MOTIONS & PRE-TRIAL HEARINGS

2015 New York State Magistrates Association Conference
Niagara Falls, New York

Daniel M. Killelea, Esq.

Education

B.S. Cornell University, 1992
J.D. University at Buffalo School of Law, 1997

Professional Experience

Owner of Law Offices of Daniel M. Killelea, Esq. 2014-Present
Instructor at Erie County Central Police Services Law Enforcement Training Academy 2006–present
Partner at Mohun & Killelea 2011-2013
Associate at Lipsitz Green Scime Cambria LLP 2007–2011
Special Assistant United States Attorney for the Western District of New York 2006-2007
Assistant District Attorney at Erie County District Attorneys Office 1998–2007

Other Professional Activities, Honors

Received Avvo.com's highest rating of "10.0/Superb," 2012, 2013, 2014, 2015.
Named among the top three Criminal Defense Attorneys in Buffalo and Western New York for DWI defense by Justice Ain't Hard blog (http://wnycriminallaw.blogspot.com/?m=0), 2013.
Named to "Who's Who in Law 2012" by Buffalo Law Journal, 2012.
Named one of "Ten Young Litigators of Distinction" by Buffalo Law Journal, 2005.
Certified as a General Topics Instructor by the New York State Municipal Police Training Council 2006-present
While working as an Assistant District Attorney in Erie County, New York, served as Coordinator of "Operation IMPACT," an anti-street-gang crime fighting initiative.
Member, Erie County Bar Association
Member, Judiciary Committee, Erie County Bar Association
Member, Criminal Law Committee, Erie County Bar Association
Member, Genesee County Bar Association
Member, New York State Bar Association
Member, SUNY at Buffalo Law School Alumni Association
Member, Wyoming County Chamber of Commerce
Honorary Member, Italian-American Police Association of Western New York
Guest Lecturer, State University of New York at Buffalo Law School

Publications

"Sovereign Citizens Movement Overview" The Docket, 2014

Analyzing Case Law Related to DWI Vehicle Stop Issues
Aspatore Books, "Strategies for Defending DWI Cases in New York" 2012

"So You (or the Attorney You're Representing) Have Been Convicted of a Crime--What Now?"
Erie County Institute of Law, "Ethical Year in Review" 2012

Speaking Engagements

Motions and Pre-Trial Hearings
Continuing Judicial Education 2015

A Primer on the Effective Assistance of Counsel
Continuing Legal Education 2014

DWI for Court Clerks
8th Judicial District Court Clerks' Training 2014

Huntley Hearings
Continuing Legal Education 2014

Criminal Jury Trials in the Justice Courts
Continuing Judicial Education 2014

The Basics of Criminal Practice
Life After Law School Continuing Legal Education 2014

Criminal Jury Trials in the Justice Courts
Continuing Judicial Education 2013

The Sovereign Citizen Movement and Its Impact on NYS Courts
Continuing Judicial Education 2013

Pringle Hearings
Continuing Judicial Education 2013

The Sovereign Citizen Movement and Its Impact on NYS Courts
8th Judicial District Court Clerks' Training 2013

The Sovereign Citizen Movement and Its Impact on NYS Courts
Court Clerks' Conference 2013

The Sovereign Citizen Movement and Its Impact on NYS Courts
Allegany County Magistrates' Association Meeting 2013

The Sovereign Citizen Movement and Its Impact on NYS Courts
Erie County Magistrates' Association Meeting 2013

The New York State SAFE Act of 2013
Genesee County SCOPE Members' Meeting 2013

The Basics of Criminal Practice
Life After Law School Continuing Legal Education 2013

Youthful Offender Proceedings
Continuing Judicial Education 2013

Search Warrants
Continuing Judicial Education 2013

Motions and Pre-Trial Hearings
Continuing Judicial Education 2013

Certificates of Relief/Sentencing in State Court
Continuing Legal Education 2012

Personal Defense Under Article 35 (Defense of Justification)
Genesee County SCOPE Panel Discussion 2012

DWI Laws and Consequences
Elma Conservation Club Members' Meeting 2012

The Basics of Criminal Practice
Life After Law School Continuing Legal Education 2012

