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# MATTER OF ABE A.  HOW MUCH PROCESS IS A DEFENDANT DUE?

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## INTRODUCTION

When the police execute a search warrant at a defendant's home, the first inkling that the gendarmes are storming the manse to search for contraband or evidence of a crime occurs when the door swings open and they hold up the court order authorizing the intrusion.

That is because search warrant applications, whether in camera or not, are based on applications made by a police officer, DA or other public servant acting pursuant to official duties (CPL 690.05[1]) on an EX PARTE basis. To alert the defendant beforehand might well defeat the purpose of the warrant by prompting the target to conceal or destroy the evidence sought.

When the authorities wish, however, to seize a person and  collect corporeal evidence from his/her body that they hope will connect him/her to a crime, something more in the nature of forewarning and opportunity to be heard is required before they compel an individual to do things like: open wide for a buccal swabbing of his/her inner cheek, hold out his/her arm for a blood draw, or reveal a concealed part of his/her body for photographing and/or documentation.

## POST ARREST SCENARIO

CPL 245.40(10) states that after the FILING OF AN ACCUSATORY INSTRUMENT, and subject to constitutional limitations, the court may, UPON MOTION OF THE PROSECUTION showing PROBABLE CAUSE to believe the defendant has committed the crime and a CLEAR INDICATION that RELEVANT, MATERIAL EIDENCE will be found, and the METHOD TO SECURE such evidence is SAFE AND RELIABLE, require a defendant to:

a. Appear in a LINE UP.

b. SPEAK for IDENTIFICATION by a witness or potential witness.

c. be FINGERPRINTED.

d. POSE for a PHOTOGRAPH (not involving an event re-enactment).

e. Permit the taking of samples of the defendant's BLOOD, HAIR or OTHER BODILY MATERIALS (that involve no unreasonable intrusion.

f.  Provide HANDWRITNG samples and

g. Submit to a reasonable PHYSICAL or MEDICAL INSPECTION of the defendant's body.

So if a victim or witness swears, for example, that the suspect manifested a particular age, height, weight and physical appearance, spoke with a noticeable accent or impediment, handled certain objects at the scene, deposited blood, semen, saliva hair or other bodily artifacts at the scene, left a note before leaving or had a tattoo of a purple pimpernel on his derriere, the court, UPON A PROPER SHOWING OF PROBABLE CAUSE (and a strong likelihood of materiality and safe collection) could order the suspect to submit to any or all of the above intrusions.

Probable cause (aka reasonable cause) to believe that a person has committed an offense when apparently reliable evidence or information discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that such offense was committed and that such person committed it (CPL 70.10[2]).

A person may be taken into custody (i.e., arrested) only when there is probable cause which cannot be based on conduct that is equally consistent with innocence as it is with guilt (*People v Valentine*, 17 NY2d 128 [1966]). Nor can evidence be seized absent the requisite showing of probable cause.

If an officer possesses probable cause to believe that the defendant has committed a crime (i.e., a felony or misdemeanor per PL 10.00[6]), based on personal knowledge or reliable hearsay, he may arrest such person (CPL 140.10[b]). The officer may do likewise for an offense (i.e., conduct subject to potential imprisonment or fine per PL 10.00[1]) committed in his/her presence (see *People v Maldonado*, 85 NY2d 631 [1995]).

ABE A. AND THE UNCHARGED SUSPECT

CPL 245.40(2) states that this section in no way affects the issuance of a similar court order, as may be authorized by law, BEFORE the filing of an accusatory instrument, consistent with the defendant's state and federal constitutional rights.

The above section codifies the long-standing practice of prosecutors of seeking a court order pre-indictment (or before any charges have been filed) to compel a suspect to submit to the taking of non-testimonial evidence (a blood sample in *Abe A*.) as long as certain due process and evidentiary standards are met and precautionary measures consistent with individual privacy and safety have been taken (*Matter of Abe A*., 56 NY2d 280 [1982]).

When a prosecutor seeks such an order, he/she is essentially attempting to obtain physical (or demonstrative) evidence from the defendant him/herself in the hopes of shoring up the People's case by tying the defendant to the crime forensically (e.g., showing that his/her DNA matches DNA found on the murder weapon or at the scene, or that the defendant had sexual contact with the victim or left other personal calling cards (e.g.., saliva, hair, finger prints) at the scene of the crime.

The Court of Appeals in that case held that a court order to obtain a blood sample of a suspect may issue provided the People establish:

1.PROBABLE CAUSE to believe a defendant has committed a crime.

