A COUPLE OF GOOD CASES ON ORDERS OF PROTECTION AND AUTOMOBILE SEARCHES BASED ON THE SMELL OF MARIJUANA

By Thomas P. Franczyk

A COUPLE OF GOOD CASES ON ORDERS OF PROTECTION AND AUTOMOBILE SEARCHES BASED ON THE SMELL OF MARIJUANA

Thomas P. Franczyk
Deputy for Legal Education
Assigned Counsel Program
July 12th, 2021

1. COURT SHOULD CONDUCT A HEARING ON THE NEED FOR AND NATURE OF AN ORDER OF PROTECTION WHEN SUBSTANTIAL LIBERTY AND PROPERTY INTERESTS ARE AT STAKE.

MATTER OF CRAWFORD V ALLY (BRONX COUNTY CRIMINAL COURT JUDGE) 2021 NY SLIP OP 040082 (1ST DEP'T 6/24/210):

In this domestic violence (DV) case, the Appellate Division (AD) held that the Supreme Court ERRED in DISMISSING AS MOOT the petitioner's request for a Writ of Mandamus (brought per CPLR Art 78), which sought to compel the Criminal Court to hold a DUE PROCESS HEARING with respect to the need for and scope of an order of protection granted against the petitioner (in her capacity as defendant in the criminal case).

FACTS:

On November 3, 2019, the defendant was ARRESTED AND CHARGED with Assault 3d degree, Obstruction of Breathing and Harassment 2d degree upon the complaint of her live-in boyfriend who alleged that she and two male accomplices attacked him in the apartment that he shared with the defendant and her children.

At arraignment, the People requested a temporary ORDER OF PROTECTION (TO/P) which, while subject to modification in Family Court, would, for the time-being, prevent her, among other things, from contacting the victim or returning to the apartment (except to retrieve some clothing and other essentials).

The TO/P was granted over the defendant's objection upon the representation that she was the lessee-of-record (along with her children and brother, but NOT the boyfriend), and that barring her from her own dwelling would effectively result in denial of access to her own children. Apparently unwilling to go out on a limb on its own, the court REFUSED to grant a more LIMITED (i.e., non-offensive contact [NOCO/P]) order without the People's consent (which they did not offer).

On the next court date, November 8, 2019, the People asked that the full stay-away order remain in effect, in part, because the alleged victim (who, himself, had been the subject of 17 prior Domestic Incident Reports [DIRs] filed against him on behalf of the defendant), refused to leave the apartment. The defendant requested that the order at least be modified to a NOCO/P, reiterating that she was the lessee and sole support of her children. She also pointed out that she was now at risk of losing her residence. (What the boyfriend, an alleged alcoholic/DV abuser, brought to the relationship of any positive value is unknown from the case record).

TRIAL COURT DENIES DEFENDANT'S MOTION FOR A HEARING:

When the court denied the defendant's motion to modify the order, the defendant requested an adjournment for a DUE PROCESS HEARING to compel the People to demonstrate why an O/P was actually necessary in light of the SIGNIFICANT PROPERTY AND FAMILY ISSUES at stake. The court denied the request stating that it had just heard (and decided) the matter.

WHEN AT FIRST YOU DON'T SUCCEED…

The criminal case was adjourned to December 20, 2019, but on November 20, the defendant brought another motion to modify the order, this time attaching the lease (between her and the NYC Housing Authority) as evidence of her legal entitlement (along with that of her children) to reside in her own dwelling. The People opposed the motion, arguing that the court had already ruled on the matter, and claiming that the alleged victim, who was not a party to the criminal proceeding, had no meaningful opportunity to be heard.

While it is true that complainants in a criminal proceeding are only witnesses and not a party, the prosecutor is -- for all intents and purposes – the complainant's spokeperson/advocate (e.g., expressing their concerns and point of view.) So, to claim that the victim was somehow without meaningful status or representation in the case strikes as hollow.

