A FEW WORDS ON IMPEACHMENT OF POLICE WITNESSES

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Criminal defense attorneys spend most of their time on trial cross examining witnesses, most of whom are police officers or other members of law enforcement. There was a time when police officers carried a certain credibility cache into the courtroom, compared to their civilian counterparts, but in light of recent events involving alleged use of excessive force or other misconduct, that may no longer be the case.

Whether one generally looks up to or down upon the police, the rules regarding evaluation of their testimony have always been the same. That is, police witnesses are supposed to be evaluated by the fact-finders (whether judge or jury), by the same tests and in the same manner as any other witness. (People v Garrett 23 NY3d 878[2014], People v Gissendanner 48 NY2d 543 [1979]).

The CJI instructs that the testimony of a witness should not be believed (or disbelieved, as the case may be), solely and simply because the witness is a police officer. (People v Freier 228 AD2d 520 [2d dep't 1996]). Moreover, New York Rule of Evidence 6.16 (see nycourts.gov /Rules of Evidence), states that a law enforcement witness is subject to the same rules governing the impeachment of any witness. Consequently, a police officer (like anyone else), may be impeached by any evidence that has a tendency in reason to discredit the truthfulness or accuracy of his/her testimony (See NYRE 6.11[1]).

Subject to the trial court's exercise of discretion to regulate the subject and scope of cross examination, the cross examiner generally enjoys a wide range of latitude not only to challenge the accuracy of a witness' rendition of an event (e.g. based on relevant factors affecting perception, memory and ability to recount), but also to discredit the witness by confronting him/her with prior specific criminal, vicious or immoral conduct that logically and reasonably casts doubt on his/her credibility. (See Delaware v Van Arsdall 472 US 673 [1983]), People v Smith 27 NY3d 652 [2016], People v Sandoval 34 NY2d 371 [1974]).

Also, conduct that reflects an "untruthful bent" or a willingness to advance one's own personal interests over principle or the interests of society (whether criminal or not), can also be an appropriate avenue of impeachment. (People v Walker 83 NY3d 453 [1994]).

When it comes to challenging a police officer's testimony with evidence of prior bad acts or dishonesty, the law (CPL 245.20 and the Civil Rights Law [CRL 50-a]) has recently made it easier to obtain information (e.g. contained in police internal affairs bureau [IAB] files), that has impeachment value. The new discovery statute, CPL 245.20(1)(k) requires the People to provide "all evidence or information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case that TENDS TO IMPEACH the credibility of a testifying prosecution witness." (Also, effective 6/12/20, CRL 50-a has essentially done away with claims of confidentiality of IAB files).

While the People do not necessarily have to conduct a "disciplinary search" for any/all prior acts of misconduct (unrelated to the case at hand) on the part of any/every officer working the case (People v Garrett supra), or to comply with sweeping requests for "any/all police records" that may have some bearing on credibility (Matter of Certain Police Officers to Quash a So-Order Subpoena 67 Misc 3d 458 [Westchester County Court 2020]), they do have a duty to disclose information that is in their possession, custody or control (or in the possession of entities under their direction/control. [CPL 245.10(k)]).

So, if the People are aware (or should be aware through the exercise of due diligence), of information in a testifying officer's background that would be favorable to the defense (i.e. evidence tending to impeach the witness), they should disclose it to the defense. In People v Randolph 2020 NY Slip Op. 20231 (Sup Ct Suffolk County 9/15/20), the defense challenged the People's declaration of trial readiness, alleging that they failed to comply with discovery with respect to disclosure of certain IAB files pertaining to police witnesses in the case. The People argued that any such files were unrelated to the case in question.

The court held that the People must provide any available IAB files (in whatever form) involving any officers whom they intended to call as a witness at the hearing or trial involving either SUBSTANTIATED OR UNSUBSTANTIATED ALLEGATIONS OF MISCONDUCT. The court defined "substantiated" as being clearly supported by facts and "unsubstantiated" as being unresolved one way or the other. The People would not be required to turn over any files where the officer was EXONERATED (i.e. the conduct was legal and proper), or the allegation was UNFOUNDED (i.e. it didn't happen). (Citing, inter alia, People v Knight 2020 WL 5224191 [Sup Ct Kings County 9/2/2020]).
The court noted that the People would then be permitted to move in limine to preclude any inquiry where the nature of the conduct or the circumstances of its occurrence did not bear logically and reasonably on the witness' credibility or there was

no good-faith basis for the inquiry. (The court also noted that its decision did not affect the defendant's right to seek information under the Freedom of Information Law (FOIL) (Public Officer's Law 87). (Citing also People v Suprenant 2020 WL 5241041 [Warren County Ct 9/10/20]).