2. A CLEAR INDICATION that RELEVANT AND MATERIAL EVIDENCE will be found, and

3. The METHOD used to secure the evidence is SAFE and RELIABLE.

The court must also WEIGH THE SERIOUSNESS of the crime, the IMPORTANCE of the evidence to the investigation and the UNAVAILABILITY OF LESS INTRUSIVE MEANS of obtaining it against concerns for the INDIVIDUAL'S RIGHT to be left FREE FROM BODILY INTRUSION.

*Abe A*. was a New York City businessman who was found violently beaten to death (head smashed, face bruised, teeth knocked out, larynx crushed) in his own apartment which was splattered and sprayed with his blood. A second sample of a different (and rare) blood type was also detected at the scene.

A's business partner, Jon L. reported A's absence to the police after he missed a scheduled meeting and did not respond to phone calls. A's car was left in the building's parking ramp and his beaten and bloody body was discovered in his dwelling.

At the apartment where the police met the victim's son and Jon L, the son noticed bruises on Jon L's face and teeth marks on his hands which were also bruised. Jon L. told police that he had been attacked and knocked out cold the day before during rush hour (right around the same time Abe A. reportedly was attacked) by an unknown assailant who apparently stole nothing from him. The police could find no witnesses at the busy subway location nor did the transit police receive any reports of the alleged attack which Jon L also kept to himself.

The DA moved on notice to the defendant, for an order compelling him to submit to the taking of a blood sample. Supreme Court found that there was probable cause to believe that Jon L killed Abe A, that the evidence sought was clearly probative (of the killer's identity in view of the second blood type found at the scene) and the intrusion (needle draw) was "trifling." The court directed that the sample be drawn by an MD at Bellevue Hospital in the presence of a detective who would promptly transport the sample to the NYCME lab for testing and comparative analysis. (Jon L's blood type was ultimately found to have matched one of the types identified at the scene).

The defendant initially failed to comply with the order and the People sought and the court granted an ORDER OF CONTEMPT per Judiciary Law 750 which was stayed pending appeal. The court said that if the Appellate Division (AD) affirmed, the defendant could purge the contempt by submitting to the blood draw.

That became unnecessary, however, when the AD (81 AD2d 362) reversed and dismissed both the contempt order and the order to provide a blood sample because it had been granted in the absence of any criminal charge pending against Jon L.

The Court of Appeals, noting the authority of courts to issue search warrants against uncharged suspects (CPL 690.05) upon a showing of probable cause (that specified evidence could be found at a particular location or in the possession of a particular person), REVERSED and upheld the order to provide a blood sample.

As the Court observed, "it is no reach…to hold that blood samples which are the target of the order, in the proceeding before us fall within these (search warrant) provisions (citing *People v Teicher*, 52 NY2d 638 [1981]).

The Court noted that the Fourth Amendment protections against unlawful searches and seizures apply, first, to the seizure of the person to bring him/her into contact with law enforcement and, second, to the subsequent search for and seizure of evidence (citing *United States v Dionisio*, 410 US 1 [1973]).

When there is no exigency (i.e., risk of imminent destruction of the sought-after evidence), providing the target with notice and an opportunity to be heard in opposition is what the law requires (citing, inter alia, *Matter of Barber v Rubin*, 72 AD2d 347 [1980]).

The Court rejected the AD's conclusion that a formal charge is a condition precedent to compelling a suspect to submit to a blood draw as there is no constitutional right to be arrested. Nor should police be required to guess at their peril the exact moment that they have sufficient evidence to make an arrest or put the brakes on an investigation as soon as they have the bare minimum to establish probable cause (citing *Holland v United States*, 385 US 293 [1966]).

The Court was satisfied that sufficient facts were put forward to support the lower court's finding of probable cause.

The second level of inquiry focuses on the bodily intrusion which requires a clear indication that the seizure is likely to yield relevant and material evidence (*Schmerber v California*, 354 US 757 [1966], *Cupp v Murphy*, 412US 291 [1973]). In *Abe A*. the blood found at the murder scene (one type of which came from someone other than the victim) and Jon L's own curious injuries (coupled with his dubious explanation) clearly made his own blood sample relevant to the issue of identification.

The Court was also satisfied that the method of obtaining the evidence involved a minimal (though not entirely pain-free) intrusion and was acceptable as long as the procedure was carried out by a medical professional in an appropriate setting. There were also no alternative means of obtaining the evidence.

PEOPLE V GOLDMAN: THE DEFENSE IS NOT ENTITLED TO DISCOVERY OR A FULL EVIDENTIARY HEARING

In this case, (35 NY3d 582 [2020]), the Court held that beyond notice (which applies to both the seizure of the person and of corporeal evidence) and opportunity to be heard, the defense is not constitutionally entitled to see and challenge (at a full blown adversarial hearing) the People's evidence in support of probable cause before a court issues an order (search warrant) compelling the collection of evidence (in this case, a buccal swab) for purposes of DNA analysis.