DEFENDANT BRINGS ARTICLE 78 PROCEEDING:

Finding no change in circumstances, the Court again denied the defendant's motion. Thereafter, on January 22, 2020, the defendant (now petitioner) brought an Article 78 proceeding, seeking a WRIT OF MANDAMUS directing the criminal court to HOLD A HEARING on the appropriateness and scope of the order of protection.

ORDER OF PROTECTION MODIFIED:

At a follow-up proceeding in the criminal court (before a different judge), the O/P was MODIFIED to NOCO/P after the court reviewed photographs of the complainant and took note of the numerous prior DIRs that had been filed against him. In contrast, no such complaints (much less an O/P) had ever been made against the defendant.

CRIMINAL CHARGES DISMISSED/ ARTICLE 78 ALSO DISMISSED AS MOOT:

The criminal case was adjourned to March 5, 2020, on which date the CHARGES WERE DISMISSED. Thereafter the Supreme Court subsequently DISMISSED the Article 78 proceeding as MOOT (since the relief sought vis-a-vis the O/P had been granted and the case had been resolved in her favor). The defendant appealed from this dismissal, arguing that the issues raised in the court below were of such import as to qualify as an EXCEPTION TO THE MOOTNESS DOCTRINE.

THE A.D. DECIDES DUE PROCESS ISSUE DESPITE MOOTNESS:

The Appellate Division found that the criminal court's initial FAILURE TO HOLD AN EVIDENTIARY HEARING after being advised that the defendant might suffer DEPRIVATION OF SIGNIFICANT LIBERTY OR PROPERTY INTERESTS upon the issuance of a TO/P falls within the EXCEPTION to the MOOTNESS DOCTRINE.

MOOTNESS is a principle of judicial procedure under which a court will decline to reach or decide an issue which is no longer in controversy because of a change in circumstances (e.g., the relief sought was otherwise accomplished such as where a student who claimed to have been wrongfully denied admission to law school based upon his race, was since admitted. (See DeFunis v Odegaard, 416 US 312 [1974]).

EXCEPTIONS TO MOOTNESS:

However, a court may nevertheless review and decide a matter where:

1. there is a likelihood of REPETITION of the conduct either between the parties or among other members of the public;
2. the matter involves a phenomenon that TYPICALLY EVADES REVIEW; or
3. there is a showing of SIGNIFICANT OR IMPORTANT QUESTIONS not previously passed upon (i.e., substantial or novel issues. Matter of Hearst Corp. v Clyne 50 NY2d 707 [1980]).

THIS CASE MEETS THE CRITERIA FOR REVIEW:

The appellate court concluded on the facts of Crawford v Ally, *supra*, that while the O/P issue was not particularly likely to re-occur with respect to these parties (a questionable supposition given their history and the repetitive, cross-complaining nature of DV cases), the court felt that the problem could well occur among members of the public, especially in light of the criminal court's representation that hearings are seldom held in connection with requests for orders of protection. The DA also conceded that TO/Ps are "routinely issued" in DV cases, and the Supreme Court concluded that similar circumstances could arise in another proceeding involving other members of the public.

The court also concluded that TO/Ps -- by their very nature and short duration -- often leave little time for litigation to challenge them while they are in effect (citing People v Forman, 145 Misc2d 115 [Crim Ct, City of N.Y. 1988]). Consequently, in the court's view, they TYPICALLY (rather than necessarily) evade review (citing Hearst Corp v Clyne, *supra* at 715).

The court was also satisfied that this case involved SUBSTANTIAL (if not necessarily novel) issues, implicating important liberty and property interests, (i.e., DUE PROCESS) inasmuch as the prospect of being prevented access to one's own home and children was potentially far-reaching (citing People ex rel McManus v Horn, 18 NY3d 660 [2012]).

The court drew a parallel between the circumstances in the Crawford v. Ally case to Matter of FW 183 AD2d 276 (1st Dep't, 2020). In that case, the AD had decided to rule upon the father's objection to Family Court's delay of a hearing (on his petition to regain custody of his children who had been removed upon complaints of parental neglect), even though the issue was mooted on the merits at a hearing (after which paternal custody was restored).