In People v Lustig 68 Misc 3d 238 (Sup Ct Queens County 4/8/20), the Court held that the People complied with their discovery obligations (and properly certified their trial readiness), by informing the defense of the existence of a civil lawsuit (with docket #) pending in Federal Court against one of their prospective police witnesses. The defense argued that the People should be required under the new discovery law to provide them with all documents associated with the lawsuit (citing Brady v Maryland 373 US 83 [1963]).

The People, citing People v Garrett, supra, replied that they were under no such obligation. (In Garrett, allegations contained in an unrelated federal suit that the officer had used coercive tactics to obtain a confession from the plaintiff were deemed to be relevant to the officer's credibility insofar as the defendant in this case accused him of coercing a false confession. The Court held there was no Brady violation, however, because the alleged misconduct was unrelated to the instant case and the People were unaware of it.

In Lustig, the Court concluded that the People were not required to obtain and turn over what could amount to volumes of information contained in an unrelated civil case that was obtainable either publicly or by subpoena duces tecum. (See also People v Gonzalez 2020 NY Slip Op. 50924 [Sup Ct Kings County 8/19/20]).

In People v Smith (Ingram and McGhee) 27 NY3d 652 (2016), the Court of Appeals laid out an analytical framework for the use of alleged prior bad acts of an officer (as set forth in a civil lawsuit) to impeach his/her testimony: 1. counsel must present a GOOD FAITH BASIS for inquiring (namely the lawsuit relied upon), 2. SPECIFIC ALLEGATIONS (rather than general, conclusory claims), must be identified as the basis for inquiry and 3.the trial judge must EXERCISE DISCRETION to decide whether inquiry into such allegations would confuse/mislead the jury, or create a substantial risk of undue prejudice to the parties. (People v Harrell 290 AD2d 160 [1st dept 1990]).

In that case, the defendant was charged with Criminal Sale of a Controlled Substance and Resisting Arrest stemming from a hand-to-hand sale of crack cocaine that was reportedly observed by three detectives, two of whom were defendants in federal lawsuits alleging civil rights violations where drug charges against the plaintiffs had been dropped. (The cases had been settled).

Defense counsel proposed to ask: "Did you arrest the plaintiff?" "Did you allege that he was guilty of a drug sale?"... "Was the case dropped." The court said, "absolutely not." The defendant was convicted of Resisting Arrest and the jury "hung" on the Drug Sale charge.

At the retrial of the drug charge (before a different judge), counsel did not raise the impeachment issue again. (Hence it was not preserved). The defendant was convicted and the Appellate Division affirmed. The Court of Appeals held the while the trial court properly denied cross examination about settlement (not relevant to impeachment unless there was an admission of wrongdoing), it was error to prevent inquiry where counsel appeared to be trying to delve into the underlying facts of the federal suit alleging that the officer made a false arrest (which is what he was asserting as a defense in this case).

The Court noted that there is NO PROHIBITION (other than the trial court's exercise of sound discretion), against cross examining a witness (civilian or police officer), about prior bad acts not formally proven in a prior prosecution or other proceeding as long as the inquiry is conducted in good faith based upon specific allegations, and the court finds that the probative value with respect to the witness credibility outweighs the risk of confusing or misleading the jury or unduly prejudicing a party. (Citing People v Sorge 301 NY 198 [1950]). "GOOD FAITH" means that the cross examiner has "some reasonable basis for believing the truth of a thing." (People v Alamo 23 NY2d 630 [1969]).

The Court in Smith held that the error in precluding the impeachment was harmless, however, because the drug transaction was amply corroborated by a third detective whose credibility was not subject to a similar attack.

A similar conclusion (harmless error) was reached in People v McGhee supra where the defendant was convicted of multiple counts of Criminal Possession of a Controlled Substance (with intent to sell) based on the testimony of several undercover officers who purchased crack cocaine from him. Pre-trial, the defendant sought permission to question the supervising detective about the facts underlying certain "false arrests" allegedly made by him based on allegations contained in three lawsuits filed against him and others in Federal Court. The trial court, finding no good-faith basis, denied the application. The Appellate Division (125 AD3d 537 91st dep't 2015]), affirmed the conviction.
The Court of Appeals found that the defendant did have a proper, good-faith basis, based on specific allegation set forth the complaints, to inquire about prior false arrests which was relevant to the detective's credibility in this case. However, as noted above, since there was overwhelming evidence of guilt otherwise, the error was deemed harmless.

