

RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW

By Hon. Barry Kamins

I. GENERAL FOURTH AMENDMENT PRINCIPLES

A. Probable Cause

1. There is probable cause to believe a defendant possessed a controlled substance based on

a) information that defendant met with a person believed to be trafficking in narcotics

and b) the hasty manner in which the defendant removed a bag from the trunk of the trafficker's vehicle.

People v. Joseph, 27 N.Y.3d 1009 (2016).

2. In establishing probable cause to arrest an occupant of an automobile for constructive possession of marihuana, the People must elicit testimony as to the defendant's physical proximity to the substance and whether that proximity rendered the substance readily accessible to him.

People v. Barkley, 55 Misc. 3d 62 (Appellate Term, 2d Dept. 2017).

Cf. People v. Carter, 60 A.D.3d 1103 (3d Dept. 2009).

3. The 4th Amendment, and not the Due Process Clause, is the proper theory upon which to bring an action under 42 U.S.C. 1983

when a prisoner is unlawfully detained *after* legal process has commenced.

Manuel v. City of Joliet, Illinois, 580 U.S. ____ (2017).

4. Probable cause for defendant's arrest based on information from a confidential informant, was predicated on evidence that established the informant's (a) reliability and (b) basis of knowledge.

People v. Clark, ____ A.D.3d ____, 2017 N.Y. Slip Op 06220 (3d Dept. 2017).

5. There was no probable cause for the defendant's arrest when he was placed in custody based on information from a stale wanted poster that should have been rescinded two months earlier.

People v. Rembert, ____ Misc. 3d ____, Ind. No. 3812/2016 (Sup. Ct. N.Y. Co. 2017).

B. Exclusionary Rule

1. The United States Supreme Court has held that the attenuation doctrine can apply where the intervening act is something other than an independent act of the defendant (*e.g.* consent to search or confession).

a) The doctrine can apply when the intervening act is the discovery of a valid arrest warrant.

b) Where an officer makes an illegal stop, runs a warrant check, discovers an outstanding warrant, and then searches incident to the arrest on the warrant, the exclusionary rule will not apply.

Utah v. Streiff, 579 U.S. ___, 136 S. Ct. 2056 (2016). See *People v. Vanterpool*, 4 Misc. 3d 137(A) App. Term, 1st Dept. 2004).

2. The exclusionary rule will not be applied when knowledge of the evidence is gained from a source independent of any unlawful conduct.

People v. Lopez, 139 A.D.3d 1381 (4th Dept. 2016).

3. Despite an illegal search of defendant's clothes in a hospital room, the later discovery of evidence in the defendant's apartment was lawfully based upon an independent source theory.

People v. Hill, ___ A.D.3d ___, 2017 N.Y. Slip Op 05920 (1st Dept. 2017).

C. Standing

1. A driver does not have a reasonable expectation of privacy in the DMV database information associated with a license plate number – and a police officer can run a license plate number through the database to check for outstanding violations or suspensions.

People v. Bushway, 29 N.Y.3d 158 (2017).

2. A person has no expectation of privacy in the information contained in the magnetic strip of a credit card in his possession.

People v. Dent, ___ Misc.3d ___, 2017 N.Y. Slip Op 27227 (Sup. Ct. Queens Co. 2017).

II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

A. Right to Approach

1. A police officer has the right to approach an individual in a NYCHA building based on the building's history of trespass activity and the defendant's "panicked attempt" to avoid contact with the police upon their attempt to enter an elevator.

People v. Perez, 142 A.D.3d 410 (1st Dept. 2016).

2. Pursuant to a level one encounter, a police officer can ask "why are you so nervous" if an individual exhibits indicia of nervousness.

People v. Williams, 144 A.D.3d 1636 (4th Dept. 2016). *See also*, *People v. Faines*, 297 A.D.2d 590 (1st Dept. 2002).

a) If a suspect is nervous, a police officer *cannot* ask "why are you so nervous" and "are you carrying drugs?"

People v. Freeman, 144 A.D.3d 506 (4th Dept. 2016).

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, 137 A.D.3d 1637 (4th Dept. 2016).

