

CONTINUING LEGAL EDUCATION

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2012 UPDATE IN SEARCH AND SEIZURE LAW

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RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW

By: Hon. Barry Kamins

I. GENERAL FOURTH AMENDMENT PRINCIPLES

A. Probable Cause

- 1) 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 the identification of marijuana.

People v. Tsouristakis, 82 A.D.3d 612 (1st Dept. 2011)

- 2) 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, 83 A.D.3d 614 (1st Dept. 2011), aff'd in part, dismissed in part, 2011 N.Y. Slip Op 8964 (2011)

- 3) Probable cause to believe an individual is in possession of a controlled substance can be based upon the following observations by a police officer in a drug-prone area:
 - a) suspect's left hand and another person's right hand touch several times for up to 30 seconds; and
 - b) a plastic bag with white powder is seen in suspect's closed fist.

People v. Martin, 88 A.D.3d 473 (1st Dept. 2011)

- 4) Probable cause to believe a suspect has sold drugs can be based upon:
 - a) a police officer's observations that the suspect has engaged in a hand-to-hand drug transaction on a porch of a 3 story building; and
 - b) a drug detection dog's alert to the presence of narcotics on the porch.
- 5) Although the police are in possession of facts that tie a defendant to the crime that is being investigated, the facts may only give rise to reasonable suspicion, rather than probable cause.

People v. Ayers, 85 A.D.3d 1563 (4th Dept. 2011)

- 6) During a vertical patrol, a police officer would have probable cause to arrest a suspect found inside the building based upon:
 - a) his inability to identify any apartment as his residence; and
 - b) the fact that a friend resided in the building without evidence that the friend had invited the suspect into the building.

People v. Lozado, ___ A.D.3d ___, 2011 Slip Op 04539

(1st Dept. 2011)

B. Exclusionary Rule

1) 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.

2) Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule, even if the binding precedent is later overruled.

Davis v. United States, 131 U.S. 2419 (2011)

3) A defendant's confession will be suppressed if it is the product of an unlawful common law inquiry.

People v. Garcia, 85 A.D.3d 28 (1st Dept. 2011)

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., 16 N.Y.3d 243 (2011)

2) 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, 82 A.D.3d 585 (1st Dept. 2011) (no attenuation when defendant's act is in response to lawful police conduct).

D. Standing

- 1) A taxicab owner has no reasonable expectation of privacy in the information generated and stored by a GPS device installed in his cab.

People v. Suleman, ___ Misc.3d ___, N.Y.L.J. July 13, 2011
(Crim. Ct., N.Y. Co. 2011)

- 2) 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, ___ Misc.3d ___, 2012 N.Y. Slip 22027
(Sup. Ct., N.Y. Co. 2012)

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A. Right to Approach

1. 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 F., 84 A.D.3d 468, 2011 N.Y. Slip Op 03728 (1st Dept. 2011); People v. Miles, 82 A.D. 3d 1010, 2011 N.Y. Slip Op 02035 (2d Dept. 2011). Cf. People v. Gandy, 85 A.D.3d 1595, 2011 N.Y. Slip Op 04887 (4th Dept. 2011); People v. Ramos, 60 A.D. 3d 1317 (4th Dept. 2009)

2. 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, ___ A.D.3d ___, 2012 N.Y. Slip Op 01572 (1st Dept., 2012)

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, 85 A.D.3d 28, 923 N.Y.S.2d 433 (1st Dept. 2011).

Cf. People v. Rodriguez, 81 A.D.3d 404 (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., 84 A.D.3d 657 (1st Dept. 2011)

3) Where a police officer observes an individual who is dressed inappropriately for the weather, crouching behind a car, holding something near his waistband or inside his sweatshirt, a police officer only has a common law right to inquire and to ask him to remove his hands from his pockets as a precautionary measure.

People v. Fernandez, 87 A.D.3d 474 (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. Brannon (Fernandez), 16 N.Y.3d 596 (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);

People v. Miranda, 76 A.D.3d 466 (1st Dept. 2010), leave granted.

- 2) Reasonable suspicion can be based upon the totality of information known to the police at the time a suspect is detained; the police are then permitted to pat down a bag dropped by the suspect, within his grabbable area, when the police have reason to suspect the presence of a gun in the bag.

People v. Bowden, 87 A.D.3d 402 (1st Dept. 2011)

- 3) 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)

- 4) A number of recent appellate cases have found reasonable suspicion to be lacking in a variety of scenarios:
- a. 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, 83 A.D.3d 1103 (2d Dept. 2011)
 - b. an individual who takes flight when there are no other sufficient factors that, in combination with the flight, would constitute reasonable suspicion. People v. Beckett, 88 A.D.2d 898, 931 N.Y.S.2d 126 (2d Dept. 2011); People v. Crawford, 89 A.D.2d 422, 931 N.Y.S.2d 313 (1st Dept. 2011)
 - c. an individual who “tenses” his arm around the vicinity of his waistband, even coupled with his flight from the police. People v. Carmichael, ___ A.D.3d 689 (2d Dept. 2010). See also People v. Cadle, 71 A.D.3d 689 (2d Dept. 2010)
- 5) 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, ___ A.D.3d ___, 2012 N.Y. Slip Op 00566 (4th Dept. 2012)

6) 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, ___ Misc.3d ___, N.Y. Slip 22027 (Sup. Ct., N.Y. Co. 2012)

III. ARRESTS

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), aff'd N.Y.3d 816 (2011).