Chain of Custody and Search Issues
Crime Scene Detectives' Training 2012

Update to DNA Collection Law
Court Clerks Conference 2012

Criminal Jury Trials in the Justice Courts
Continuing Judicial Education 2012

Motions and Pre-Trial Hearings
Continuing Judicial Education 2012

Motions and Pre-Trial Hearings
Continuing Judicial Education 2012

Home Defense Under Article 35 (Defense of Justification)
Judges' and Police Conference Panel Discussion 2011

Getting Your Client Through It All--From the Late Night Phone Call to License Restoration
Defending the DWI Defendant Continuing Legal Education 2011

White Collar Crime
Buffalo Police Department Detectives' Inservice 2007

Basic Criminal Investigations
Buffalo Police Department Detectives' Inservice 2007

New York State Firearms Laws
Project Safe Neighborhoods Firearms Conference 2006

Laws of Arrest; Search & Seizure
Peace Officer Inservice Training 2005

Community Involvement

Judge, New York State Bar Association's High School Mock Trial Tournament
Member, Elma Conservation Club
Member, Red Jacket Game Club
Member, National Wild Turkey Federation
Former Advancement Chair, Cub Scout Pack 281

Motions & Pre-Trial Hearings

Cattaraugus County Magistrate's Association March 21, 2015

Presented By

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Motions & Pre-Trial Hearings

By
Daniel M. Killelea, Esq.

MOTIONS

I. Discovery and Bills of Particular—Not Formal Motions (yet…)

A. CPL Article 240: Demand to Produce (CPL §240.20)

i. It's a written notice served by and on a party to a criminal action, without leave of the court (CPL §240.10[1])

ii. Available for all accusatory instruments except Felony Complaints, and Simplified Traffic Informations charging non-criminal offenses (CPL §240.20[1])

iii. CPL §240.20(1)(k) is specific to V&T offenses such as DWI

iv. There's a codified list of additional materials defendant is entitled to (CPL §240.20[1][a] through [j]), but nothing prohibits expansion of requests

v. Details of Prosecution deals with witnesses are discoverable under People v. Novoa (70 NY2d 490 [1987])

vi. Unless material is subject to protective order, prosecutor "shall disclose and…make available for inspection, photographing, copying or testing"

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B. CPL Articles 200 and 100: Request for a Bill of Particulars (CPL §200.95; CPL §100.45[4])

i. A Bill of Particulars is a written statement by the prosecutor specifying items of factual information which are not recited in the accusatory instrument and which pertain to the offense charged, including the substance of each defendant's conduct and whether he was an accomplice or a principal (CPL §200.95[1][a])

ii. A Request for a Bill of Particulars is a written request served by the defendant upon the People without leave of the Court requesting a Bill of Particulars, specifying the items of factual information desired, and alleging that the defendant cannot adequately prepare or conduct his defense without the information requested (CPL §200.95[1][b])

iii. Doesn't require the ADA to include matters of evidence relating to how the People intend to prove the elements of the offense charged or how the People intend to prove any item of factual information included in the BOP (CPL §200.95[1][a])

a. What type of "firearm" is an appropriate request, but…

b. Caliber of weapon is matter of evidence

iv. BOP is available for all accusatory instruments except Felony Complaints and Simplified Informations (CPL §§100.45[4], 200.95)

v. In most DWI prosecutions, the prosecutor will respond that the defendant has already received a Bill of Particulars at his arraignment—the "DWI Longform/Bill of Particulars" (DCJS Form 3204)

vi. Despite not being a "written response by the prosecutor," it's likely there will be more information included in the

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DWI Longform than in a formal written response by the prosecutor

vii. Timely request is within 30 days of arraignment or first appearance of counsel (CPL §200.95[3])

viii. Upon timely request by defendant, People have 15 days to comply (CPL §200.95[2])

ix. People's refusal to comply (either in whole or in part) must be in writing (CPL §200.95[4])

x. Request for a Bill of Particulars must allege that defendant cannot adequately prepare or conduct his defense without the information requested (CPL §200.95[1][b])

C. Cross Demand

i. CPL §240.35 allows for Discovery Upon Demand of Prosecutor

a. Written Report or Document concerning a physical or mental examination, or scientific test, experiment, etc.

b. Any photograph, drawing, tape or other electronic recording which the defendant intends to introduce at trial

ii. Only applies in criminal prosecutions

iii. Prosecutor can also demand a Notice of Defense(s) (CPL Article 250)

a. Psychiatric Defense (CPL 250.10) (within 30 days)

b. Alibi Defense (CPL §250.20)