4. A police officer has the right to approach a pedestrian who uses a restricted roadway in violation of VTL §1156.

People v. Binet, 147 A.D.3d 1390 (4th Dept. 2017).

B. Right to Conduct Common-Law Inquiry

1. An individual's nervousness upon being confronted by the police does not give rise to a founded suspicion that criminal activity is afoot.

People v. Freeman, 144 A.D.3d 1650, 42 N.Y.S.3d 506 (4th Dept. 2016); *People v. Gates*, ___ A.D.3d ___, 2017 N.Y. Slip Op 05549 (4th Dept. 2017).

2. A police officer will have a founded suspicion of criminal activity when

a. a passenger of a vehicle exits the vehicle, refuses to get back inside, and places his hand on his waistband.

People v. Walker, 149 A.D.3d 1537 (4th Dept. 2017).

b. an individual walks past an officer on a "dangerous street" in a high crime area, and grabs his waistband with his hand concealed under his shirt.

People v. Simmons, 149 A.D.3d 1464 (4th Dept. 2017).

3. 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).

4. During a common-law inquiry, the police may take the following action: a) ask to see a suspect's hands; b) grab a suspect's wrist; and c) pull back a sleeve of a sweater when the police feel a metal object underneath.

People v. Perez, 142 A.D.3d 410 (2d Dept. 2016).

5. 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).

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

People v. Hall. 51 Misc. 3d 1203(A) (County Ct. Monroe Co. 2016).

C. Right to Stop

1. When a police officer conducts a brief investigation into whether an individual is a trespasser inside a NYCHA building or

trespass affidavit building, the following conduct by the police does NOT constitute a seizure:

a) retaining an individual's identification (given voluntarily) while the officer attempts to verify the person's explanation for being in the building.

People v. Hill, 150 A.D.3d 627 (1st Dept. 2017).

b) requesting that an individual remain in the lobby while the police investigate whether the person is a trespasser.

People v. Montero, 130 A.D.3d 474 (1st Dept. 2015).

c) requesting that an individual step outside the vestibule so that the police can talk to him.

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

d) asking permission for the police to accompany a suspect to the apartment of someone whom the suspect claimed to be visiting.

People v. Lozado, 90 A.D.3d 582 (1st Dept. 2011).

2. The police may ask of a person they believe is a victim of a crime, but they may not seize him in order to do so.

People v. Coronado, 139 A.D.3d 452 (1st Dept. 2016).

3. A police officer can chase a suspect in order to issue a citation when the suspect has violated a municipal ordinance.

People v. Harris, 147 A.D.3d 1374, 45 N.Y.S.3d 847 (4th Dept. 2017).

4. The police may chase a passenger of a vehicle who, upon exiting the vehicle,

a) positions his body so that his back was to the police officer;

b) refuses to return to the vehicle;

and c) turns to the officer with his hand on his waist and began to run when the officer draws his weapon.

People v. Walker, 149 A.D.3d 1537 (4th Dept. 2017).

5. Pursuant to a valid common law inquiry, if a suspect is warned about giving false pedigree information and then gives two different years of birth and two ages that do not correspond with either birth year, a police officer will have probable cause to arrest for false personation (P.L. 190.23).

People v. Smith, 151 A.D.3d 1476 (3d Dept. 2017).

D. Right to Stop and Frisk

1. When the police confront a group of individuals who are congregating outside a site known for gang activity, the police have the right to frisk members of the group after they recover a gun from the pocket of one of the individuals.

People v. Rouse, 149 A.D.3d 1597 (4th Dept. 2017).

2. A pat down of an individual before he is placed in a police car will be unlawful if the People cannot establish the legitimacy of placing him in the police car in the first place.

People v. Richards, 151 A.D.3d 1717 (4th Dept. 2017).

III. ARRESTS

1. The police do not have to cross the threshold in order to violate *Payton*, if they engage in an “across the threshold arrest.”

United States v. Allen, 813 F. 3d 76 (2d Cir. 2016). *See also, People v. Garvin*, 130 A.D.3d 644 (2d Dept. 2016), (*leave granted*).

2. When the police have an arrest warrant for A, and enter the premises of B to arrest A, the fact that they do not also have a search warrant for B’s premises does not violate A’s Fourth Amendment rights.

