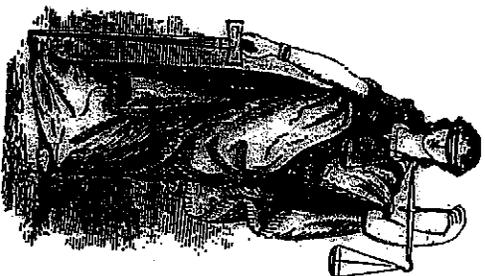

CONTINUING LEGAL EDUCATION

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2013 Update in Search and Seizure Law

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) Probable cause does not turn on whether an individual actually committed a crime. The question is whether there was a basis for a reasonable officer to believe, even if incorrectly, that the individual committed the crime.

Fabrikant v. French, 691 F3d 193, 2012 US App Lexis 17254 (2d Cir 2012).

2) Probable cause can be based upon the accusation of an identifiable citizen, absent materially impeaching circumstances. Neither the mere denial by the accused nor the fact that the police do not conduct a more extensive investigation, will negate the existence of probable cause.

Medina v. City of New York, 102 AD3d 101, 953 NYS2d 43 (1st Dept. 2012).

3) 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 (1st Dept.2013).

- 4) 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).

B. Standing

- 1) A bystander (A) has standing to challenge the underlying basis for arresting a person standing next to the bystander (B), when the same information the police rely upon to arrest B supplies their justification to forcibly detain A.

People v. McLoyd, 35 Misc.3d 822, 2012, 946 NYS2d 829 (Sup. Ct., N.Y. Co. 2012).

- 2) A defendant has no proprietary interest in the user information on his or her Twitter account and thus has no standing to quash a subpoena for the contents of the information in tweets that are publicly posted.

People v. Harris, 36 Misc3d 613 (NYC Crim Ct 2012)

- 3) A defendant has no standing to challenge the search or seizure of evidence on the porch of a multi-apartment house because it is a common area accessible to other tenants and their guests.

People v. Lovejoy, 92 AD3d 1080 (3d Dept 2012).

- 4) 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, ___ Misc3d ___, 959 NYS2d 868 (County Court, Monroe Co. 2013).

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A. Right to Approach

1. As part of a patrol in a NYC Housing Authority building, a police officer can approach an individual who enters the building through a door with a broken lock, goes upstairs, returns to the lobby in a few minutes and who looks "familiar", either from a wanted poster or a trespass program.

People v. Wanamaker, 93 AD3d 426, 939 NYS2d 411 (1st Dept 2012).

2. In response to a recent federal lawsuit challenging the trespass affidavit program in private residential buildings, the Police Department has issued a new Patrol Guide Order #212-59. Pursuant to the order, police officers may approach an individual in a

trespass affidavit building only if he or she has an objective credible reason to do so. Under prior case law, some courts had held that an initial approach could be based merely upon the fact that an individual was observed in a trespass affidavit building.

People v. Anderson, 306 AD2d 54 (1st Dept. 2003)

People v. Tinort, 272 AD2d 206 (1st Dept 2000); People v. Dozier, 12 Misc3d 128A (App Term, 1st Dept 2006).

B. Common Law Right to Inquire

1) 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).

2) During a lawful common law inquiry, a police officer may seize a knife which is plainly visible to the officer due to the suspect's own movements.

People v. Miranda, 19 NY3d 912 (2012).

3) A common law inquiry cannot be used to detain an individual for more than a temporary period for the purpose of investigating a crime.

People v. Lee, 96 AD3d 1522 (4th Dept 2012).

C. Reasonable Suspicion

1) With respect to a stop:

- a. Where A is in the company of B, whom the police intend to arrest, A's mere presence does not permit the police to forcibly detain A by pushing him and holding him against a wall.

People v. McLoyd, 35 Misc3d 822, 946 NYS2d 829 (Sup Ct, NY Co 2012).

- b. A verbal command by a police officer, e.g. "stop", while an officer's gun is drawn, constitutes a seizure requiring reasonable suspicion.

People v. Moore, 93 AD3d 519 (1st Dept 2012).

- c. Information from a person whose identity is unknown can establish reasonable suspicion when:
- a) there is a face-to-face encounter;
- b) the witness states her basis of knowledge;
- c) the witness' statement is an excited utterance; and
- d) the urgency of the situation prevents the police from obtaining the witness' name.