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1. Prosecutor's Demand must be within 20 days

2. Defendant's Response must be within 8 days of Prosecutor's Demand

c. Defenses (found at PL §156.50) Relating to Use of Computers (within 45 days of Arraignment, but not more than 20 days before Trial)

II. Pre-Trial Motions (CPL §255)

A. Standard timeframe is within 45 days of arraignment, unless Court grants additional time upon defendant's request (CPL §255.20[1])

B. All motions must be made at the same time wherever practical (CPL §255.20)

C. <u>Dismissal</u>

i. Geographical Jurisdiction (CPL Article 20)

a. An offense committed within five hundred yards of the boundary of a particular county with an adjoining county in NYS may be prosecuted in either county (CPL §20.40[4][c])

b. An offense committed upon any bridge having terminals in different counties may be prosecuted in either county (CPL §20.40[4][e])

c. An offense committed in a private vehicle during a trip extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip (CPL §20.40[4][g])

d. These same principles apply to the determination of geographical jurisdiction over offenses as

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between cities, towns, and villages within a particular county (CPL §20.50[1])

e. Where an offense prosecutable in a local criminal court is committed in a city (other than NYC), town or village but within 100 yards of any other city, town or village, it may be prosecuted in either locale (CPL §20.50[2])

ii. Statutory Bases for Motions to Dismiss in Local Court (CPL §170.30)

a. Defective accusatory instrument (CPL §§170.30[1][a], 170.35)

b. Defendant has immunity (CPL §§170.30[1][b], 50.20, 190.40)

c. Double Jeopardy has attached (CPL §§170.30[1][c], 40.20)

d. Statute of Limitations (CPL §§170.30[1][d], 30.10)

e. Speedy Trial Violation (CPL §§170.30[1][e], 30.20, 30.30)

1. Adjournments with Consent of defendant or attorney are excludable from calculation (CPL §30.30[4])

2. In misdemeanors, People must be ready for trial within 90 days of commencement of action, and readiness must be placed on the record (People v. Kendzia, 64 NY2d 331 [1985])

3. Post-readiness delay (i.e., when the People cannot proceed to trial after declaring readiness) is calculated using the same analysis as pre-readiness delay

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4. Burden is on the Defendant to establish a *prima facie* case of violation of the statute; the People must then show that there is excludable time (People v. Berkowitz, 50 NY2d 333 [1980])—a hearing may be necessary to make final determination

5. Factors for establishing violation of Constitutional Speedy Trial rights (i.e., CPL §30.20) are found in People v. Taranovich (37 NY2d 442 [1975])

f. Some other jurisdictional or legal impediment to conviction of defendant for the offense charged (CPL §170.30[1][f])

g. In furtherance of (or "in the interests of") justice (CPL §170.30[1][g])

iii. Furtherance of Justice (CPL §§ 170.30[1][g], 170.40; 210.20[1][i], 210.40)

a. Applies to Vehicle & Traffic law offenses, as well as Penal Law offenses (CPL §§170.40[1], 210.40[1])

b. Dismissal required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice (Id.)

c. List of factors to be considered by Court in making determination includes "any other relevant fact indicating that a judgment of conviction would serve no useful purpose" (CPL §§170.40[1][j], 210.40[1][j])

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iv. Failure to file charges with Court

a. Occasionally, when defendants are given Appearance Tickets with early return dates on them, copies of those accusatories are not filed with the Court in time for "arraignment"

b. Some local courts will consequently, and upon defense motion, dismiss the accusatory instruments served upon the defendants

c. Double jeopardy does not attach, however, since there was neither a conviction nor a trial—and there was no accusatory instrument filed in a court (CPL §40.30[1])

D. Discovery

i. Upon motion of defendant, Court must order discovery of any materials sought in defendant's Demand to Produce if prosecutor's refusal is "not justified" (CPL §240.40[1][a])

iii. Upon motion of defendant, and unless the prosecutor can show good cause for it not to, the Court must order discovery of any materials sought in defendant's Demand to Produce if prosecutor has not filed a written refusal, or must order one of the other remedies provided by CPL §240.70(1):

a. The Court may grant a continuance;

b. The Court may issue a protective order;

c. The Court may prohibit the introduction of the evidence; or

d. The Court may "take any other appropriate action"