United States v. Bohannon, 824 F. 3d 242 (2d Cir. 2016).

3. One area of the “home” that is protected for purposes of *Payton* is the “curtilage”; when the police enter a defendant’s fenced-in rear yard, they have improperly entered the curtilage of the defendant’s home.

People v. Avinger, 140 A.D.3d 895 (2d Dept. 2016).

4. When effecting an arrest, the police will not use excessive force if they deploy a dog to bring the suspect down if,

a) the suspect continues to run after an officer identifies himself;

b) the officer repeatedly orders the suspect to stop; and

c) the officer warns the suspect that he will release the dog unless the suspect stops.

People v. Hill, 151 A.D.3d 479 (1st Dept. 2017).

IV. Search Warrants and Exceptions to the Warrant Requirement

A. Searches and Search Warrants

1. A person arrested for a drunk driving charge cannot be required to take a blood test unless the police obtain a search warrant.

a) No warrant is required for conducting a breath test, pursuant to a search incident to an arrest.

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (2016).

2. A person cannot be charged criminally for refusing to take a blood test following an arrest on a drunk driving charge.

a) A person *can* be criminally charged for refusing to take a breath test.

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (2016).

See also, People v. Shaw, 72 N.Y.2d 1032 (1988) (no constitutional right to refuse to take a breathalyzer test).

3. Where a search warrant authorizes the seizure of “any computer and/or storage device capable of maintaining records pertaining to illicit controlled substances,” the police may seize a cell phone even though a cell phone was not specified; the language is sufficiently particular to permit a cell phone to be seized.

People v. Victor, 139 A.D.3d 1102 (3d Dept. 2016).

4. The Government's retention of a defendant's computer records for two-and-a-half years after executing a warrant was reasonable where the agents acted in good faith even though the retention of the records implicates Fourth Amendment concerns.

United States v. Ganius, 824 F. 3d 199 (2d Cir. 2016).

5. There is no authority under the Criminal Procedure Law to take an interlocutory appeal to the Appellate Division or Court of Appeals from an order:

- a) denying a motion to quash or vacate a search warrant;
- or b) denying a motion to compel disclosure of an affidavit in support of a search warrant application.

Matter of 381 Search Warrants Directed to Facebook, 29 N.Y.3d 231 (2017).

6. A search warrant will be defective if:

- a) it contains no specific allegations that tie a residence to the evidence sought.

People v Moxley, 137 A.D.3d 1655 (4th Dept. 2016).

- b) it fails to include a search of a shed in a backyard.

People v. Velez, 138 A.D.3d 1041 (2d Dept. 2016).

c) it authorizes a general search of an electronic device without linking the evidence sought and the criminal activity supported by probable cause.

People v. English, 52 Misc. 3d 318, 2016 N.Y. Slip Op 26113 (Sup. Ct. Bronx Co. 2016).

7. There can be probable cause to issue a search warrant despite a failure to establish an informant's reliability where the police corroborate information from the informant by conducting two controlled buys of drugs at the defendant's residence.

People v. Luciano, ___ A.D.3d ___, 2017 N.Y Slip Op 05770 (3d Dept. 2017).

B. Exceptions to the Requirement of a Search Warrant

1. Search Incident to an Arrest

a) Traditional Searches

1. The People fail to establish exigent circumstances when:

a) A police officer does not claim that a search of a briefcase was conducted out of a concern for his safety or to prevent the defendant from destroying evidence.

People v. Houston, 143 A.D.3d 737 (2d Dept. 2016); *People v. Hinton*, 2017 N.Y. Slip Op 01989 (1st Dept. 2017).

b) The defendant is handcuffed, his duffle bag is a distance away in the same room, the police previously searched the residence and found no drugs and the defendant denied that there was contraband in the bag.

People v. Ortiz, 141 A.D.3d 872 (3d Dept. 2016).

c) The facts do not objectively support a reasonable belief that the defendant's bag contained either a weapon or destructible evidence.

People v. Anderson, 142 A.D.3d 713 (2d Dept. 2016).

2. As an alternative argument to a search-incident-to-arrest, a prosecutor can argue that a bag was searched during the booking process, but there are strict requirements for this exception.

