SEARCHES OF PAROLEES, PROPERTY, AND THEIR PLACES OF RESIDENCE

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Whenever a state prisoner is released to parole which is a statutory privilege rather than a constitutional right, the "parolee" must consent in writing to several conditions of supervision which include visits from a parole officer at home and/or at work and searches of his/her person, residence or property. (Condition #4 on the standard form).

The consent to searches does not mean, however, that the parole officer has carte blanche to roust, rattle and roll the parolee (or search his/her residence), for no particular reason other than the fact that he/she is on parole. As noted in People v Huntley 43 NY2d 175 (1977), the consent to search is not an all-out submission to any and all searches, nor is it a blanket waiver to be free from unreasonable searches and seizures.

So, while a parolee, (much like a probationer) does not enjoy the full breadth of constitutional protections available to law-abiding citizens, (People v Hale 93 NY2d 454 [1999]), he/she retains the right to be subject to only those searches that are reasonably and rationally related to purposes of parole supervision to wit: the detection and (ideally, the prevention) of parole violations to protect the public from future crimes and also to help the parolee prepare for eventual re-entry into the community.

The requirement that parolee searches be geared toward the execution of parole officer's responsibilities means that such duties apply not in some vague, generalized way but relate specifically to the parolee in question and his/her particular situation. (People v Huntley supra).

As noted in People v Bermudez 2015 NY Slip Op. 25208 (Monroe County Court 6/10/15), "prior to contact with a parolee, the parole officer must have, at the very least, an articulable and particularized concern (that is) substantially and rationally related to parole supervisory responsibilities to to justify a seizure and a search."

In Bermudez, the court found that there was no justification for a parole officer who was helping police investigate another parolee's residence (which was the subject of a week-old "shots-fired" report), to approach the defendant (who was just standing across the street and not in violation of curfew or any other parole condition), and, without asking any questions, pat him down. At the time, the defendant was four hours away from getting off of parole.

In suppressing the drugs found on the defendant's person, the court noted that while a search of a parolee need not require probable cause (as would be the case with anyone else), under New York law, unlike its federal counterpart (see Samson v California 547 US 843 [2006]), there must be at least some modicum of individualized suspicion (of a parole violation), to justify a seizure and search of a parolee. Here, there was none.

In People v Huntley, supra, by contrast, the Court of Appeals found sufficient basis for parole officers to enter and search the defendant's residence after he missed two consecutive report dates, lied about his work status and went on welfare without permission from his parole officer. He was also described as being an otherwise unreliable parolee.

In affirming the denial of the defendant's motion to suppress bullets, drugs and drug paraphernalia found in his apartment, the Court noted that while parolees do not surrender their constitutional rights to be secure against unreasonable searches and seizures (Morrissey v Brewer 408 US 471 [1972]), their status is always relevant and often critical to the determination of the reasonableness of searches conducted by their parole officers who have more latitude (by virtue of their supervisory responsibilities and relationship to the parolee), than police officers who are bound by the constraints of probable cause. (See US ex rel. Santos v NYS Bd. of Parole 441 F2d 1716 [2d Cir. 1971]), US v Consuelo-Gonzalez 53 F2d 266 [9th Cir. 1975]).

Based on the defendant's deliberate delinquency, the Court concluded that the issuance of a parole violation warrant was appropriate, and the search of his residence "to find a possible explanation for his otherwise unexplained failure to report" was justified. Also important to the Court's finding was the fact that the parole officers who searched the residence were not acting at the behest of police nor were they trying to find evidence of other crimes for which the defendant could be prosecuted.

The Court in Huntley appears to have taken a fairly broad view of the right to search the residence (to carry out parole supervision responsibilities) inasmuch as the defendant's unexplained failures to report didn't seem to require further evidence to support his non-appearance on mandatory report dates. (Perhaps parole officers believed he was occupying his time with illegal activities as opposed to just wasting his days, collecting an unauthorized welfare check instead of working like he had led his officer to believe).

In contrast, see People v Candelaria 63 AD2d 85 (1st dep't 1978) where the parole officer's search of the defendant's apartment (ostensibly for a knife to corroborate a witness' account of the defendant's alleged threat of her husband in support of an alleged parole violation), was deemed by the court to be unnecessary (inasmuch as the knife hadn't even been described), as well as a pretext for a search for other evidence on behalf of the police who had arrested the defendant for shooting and killing the same person who was the subject of the knife threat.