The AD held that even though the issue was moot, it implicated substantial issues that will likely re-occur elsewhere. The Court also determined that delaying the Family Court proceedings interfered with the father's FUNDAMENTAL LIBERTY INTEREST IN THE CARE, CUSTODY AND CONTROL OF HIS OWN CHILDREN, thereby depriving him of due process of law (*id.* at 281).

DEFENDANT WAS DENIED DUE PROCESS:

Likewise, in Crawford, the criminal court had deprived the defendant of due process by not conducting a PROMPT EVIDENTIARY HEARING with respect to the issuance (and scope) of the TO/P. In particular, the criminal court should have considered whether, under CPL 530.12(a)(1), such order, as requested by the People, was LIKELY TO ACHIEVE ITS PURPOSE without the conditions proposed (no-contact/ no-return to the residence).

The AD noted that at the January 20, 2020, proceedings the criminal court, after finally considering pertinent factors (e.g., no prior O/Ps against the defendant, 17 prior DIRs against the complainant), found a REASONABLE BASIS to modify the TO/P to a NOCO/P.

MANNER OF HEARING:

With respect to the manner of proceedings, the AD held that the hearing need not necessarily be formal (as opposed to summary), but the defendant should be afforded a meaningful opportunity to present sufficient information to show that there may be an IMMEDIATE AND SIGNIFICANT DEPRIVATION OF A SUBSTANTIAL PERSONAL OR PROPERTY INTEREST if the TO/P is granted.

Consequently, in the court's view, under such circumstances, the court should CONDUCT A PROMPT EVIDENTIARY HEARING on notice to all parties in a manner that allows the judge to ascertain the FACTS NECESSARY to decide whether or not such order should be granted. (citing Matter of Lopez v Fischer, 2009 NY Slip Op 32839 [U] [Sup Ct, Nassau County 2009).

BOTTOM LINE:

So, even though the issue was moot, the AD held that a Supreme Court erred in denying the petitioner's motion and, therefore, REVERSED and declared that A PROMPT HEARING SHOULD HAVE BEEN HELD IN THE CRIMINAL COURT ON THE CHALLENGE TO THE PROPRIETY OF ORDER OF PROTECTION.

PRACTICE TIP:

Criminal defense counsel and Family Court practitioners are undoubtedly familiar with the frequency and circumstances under which orders of protection are granted against criminal defendants and one party or the other in Family Court proceedings. While courts undoubtedly consider pertinent statutory factors, (hoping, above all else, to minimize the possibility of further harm coming to the protected party[ies]), they most certainly do not want to be publicly perceived as the person responsible for such harm if it occurs after an application for an order of protection has been denied.

Nevertheless, it is important for counsel, often in the hurly-burly of busy, fast-moving court proceedings, to take the time to point out the relevant constitutional (i.e., due process)

considerations, and not be bashful about demanding a PROMPT HEARING in appropriate cases.

II. SMELL OF MARIJUANA AND OBSERVATION OF SMALL AMOUNT IN CAR DOES NOT PROVIDE PROBABLE CAUSE TO SEARCH THE TRUNK.

PEOPLE V PONDER 191 AD3d 1409 (1ST DEP'T 2021):

In this case, decided on February 21 2021, (one month before PL 222.05[4] was introduced to prevent police searches of vehicles based solely on the smell of burnt marijuana not reasonably related to the driver's condition, and limited to the area within driver's immediate reach), the First Department departed from its earlier precedent and HELD that the smell of marijuana (and observation of a small amount in the vehicle) DOES NOT PROVIDE PROBABLE CAUSE to search inside the trunk.

SMELL OF MARIJUANA INSIDE VEHICLE:

On February 17, 2017, NYC detectives on vehicular patrol in Manhattan observed the defendant driving a vehicle on Eighth Street without working taillights. After pulling the car over and directing the defendant/driver to roll down the window, the detective smelled the odor (and observed some smoke) of what he concluded was recently smoked marijuana. The detective did not, however, observe anything in particular about the defendant's appearance or demeanor suggesting that he was driving under the influence.