IV. SEARCH WARRANTS AND EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Searches and Search Warrants

- 1) A search occurs either when
 - a) a trespass occurs for the purpose of obtaining information, e.g. installing a GPS device on a vehicle for the purpose of monitoring the vehicle's movements on public streets; or
 - b) the Government's conduct violates a reasonable expectation of privacy

United States v. Jones, ___ U.S. ___ (Jan. 23, 2012)

- 2) No search warrant is required for cell site-location information when the records do not constitute a protracted surveillance.

People v. Hall, 86 A.D.3d 450 (3 days) (1st Dept. 2011).

Cf. Matter of an Application of the U.S. for an Order Authorizing the Release of Historical Cell Site Information, ___ F.Supp. 2d ___, 10-MC-897 (E.D.N.Y. 2011), 2011 WL 3678934 (warrant required for 113 days of cell site location information)

- 3) 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, 82 A.D.3d 797, 917 N.Y.S.2d 677 (2d Dept. 2011)

- 4) a) 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, 83 A.D.3d 1220, 920 N.Y.S.2d 850

(3d Dept. 2011)

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

People v. Miller, ___ A.D.3d ___, 2012 N.Y. Slip Op 01520

(3d Dept. 2012)

- 5) 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, 84 A.D.3d 1427 (3d Dept. 2011)

- 6) 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, 84 A.D.3d 982 (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)

- 7) A search warrant will be defective if it fails to satisfy the Aguilar-Spinelli standard. Police conduct can also be criticized because of the manner in which a warrant is executed.

Delgado v. City of New York, 86 A.D.3d 502 (1st Dept. 2011)

- 8) The Fourth amendment requires that a search, pursuant to a lawful search warrant, be conducted within a reasonable time. In addition, should the police conduct a search of a computer, a later and more thorough search does not require a second search warrant.

People v. Deprospero, ___ A.D.3d ___, 2011 N.Y. Slip Op 08421 (4th Dept. 2011)

B. Exceptions to the Requirement of a Search Warrant

- 1) In determining whether the police have created exigent circumstances, one must determine whether the police have violated the Fourth 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, 131 U.S. 1849, 131 S. Ct. 1849 (2011)

Cf. People v. McBride, 14 N.Y.2d 440 (2010)

2) Bodily Examinations for Drugs

A police officer may not conduct a visual body cavity search 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, 80 A.D.3d 440, 913 N.Y.S.2d 658

(1st Dept. 2011)

3) Emergency Doctrine

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

People v. Jassan J., 84 A.D.3d 620 (1st Dept. 2011)

4) 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, 84 A.D.3d 573 (1st Dept. 2011)

V. Automobiles

A. Automobile Stops

1. Duration of the VTL Stop

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, 81 A.D.3d 404 (1st Dept. 2011)

Cf. People v. Garcia, 85 A.D.3d 28, 923 N.Y.S.2d 433

(1st Dept. 2011)

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, 82 A.D.3d 1010 (2d Dept. 2011)

Cf. People v. Gandy, 85 A.D.3d 1595, 2011 N.Y. Slip Op 04887

(4th Dept. 2011)

C. Automobile Exception

Pursuant to the automobile exception, the police may search a container magnetically attached to the undercarriage of a car.

People v. Howard, 81 A.D.3d 404 (1st Dept. 2011)

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, 83 A.D.3d 614 (1st Dept. 2011), aff'd in part, dismissed in part, 2011 N.Y. Slip Op 8964 (2011)

E. Inventory Search

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. Taylor, ___ A.D.3d ___, 2012 N.Y. Slip Op 01622 (2d Dept. 2012)

VI. Suppression Hearings

1. The People cannot 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, 17 N.Y.3d 725 (2011)

2. 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 address the People's allegations that he engaged in specific illegal conduct. People v. Miller, ___ A.D.3d ___, 2012 N.Y. Slip 01132 (1st Dept. 2012)

3. The right to counsel at a suppression hearing is constitutionally guaranteed at a suppression hearing. However, the deprivation of counsel does not always mandate an automatic remand for a de novo hearing; the issue is subject to a harmless error analysis. People v. Strothers, 87 A.D. 431 (1st Dept. 2011)

4. The denial of an adjournment of a suppression hearing will not be an abuse of discretion if the court considers, among other factors:
 - a) whether due diligence was exercised by a party in attempting to produce a witness;
 - b) whether the testimony of the witness would be material and favorable to a party;
 - c) whether the witness will be available at a later date; and
 - d) whether the evidence would be merely cumulative of other evidence.

People v. Apelbaum, 33 Misc.3d 4, 930 N.Y.S.2d 401 (App Term, 9th & 10th Dist. 2011)

5. 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, 82 A.D.3d 424 (1st Dept. 2011)

6. In reviewing a suppression issue on appeal, the Appellate Division, and the Court of Appeals, lack authority under CPL 470.15 to consider an alternate legal theory raised below but rejected by the trial court.

People v. Concepcion, 17 N.Y.3d 192, (2011). See also, People v. Washington, ___ A.D.3d ___, 2012 N.Y. Slip Op 00401 (1st Dept. 2012)

7. A suppression court is not permitted to conduct an experiment after the close of the hearing without informing the parties.

People v. Allen, ___ A.D.3d ___, 933 N.Y.S.2d 756
(3d Dept. 2011)