

CONTINUING LEGAL EDUCATION

SPRING 2016

APRIL 28, 2016

SEARCH AND SEIZURE LAW: UPDATE 2016

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Appellate Division, First Department and the
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RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW

By Hon. Barry Kamins

I. GENERAL FOURTH AMENDMENT PRINCIPLES

A. Probable Cause

There is no probable cause to arrest for disorderly conduct when a verbal exchange between a police officer and a citizen does not rise to the level of a potential or immediate public problem.

People v. Gonzalez, 25 N.Y.3d 1100 (2015).

B. Exclusionary Rule

1) Despite the fact that a search warrant is defective because it is based upon stale information, the exclusionary rule will not be applied when the officer relies in good faith upon the warrant and the officer is not grossly negligent in seeking the warrant.

United States v. Raymonda, 780 F.3d 105 (2d Cir. 2015). *Cf. United States v. Bershchansky*, 788 F.3d 102 (2d Cir. 2015).

2) The exclusionary rule is applicable to a violation of probation hearing.

People v. Robinson, 128 A.D.3d 1464 (4th Dept. 2015).

C. Standing

1) 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. Morris, 126 A.D.3d 813 (2d Dept. 2015); *People v. Theodore*, 114 A.D.3d 814, 980 N.Y.S.2d 148 (2d Dept. 2014).

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A. Right to Approach

1. A police officer, while about to conduct a vertical patrol, may approach an individual standing in the lobby of a TAP building and ask a person what he is doing there; if the individual cannot identify the “friend” he claimed he was visiting and acknowledges he does not live there, the officer can arrest him for criminal trespass.

People v. Barksdale, 26 N.Y.3d 139 (2015).

2. A police officer has a right to approach an individual who is present in the vestibule of a public housing building for more than five minutes with no circumstances explaining his presence.

People v. Donald R., 127 A.D.3d 575 (1st Dept. 2015).

3. 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, ___ A.D.3d ___, 2016 N.Y. Slip Op 02184 (4th Dept. 2016).

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 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).

3. When exercising their right to inquire, the police may encounter a situation which they perceive that their safety is in jeopardy. In such cases, the police can engage in a precautionary measure, *e.g.* requesting that the individual make his hands visible.

People v. Abdul-Mateen, 126 A.D.3d 986 (2d Dept. 2015); *Matter of Shariff H.*, 123 A.D.3d 714 (2d Dept. 2014).

a. However, the police may not take the more intrusive step in asking an individual to lift his shirt.

Matter of Shakir J., 119 A.D.3d 792 (2d Dept. 2014). *See also*, *People v. Johnson*, 54 N.Y.2d 958 (1981) (not proper to ask a suspect to open his coat).

4. The odor of stale or burnt marijuana coming from the clothing of an individual on the street, will provide a police officer with a founded suspicion of criminality justifying a common-law inquiry.

People v. Brukner, ___ Misc. 3d ___, 2015 N.Y. Slip Op 25434 (Ithaca City Ct. 2015).

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

People v. Hall. ___ Misc. 3d ___, 2016 N.Y. Slip Op 50364U (County Ct. Monroe Co. 2016).

C. Right to Stop

1. No reasonable suspicion where clothing worn by a group of men did not match the clothing described in a report of the crime; there was nothing unique about four men walking together late on a summer evening; the fact that they left a building which was located in the housing project from which the radio run had reported the robbers were running, was not strongly indicative that this was the same group.

People v. Thompson, 127 A.D.3d 658 (1st Dept. 2015).

2. The flight of one member of a group cannot be imputed to other members of the group as a whole as consciousness of guilt.

People v. Thompson, 127 A.D.3d 658 (1st Dept. 2015).

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 without an arrest warrant even if they have probable cause.

People v. Gonzalez, 111 A.D.3d 147, 972 N.Y.S.2d 642 (2d Dept. 2013); *People v. Riffas*, 114 A.D.3d 810, 979 N.Y.S.2d 706 (2d Dept. 2014).

a. The “threshold” of a residence is the area between the door jambs.

People v. Mendoza, 49 Misc. 3d 1007 (Sup. Ct. N.Y. Co. 2015).

