Our February 2007 edition of The Criminal Law News was dedicated to providing police officers with legal and practical guidance in the preparation and execution of search warrants. We return to the Fourth Amendment in this issue and focus our attention to the law governing warrantless searches and seizures that occur during police encounters with citizens both on the street and pursuant to vehicle stops.

The legality of the police seizure of evidence obtained as a result of these citizen encounters is gauged by the four graduated levels of permissible police intrusion set forth in the Court of Appeals’ 1976 decision in People v. De Bour. For more than 30 years, the Courts have used the De Bour decision to determine the limits of what a police officer may and may not do during a citizen encounter. Our analysis of De Bour in this newsletter is intended to assist the police who must act within the confines of the Fourth Amendment as they engage in rapidly developing street encounters. We have included examples of case law to show how the New York Courts scrutinize the specific facts of any police action to determine the lawfulness of any search and seizure.

We continue our coverage of Fourth Amendment law by discussing the automobile exception to the search warrant requirement. New York law allows a police officer who has lawfully stopped an automobile to search the vehicle without obtaining a warrant when the officer has probable cause to arrest the occupant and reason to believe that the car may contain evidence related to the arrest of the occupant. We also discuss the circumstances required to conduct other permissible warrantless searches of automobiles: a protective search for an officer’s safety, a consent search, an inventory search, a plain view search and a search incident to the arrest of an occupant of the vehicle.

We hope that the information we have provided in this issue will assist you in the proper performance of your police duties which oftentimes include the varied and sometimes unpredictable encounters you are called upon to engage in with the members of our community.

Of course, please remember that the District Attorney’s Office is available to you at all times to provide any legal assistance helpful to you in the performance of your duties.
The Fourth Amendment of the United States Constitution and Article I, §12, of the New York State Constitution protect the individual from unreasonable searches and seizures. The New York Court of Appeals’ decision in *People v De Bour* (40 NY2d 210) is this State’s fundamental guide for determining the Fourth Amendment limits of what a police officer may and may not do during a citizen encounter. The Court’s purpose in *De Bour* was to provide clear guidance for police officers seeking to act lawfully in what may be fast-moving street encounters. The basis for thousands of decisions over the past 30 years, *De Bour* has become an integral part of our jurisprudence (*People v Moore*, 6 NY3d 496, 499). A determination as to whether police conduct is reasonable requires a weighing of the government’s interest against that of an individual’s right to privacy. Police action must be “justified in its inception” and “reasonably related in scope to the circumstances which rendered its initiation permissible.”

*De Bour* sets out, in broad terms, four graduated levels of permissible police intrusion during street encounters:

- **LEVEL ONE** permits a police officer to make a request for information from an individual and requires an objective credible reason to do so, though “not necessarily indicative of criminality.” This is a brief encounter initiated by police and the questions asked are related to identity, destination or reason for being in the area (*People v Hollman*, 79 NY2d 181, 185).

- **LEVEL TWO** is the common law right of inquiry which permits a slightly greater level of intrusion and is triggered by a founded suspicion that criminal activity is afoot. The questions asked for information are more pointed, may be more accusatory and focused on the possible criminal conduct of the person.

- **LEVEL THREE** authorizes a police officer to forcibly stop and temporarily detain an individual and requires reasonable suspicion that a particular person has committed, is committing or is about to commit a crime.

- **LEVEL FOUR** authorizes the police to arrest the individual and requires probable cause that the person arrested has committed a crime.

*During a Level Three temporary forcible detention, a Terry frisk for weapons may take place, but only if there is reasonable suspicion the defendant may be armed* (*Terry v Ohio*, 392 US 1).

**Practice Points**

An individual stopped based upon a **level one** request for information or a **level two** common law right of inquiry has the right to refuse to answer questions and walk away. The pursuit of defendant or an order that he or she “stop” is a **level three** intrusion which requires reasonable suspicion (*People v Moore*, 6 NY3d 496).

**Level three** limited pat-down for weapons (*Terry-frisk*) must be justified by reasonable suspicion that the suspect may be armed or poses a safety threat. It is not as an automatic and routine precaution in every situation (*Florida v J.L.*, 529 US 266, 272-273 [no “automatic firearm exception” to frisk a suspect on an anonymous tip unless the tip is first proven reliable to justify a forcible action by police]).