The defendant was a member of a gang who, along with three colleagues, drove to a rival neighborhood in a gold Nissan Maxima, got out of the front passenger door and fatally shot a 16-year-old adversary.

Street video captured images of the car and four occupants, and a different video recorded the defendant and the vehicle at his apartment building shortly after the shooting. The driver eventually flipped and identified the defendant as the shooter. The vehicle was seized and swabbed for DNA which uncovered a male profile on the driver's side door handle and arm rest.

The People sought a search warrant to obtain a sample of his saliva for comparison with the DNA found in the car. The prosecutor sent notice of the application to defense counsel who represented the defendant who was now in Rikers prison on an unrelated matter.

At proceedings on the application, the lower court questioned the presence of defense counsel but provided a limited opportunity to be heard in opposition to the People's application. Counsel, citing *Abe A*., argued that the defendant was entitled to discovery of the People's evidence submitted in support of their claim of probable cause and requested a hearing to examine any witnesses to challenge the issuance of the warrant.

The court then sent counsel packing for the remainder of the proceeding and granted the People's application. A post-indictment motion to suppress for lack of probable cause was denied and the defendant was tried and convicted of Manslaughter 1st degree.

The First Department reversed (17 AD3d 581 [1st Dept 2019]), noting that the due process requirements apply not only to the seizure of the person (whether he is in or out of custody) but also to the seizure of corporeal evidence from his person.

The Court of Appeals reversed, noting that an application for a court order compelling an individual to submit to the collection of evidence, like a search warrant, need not be litigated beforehand at an evidentiary hearing.

In the Court's view, the court's obligation is to ensure that there is probable cause (and the other factors have been met) and that the Fourth Amendments standards of reasonableness have been satisfied. (Citing *Abe A*., supra at 295). The Court concluded that the Fourth Amendment protective standards had been met, and absent a request for a particularly invasive or risky procedure (e.g., surgery to remove evidence), there is no call for a more in-depth adversarial proceeding (citing *Winslow v Lee*, 470 US 753 [1988]).

As the Court saw it, there is no need for a hearing if the reasonable and minimal nature of the bodily intrusion is well established and, as here, there is a strong likelihood that the evidence seized will be of probative value. The Court noted more than once that the defense made no argument about the intrusiveness of the procedure, or the risk of a suspect's DNA being used for other unauthorized purposes that might violate his right of privacy (referencing NY Executive Law 995-d).

In sum, the Court concluded that the constitutional role of a neutral and detached magistrate to determine probable cause from the facts submitted in support thereof (thus permitting the collection of corporeal evidence) required "no supplemental adversarial process" beyond an initial opportunity to be heard in opposition.

Also, the method and manner of collecting the evidence (buccal swabbing) met constitutional standards of reasonableness and the defendant's request for discovery and an adversarial hearing, in the Court's view, was without constitutional basis.

DAMNING DISSENT

The dissenting judge (Hon. Jenny Rivera) argued that *Abe A'*s strict standard requires more than a perfunctory appearance in opposition without the opportunity to challenge (with ammunition provided in discovery) at a hearing the alleged factual basis for the claimed probable cause. Moreover, it is the fact rather than the degree of intrusion that should trigger constitutional protections BEFORE the evidence is taken from the person's body.

In the dissenter's view, the majority trivialized *Abe A*.'s due process protections which should apply no matter how unobtrusive (relatively speaking), the procedure may be.

FINAL THOUGHT

While *Goodman* appears to limit the scope of due process challenges to buccal swab and other such requests, as a practical matter, prosecutors typically lay out their case for probable cause (if only in summary form) in their applications which are routinely provided to the defense.

Counsel should therefore seize every opportunity to contest the People's claim by pointing out the gaps or flaws in their facts that purport to connect the defendant to the crime in question. If, in fact, there is probable cause, there should already be enough evidence to arrest the defendant (not that the police must do so at any particular point in time).

It might be worth asking the court (rhetorically) if it sees sufficient facts alleged to authorize an arrest of the suspect (reasonable suspicion will not cut it). If the answer is no, then the court should NOT order the suspect to submit to the taking of evidence from his/her person.

In some cases, the prosecutor may throw whatever he/she has at the court in the hope of obtaining permission to collect and cobble together evidence to shore up a weak (or non-existent) case and turn a sow's ear into a silk pocketbook. Such efforts should be vigorously resisted.