Prior to arresting the defendant, the police were aware that the defendant had, in addition to wielding the knife, threatened to shoot the victim. The following day, a seven-year-old girl reportedly saw the defendant shoot and kill the victim in an alleyway but the defendant, who reported the knife altercation the next day to parole (claiming he waved it in self-defense), also mentioned that he had been questioned by detectives in connection with the homicide. (His defense at trial was that two other people who were with the victim had shot him).

The detective later called the defendant's parole officer, inquiring whether he could be arrested for a parole violation. The officer replied that they needed independent evidence of the knife threat (whereupon the detective sought out and interviewed the victim's wife). Upon receipt of the wife's statement, the parole supervisor authorized a warrant of temporary detainer. At that point, parole also learned that the police had arrested the defendant for the homicide after which they all went to the defendant's apartment (with the defendant in tow), to search, presumably for knives (as well as contraband and narcotics). What they found were .22 caliber long rifle bullets (the same caliber used to kill the victim), after which they ceased any further search.

In reversing the trial court's denial of suppression, the First Department held that while police presence will not necessarily turn a parole search into a police operation, where parole officers are acting at the direction of police in a search for evidence of a crime unrelated to the exercise of parole duties (in this case, the search for a knife in support of the alleged parole violation), the search cannot be justified.

Noting that while evidence that is seized incidental to a search that is proper from the start may be used in a subsequent criminal prosecution (People v Randazzo 15 NY2d 526 [1964]), a parolee's status cannot be exploited to allow a search which is designed solely to collect contraband or evidence in aid of the prosecution of an independent criminal investigation.(Citing People v Huntley 43 NY2d at 102). In such circumstances, parole becomes a conduit for conduct that the police could not do on their own.

The court noted that the search for a knife was merely a pretext for helping the police conduct a search for evidence of the homicide (which would otherwise have required a search warrant), inasmuch as parole already had evidence of a parole violation (e.g. statement from the victim's wife and the defendant's admission of brandishing a knife in the altercation), and didn't need to look for an unspecified knife to sustain it.

There was also no basis, in the court's view, for parole to take any action with respect to the homicide after obtaining the aforementioned evidence of the parole violation. Consequently, since parole officers were acting as agents of the police in their efforts to find evidence of the homicide, their presence could not shield what the court described as "plainly an action to effect an illegal search." (Citing US v Halloran 365 F2d 321 [2d Cir. 2016]).

Similarly, in People v Tony 30 Misc3d 867 (Sup Ct Bronx County 2010), the court held that parole officers were acting as stalking horses for police when they agreed to search the defendant's residence (ostensibly to check on compliance with parole conditions), so that they could see if he had any knowledge of a string of local robberies committed by teens in the area that the police were investigating.

The defendant was selected (among a handful of other parolees), to be interviewed in this "special operation" because he was considered, (based on his record of compliance with parole conditions)m likely to be cooperative with a home visit. During the search, they found a gun (and a bullet proof vest) which the defendant said his cousin had dropped off temporarily.

The court observed that while parole claimed to be there to look for evidence of parole violations, they had no knowledge of any particular facts or circumstances indicating that a search would further their duty to detect or prevent parole violations by this parolee or facilitate his re-entry into the community. Under the circumstances, it was clear that parole was merely taking advantage of the defendant's parolee status to help police investigate other crimes (in which the defendant wasn't even a suspect).

In People v Mackie 77 AD2d 778 (4th dep't 1980), a parole officer who led police in a search of his parolee's residence for evidence of a rape (in which the defendant was not yet even a suspect), was deemed to have gone beyond the scope of his duties where there were no facts or circumstances (and no evidence of any parole violation) to justify the intrusion.

The court found that this was unquestionably a search to obtain evidence in furtherance of a police investigation wherein the parole officer was engaging in conduct that the police could not do on their own. In the court's estimation, there was no good reason for police to even be there in a back-up capacity inasmuch there was no parole violation to investigate. (Citing People Candelaria supra). Consequently, it was error for the trial court not to suppress evidence (wash cloth and napkins containing the victim's blood type) seized from the residence.