New York does not recognize the “plain touch” exception to warrant requirement. If during a lawful **level three** pat-down for weapons, the officer feels what seems to be something other than a weapon, the officer cannot conduct a warrantless **level four** search (i.e. reach inside the pockets) for that contraband (*People v Diaz*, 81 NY2d 106).

A forcible detention of a defendant for a prompt show-up identification procedure requires, at a minimum, **level three** reasonable suspicion (*People v Hicks*, 68 NY2d 234; see also *People v Chestnut*, 51 NY2d 14). Transporting a suspect to police headquarters is not a **level three** forcible stop but a **level four** arrest requiring probable cause.
Observation of an undefined waistband bulge, without more, is not enough for a level three forcible stop and frisk of a defendant (People v Stevenson, 7 AD3d 820). This does not mean, however, that a police officer must “await the glint of steel before he can act to preserve his safety,” given that street encounters are often dynamic situations with “factors rapidly developing” (People v Benjamin, 51 NY2d 267, 270-271). A defendant’s hand movement toward the hidden weapon will justify a level three frisk.

**CASE LAW**

**People v Moore** (6 NY3d 496): Police received an anonymous tip of a dispute at a particular location involving a male with a gun, about 18 years old, wearing a gray jacket and a red hat. Officers arrived at the location in a marked patrol car within one minute of receiving the tip. They saw the defendant who matched the description, but could not confirm a dispute and saw no one else around. When the officers walked toward defendant, he walked away. The officers drew guns and ordered the defendant not to move. In response to a police order that he put up his hands, the defendant made a movement toward his waistband. Police frisked him, felt a hard object in his left jacket pocket, and recovered a gun.

**Outcome:** Gun suppressed. The Court of Appeals found that the anonymous tip only authorized a level two common law right of inquiry. The gunpoint stop of the defendant was a level three intrusion requiring reasonable suspicion, that the police did not have. The defendant had the right to continue about his business by walking away without risk of forcible detention (People v May, 81 NY2d 725, 728). To justify a level three intrusion on the basis of an anonymous tip, the information given must first be proven reliable in its assertion of illegality, not just in its tendency to identify a particular person (Florida v J.L., 529 US 266, 272). The gun was suppressed as a fruit of illegal police action.

**People v Moyaho** (12 AD3d 692): A police officer watching people exit a park after a festival, observed the defendant wearing a heavy winter jacket on a spring day. The officer approached the defendant, tapped him on the back and said “excuse me.” The defendant turned around and immediately reached for his waistband with both hands. The officer spun the defendant around and when the defendant continued reaching for his waistband, grabbed the defendant’s right hand and pulled up his shirt, discovering a loaded gun in the defendant’s front waistband.

**Outcome:** Suppression of gun denied. The officer had an objective, credible basis for approaching the defendant to conduct a level one De Bour inquiry. From there, the situation rapidly (if not instantly) escalated, providing the officer with reasonable suspicion to forcibly restrict defendant’s movements, a level three intrusion.

**People v Pines** (99 NY2d 525): While in a drug-prone area, the police in an unmarked car observed the defendant looking around nervously and engaging in conduct suspiciously like a drug transaction. When defendant first saw the police, his eyes “bulged out.” He continued to walk down the street but his gaze remained fixed on the police vehicle. The defendant placed his right arm against the side of his bubble jacket bunching it up by reaching underneath with his hand in a cupping motion. This conduct reminded the testifying officer of how he, himself, would sometimes adjust a gun under a jacket. Defendant tried to keep his right side out of view of the officers. Two officers exited their car and approached defendant displaying their shields, asking if they could talk for a minute. Defendant ran away. Pursuing defendant on foot, the officers saw defendant throw a gun into a garbage can as he ran away.

**Outcome:** Suppression of gun denied. The officers’ initial observations gave rise to a level two “founded suspicion” of criminal activity justifying a common law right of inquiry. Defendant’s furtive conduct and flight upon the approach of the officers then gave rise to a level three reasonable suspicion of criminal conduct, justifying the police pursuit. Since the gun was abandoned as a result of the lawful police action it was properly seized. A defendant’s flight may be considered in conjunction with other attendant circumstances in determining whether there is reasonable suspicion to support a police pursuit (People v Martinez, 80 NY2d 444, 447-448).
WARRANTLESS SEARCHES OF AUTOMOBILES

AUTOMOBILE EXCEPTION

Under the Fourth Amendment, a search conducted without a warrant is unreasonable unless one of the established exceptions to the warrant requirement applies (California v. Acevedo, 500 US 565; Mincey v Arizona, 437 US 385). One such exception is the automobile exception: the police may search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there (Cady v Dombrowski, 413 US 433, 442; Carroll v United States, 267 US 132). This exception is justified by the mobility of vehicles, the likelihood that evidence or contraband will disappear if the search is delayed to obtain a warrant, and by the diminished expectation of privacy one has in an automobile, due to its highly visible interior, its use on public thoroughfares, and its being subjected to extensive state regulation and inspection (California v. Carney, 471 US 386, 392-393; People v Langen, 60 NY2d 170). A warrantless search of the entire vehicle for evidence must still be supported by probable cause (Carroll v United States, supra, at 154).