2. When the police stand outside the threshold of an apartment and tell the occupant, who is standing inside the apartment, that he is under arrest, the police have violated *Payton* by engaging in an “across the threshold arrest.”

United States v. Allen, ___ F.3d ___ (2d Cir. 2016).

IV. Search Warrants and Exceptions to the Warrant Requirement

A. Searches and Search Warrants

1. When a valid search warrant authorizes the seizure of a computer, the target has no cause of action for damages if the computer is not returned until several months after the target's sentence and even if the computer was retained without any legitimate law enforcement purpose.

LM Bus Assoc. v. State of New York, 124 A.D.3d 1215 (4th Dept. 2015).

2. Placement of a tracking device on a recidivist sex offender without consent, for the purpose of tracking that individual's movement constitutes a search under the Fourth Amendment.

Grady v. North Carolina, 575 U.S. ___, 135 S. Ct. 1368 (2015).

3. A) The Government's retention of a defendant's computer records for two-and-a-half years after executing a warrant was unreasonable; this improperly enabled the Government to possess records that were beyond the scope of the warrant while it looked for other evidence to give it probable cause to search the files.

United States v. Ganius, 755 F. 3d 125 (2d Cir. 2014); *rehearing en banc, granted*, 791 F. 3d (2d Cir. 2015).

B) In the absence of a search warrant, the Government cannot indefinitely retain custody of bank accounts that were originally seized with a warrant based on exigent circumstances.

United States v. Cosme, 796 F. 3d 226 (2d Cir. 2015).

4. An online social networking service, served with a warrant for a customer account, and assuming it has standing, cannot challenge the warrant before it is executed.

In re 381 Search Warrants Directed to Facebook, Inc. v. New York County District Attorney's Office, 132 A.D.3d 11, 14 N.Y.S.3d 23 (1st Dept. 2015) *leave granted*.

5. An application for a search warrant will be defective if it contains no specific factual allegations that tie a residence to the evidence sought.

People v Moxley, ___ A.D.3d ___, 2016 N.Y Slip Op 02192 (4th Dept. 2016).

B. Exceptions to the Requirement of a Search Warrant

1. Search Incident to an Arrest

a. People fail to establish exigent circumstances when the defendant's jacket is outside the defendant's grapple area, the

defendant is handcuffed, and sitting in a vehicle.

People v. Morales, 126 A.D.3d 43 (1st Dept. 2015).

b. People established exigent circumstances; reasonable belief that a backpack contained a weapon.

People v. Alvarado, 126 A.D.3d 803 (2d Dept. 2015).

c. The People must establish that at the time a search is conducted, an arrest has been made or the police have actually formulated an intent to effectuate an arrest.

People v. Mangum, 125 A.D.3d 401 (1st Dept. 2015).

d. Body Cavity Searches

1. A manual body cavity search cannot be conducted without a warrant unless exigent circumstances exist; the presence of an object containing drugs in a suspect's rectum will not, in and of itself, create exigent circumstances.

People v. Nicholas, 125 A.D.3d 1191 (3d Dept. 2015).

2. A visual cavity search based upon reasonable suspicion in which the suspect removes an object from his rectum and gives it to the police will not be a violation of the Fourth Amendment.

People v. Cogdell, 126 A.D.3d 1136 (3d Dept. 2015).

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

People v. Smith, 134 A.D.3d 1453 (4th Dept. 2015).

2. Administrative Searches

a) A municipal ordinance giving the police the ability to inspect hotel registration records without advance review, is an unlawful administrative search, absent consent or exigent circumstances.

City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015).

3. Emergency Doctrine

a) After the police lawfully enter premises under the emergency doctrine and begin to search, should they receive additional information that establishes an "ongoing emergency", such information will justify the continued presence of the police and a subsequent search.

People v. Loucks, 125 A.D.3d 887 (2d Dept. 2015).

b) The emergency exception will not apply in a domestic violence case where the police respond to a location and:

1. have no knowledge of any previous domestic violence between the parties; and

2. have no indication that the defendant and the victim were engaged in a domestic dispute at the time they arrived at the apartment.

People v. Casillas, 134 A.D.3d 1394 (4th Dept. 2015). Cf. *People v. May*, 135 A.D.3d 598 (1st Dept. 2016) (police facing danger that a victim of a shooting was in an apartment).