See also People v LaFontant 46 AD3d 840 (2d dep't 2007) where the police had probable cause (based on information from an identified witness who reported seeing the defendant drop a gun in a park) to arrest him, but there was no basis for parole to then search the contents of his cell phone because there was no reason to believe that it would contain evidence of any parole violation.

While there must be something more than the defendant's parolee status (or the fact that they all sign a consent to search as a condition of parole release), to justify a search, information from third parties (whether identified citizens or confidential police informants), and/or the defendant's own conduct can provide sufficient justification to search for evidence of parole violations.

In People v Nappi 83 AD3d 1592 (4th dep't 2011), for example, the Fourth Department held that the trial court properly denied suppression of ammunition found in the defendant's apartment where information from the defendant's wife provided a rational and reasonable basis to believe that the defendant had a gun on the premises. (Citing People v Felder 272 AD2d 804 [2000]).

Similarly, in People v Wheeler 2017 NY Slip Op. 03359 (4th dep't 4/18/17), the court found the information from a police informant provided a sufficient basis for parole to search the defendant's residence for a gun. (Citing People v Escalera 121 AD3d 1519 [4th dept 2014]).

Likewise, in People v Sapp 2017 NY Slip Op, 01104 (4th dep't 2/10/17), the search of the defendant's apartment which turned up a gun was deemed to be reasonably and rationally related to parole duties where parole had credible information from an FBI source that the defendant had cocaine there. The court was also satisfied that this was not a "police operation," inasmuch as the FBI was not investigating the defendant, nor did it play any part in the decision to conduct the search.

In People v Rounds 124 AD3d 1351 (4th dep't 2015), the search of the defendant's dwelling (which led to discovery of a gun), was found to have been properly conducted in furtherance of parole duties where the defendant's claim that he had been shot in the foot by unknown assailants at his residence was unsupported by any credible evidence. (Citing People v Johnson 63 NY2d 888 [1984]).

(See also People v Johnson 54 AD3dc969 [2d dep't 2008]: Police properly initiated search of defendant's residence based on his own admission of smoking marijuana, and police assistance did not turn it into a "police operation").

In some instances, police activity may provide sufficient impetus and a legal basis for parole to search a parolee and/or his/her residence. In People v Davis 101 AD3d 1778 (4th dep't 2012), the Fourth Department held that parole officers were acting within the scope of their duties to search the defendant's residence after police reported that they had arrested him (in what was deemed to be a lawful stop and pat down search) for possessing cocaine and marijuana.

In People v Holdby 2018 NY Slip Op. 00928 (4th dep't 2018]), the Fourth Department affirmed the trial court's order denying of suppression of guns found in an apartment occupied by the defendant without knowledge or permission of the federal probation department. The apartment manager alerted police that maintenance workers had found guns in the apartment which was supposed to be vacant.

When police arrived, they encountered the defendant who said, "I'm on federal probation. I live here." The police, in turn, notified the probation department which sent in officers to search because the defendant was reportedly staying at an unauthorized location unknown to them. Under the circumstances, the court found that the search was justified in furtherance of parole duties to search for evidence in support of his violation of probation.

See also People v Johnson 2016 NY Slip Op. 04517 (4th dep't 6/10/16) where the defendant's status as a parole absconder for four months provided sufficient justification to search his apartment (which led to discovery of a weapon) for evidence of his whereabouts as part of parole's performance of its supervisory duties. (The parole release form states that "continued contact with your parole officer is the essence of successful parole supervision. If you you break contact [as the defendant

did here], your parole officer can no longer assist you and [help you] ensure your compliance [with the conditions of parole release"]).

As noted above, a parolee's status does not provide parole officers with a golden ticket to search him/her (or their premises) whenever the mood strikes, nor can they just run interference for the police to help them find evidence of crimes that they are investigating but otherwise lack probable cause to act upon (e.g. where they lack a search warrant or other valid basis to conduct a search or make an arrest). And when parole officers cannot justify their conduct with specific reasons related to the performance of their duties (based on some articulable facts), to detect or prevent parole violations by the parolee in question, counsel should not hesitate to take them to task for overstepping their authority or acting as agents of law enforcement.