SMALL BAG OF MARIJUANA FOUND IN CONSOLE:

The detective (#1) removed the defendant from behind the wheel, patted him down (nothing found), and directed him to the rear of the vehicle. The other detective (#2) followed suit with the front seat passenger. Detective #1 then searched the interior compartment and found a plastic bag containing a small amount of loose marijuana in the console.

UP GOES THE TRUNK LID/ GUN FOUND/SUPPRESSION DENIED/D PLEADS GUILTY:

The detectives then put both occupants back in the vehicle and proceeded to open and search the trunk where they found a loaded handgun. After the defendant's motion to suppress was denied, the pled guilty to Criminal Possession of a Weapon 2d degree for which he was sentenced to a determinate term of five years in prison as a second felony offender.

DEFENDANT ARGUES ON APPEAL: "NO PC TO SEARCH IN TRUNK.":

On appeal, the defendant argued that: 1. the odor and presence of marijuana in the vehicle did not furnish the requisite probable cause to search the trunk and 2. there was NO FACTUAL NEXUS between the possession of a personal-use amount of marijuana (as compared a large quantity suggestive of drug dealing/transporting) and a search for contraband in the trunk.

The defendant cited US v Ross 456 US 803 (1982) for the proposition that the scope of a warrantless search of a vehicle (pursuant to the automobile exception to the warrant requirement) is defined, not by the nature of the container in which contraband is secreted, but

by the OBJECT of the search and the PLACES in which there is PROBABLE CAUSE to believe that it may be found.

Consequently, as the Court acknowledged, probable cause to look for one thing believed to be in one place (e.g., stolen lawn mower in a garage) does not provide probable cause to search in another place (e.g., an upstairs bedroom), where there is no factual basis to believe the item may be located (*see also* People v Langen, 60 NY2d 170, 181 [1983]: "in order for there to be a permissible vehicle search, there must be both probable cause to search the automobile generally, and a NEXUS …(to the) crime for which the arrest is being made.")

Also, as noted in People v Baez, 24 AD3d 112 [1st Dep't 2005]), the permissible scope of a warrantless search pursuant to the automobile exception is defined as being the equivalent (in terms of its legal requirements), of a search that a magistrate would be able to authorize based on a particularized description of the place to be searched and the thing to be seized (citing US v Ross, *supra* at 798).

AUTOMOBILE EXCEPTION:

The rationale for the automobile exception, as the court in Ponder pointed out, stems from the fact that: 1. contraband concealed in a vehicle can be readily moved beyond the reach of a search warrant, and 2. there is a reduced expectation of privacy in vehicles (as compared, for example, to one's dwelling place), because of the extensive regulations imposed upon drivers. (*see* People v Blasich, 73 NY2d 673 [1989] and People v Belton, 55 NY2d 49 [1982].)

The Ponder court cautioned, however, that the auto exception dispenses only, in appropriate cases, with the warrant requirement, but NOT with the requirement that there be probable cause to search the vehicle in the first place (citing People v Blasich, *supra* and People v Langen, *supra*).

THE PEOPLE ARGUE: "PER SE PC BASED ON MARIJUANA SMELL":

Also relying on US v Ross, *supra* and relying also on People v Mena 87 AD3d 87 AD3d 946 (1st Dep't 2011) and People v Valette 88 AD3d 461 (1st Dep't 2011), the People argued that the smell of marijuana in a lawfully stopped vehicle PER SE provides probable cause to search the trunk (*see also* People v Peterson, 22 AD3d 1770 [2d Dep't 2005] and People v Horge, 80 AD3d 1074 [3d Dep't 2011] where the smell of marijuana [in both cases] and the defendant's admission to smoking and having more pot in the car [Peterson], and the defendant putting up air fresheners and trying to ditch a cell phone [Horge], were deemed to furnish probable cause to search the inside of the car and trunk).