People v. Taylor, 11 Misc. 3d 1053(A) (Sup. Ct. Bronx Co. 2006); *People v. Sommerville*, 170 Misc. 2d 1024 (Sup. Ct. Kings Co. 1996); *People v. Duran*, 154 Misc. 2d 705 (Sup. Ct. N.Y. Co. 1993); *People v. Freeman*, ___ Misc. 2d ___, N.Y.L.J. 5/6/91 (Sup. Ct. N.Y. Co. 1991).

3. The New York Court of Appeals and the 2d

Circuit Court of Appeals are now split in the issue of a search incident to an arrest when an officer has probable cause to make an arrest, does not do so, but because of evolving circumstances conducts a frisk and recovers a gun.

United States v. Diaz, ___ F. 3d ___ (April 18, 2017); *People v. Reid*, 24 N.Y.3d 615 (2014);

a) New York courts continue to require the prosecution to establish that the police officer intended to arrest the suspect prior to recovering contraband.

People v. Simmons, 151 A.D.3d 628 (1st Dept. 2017).

b) Body Cavity Searches

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

People v. Tisdale, 140 A.D.3d 1759 (4th Dept. 2016); *People v. Smith*, 134 A.D.3d 1453 (4th Dept. 2015).

2. Exigent Circumstances

a) Emergency Doctrine

The emergency doctrine exception will not be applied when:

1. A search is conducted after an emergency has abated.

People v. Williams, 146 A.D.3d 906, 48 N.Y.S.3d 405 (2d Dept. 2017).

2. The facts do not support an objectively reasonable belief that there was an emergency at hand requiring the immediate assistance of the police in order to protect life or property.

People v. Ringel, 145 A.D.3d 1041, 44 N.Y.S.3d 152 (2d Dept. 2016). *Cf. People v. May*, 135 A.D.3d 598 (1st Dept. 2016) (emergency doctrine applied where police were facing danger that a victim of a shooting was in an apartment).

b) Exigent Circumstances Involving Threat to Law Enforcement and Confidential Informants

Law enforcement officers were justified in engaging in a warrantless "pinging" of a suspect's cell phone based on a reasonable fear that the defendant would cause imminent harm to undercover officer.

U.S. v. Carabello, 831 F. 3d 95 (2d Cir. 2016).

c) Protective Sweeps

1) A protective sweep may not be expanded into an immediately adjoining area in a residence unless the police have articulable facts upon which to believe there is a person in that area who may pose a danger.

People v. Harris, 141 A.D.3d 1024 (3d Dept. 2016).

2) A protective sweep will be unlawful if, after passing through a room and finding no one, the police later reenter the room and observe contraband in plain view.

U. S. v. Delva, ___ F. 3d ___, June 1, 2017 (2d Cir. 2017).

3) In the above scenario, if the reentry was based on exigent circumstances, *i.e.*, the need to reenter a room to determine who, among several people owned or possessed contraband, the seizure of contraband in plain view will be lawful.

U. S. v. Delva, ___ F. 3d ___, June 1, 2017 (2d Cir. 2017).

3. 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, 26 N.Y.3d 773 (2016).

4. Consent

a) The People fail to establish the voluntariness of a consent to (1) enter a residence and (2) search a residence

where among other factors, the defendant signed a consent form when:

1) it was signed by the defendant while his hands were handcuffed behind his back;

2) it was not read to the defendant;

and 3) the officer never sought any assurance from the defendant that he had read it.

People v. Freeman, 29 N.Y.3d 926 (2017).

b) The People fail to establish the voluntariness of a consent to search a car when the only witness they call is a police officer who testifies that he interviewed the consenting party at the police station but was unfamiliar with the details of that party's detention or arrest prior to the time the police officer interviewed him.

People v. Kendrick, 147 A.D.3d 1419, 47 N.Y.S.3d 550 (4th Dept. 2017).

5. Administrative Search

A statutory and regulatory framework that requires pawnbrokers and secondhand dealers to permit inspections by the police and requires them to record transactions, constitutes a

valid administrative search because it is designed to primarily protect customers and not to uncover evidence of criminality.

