

RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW

By Hon. Barry Kamins

I. GENERAL FOURTH AMENDMENT PRINCIPLES

A. Probable Cause

- 1) A police officer lacks probable cause to believe an individual has committed criminal trespass in a public housing project when the officer is aware that the individual had previously been given permission to enter the property.

People v. Finch, 23 NY3d 408 (2014).

- 2) There is no probable cause to arrest for Disorderly Conduct (PL240.20(6)), when there is no reasonable cause to believe that the defendant, gathering with three alleged gang members near the entrance to a store, intended to cause public inconvenience or annoyance.

People v. Johnson, 22 NY3d 1162 (2014).

- 3) 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 NY3d 1100 (2015)

B. Exclusionary Rule

1) In a civil deportation proceeding, the individual who seeks suppression of evidence must come forward with prima facie proof of an egregious Fourth amendment violation before the Government will be required to justify the manner in which it obtained its evidence.

Maldonado v. Holder, 763 F3d 155 (2014);

Cotzojay v. Holder, 725 F2d 172 (2<sup>nd</sup> Cir 2013);

INS v. Lopez-Mendoza, 468 US 1032 (1984).

2) 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 F3d 105 (2d Cir. 2015)

Cf. United States v. Berschansky, \_\_ F3d \_\_ (2d Cir, 6/5/15).

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

People v Robinson, 128 AD3d 1464 (4<sup>th</sup> 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. Theodore, 114 AD3d 814, 980 N.Y.S.2d 148 (2<sup>nd</sup> Dept. 2014); People v. Morris, , 126 AD3d 813 (2d Dept. 2015).

2) A defendant has no standing to challenge the search of a vehicle where

a) he denies owning it and denies having driven it and

b) the People do not rely entirely upon the statutory presumption of standing.

People v. Anderson, 118 AD3d 1128 (3<sup>rd</sup> Dept. 2014).

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A. Right to Approach

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 AD3d 575 (1<sup>st</sup> Dept. 2015).

B. Right to Conduct a Common-Law Inquiry

1) During a lawful common-law right to inquire, a police officer may follow an individual who ignores the officer's request to stop and step in front of the individual in an attempt to engage him.

Matter of Shariff H., 123 AD3d 714 (2<sup>nd</sup> Dept. 2014).

2) When exercising their right to inquire, the police may encounter a situation in 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.

Matter of Shariff H., 123 AD3d 714 (2<sup>nd</sup> Dept. 2014);

People v. Abdul-Mateen, 126 AD3d 986 (2d Dept. 2015).

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

Matter of Shakir J., 119 AD3d 792 (2<sup>nd</sup> Dept. 2014).

See also People v. Johnson, 54 NY2d 958 (1981)

(not proper to ask a suspect to open his coat).

C. Right to Stop

1) A number of appellate courts have recently found stops by police officers to be unlawful:

a) No reasonable suspicion despite knowledge of a suspect's prior criminal conduct in the same neighborhood, where the police did not observe conduct indicating any crime had occurred or that a crime had occurred in the area.

People v. Thomas, 115 AD3d 69, 979 N.Y.S.2d 34 (1<sup>st</sup> Dept. 2014); People v. Brown, 115 AD3d 38, 978 N.Y.S.2d 206 (1<sup>st</sup> Dept. 2014).

b) No reasonable suspicion where a suspect merely grabbed his waistband after making eye contact and fled from police.

People v. Haynes, 115 AD3d 676, 981 N.Y.S.2d 542 (2d Dept. 2014).

c) No reasonable suspicion where an experienced police officer could not see:

- (1) the object being exchanged;
- (2) any currency being exchanged;
- (3) any furtive conduct.

People v. Lopez, 115 AD3d 875, 981 N.Y.S.2d 806 (2d Dept. 2014).

d) No reasonable suspicion where a suspect was in the general vicinity of a stash house and there was no credible evidence connecting suspect to the contraband.

People v. Ingram, 114 AD3d 1290, 980 N.Y.S.2d 653 (4<sup>th</sup> Dept. 2014).

e) 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 AD3d 658 (1<sup>st</sup> Dept, 2015)

2) Conduct which does not constitute flight nor which is furtive, cannot elevate a level two encounter into reasonable suspicion.

People v. Major, 115 AD3d 1, 978 N.Y.S.2d 165 (1<sup>st</sup> Dept. 2014).

a) 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 AD3d 658 (1<sup>st</sup> Dept, 2015).

3) A police officer has reasonable suspicion, and thus the right to pursue an individual, when he observes an individual with a bulge in his waistband and while in geographic and temporal proximity of gunshots, who then flees from the police.

Matter of Ya-Sin S., 122 AD3d 751 (2<sup>nd</sup> Dept. 2014).

4) A stop and frisk will be unlawful despite the observation of an unidentifiable waistband bulge which seems to be a hard object when

a) the suspect does not pose a threat to the officer's safety;

b) the police are not responding to a crime involving a weapon; and

c) the suspect does not reach for the bulge.

People v. Harris, 122 AD3d 751 942 (2<sup>nd</sup> Dept. 2014).