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, ___ N.Y.3d ___, 2016 N.Y. Slip Op 01255 (2016).

IV. Automobiles

A. Automobile Stops

1. The police may not extend an otherwise completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff for drugs.

Rodriguez v. United States, ___ U.S. ___, 135 S. Ct. 1609 (2015).

2. Police Officer A has probable cause to stop a vehicle based on information provided by Officer B that Officer B observed the driver drink from a can which Officer B concluded was a beer can, based on its distinctive size and color.

People v. Robinson, 134 A.D.3d 1538, 22 N.Y.S.3d 771 (4th Dept. 2015).

3. An automobile stop based upon an anonymous tip is valid and based upon reasonable suspicion when it is predicated on:

1. a 911 call with certain indicia of reliability; and
2. confirmatory observations by the police.

People v. Williams, 126 A.D.3d 1304 (4th Dept. 2015).

4. Reasonable suspicion to stop a vehicle can be based upon a reasonable mistake of law, *i.e.*, a police officer's mistaken, but reasonable, interpretation of an ambiguous statute.

Heien v. North Carolina, ___ U.S. ___, 135 S. Ct. 530 (2014).

a) The New York Court of Appeals has declined to utilize a “mistake of law vs. mistake of fact” analysis in assessing traffic stops; it will, instead, analyze the reasonableness of a police officer’s conduct.

People v. Guthrie, 25 N.Y.3d 130 (2015).

5. The prosecution has the burden to establish a founded suspicion of criminality that will trigger a common-law inquiry during which the police can:

a) ask accusatory questions; and

b) ask for consent to search the vehicle.

People v. Wideman, 121 A.D.3d 1514 (4th Dept. 2015); *People v. Mercado*, 120 A.D.3d 441 (1st Dept. 2014).

6. 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, ___ A.D.3d ___, 2016 N.Y. Slip Op 00852 (4th Dept. 2016).

B. Automobile Searches

1. Protective Search for Weapons During Investigative Stop

Absent probable cause, a limited search of an automobile to search for a weapon may only be conducted once the occupants are removed, when there is a substantial likelihood of a weapon in the car, resulting in an actual and specific danger to the police.

People v. Hardee, 126 A.D.3d 626 (1st Dept. 2015); *People v. Baksh*, 113 A.D.3d 626, 977 N.Y.S.2d 407 (2d Dept. 2014). *Cf. People v. Leach*, 114 A.D.3d 518 (1st Dept. 2014).

2. 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. Raghnaal, 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, ___ A.D.3d ___, 2016 N.Y. Slip Op 02680 (3d Dept. 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, 2016 N.Y. Slip Op 00027 (1st Dept. 2016).

- b. when his attorney fails to move to suppress a gun recovered from the defendant and there is no strategic or legitimate explanation.

People v. Bilal, ___ N.Y.3d ___, 2016 N.Y. Slip Op 02475 (2016).

2. A defendant is not entitled to a suppression hearing when he fails to raise a legal basis for suppression by alleging innocent conduct at the time of arrest in the face of allegations that he was part of a drug dealing conspiracy.

People v. Garay, 25 N.Y.3d 62 (2015).

3. The prosecution sustained its burden of going forward with credible testimony when a police officer testified that he approached a vehicle parked in a municipal lot where no parking was allowed, even though there was testimony that a "no parking" sign was bent flat to the ground.

People v. Layou, 134 A.D.3d 1510 (4th Dept. 2015).

4. In addressing ineffective assistance of counsel, a court must consider whether:

a. defense counsel failed to file a colorable suppression motion;

b. whether counsel had a strategic or legitimate reason for failing to do so; and

c. the likelihood that the motion would have been successful.

People v. Carver, 124 A.D.3d 1276 (4th Dept. 2015); *leave granted*, *People v. Frederick*, 46 Misc. 3d 33 (App. Term, 2d Dept. 2014).

5. The Court of Appeals has no jurisdiction to hear an appeal when the issue presents a mixed question of law and facts, *e.g.*, whether on a factual review an inference of reasonable suspicion is permitted.

People v. Brown, 25 N.Y.3d 973 (2015).

6. 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, ___ A.D.3d ___, 2016 N.Y. Slip Op 02222 (4th Dept. 2016).