Collateral Loanbrokers Associations of New York v. City of New York, 148 A.D.3d 133, 46 N.Y.S.3d 600 (1st Dept. 2017).

6. Searches of Parolees

A search of a parolee's car is valid where the police officer conducting the search was assigned to a joint task force responsible for executing parole warrants and he had a reasonable suspicion to believe the vehicle contained a gun.

People v. McMillan, 29 N.Y.3d 145 (2017).

V. Automobiles

A. Automobile Stops

1. An automobile stop is valid if based upon a cell phone tip that

a) was anonymous (although possible traceable) and accompanied by several indicia of reliability *e.g.* it was in the form of a present sense impression.

People v. Arias, 142 A.D.3d 874 (1st Dept. 2016).

b) was from an identified citizen informant.

People v. Wisniewski, 147 A.D.3d 1388, 47 N.Y.S.3d 543 (4th Dept. 2017).

2. Stopping a vehicle with a temporary inspection sticker based merely on idle curiosity as to the sticker's validity, is unlawful.

People v. Driscoll, 145 A.D.3d 1349, 44 N.Y.S.3d 269 (3d Dept. 2016).

3. Once an automobile is validly stopped for a VTL violation, pursuant to a level one request for basic information, a police officer may ask an occupant who appears nervous why he or she is nervous.

People v. Williams, 144 A.D.3d 1636 (4th Dept. 2016).

4. Once an officer has a credible reason for approaching a stopped vehicle, he or she may, under a level one request for basic

information, ask the driver for a license, registration and insurance card.

People v. Karagoz, 143 A.D.3d 912 (2d Dept. 2016).

5. 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, 136 A.D.3d 1344 (4th Dept. 2016).

6. A founded suspicion of criminal activity will justify:
a) an extension of a VTL stop beyond its initial justification;
and b) a canine sniff of the vehicle's exterior.

People v. Banks, 148 A.D.3d 1359 (3d Dept. 2017).

7. A police officer cannot stop a vehicle based on reasonable suspicion when there are significant discrepancies between the description of a suspect and the physical characteristics of an individual who enters a vehicle that drives off.

People v. Lopez, 149 A.D.3d 1545 (4th Dept. 2017).

8. After the police make a VTL stop, they cannot
a) chase a passenger who exits the vehicle and runs away, without reasonable suspicion to believe the passenger was engaged in criminal activity.

***People v. Furrs*, 149 A.D.3d 1098 (2d Dept. 2017).**

b) handcuff and remove a passenger from the vehicle when

1. the passenger had not been ordered to exit or remain in the car;

2. the passenger had not been ordered to keep his hands within view.

***People v. Brown*, 55 Misc. 3d 1224(A) (Sup. Ct. Bronx Co 2017).**

c) frisk a passenger based merely on the passenger's refusal to exit the vehicle or his demand to know why he was being asked to exit the vehicle.

***People v. Ford*, 145 A.D.3d 1454 (4th Dept. 2016).**

B. Automobile Searches

1. 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). *Cf. People v. Morris*, ___ A.D.3d ___, 2017 N.Y. Slip Op 06194 (2d Dept. 2017).

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, 138 A.D.3d 1165 (3d Dept. 2016).

2. Inventory Search

Although an inventory search may not be a “model” one, it can still meet minimum standards where the prosecution introduced into evidence:

- a) The relevant Patrol Guide section;
- b) A handwritten list of items removed from the vehicle;
- and c) A Property Clerk invoice.

People v. Lee, ___ N.Y.3d ___, 2017 N.Y. Slip Op 06415 (2017).

3. Community Caretaking Function

The Court of Appeals has upheld the towing, impoundment and inventory search of an automobile under a community caretaking function.

People v. Tardi, 28 N.Y.3d 1077 (2016). *See also, People v. Fenti*, ___ Misc.3d ___, 2017 N.Y. Slip Op 27271 (Justice Ct. Monroe Co. 2017).

VI. Motions to Suppress and Suppression Hearings

1. A defendant is denied the effective assistance of counsel when his attorney

a) fails to argue at a suppression hearing that there were no exigent circumstances justifying the warrantless search of the defendant's bag;

People v. Shutsha, 151 A.D.3d 657 (1st Dept. 2017).

b) 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, 135 A.D.3d 423 (1st Dept. 2016). *Cf. People v. Gray*, 27 N.Y.3d 78 (2016).