Such was not the conclusion in People v Ingram supra. In that case, the defendant who was charged with Criminal Possession of a Weapon, alleged that the two detectives who chased him and accused him of shooting at them with a gun that he allegedly tossed (which they promptly "recovered" but never had tested for fingerprints or DNA), were rogue cops who concocted a story to protect the detective who fired his weapon at him for no good reason. In support of that theory, the defendant sought to question the detectives about a pending lawsuit where they were accused of fabricating evidence. The court rejected the defendant's request on the grounds that the suit was still pending and the subject matter was too prejudicial. (The fact that the lawsuit was pending was of no moment).

The Court held that the trial court abused its discretion and committed reversible error in refusing to allow the defendant to cross examine the key prosecution witnesses (upon whose credibility the People's case rested entirely), based on some unexplained finding of prejudice. (The Court also saw no hint of any risk of jury confusion).

In People v Smith 2019 NY Slip Op 02803 (1st dep't 2019), by contrast, the court held in this drug sale case that the trial court properly precluded examination of two detectives with respect to civil lawsuits wherein they were named defendants because the allegations failed to implicate them specifically in the alleged wrongdoing or suggest that they acted with knowledge of misconduct by other officers.

As such, the allegations were NOT RELEVANT to credibility because they had no demonstrable impeachment value. The court did find, however, that it was error (albeit harmless in light of the overwhelming evidence of guilt), to disallow cross examination about a lawsuit in which the officer was alleged to have fabricated evidence which bore directly on his credibility.

(See also People v Enoe 144 AD3d 1052 [2d dep't 2016]: PO who testified to observing D in possession of gun in back seat of cab was properly cross examined about a federal civil law suit alleging that he had arrested the plaintiff on a bogus weapon's charge in order to get a gun-bust collar and court overtime. In contrast, see People v Watson 163 AD3d 855 [2d dep't 2018]: Trial court properly excluded cross exam of officer about two federal lawsuits containing only conclusory allegations of police misconduct on the part of several officers rather than specific acts attributed to this officer).

In People v Rouse 34 NY3d 269 (2019), the Court of Appeals, in a case that is factually similar to People v Ingram supra, applied the framework of People v Smith 27 NY3d 652 (2016) supra (regarding cross examination into prior bad acts) to prior acts of dishonesty (in that case, lies told to a federal prosecutor in an unrelated proceeding and a judicial finding that the officer's testimony at a suppression hearing in another case was not credible).

Rouse was charged with and convicted of Attempted Murder for shooting into a crowd of people based entirely on the testimony of two officers who chased him, retrieved the gun (as in Ingram, no fingerprints or DNA test conducted), and identified him as the shooter.

Defense counsel sought (but the trial court denied his request), to explore the fact that one of the officers lied to a federal prosecutor about the extent of his involvement in a ticket-fixing scheme. (The AUSA brought out the fact of his involvement on direct examination but the court would not allow the defense to bring out the fact that he lied about it until he was confronted with irrefutable evidence. The trial court apparently wasn't certain that dishonesty qualified as as a bad act for impeachment purposes, and was concerned that there had been no prosecution or administrative sanction against the officer).

The trial court also granted the prosecution's motion in limine to preclude cross examination into the findings of certain suppression court judges in the SDNY that the officers in question had made up testimony about the reason for a traffic stop and testified "incredibly" about a frisk leading to the discovery of a gun.

The Appellate Division affirmed (159 AD3d 530), but the Court of Appeals reversed, finding reversible error in the trial court's refusal to allow the defense to probe into the extent of the officer's deception in representations to the federal prosecutor and the federal court's findings of incredibility of their sworn testimony . The Court noted that "perjury or other acts of individual dishonesty or untrustworthiness will usually have a material relevance to a witness' credibility." (Citing People v Sandoval 34 NY2d 371 supra). The Court also noted that there is no blanket impediment to inquiry about a prior judicial determination that an officer's testimony is unworthy of belief. (Citing People v Scarola 71 NY2d 769 [1988]]).