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1. Dismissal of Charge (People v. Churba, 76 Misc2d 1029 [NYC Crim. Ct. 1974]; People v. Nieves, 133 AD2d 234 [2nd Dept. 1987])

2. Adverse Inference Charge (PL §450.10[10]; People v. Sosa, 255 AD2d 236 [1st Dept. 1998])

E. Bills of Particulars

i. Upon appropriate written motion of defendant for a Bill of Particulars where the prosecution has refused to comply in writing, the Court must (absent a protective order) order the prosecutor to comply with the request (CPL §200.95[5])

ii. Upon appropriate written motion of defendant for a Bill of Particulars where the prosecution has not timely refused to comply, the Court must (absent good cause) order the prosecutor to comply with the request, or order one of the other remedies provided by CPL §240.70(1):

a. The Court may grant a continuance;

b. The Court may issue a protective order;

c. The Court may prohibit the introduction of the evidence; or

d. The Court may "take any other appropriate action"

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F. Motions to Remove the Action to Another Court

i. CPL §170.15(3) governs removal from one court to another

ii. Applies due to incapacity or disqualification of judge(s)

iii. Applies when Court cannot form a jury

iv. Recusal of Judge is covered under Judiciary Law §14

G. Motions to Suppress

i. Physical Evidence (Mapp v. Ohio, 367 U.S. 643 [1961])

a. Defendant must allege standing in pleadings, then must establish standing at Hearing

b. Standing must be alleged to contest seizure of evidence (CPL §710.20)

c. People v. Ponder (54 N.Y.2d 160 [1981]) describes standing as either a present possessory interest or an expectation of privacy in the area or premises searched

d. Grounds for Motions to Suppress are found CPL §710.20

ii. Statements

a. People v. Huntley (15 N.Y.2D 72 [1965])

1. To determine if a statement made to public official or one working in cooperation with public official was voluntarily made, and therefore admissible

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2. Prosecution has the burden of showing beyond a reasonable doubt that the statement was voluntarily made

3. Defendant must have been put on notice of statement(s) made to a public servant, within 15 days of Arraignment (CPL §710.30[2]) for it to be admissible in People's case-in-chief

4. If no notice is served, statement is to be precluded from use at trial unless defendant has moved to suppress it (CPL §710.30[3])

5. Where a defendant claims a statement should be suppressed because of involuntariness, no factual allegations need be alleged to be entitled to a Hearing (CPL §510.50[3][6])

b. Berkemer v. McCarty (468 U.S. 420 [1984])

1. Roadside questioning is non-custodial for purposes of Miranda

2. Not an absolute, however—if situation evolves into what constitutes custodial questioning, Miranda will apply

c. People v. Berg (92 N.Y.2d 701 [1999])

1. "Reciting the alphabet and counting are not testimonial or communicative" (Berg, at 705)

2. Left open the question of whether the refusal to perform SFSTs is testimonial or non-testimonial

iii. Identifications (U.S. v. Wade, 388 U.S. 218 [1967])

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a. CPL §710.30 requires Defendant be given notice of any police-arranged identification proceedings within 15 days of arraignment

b. No notice required if witness and defendant know each other, or if the pre-trial identification is not the result of police conduct

c. Absent Notice, identifications must otherwise be precluded (CPL §710.30[3]), regardless of any independent basis for the ID (People v. Perez, 177 A.D.2d 657 [2d Dept. 1991], *appeal denied by* 79 N.Y.2d 951 [1992])

iv. Vehicle Stops

a. People v. Ingle (36 N.Y.2d 413 [1975])—articulable reason to stop the vehicle, which must be rational and not due to whim, caprice or prejudice

b. Delaware v. Prouse (440 U.S. 648 [1979])—police cannot stop vehicles absent an articulable reason or reasonable suspicion of criminal activity

c. People v. Rose (67 A.D.3d 1447 [4th Dept. 2009])—"in the time since Ingle 'the Court of Appeals has made it "abundantly clear"…that "police stops of automobiles in this state are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or where there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime"…or where the police have "probable cause to believe that the driver…has committed a traffic violation"' (People v. Washburn, 309 A.D.2d 1270, 1271; *see* People v. Robinson, 97 N.Y.2d 341, 348-349; People v. Spencer, 84 N.Y.2d 749, 752-753,