Under the New York State Constitution, there must be a nexus between the arrest of the occupant(s) and the probable cause to search to justify a warrantless search of the entire vehicle (People v Blasich, 73 NY2d 673; People v Langen, 60 NY2d 170, 180-181, People v Belton, 55 NY2d 49; see also, NY Const, art I, §12). Of course, the stop of the occupants of the vehicle must be valid from the outset. A vehicle stop is justified only when conducted pursuant to “nonarbitrary, nondiscriminatory, uniform” highway traffic procedures, or when there is, at least, level three reasonable suspicion that an occupant has committed a crime (People v Sobotker, 43 NY2d 559). Ordering the occupants in a parked car to exit or remain in the vehicle, even temporarily, requires level three reasonable suspicion (People v Harrison, 57 NY2d 470).

AUTOMOBILE EXCEPTION: TO CONDUCT A WARRANTLESS SEARCH YOU MUST SATISFY THREE COMPONENTS:
1. probable cause to arrest an occupant,
2. probable cause to believe evidence of a crime can be found in the car, and
3. a nexus between the stop of the occupants in the car and search of the car.

If the police have probable cause to arrest an occupant of an automobile for a crime and there is also probable cause to believe that the car may contain contraband or evidence of a crime, then the police may immediately search the entire vehicle (including the trunk) and any containers therein, whether the containers are locked or not (People v Langen, supra; United States v Ross, 456 US 798). Sometimes the very circumstances that supply probable cause for the arrest of an occupant may also provide the police probable cause to believe that the vehicle contains contraband, evidence of the crime, or a weapon. A search pursuant to the automobile exception is far greater in scope than and should not be confused with a search incident to arrest of an occupant which only permits a search of the arrestee’s person and his/her “grabbable area.”

“The search incident to arrest exception to the warrant requirement exists only to protect against the danger that an arrestee may gain access to a weapon or may be able to destroy or conceal critical evidence. The scope of such a search must be limited to the arrestee’s person and the area from within which he might gain possession of a weapon or evidence” (People v Blasich, 73 NY2d 673).
WARRANTLESS SEARCHES OF AUTOMOBILES

The automobile exception search may also be justified by facts developed after the arrest of an occupant. For example, in People v Ellis (62 NY2d 393), the defendant was stopped for a traffic infraction and placed into custody because he could not produce a driver’s license, the vehicle’s registration, or any identification. The police conducted a search incident to arrest and found two .38 caliber bullets in the driver’s pocket. Discovery of the bullets gave police probable cause to believe a gun would be found in the car. The immediate warrantless search of the entire car for the weapon was upheld. The gun was found in the locked glove compartment.

**NOTE:** A WARRANTLESS SEARCH OF A CAR BASED UPON A LONG-DORMANT INVESTIGATION OF CRIMES UNRELATED TO THE ARREST OF AN OCCUPANT WOULD FAIL THE AUTOMOBILE EXCEPTION NEXUS TEST (PEOPLE v GALAK, 81 NY2d 463).

Police who have arrested an occupant and who have probable cause to believe that the vehicle may contain evidence of a crime are not required to immediately conduct the search at the site of the traffic stop. The justification for an immediate warrantless search pursuant to the automobile exception does not dissipate merely because the vehicle has been placed in the control of the police (People v Milerson, 51 NY2d 919, 921). The exception is equally applicable whether the search is conducted at the time and place where the automobile was stopped or whether, instead, the vehicle is impounded and searched soon after removal to the police station. If the search is not conducted reasonably close in time to the point of arrest you need to obtain a warrant (People v Orlando, 56 NY2d 441, 446; People v Blasich, 73 NY2d 673).