People v. Colon, 95 AD3d 420, 942 NYS2d 542

(1st Dept 2012).

d. A “tensing” of a suspect’s arm around the vicinity of his waistband, even coupled with flight, does not constitute reasonable suspicion. People v. Carmichael, 92 AD3d 687, 938 NYS2d 197 (2d Dept 2012).

2) With respect to a stop and frisk:

a. 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 (1st Dept 2012).

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

1) 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 (1st Dept 2012).

- 2) 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 (1st Dept 2012).

- 3) 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).

- 4) Where an individual, during a common law inquiry:
- a) turned his left shoulder towards the officer;
 - b) stated unresponsively that he did not have any drugs on him;

c) continued to talk on his cell phone;
and

d) attempted to block the officer's hand as the officer reached toward his pocket to feel a pocket bulge.

People v. Gerard, 94 AD3d 592 (1st Dept 2012).

5) 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).

c. A police officer can conduct a lawful frisk when the officer has a reasonable suspicion to believe that a suspect is carrying a dangerous knife based upon:

- 1) observations that a knife was in the back pocket of a compartment running the length of a backpack;
- 2) knowledge that a suspect was wearing clothing of a color and style typically worn by youths associated with a gang; and
- 3) experience in making arrests for the possession of illegal knives

carried in a particular type of
backpack.

Matter of Mateo, F., 95 AD3d 1314, 945 NYS2d 372,
(2d Dept 2012).

d. Although a police officer may be justified in
conducting a frisk for a weapon, during the
frisk the officer may not remove a bag and
search its contents.

People v. Bracy, 91 AD3d 1296 (4th Dept 2012).

3) With respect to flight:

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.

People v. Pitman, 102 AD3d 595 (1st Dept. 2013); People v.

Lacy, ___ AD3d ___, 2013 NY Slip Op 01458 (1st Dept 2013). See
also People v. Pines, 281 AD2d 311 (1st Dept 2001); People v.
Randolph, 278 AD2d 52 (1st Dept 2000).

III. ARRESTS

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 US 1409 (2013).

2) 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, ___ NY3d ___, 2013 NY Slip Op 01992 (2013).

3) A request for cellsite location information pursuant to a court order under 18 USC 2703(d), supported by probable cause, is the equivalent of a valid search warrant.

People v. Sorrentino, 93 AD3d 450 (1st Dept 2012).

4) When there is a passage of time, courts will also assess the nature of the property sought in determining staleness.

People v. Miller, 93 AD3d 882, 939 NYS2d 186 (3d Dept 2012).

5) When a warrant does not authorize a nighttime search, a search will be lawful if it commences before 9 P.M. but extends past that time.

People v. Pena, 95 AD3d 541 (1st Dept 2012).

6) The United States Supreme Court has held that the prosecution may seek a warrant to obtain evidence that may be used for impeachment purposes and not as part of its case-in-chief.

Messerschmidt v. Millender, 132 S Ct 1235 (2012).

7) 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).

- 8) 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 (1st Dept. 2013);

People v. Weaver, 12 NY3d 433 (2009).

- 9) 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).

- 10) 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).

B. Exceptions to the Requirement of a Search Warrant

- 1) Search Incident to an Arrest
- a) A search of a cigarette box incident to an arrest, was lawful because
 - a) the police reasonably believed the box contained narcotics;

- b) the defendant could easily have taken steps to destroy the contents; and
- c) the officer looked into the box in close spatial and temporal proximity to the defendant's arrest.

People v. Luna, 35 Misc3d 1204(A)
(NY Sup Ct 2012)

- b) A search of a purse was unlawful because
- a) the People failed to establish any exigency, and
- b) the purse was no longer under the control of the arrestee.

People v. Warner, 94 AD3d 916 (2d Dept 2012).

2) Search of Prisoners

- a) Prison officials may conduct strip searches of individuals arrested for any offense, however minor, before admitting them to jails even if the officials have no reason to suspect the presence of contraband.

Florence v. Board of Chosen Freeholders,
132 S Ct 1510 (2012).

b) In determining the right of officials to seize property from a civilly committed individual, a court must balance both the state's interest in maintaining security and the individual's treatment against the individual's property interest in what is being seized.

Ahlers v. Rabinowitz, 684 F3d 53 (2d Cir 2012).

3) Emergency Searches

a) Courts should be cautious about second guessing a police officer's assessment of a danger present in an emergency situation.