PONDER COURT AGREES WITH THE DEFENDANT:

The Court in Ponder accepted the defendant's argument that the ruling in US v Ross, *supra* (which the People relied on for the proposition that "a warrant to search a vehicle would support the search of every part of such vehicle that MIGHT CONTAIN the object of the search," [456 US at 821]), did not extend so far beyond its own facts to apply to a situation like this where there was little if anything to suggest the presence of contraband in the trunk.

US v ROSS:

In Ross, the police actually received a tip that the defendant was selling drugs OUT OF THE TRUNK OF HIS CAR (a description of which had been provided), before they pulled it over and ordered him to get out. Once the defendant was removed, a police sergeant observed a bullet on the front seat. He then searched the glove box and found pistol inside. An ensuing search of the trunk uncovered a brown paper bag which contained heroin, and a leather pouch containing cash.

The Ponder court noted that the issue in Ross was not whether the TRUNK search was permissible but whether there was probable cause to search the CLOSED CONTAINERS found therein. In the court's view, nothing in the Ross decision altered the PROBABLE CAUSE requirement or implied that all vehicle searches necessarily include the trunk.

As the Supreme Court observed in Ross, "the probable cause determination must be BASED ON OBJECTIVE FACTS that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." (456 US at 808).

To the extent, then, that the People were relying on Ross for the argument that the smell of marijuana alone provides the key (i.e., probable cause) to opening the trunk, such reliance, in the court's estimation, was misplaced.

BYE-BYE MENA AND VALETTE:

Also, insofar as the People relied on Mena and Valette *supra*, the court in Ponder rejected those decisions as being contrary to existing law and without value as legal precedent.

HELLO RAMOS AND ROMEO:

The court was more persuaded by cases like People v Ramos, 122 AD3d 462 (1st Dep't 2014), where equivocal police testimony about the smell of marijuana in the defendant's car, and observation of an empty plastic baggie on the floor, together with the defendant's seemingly sober appearance, provided no valid basis to search the trunk; and People v Romeo, 15 AD3d 420 (2d Dep't 2005) where the smell of marijuana, the defendant's inability to produce a valid driver's license and an interior car search that turned up nothing, furnished no valid reason to search a closed duffel bag found inside the trunk.

With respect to whether the observation of a small amount of marijuana in the vehicle provided the necessary nexus to support the search of the defendant's trunk, the court determined that the only reasonable conclusion to be drawn from the presence of so scant a quantity was that it was for personal consumption rather than distribution or trafficking. Even the lower court, despite deeming itself constrained by then-existing precedent (Mena and Valette, *supra*) in denying the defendant's motion to suppress, wondered whether it would rule differently if this had been a case of first impression.

The First Department appears to have resolved that dilemma in Ponder, and the new law (PL 222.05[4]) seems to have taken it a step further by not allowing the smell or observation of marijuana in a vehicle to permit a search beyond the area that is readily accessible to the driver and only insofar as it is reasonably likely to contain evidence that it is relevant to his/her condition.

FINAL TOUGHT:

The old per se rule, “where there’s weed, there’s a way” (to justify a search of a motor vehicle) appears now to be a thing of the past. And cases like People v Chestnut, 43 AD2d 260 (3d Dep’t 1974) -- which held that the smell of marijuana smoke alone can provide probable cause to search an automobile and its occupants -- can now be considered to have been roasted on the open fire of recent changes in the law with respect to possession of marijuana. While the automobile exception still applies, there must be something more than marijuana to justify such searches (unless the defendant is driving under the influence).

It will be interesting to see whether there will be an increase in the number of motorists who are described by the arresting officer as appearing “under the influence” (in cases where marijuana and, more importantly, a weapon is found in the vehicle). The use of Drug Recognition experts may also increase (especially since the new marijuana legislation is supposed to provide more funds for drug recognition). Time will tell how the new marijuana laws and case developments shape the search and seizure landscape in the context of motor vehicle stops.

Thanks to Alan Hoffman Esq. for submitting People v Ponder for consideration. TF