**Best Practice** - when there is probable cause to believe a vehicle may contain evidence which can only be seized and/or collected by the forensic laboratory for testing through cuttings or the use of chemicals or other destructive means, you should obtain a search warrant even if the vehicle was lawfully seized without a warrant. The use of a search warrant is also necessary when the event data recorder in the vehicle is to be analyzed.

PROTECTIVE SEARCH FOR OFFICERS’ SAFETY

In the absence of probable cause to search a lawfully stopped car, the police are permitted to conduct a warrantless protective search of the passenger compartment of the vehicle when there is reasonable suspicion of criminal activity and an articulable basis to fear for their own safety (People v Torres, 74 NY2d 224). However, the Court of Appeals in Torres held that absent probable cause to believe there is a weapon in the car, it is unlawful for the police to invade the interior of a vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers’ safety has consequently been eliminated. In contrast, the United States Supreme Court found that the removal of the occupants does not eliminate the danger for “if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and will then have access to any weapons inside” (Michigan v Long, 463 US 1032, 1052).

Squarely presented with the more expansive protective weapon search permitted by the Fourth Amendment, the Court of Appeals held that “despite the Supreme Court’s approval of such intrusions in Michigan v Long (supra), our more protective State constitutional provisions prohibit them under the circumstances presented here (NY Const, art I, §12).”

The Torres rule has been clarified in People v Carvey (89 NY2d 707), when the Court upheld a protective search which produced a gun, found under the rear passenger’s seat, and the protective search was conducted after all four occupants were removed from the car and frisked. In Carvey the police stopped the car because of a missing license plate. They saw the rear seat passenger place something under his seat and that the front seat passenger was wearing a bullet proof vest. Although the occupants were safely removed from the car, these facts provided reasonable suspicion to search for a weapon in the passenger compartment of the car as there was an actual and specific danger to the officer’s safety (see also, People v Mundo, 99 NY2d 55).
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n inventory search is a search designed to catalogue every item in the vehicle searched. The motor vehicle must be lawfully seized but the police do not need to have probable cause to conduct an inventory of the contents of the vehicle. An inventory search must be made pursuant to your police department’s written guidelines and preferably conducted pursuant to a preprinted checklist. The specific objectives of an inventory search are to protect the property of the defendant, to protect the police against any claim of lost property, and to protect police personnel and others from any dangerous instruments (Florida v Wells, 495 US 1, 4). “[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence” (id). To guard against this danger, an inventory search must be conducted pursuant to “an established procedure clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably” (People v Galak, 80 NY2d 715, 719). A standard procedure limits the discretion of the officer in the field (id). The hallmark of a proper inventory search is a meaningful inventory checklist which the officer fully completes during the search (People v Johnson, 1 NY3d 252). In court, the checklist will be introduced into evidence to prove the officer did not deviate from the uniform procedures set by the department. An inventory form which is partially filled out may result in suppression of evidence.

EVERY POLICE DEPARTMENT SHOULD ESTABLISH A WRITTEN INVENTORY GUIDELINE AND CHECK LIST THAT MUST BE COMPLETED BY THE OFFICER WHO DOES AN INVENTORY SEARCH OF THE VEHICLE FOLLOWING ITS IMPOUNDMENT.

CONSENT SEARCHES

A voluntary consent given by a party with the requisite authority over the item to be searched is an exception to the warrant requirement. If an officer has a level two founded suspicion that criminality is afoot, he or she may ask to search the car upon consent. The officer may search the entire car and any containers therein. However, “general consent to search alone cannot justify a search that impairs the structural integrity of a vehicle or that results in the vehicle being returned in a materially different manner than it was found” (People v Gomez, 5 NY3d 416 [carpets torn up and gas tank pried open]).

If during a lawful vehicle traffic stop, police acquire no more information that would warrant detaining the motorist longer than necessary to issue tickets, seeking consent of the occupants of the vehicle to search at that time is invalid. In People v Banks (85 NY2d 558), the Court held that after police had stopped the driver of a vehicle and issued summons for the occupants’ failure to wear their seatbelts, there was no justification to ask for consent to search the vehicle. For a traffic stop to pass constitutional muster, the stop of the vehicle must be justified at its inception and the detention of the occupants must be reasonably related in scope, including the length of the detention, to the purpose of the traffic stop (United States v Sharpe, 470 US 675, 682; Florida v Royer, 460 US 491, 500).