The Court remarked that in a case where the defendant's entire defense was directed toward convincing the jury that the officers falsely identified him as the shooter (in his view, to avoid backlash from beating him up and arresting an innocent person), the refusal to allow inquiry into matters bearing directly on their credibility (i.e.honesty) as witnesses, constituted reversible error. The Court also noted that any concern about the jury affording conclusive weight to a prior judicial finding of (in)credibility could be remedied with a limiting instruction. In fact, the CJI provides for the following instruction in appropriate cases:

“You have heard testimony that a judge found that PO _________ testified falsely in an unrelated proceeding. That judge’s determination is not binding on your determination of of PO ______’s credibility You may, however, consider that determination along with other evidence in the case to evaluate the truthfulness and accuracy of PO _________’s testimony.”

Under NYRE 6.16, then, the foundational elements for impeachment of a police witness include: a. a GOOD FAITH basis for the impeachment inquiry; b. identification of SPECIFIC ALLEGATIONS that are RELEVANT to the WITESS’ CREDIBILITY in the proceeding; c. a determination by the court that the proffered impeachment would not confuse/mislead the jury or create a substantial risk of prejudice to a party.

Sources of god faith include: a. specified acts of misconduct set forth in a lawsuit against a testifying officer (provided they are RELEVANT to the witness’ credibility in the proceeding in which he/she is testifying); If the lawsuit DID NOT result in an adverse finding against the witness, it is NOT PERMISSIBLE to ask him/her on cross examination if he/she has been sued, or if the case was settled (UNLESS there was an admission of wrongdoing), or if any charges related to the plaintiffs in those actions were dismissed. COUNSEL MAY, HOWEVER, INQUIRE ABOUT SPECIFIC ALLEGATIONS (i.e. the alleged underlying acts), in the suit.

As note in People v Rouse supra, a judicial determination that a police officer testified falsely in a proceeding, while not binding on the question of the witness’ credibility in this proceeding, constitutes a good faith basis for inquiry of the witness about that determination.

Also, as noted in People v Rouse supra, acts of misconduct (WHETHER OR NOT PROVEN IN A COURT PROCEEDING), including acts of DISHONESTY, MISSTATEMENTS about an event made to a prosecutor, constitute a good faith basis.

The rule also states that evidence that charges on trial have already been determined adversely to the defendant by another tribunal (e.g. an administrative finding by a police review board) is NOT ADMISSIBLE FOR IMPEACHMENT or otherwise.

As with cross examination of a civilian witness, the cross examiner is BOUND by a police witness’ answer and, consequently, cannot then introduce extrinsic evidence (e.g. testimony from another witness or contradictory physical evidence or documentary evidence) to refute it UNLESS the matter to be refuted relates to a material issue in the case. (See People v Pavao 59 NY2d 282 [1983]).

For example, in a Resisting Arrest case where the defendant claims the arresting officer punched him in the face after arresting and cuffing him, and the arresting police officer claims that he punched the defendant because he attacked him before the arrest, defense counsel could not only inquire on cross exam about whether the defendant was already cuffed when he punched him, but also call a witness to whom the officer reportedly said, “the defendant kept mouthing off after I arrested him, so I clocked him”). On the other hand, if the subject matter of the particular inquiry relates only to the witness’ credibility with respect to a non-material fact (e.g. his testimony regarding the color of the defendant’s clothing), extrinsic evidence would likely be barred because the matter is collateral. (See People v Wise 46 NY2d 328 [1978]).

So, evidence is not collateral if it relates directly to one or more material issues in the case, or relates to the witness’ capacity to testify or demonstrates a witness’ BIAS, HOSTILITY OR INTEREST. If the defense contests the testimony of a prosecution witness who is physically or mentally disabled, for example, a witness could be called to demonstrate that disability insofar as it affects his/her capacity to give testimony. Or if the defense wishes to establish that a police officer has it in for the defendant (i.e. is biased against him) the defense could call a witness who has personal knowledge of the officer’s hostility toward the defendant. (“I heard the officer refer to the defendant as a scum bag and say that he would say whatever he had to say to ensure that he gets convicted.”)

Knowing that police officers are, at least for purposes of cross examination, no better or worse than any other witness (at least until they testify), counsel is at liberty to use the same tools and techniques that apply to anyone who takes the stand and swears to tell the truth about the facts underlying a criminal accusation. And, because police officers are expected to uphold the law, and their word can result in a significant deprivation of a person’s liberty, one could argue that they should be held (if only subconsciously), to a higher standard of truth-telling than the average citizen. When they have a demonstrated history of dishonest or disreputable behavior (as reflected in their police files or in the allegations of lawsuits filed against them), counsel (and the client) are often well-served when the misconduct is exposed and his/her credibility has been impugned by skillful impeachment.