### 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. Gonzales, 111 AD3d 147, 972 N.Y.S.2d 642 (2<sup>nd</sup> Dept. 2013); People v. Riffas, 114 AD3d 810, 979 N.Y.S.3d 706 (2<sup>nd</sup> Dept. 2014).
2. The police may enter a premises without an arrest warrant if they are in a "true" hot pursuit. People v. Watson, 115 AD3d 687, 981 N.Y.S.2d 753 (2<sup>nd</sup> Dept. 2014).
3. Courts must analyze claims of "excessive force" to effect a seizure under the Fourth Amendment's standard of objective reasonableness and courts must balance the nature and quality of an intrusion on an individual's interests against the countervailing governmental interests at stake. People v. Atkinson, 119 AD3d 1151 (3<sup>rd</sup> Dept. 2014).



IV. SEARCH WARRANTS AND EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Searches and Search Warrants

- 1) Although the installation of a GPS device on a suspect's automobile, without first obtaining a search warrant, is a violation of Weaver, the violation is harmless when the GPS device provides information already obtained legally by investigators from another source.

People v. Lewis, 23 NY3d 179 (2014); People v. Weaver, 12 NY3d 433 (2009).

- 2) When the police seek to obtain a search warrant to obtain a DNA sample from a suspect, they must give the suspect notice to allow him to be heard in opposition, unless there are exigent circumstances justifying the lack of any notice.

People v. Walker, 117 AD3d 1094, 2014 (3<sup>rd</sup> Dept. 2014).

- 3) In assessing the reliability of an informant for purposes of the Aguilar-Spinelli standard, a declaration against penal interest can be a factor, supportive of reliability, whether it is made to a police officer or to a civilian trusted by the informant.

People v. Myhand, 120 AD3d 970 (4<sup>th</sup> Dept. 2013).

Cf. People v. Morusty, 195 AD2d 733 (3<sup>rd</sup> Dept. 1993).

- 4) 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 AD3d 1215 (4<sup>th</sup> Dept. 2015).

- 5) 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 US \_\_\_\_ (2015).

- 6). 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.

U.S. v. Ganas, 755 F.3d 125 (2d Cir., 2014); 2<sup>nd</sup> Circuit will rehear case *en banc*, U.S. v. Ganas \_\_ F3d. \_\_ (6/29/15)

B) In the absence of a search warrant, the Government cannot indefinitely retain custody of bank accounts that were originally seized without a warrant based on exigent circumstances.

United States v. Cosme \_\_F3d. \_\_, 2015 US App Lexis 13996 (2d Cir, 2015)

7. 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  
\_\_AD3d \_\_, 2015 NY Slip 06201 (1<sup>st</sup> Dept, 2015).

B. Exceptions to the Requirement of a Search Warrant

1) 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), 134 S. Ct. 1126.

- b) The People fail to meet their heavy burden of establishing consent to search a sealed envelope containing the defendant's personal papers by merely establishing that the defendant told the police that hospital personnel had taken custody of his papers while he was a patient.

People v. Alston, 122 AD3d 934 (2<sup>nd</sup> Dept. 2014).

2) Search Incident to an Arrest

- a) The United States Supreme Court has held that, absent exigent circumstances, the police must obtain a search warrant before searching a cell phone seized incident to an arrest.

Riley v. California, \_\_ US \_\_, 134 S.Ct. 999 (2014).

- b) Under this exception, 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. Jimenez, 22 NY3d 717 (2014).

- 1) People fail to establish exigent circumstances when the defendant's jacket is outside the defendant's grabbable area, the defendant is handcuffed, and sitting in a vehicle.

People v. Morales, 126 AD3d 43 (1<sup>st</sup> Dept. 2015).

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

People v. Alvarado, 126 AD3d 803 (2d Dept. 2015).

c) A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not.

People V. Reid, 24 NY3d 605, (2014).

1) 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 AD3d 401 (1<sup>st</sup> Dept, 2015)

d) A search of a bag incident to an arrest for a minor nonviolent offense will be unlawful where

1) the defendant was handcuffed and guarded by several officers;

2) the defendant was fully cooperative;

3) the defendant's actions were not threatening; and

4) there was no indication that the defendant might try and grab or kick the bag.

People v. Febres, 118 AD3d 489 (1<sup>st</sup> Dept. 2014).

e) 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 AD3d 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 AD3d 1136 (3d Dept. 2015).

3) 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, \_\_ US \_\_ (6/22/15)

b) Unless a property owner consents to a search of her premises, a search warrant is required for a routine inspection of the physical condition of private property for purposes of appraising its value.

Matter of Jacobowitz v Board of Assessors, 121 AD3d 294 (2<sup>nd</sup> Dept. 2014).

4) Exigent Circumstances

The People have the burden of establishing that a warrantless search is necessary to

- a) prevent the immediate use of a weapon or
- b) preserve evidence or contraband threatened with removal or destruction.

People v. Jenkins, 24 NY3d 62 (2014).

5) Emergency Doctrine

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 AD3d 887 (2d Dept. 2015).