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cert denied 516 U.S. 905; People v. White, 27 A.D.3d 1181)"

d. Mistakes of Law

1. Matter of Byer v. Jackson (241 A.D.2d 943 [4th Dept. 1997])—"Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal"

2. People v. Rose (*supra*)—flashing of high beams

3. People v. Smith (1 A.D.3d 965 [4th Dept. 2003])—missing front plate

v. Roadblock Stops

a. A roadblock or checkpoint stop is a seizure within the meaning of the Fourth Amendment (People v. Scott, 63 N.Y.2d 518 [1984]; In the Matter of Muhammad F., 94 N.Y.2d 136 [1999]; Michigan Dept. of State Police v. Sitz, 496 U.S. 444 [1990])

b. It's only Constitutional if it follows certain requirements:

1. Must not intrude upon privacy of motorists approaching checkpoint (People v. Scott, *supra*)

2. Must be maintained in accordance with a uniform procedure which affords little discretion to individual officers (Id.) regarding, for example:

I) Which vehicles are to be stopped

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II) Which questions are to be asked

III) Which Standardized Field Sobriety Tests ("SFSTs") are to be conducted

c. Must have adequate precautions to safety, lighting and fair warning of its existence (Ibid.)

d. The plan or directive used by the police in the selection and operation of the checkpoint must be in writing (In the Matter of Muhammad F., *supra*)

e. Checkpoint stops are presumptively unconstitutional, and will be held unconstitutional unless the primary purpose of the checkpoint was not merely to serve the general interest in crime control or to detect evidence of ordinary criminal wrongdoing (City of Indianapolis v. Edmond, 531 U.S. 32 [2000])

f. This cannot be done merely by calling the roadblock a "sobriety checkpoint" (City of Indianapolis v. Edmond, *supra*)

g. The prosecution has the burden of showing that the stated purpose of a checkpoint was its actual purpose (People v. Jackson, 99 N.Y.2d 125 [2002]; *see also*, People v. Trotter, 28 A.D.3d 165 [4th Dept. 2006], *leave to appeal denied by* 6 N.Y.3d 839 [2006])

h. To prove the primary purpose of the checkpoint, the prosecution will be required to present the testimony of a high-ranking police official involved in policy making, not merely an officer who conducted the checkpoint (City of Indianapolis v. Edmond, *supra*)

vi. Probable Cause for Arrest

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a. Dunaway v. New York (442 U.S. 200 [1979])

b. Absent probable cause to arrest for DWI/DWAI, evidence obtained subsequent to arrest should be suppressed

1. Statements

2. Observations

3. Chemical Test Results

c. If Court won't grant a stand-alone Dunaway (i.e., "probable cause") hearing, it should at least allow challenging of probable cause in a Huntley or Mapp hearing (People v. Wise, 46 N.Y.2d 321 [1978])

vii. Court may grant the Motion to Suppress where the People do not deny the allegations in defendant's pleadings (CPL §710.60[2][a])

viii. Court may deny the Motion to Suppress where defendant's pleadings fail to set forth any of the grounds for suppression listed above, or if the facts alleged—even if true—are insufficient as a matter of law to support the Motion (CPL §§710.60[3][a], 710.60[3][b]; People v. Lomax, 50 NY2d 351 [1980])

H. Motions for Separate Trials

i. CPL §100.45 applies CPL §§200.20 & 200.40 to misdemeanor informations and complaints

ii. Co-Defendant represented by attorney who previously represented defendant (People v. Gomberg, 38 NY2d 307 [1975])

iii. Co-Defendant makes a statement that exonerates himself and implicates defendant; jury is unable to follow

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instruction to ignore statement as it relates to guilt of remaining defendant(s); defendant is entitled to severance (Bruton v. United States, 391 U.S. 123 [1968])

I. Motions for Brady Material

i. Brady v. Maryland (373 U.S. 83 [1963])

ii. United States v. Agurs (427 U.S. 97 [1976])

iii. United States v. Bagley (473 U.S. 667 [1985])

iv. Kyles v. Whitley (514 U.S. 419 [1995])

v. People v. Geaslin (54 N.Y.2d 510 [1981])

vi. United States v. Gleason (265 F.Supp. 880, 886 [S.D.N.Y. 1967])

vii. United States v. Gil (297 F.3d 93, 104 [2nd Cir. 2002])

vii. CPL §240.20(1)(h): "Anything required to be disclosed prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States"

