officer may lift a suspect’s shirt, unbuckle his pants and reach into his underwear, this conduct may not amount to a strip search.

People v. Contant, 77 A.D.3d 967 (2d Dept. 2010).

- c) A police officer may not conduct a visual body cavity search based merely upon the officer’s knowledge that drug sellers routinely secrete drugs in a body cavity, unless the officer observes some conduct supporting a reasonable suspicion that a particular suspect has hidden drugs.

People v. Colon, ___ A.D.3d ___, 913 N.Y.S.2d 658

(1st Dept. 2011)

3) Emergency Doctrine

- (a) Under the emergency doctrine, an officer must have an objectively reasonable basis to believe that medical assistance is needed or that a person is in danger.

Michigan v. Fisher, 130 S. Ct. 546 (2009).

- (b) Under New York's emergency search doctrine, entry into a home is permissible without a warrant if the police "reasonably believe" that emergency assistance is needed:

- (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
- (2) There must be some reasonable basis to associate the emergency with the area or place to be searched.
- (3) The search must not be primarily motivated by intent to arrest and seize evidence.

People v. Mitchell, 39 N.Y.2d 173.

(c) The United States Supreme Court has rejected the third prong of the Mitchell test.

Brigham City v. Stuart, 547 U.S. 398 (2006).

(d) As a result of Brigham City, an inquiry into the subjective motivations of the police is no longer necessary in determining whether the Fourth Amendment has been violated.

People v. Desmarat, 38 A.D.3d 913 (2d Dept. 2007).

(e) When the facts support an emergency under both Mitchell and Brigham City, a court will need not determine whether the New York Constitution requires retention of the “subjective motivation” prong of Mitchell.

People v. Rodriguez, 77 A.D.3d 280 (2d Dept. 2010), 2010 WL 3419223.

(f) Pursuant to the emergency exception, the police may not take photographs of evidence that was not reasonably related to the emergency and which bore no indicia of criminality.

People v. Olavarrueth, 74 A.D.3d 1361 (2d Dept. 2010).

g) The propriety of an emergency search must be measured by the totality of information available to the police.

People v. Jassan, ___ A.D.3d ___, 2011 N.Y. Slip Op

04294 (1st Dept. 2011).

4) Searches of Government Employees

Even assuming that an employee has a reasonable expectation of privacy in his or her text messages sent on a pager provided by the Government, and that a Government review of the transcript of the text message constitutes a search, the search will be reasonable if:

- (1) It is motivated by a legitimate work-related purpose; and
- (2) It is not excessive in scope.

City of Ontario v. Quon, ___ U.S. ___ 130 S. Ct. 2619 (2010).

5) Search Incident to an Arrest

A search of a backpack incident to an arrest, within the “grabbable area”, will be unlawful unless there is:

- a) a threat to the general public and/or the arresting officer; or
- b) there is a reason to protect evidence from concealment or destruction.

People v. Evans, ___ A.D.3d ___, 2011 N.Y. Slip Op 04087 (1st Dept. 2011).

V. Automobiles

A. Automobile Stops

1. Legal Standard for VTL Stop of an Automobile

- a) A traffic stop can be valid based upon the use of a “plate reader” (an image processing technology system) even when the officer has not adhered to police protocol in using this technology.

People v. Davila, 27 Misc.3d 921 (Sup. Ct., Bronx Co. 2010).

- b) When a police officer stops a motor vehicle for speeding based on a police officer’s estimate of the speed of a moving vehicle, the People have the burden of establishing that:

- 1) the officer was trained visually to estimate the speed of a moving vehicle; or
- 2) the officer’s practical experience qualified him to make such an estimate.

People v. Donnelly, ___ Misc.3d ___, 2010 N.Y. Slip Op 52376(u) (App. Term, 9th & 10th Jud. Dists. 2010).

2. Duration of the VTL Stop

- a) A canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under Article I Section 12 of the State Constitution.
- b) Law enforcement need only have a founded suspicion that criminal activity is afoot, before conducting a canine sniff of the exterior of a vehicle.

People v. Devone, 15 N.Y.3d 106 (2010).

- c) The police may not unreasonably extend the duration of a VTL stop; a duration of five to six minutes does not seem unreasonable. *U.S. v. Harrison*, 606 F3d 42 (2d Cir. 2010).
- d) When a motorist cannot locate a driver's license or other necessary documents, a police officer cannot direct the motorist to empty the glove compartment and console. This constitutes an impermissible search of the vehicle and any contraband will be suppressed. *People v. Alvarado*, 28 Misc.3d 732, 905 N.Y.S.2d 483 (Dist. Ct., Nassau Co. 2010).
- e) During a lawful traffic stop, if a police officer has a founded suspicion of criminal activity (level 2), he or she can ask whether the motorist has any weapons or anything else he is not supposed to have. *People v. Rodriguez*, ___ A.D.3d ___, 2011 N.Y. Slip Op. 00546 (1st Dept. 2011). Cf. *People v. Garcia*, ___ A.D.3d ___, 2011 N.Y. Slip Op 03306 (1st Dept. 2011).

3. Stop of Car Based on Criminal Activity

When the police position their car behind a motorist's vehicle in such a manner as to prevent the individual from driving away, the motorist has been seized; the seizure must be based upon reasonable suspicion to believe that a crime has been committed.

People v. Layou, 71 A.D.3d 1382 (4th Dept. 2010).

Cf. People v. Dean, 73 A.D.3d 801 (2d Dept. 2010).

B. Right to Approach a Parked Car

The police lack an objective, credible reason to approach a car parked outside a bar, merely because there have been “community complaints” of gang and drug activity in the area.

People v. Miles, ___ A.D.3d ___, 2011 N.Y. Slip Op 02035 (2d Dept. 2011).

C. Automobile Exception

1. While the smell of burning marijuana, emanating from a vehicle can provide probable cause to search the vehicle, the smell of unburnt marijuana in a bag will not provide probable cause unless the officer can demonstrate a familiarity with the smell of unburnt marijuana.

People v. Kim, ___ Misc.3d ___, (District Court, Nassau Co. 10/28/10).

2. Pursuant to the automobile exception, the police may search

a container magnetically attached to the undercarriage of a car.

People v. Howard, ___ A.D.3d ___ 2011 N.Y. Slip Op. 00545.

D. Protective Search for Weapons During Investigative Stop

A police officer may search a limited area of a vehicle where numerous factors create an actual and specific danger to the officer, i.e. a substantial likelihood of a weapon in the car.

**People v. Omowale, ___ A.D.3d ___, N.Y. Slip Op 03348
(1st Dept. 2011).**

VI. Suppression Hearings

1. An appellate court can reverse and make a new finding of facts when it does not accept a suppression court's decision to discredit testimony.

People v. Rodriguez, 77 A.D.3d 280 (2d Dept. 2010).

2. The Court of Appeals has granted leave to determine whether the People can raise standing for the first time on appeal, when they do not raise the issue before the suppression court either in motion papers or during a hearing.

People v. Hunter, 70 A.D.3d 1343 (4th Dept. 2010), lv. granted.

3. A suppression hearing may be denied when the defendant, in his motion papers, fails to raise a factual issue or dispute as to:
 - a) whether he fit the description of a person described in a search warrant;
 - b) whether he was the subject of a body cavity search.

People v. Yusuf, ___ A.D.3d ___, 2011 N.Y. Slip Op 01573 (1st Dept. 2011).