Ryburn v. Huff, ___ US ___, 132 S. Ct. 987 (2012).

b) 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 ___ (2013).

4) 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, ___ AD3d ___, 2013 NY Slip Op 01466

(1st Dept 2013).

5) Search Incident to an Arrest

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, ___ AD3d ___, 2013 NY Slip Op 01439
(3d Dept 2013).

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. The police may stop a vehicle based upon

consideration of public safety even when an actual violation of the VTL is not detectable.

People v. Gill, 37 Misc3d 24 (App Term, 2012);

People v. Mahneke, 935 NYS2d 440 (App Term, 9th & 10th Dist. (2011)).

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).

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 an overheard conversation in which a police officer heard the defendant say he had a “slammy” on him, a term the officer understood to mean a gun.

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

c) There is probable cause to search a vehicle for drugs when, after a CI buys drugs from the defendant in a vehicle, the CI informs the police that there is a large quantity of cocaine in the car.

People v. Anderson, ___ AD3d ___, 2013 NY Slip Op 01439 (3d Dept 2013).

2. Protective Search for Weapons During

Investigative Stop

- a) The belief that there is a substantial likelihood of a weapon in a car must be based upon “objective indicators”.

People v. Newman, 96 AD3d 34, 942 NYS2d 93 (1st Dept 2012). See also, People v. Hackett, 47 AD3d 1122 (3d Dept 2008).

3. 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) 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 (1st Dept. 2013).

4. Consent Search

- a) In measuring the scope of a consent search, courts must apply a standard of objective reasonableness: what would a reasonable person have understood by the exchange between the officer and the motorist.

People v. McFarlane, 93 AD3d 467 (1st Dept 2012).

- b) A reasonable person would understand that 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. Trotter, 710 F3d 49 (2d Cir 2013).

VI. Suppression Hearings

1. An appeal from a suppression of evidence may be taken from an oral decision as well as a written order.
People v. Elmer, 19 NY3d 501 (2012).
2. Defense attorney was not ineffective at a suppression hearing even though he:
 - a) filed an affidavit in support of a motion to suppress in which he cited facts from a different case; and
 - b) failed to alert the suppression court that the court relied on the wrong facts when denying suppression.People v. Clermont, 95 AD3d 1349 (2d Dept 2012).
3. 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 (1st Dept 2012).
- 4) A defendant is entitled to Brady material prior to a suppression hearing.
People v. McCutcheon, 96 AD3d 580 (1st Dept. 2012).
5. When a prosecutor reads into the record, at a defendant's arraignment, a detailed account of the

events leading to the defendant's arrest, the defendant can be denied a suppression hearing if he does not utilize the information given at the arraignment to address the People's allegations that he engaged in specific illegal conduct.

People v. Miller, 92 AD3d 520 (1st Dept 2012).

6. The People can satisfy their burden of going forward to establish a lawful vehicular stop by offering credible evidence that a videotape of the incident corroborates the testimony of one of the police officers.

People v. Williams, 34 Misc3d 148(A) (App Term, 9th and 10th Jud Dist 2012).

7. Under the "fellow officer" doctrine, once the defendant challenges the underlying reliability of the information received by an officer from the sending officer, the People's failure to offer any evidence of reliability will result in suppression.

People v. McLoyd, 35 Misc3d 822 (NY Sup Ct 2012).

8. On rare occasions, an appellate court will reverse a lower court's ruling that is based upon an assessment of credibility; the appellate may do so when:

- a) the inconsistencies in testimony were not as great as the lower court had determined;

b) the officer's reason for not completely recording an encounter on his cellular device was rational; and

c) the lower court improperly drew an adverse inference from the officer's failure to take photographs of part of the roadside encounter.

People v. Wallgren, 94 AD3d 1339 (3d Dept 2012).

9. The People failed to go forward with credible testimony when an officer testified that he recognized the smell of marijuana emanating from a vehicle but the only marijuana found in the vehicle was in a closed plastic bag inside a motorist's pocket.

People v. Howington, 96 AD3d 1440 (4th Dept 2012).

10. 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).

VII. Miscellaneous

Law enforcement officials may not use excessive force, e.g. the use of a taser, to obtain a buccal swab for the purpose

of obtaining a DNA sample when a suspect does not
physically resist the police.

People v. Smith, 95 AD3d 21, 940 NYS2d 573 2012
(4th Dept 2012).