J. Sandoval Motions

i. People v. Sandoval (34 N.Y.2d 371 [1974])—burden on defense

ii. CPL §240.43—burden on prosecution

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K. Molineux/Ventimiglia Motions

i. People v. Molineux (168 N.Y. 264 [1901])—prior uncharged crimes

ii. People v. Ventimiglia (52 N.Y.2d 350 [1981])—hearing must be held to determine admissibility

L. Motions *In Limine*

i. Horizontal Gaze Nystagmus

a. Now accepted by NYS Courts: "Such tests have been found to be accepted within the scientific community as a reliable indicator of intoxication and, thus, a court may take judicial notice of the HGN test's acceptability" (People v. Tetrault, 53 A.D.3d 558 [2nd Dept. 2008], *leave to appeal denied by* 11 N.Y.3d 835 [2008]; *citing*, People v. Hammond, 35 A.D.3d 905 [3rd Dept. 2006], leave to appeal denied by 8 N.Y.3d 946 [2007]).

b. BUT…Considered a "standardized" field sobriety test; therefore, standard procedures must be followed to allow its admission at trial

c. In absence of compliance with NHTSA's specific procedures for administration of test, motion in limine should be made to prevent its admission at trial

ii. Roadside Breath Test ("Alco-Sensor")

a. Evidence relating to administration of Alco-Sensor test, as well as to the results of an Alco-Sensor test, are inadmissible at trial (People v. Thomas, 121 A.D.2d 73 [4th Dept. 1986], order *affirmed*, 70 N.Y.2d 823 [1987])

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b. Admission of such evidence is subject to harmless error analysis, however (People v. Thomas, *supra*), so pre-trial motion in limine should be made

iii. Chemical Test to Determine Blood Alcohol Content

a. CPL §710.20(5) authorizing a motion to suppress "a chemical test of the defendant's blood" is also applicable to chemical tests of defendants' breath (People v. Ayala, 89 N.Y.2d 874 [1996])

b. Even where there is no ground for suppression, however, a motion in limine should be made where the breath test was administered improperly (e.g., more than two hours after arrest; by an uncertified operator; on an improperly working instrument; etc.)

iv. Breath Documents

a. Discovery Response containing incorrect documentation

b. Remote Calibration of breath-testing instrument

v. Discovery not provided (CPL §240.70[1])

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PRE-TRIAL HEARINGS

I. Pre-Trial Hearings

A. Effort of Defense to limit Prosecution's Evidence

B. Therefore, most often granted based upon Motions to Suppress

C. Requires sworn testimony of witnesses

D. Rosario rule applies

i. Normally, People v. Rosario (9 NY2d 286 [1961]) and CPL §240.45(1) require the Prosecution, after the jury has been sworn and before the People's opening statement, to make available to defendant any written or recorded statement made by an individual whom the prosecution intends to call as a witness at trial

a. Criminal History of Witness

b. Pending Charges Against Witness

c. Sworn Statements of Witness (Including Testimony)

d. 911 Tapes and Police Reports, Notes, etc.

ii. Rosario Rule also applies to Pre-Trial Hearings (CPL §240.44), but obligation attaches after People's direct examination of their witness

iii. Reverse Rosario Rule: CPL §240.44 specifically applies to "each party"—i.e., the Defense as well

E. Hearsay is admissible (CPL §710.60[4])

F. Following Hearing(s), Court must make Findings of Fact and Conclusions of Law on the record (CPL §710.60[6])

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G. Huntley Hearings

i. To determine whether a statement made by the defendant to a public servant was involuntarily made and is thus suppressible

ii. People must prove Beyond a Reasonable Doubt that the statement was *voluntarily* given

a. To establish voluntariness, People can show that Miranda warnings were given

b. To demonstrate that Defendant waived his right to counsel, the People will attempt to show that there were no threats, duress or coercion

c. Interrogation must have ceased if defendant requested a lawyer (People v. Cunningham, 49 NY2d 203 [1980])

iii. People will generally call the officer who obtained the statement from Defendant, though hearsay is admissible to establish any material fact (CPL §710.60[4])

iv. Spontaneous utterances of the Defendant which were not the product of any conduct on the part of the police will be admissible (People v. Ferro, 63 NY2d 316 [1984])

v. Defendant may testify—though this is rare

a. Defendant's testimony at the Hearing may be confined to the circumstances surrounding the taking/obtaining of his statement

b. If defense counsel "opens the door" on direct examination of Defendant, however, the People can cross examine Defendant on the issue of his guilt