IV. Automobile

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, \_\_US\_\_ (4/21/15).
2. Police have authority to stop a vehicle based on an anonymous 911 call from a driver who claimed to have been run off the road by a driver of a pick-up truck.  
Navarette v. California, \_\_\_US \_\_\_ 134 Sup. Ct.1683 (2014).
3. a) For the first time, the New York Court of Appeals applied both the Aguilar-Spinelli and totality of circumstances standard in assessing whether a car stop was founded on reasonable suspicion, where the stop was based in part on an anonymous 911 call.  
People v. Argyris, 24 NY3d 1138 (2014).  
b) 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 AD3d 1304 (4<sup>th</sup> 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, \_\_\_ US \_\_\_, 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 NY3d 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. Mercado, 120 AD3d 441 (1<sup>st</sup> Dept. 2014);

People v. Wideman, 121 AD3d 1514 (4<sup>th</sup> Dept. 2014).

6. A police officer may stop a vehicle when, based upon past experience, he has reasonable suspicion to believe that the driver was handling a marijuana

cigarette, even though no marijuana is ultimately recovered from the vehicle.

People v. Ramos, 182 AD3d 462 (1<sup>st</sup> Dept. 2014).

7. The police have no authority to approach a car and shine a flashlight into the car merely based on the following:

- a) the car was parked early in the morning where cars are usually not parked; and
- b) the occupant may have moved something from the dashboard and thrown it on the floor of the car.

People v. Laviscount, 116 AD3d 976 (2<sup>nd</sup> Dept. 2014).

8. An automobile stop is invalid when a police officer is unable to articulate a sufficient reason or standard for believing that:

- a) the occupants were drinking alcoholic beverages;
- b) the car windows were tinted; or
- c) the occupants were playing excessively loud music.

People v. Pita, \_\_ Misc. 3d \_\_, NYLJ 6/13/14 (Sup.Ct., NY Co. 2014)

## B. Automobile Searches

### 1. Inventory Search

An inventory search will be invalid where the People fail to sustain their burden of establishing that:

- a) The inventory search was conducted according to a familiar routine procedure; and
- b) That the procedure meets standards of reasonableness.  
People v. Leonard, 119 AD3d 1237 (3<sup>rd</sup> Dept. 2014).

2. 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. Baksh, 113 AD3d 626, 977 N.Y.S.2d 407 (2<sup>nd</sup> Dept. 2014); People v. Hardee, 126 AD3d 626 (1<sup>st</sup> Dept. 2015). Cf. People v. Leach, 114 AD3d 518 (1<sup>st</sup> Dept. 2014).

3. Automobile Exception

- a) A suspicion that a bag might contain proceeds of a robbery will not justify a search of a vehicle pursuant to the automobile exception.

People v. Baksh, 113 AD3d 626 (2<sup>nd</sup> Dept. 2014).

- b) A search will not be justified where an officer is equivocal about whether he smelled burning or unburnt marijuana and where

- 1) the officer never recovered the marijuana cigarette he claimed he observed in the driver's hand;
- 2) the driver did not appear to be intoxicated; and
- 3) a recovered glassine envelope was empty.

People v. Ramos, 122 AD3d 462 (1<sup>st</sup> Dept. 2014)

VI. Motion to Suppress and Suppression Hearings

1. A defendant is entitled to a suppression hearing, despite a conclusory statement alleging a "lack of probable cause to arrest the defendant", when the People do not provide information to the defendant on the following:

- a) how the defendant came to be a suspect; and
- b) the basis for her arrest.

People v. Wynn, 117 AD3d 487 (1<sup>st</sup> Dept. 2014).

2. A defendant is entitled to a suppression hearing where he denies any participation in criminal conduct at the time of his arrest and also alleges the following:

- a) he did not engage in criminal activity "at that time nor any time prior";
- b) he did not "make any sale to any person that day";
- c) he was not involved in any drug sale; and
- d) he did not "have a drug related conversation on that day with any person".

People v. French, 122 AD3d 535 (1<sup>st</sup> Dept. 2014).

3. 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 NY3d 62 (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 AD3d 1276 (4<sup>th</sup> Dept. 2015);

People v. Frederick, 46 Misc.3d 33 (App. Term 2<sup>nd</sup> Dept. 2014).

- 5. On rare occasions, an appellate court will reverse a lower court's ruling that is based on an assessment of credibility.

People v. Wideman, 121 AD3d 1514 (4<sup>th</sup> Dept. 2014).

- 6. An Article 78 proceeding may not be utilized to prohibit a judge from reopening a suppression and taking further testimony.

Matter of Rodriguez v. Justices of the State of New York, 117 AD3d 958 (2<sup>nd</sup> Dept. 2014).

- 7. Under the fellow-officer rule, the People fail to establish that the police had probable cause to arrest the defendant when the communication from the undercover officer failed to contain any information as to:

- a) the physical description of the defendant, including race or gender; and
- b) the building in which the sale took place.

People v. Walker, 44 Misc.3d 584 (Sup.Ct. NY Co. 2014).

8. 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 NY3d 973 (2015).