2. A defendant is not denied the effective assistance of counsel when his attorney fails to file a suppression motion if

a. there was no colorable argument that could be made in support of the suppression issue;

and b. even if there was a colorable argument, the defendant cannot establish that the failure to raise the issue was not based on a strategy.

People v. Carver, 27 N.Y.3d 418 (2016); *People v. Bilal*, 27 N.Y.3d 961 (2016).

3. If a defendant receives “meaningful representation” at a suppression hearing, an appellate court will not engage in a “hindsight review” of counsel’s performance to determine if counsel could have conducted a more vigorous cross-examination.

People v. Parson, 27 N.Y.3d 1107 (2016).

4. A defendant was not denied the effective assistance of counsel when his attorney

a) waived his client’s presence in the court’s chambers where the court listened to a recording of a jail house call made by the defendant;

b) did not review the call himself but relied on the prosecutor’s description of the call;

and c) failed to submit a post-hearing memorandum of law.

People v. Harris, 147 A.D.3d 1374, 45 N.Y.S.3d 847 (4th Dept. 2017).

5. When a claim of ineffectiveness is raised and counsel articulates a strategy for not pursuing a suppression hearing, a court’s inquiry will focus on whether such strategy was a product of a reasonably competent attorney.

People v. Zeh, 144 A.D.3d 1395 (3d Dept. 2016).

6. It is error to deny a hearing

a) when a defendant raises a factual dispute over the time and place of arrest and the People fail to provide sufficient information in the Voluntary Disclosure Form as to that issue.

People v. McUllim, 152 A.D.3d 461 (1st Dept. 2017).

b) when a defendant raises a factual dispute relating to the use of software and whether it constitutes a search and whether an investigator was able to identify child pornography files.

People v. Worrell, 138 A.D.3d 1154 (2d Dept. 2016).

7. The prosecution failed to sustain its burden of going forward with credible testimony when

a) A police officer was not credible on whether he smelled marijuana emanating from inside a vehicle and the officer had previously been found lacking in credibility by another judge.

People v. Simon, 51 Misc. 3d 1212(A) (Sup. Ct. Kings Co. 2016).

b) A police officer was not credible when testifying that he was able to observe marijuana in plain view inside an apartment as the officer stood in a hallway.

People v. Pendley, 51 Misc. 3d 1217 (Sup. Ct. Kings Co. 2016).

c) A police officer was not credible when testifying that he was able to observe a glassine envelope with a label and stamp on it through a partially open car window at 9:50 P.M.

People v. Duran, 51 Misc. 3d 1220(A) (Sup. Ct. Kings Co. 2016).

d) A police officer was not credible when he testified he was able to smell marijuana emanating from a car when the defendant was on his way to a drug program to be tested for drugs and he had been tested negative for drugs for the preceding two and one-half months.

People v. McManus, ___ Misc. 3d ___, Ind. No. 2526/15 (Sup. Ct. Kings Co. 2016).

e) In other cases, the credibility of police officer testimony has been an issue.

See People v. George, 2017 N.Y. Slip Op 50392(U) (N.Y. Crim. Ct. 2017); *People v. Suazo*, 55 Misc. 3d 130(A) (App. Term, 1st Dept. 2017); *People v. Cruz*, ___ Misc. 3d ___, N.Y.L.J. 4/17/17 (Sup. Ct. Queens Co. 2017).

8. A trial court commits error when it denies a defendant's application, midtrial, for a suppression 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, 137 A.D.3d 1691 (4th Dept. 2016).

9. A *Darden* hearing is not necessary when probable cause is established by the observations of the police, independent of any information given by a confidential informant.

People v. Crooks, 27 N.Y.3d 609 (2016).

10. The fellow officer rule permits an arresting officer to testify that he made an arrest based on the inference that he heard a radio transmission from an undercover officer providing information on where to go and whom to arrest.

People v. Vidro, 148 A.D.3d 526, 48 N.Y.S.3d 594 (1st Dept. 2017).