In Banks, once the driver’s license and stolen vehicle radio check came back negative and the traffic tickets for the seat belt violations prepared, the initial justification for the detention of the driver was exhausted. The trooper in court admitted that he delayed issuing the traffic tickets and returning the license and rental agreement to the driver for the specific purpose of effecting a search of the automobile. The consent to search was obtained during that extended detention and therefore was unconstitutional. Defendant's nervousness and the discrepancies in the occupants’ answers to the trooper’s questions regarding the origin, destination and timing of their trip did not, alone, provide a basis for a founded suspicion of criminality to justify a request for consent to search the car.
**PLAIN VIEW**

It is well-settled that police officers may seize contraband in plain view inside an automobile, provided that the observation of the apparent contraband is made from a lawfully obtained vantage point (Coolidge v New Hampshire, 403 US 443; People v Manganaro, 176 AD2d 354). “The plain view doctrine … establishes an exception to the requirement of a warrant not to search for an item, but to seize it.” (People v Diaz, 81 NY2d 106, 110).

**NOTE:** Digital information hidden in computers and cell phones are not items in plain view.

The doctrine rests on the premise that police should be able to seize incriminating evidence in plain view if the following three conditions are met:

1. the police are lawfully in the position to view the object;
2. the police have lawful access to the object; and
3. the object’s incriminating nature is immediately apparent.

Shining a flashlight into a lawfully stopped car to observe what would otherwise be in plain view is not an unreasonable intrusion or a search (People v Beriguette, 199 AD2d 515, aff’d, 84 NY2d, 978). “The discovery of contraband by an officer who ‘purposefully’ looks inside a…car, may...be considered inadvertent, provided that he was not actually aware that that particular item of contraband or evidence would be found in that particular place” (People v Manganaro, 176 AD2d 354, 356; Coolidge v New Hampshire, supra, at 470; Texas v Brown, 460 US 730).

**AFTER THE SEARCH AND SEIZURE: PROTECTING THE ADMISSIBILITY OF THE EVIDENCE SEIZED**

It is important to document the circumstances of any seizure of evidence and the measures taken to preserve the integrity of the evidence. For the evidence to be admissible at trial, the prosecution must establish the lawfulness of the seizure and that the seized evidence has not been tampered with. The People’s ability to sustain their burden of proof in court on these issues depends upon the officer’s ability to articulate in detail the facts underlying his or her actions. The ability to testify on these very fact specific matters is greatly enhanced by the prior documentation of the facts.

The following are some suggestions, where practicable, for ensuring positive outcomes:

- **Police Reports** - Reports must be thoroughly detailed and prepared by the officers who played significant roles in the action taken. As suppression hearings often occur a year after an arrest, detailed police reports will serve as an invaluable means to refresh memory.

The facts control the issues. Detail all the facts and circumstances surrounding the encounter as well as any search or seizure. Examples: the behavior of the defendant including the specific conduct which drew your attention to the suspect; all statements defendant and others made during encounter; the relative positions of all occupants in car; the exact location of evidence, i.e., defendant’s left front pocket or glove compartment; whether V&T summonses were issued and infractions charged. Also, prepare diagrams and/or obtain photographs of important features of the scene, e.g. the location of street lamps and other lighting for nighttime encounters.

**NOTE:** OMISSION OF CRITICAL FACTS WILL BE USED TO IMPEACH THE AUTHOR OF THE REPORT ON CROSS-EXAMINATION.
Photographs/Video Recordings - Whenever practicable, police should make efforts to photograph or video evidence in situ before its seizure. When not possible, i.e. the gun had to be immediately secured, photograph the exact area where the evidence was seized. It is permissible to photograph a reenactment of the original location of evidence, but it must be plainly noted in the police report that it is a reenactment and the reasons why the evidence had to be immediately removed at the outset. For stops of automobiles where the patrol vehicle is equipped with a dashboard camera, the video/digital recordings of the encounter must be preserved.

Audio Recordings - Recordings of radio runs, dispatches, and 911 calls must be preserved. These tapes and/or digital recordings, which are considered very reliable, will be used as evidence in court.

Consent - If officer obtains consent to search a vehicle, it should be in writing. The consent must be from the occupant who has the expectation of privacy in the vehicle.

Collection of the Evidence - Evidence should be collected in the manner best designed to preserve the original state in which it is found. Do not commingle evidence. Keep items separate.

Chain of Custody - Thorough documentation (and notation within police report or property logs) of all persons who have contact with the evidence as well as the “when and where” of the contact.

Inventory Searches - Preserve the checklist you followed during an inventory search of vehicle.

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