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c. If Defendant does testify, his testimony is inadmissible at trial except to impeach him (should he testify)

H. Mapp Hearings

i. Concerns the admissibility of physical evidence or contraband obtained by law enforcement pursuant to a search and seizure

ii. The Fourth Amendment to the United States Constitution and Article I, Section 12 of the New York State Constitution are identical: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

iii. Defendant must establish standing at the Hearing

iv. Once Hearing is granted (based upon Motion Papers), Prosecution has the Burden of Proof of showing the legality of the police conduct; then the Defense has the burden of proving the illegality of the search/seizure by a preponderance of the evidence

a. A search and seizure violates the U.S. and State Constitutions unless conducted pursuant to a valid search warrant, by consent, or incident to a lawful arrest

1. Exceptions include: Exigent Circumstances;

2. Plain View Seizures;

3. Vehicle Exception ("grabbable area")

4. Inventory Searches

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5. Roadblocks

6. Telephone tips to the Police (but these must pass the Aguilar-Spinelli test and establish the Caller's Reliability and the Basis of the Caller's Knowledge; known citizens are presumed reliable)

b. Where a warrantless seizure has been effected, the burden of proof is on the People to establish that the seizure was justified, and if that is established, the burden shifts to the Defendant to prove illegality (People v. Pettinato, 69 NY2d 653 [1986])

c. Where the justification for a warrantless seizure is consent, the People must show that the consent was voluntarily given

d. If Defendant is able to show that the Search and Seizure was a "fruit of the poisonous tree", then the burden falls once again upon the People to prove admissibility by clear and convincing evidence, independent source, or inevitable discovery

I. Wade Hearings

i. To challenge the police conduct in a police-arranged identification proceeding (i.e., was the show-up, line-up or photo array "unduly suggestive"?)

ii. Defense has the burden of showing that the identification procedure was unduly suggestive; the People then have to show that there is an independent basis for the in-court identification to be made, and they must show this by clear and convincing evidence

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iii. Defendant, even if unsuccessful at the pre-trial Hearing, can argue credibility of the identifier at trial (People v. Ruffino, 110 AD2d 198 [2nd Dept. 1985])

iv. Identification proceedings which were merely "confirmatory" are not subject to suppression (i.e., where there is a strong independent basis, such as a familiarity with the Defendant)

J. Sandoval Hearings

i. If Defendant intends to testify at trial, his attorney will seek a ruling regarding whether proof of prior "bad acts" (e.g., convictions or commission of uncharged crimes) may be used at trial for cross-examination purposes

ii. Burden is on the Defense to show that the prejudicial value of the prior bad acts outweighs the probative value to the finder of fact

iii. "Sandoval Compromise"—allows proof of fact of conviction, but not the underlying facts

K. Molineux/Ventimiglia Hearings

i. Similar to Sandoval Hearings, but relates to the use of defendant's prior bad acts in the People's case-in-chief

ii. Burden of proof is on the People to show that the probative value of the information outweighs the prejudicial effect

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II. Felony Hearings (CPL Article 180)

A. CPL §180.80

B. The People have 120 hours (5 days), or 144 hours (6 days) if there's a weekend or Holiday

C. No hearsay is admissible, except reports of experts and other documents admissible in the Grand Jury (CPL §180.60[8])

D. People have the burden of proof, and must show that there is reasonable cause to believe a felony was committed by the Defendant—not required to be the felony Defendant stands charged with (CPL §180.70[1])

E. Cross-Examination is permitted of all witnesses (CPL §180.60[4])

F. Defendant has a right to testify BUT he may only call defense witnesses if permitted by the Court in its discretion (CPL §180.60[7])

G. The Court may exclude the public upon application of the Defendant and order that no disclosure be made of the proceedings (CPL §180.60[9])

H. Felony Hearings should be conducted in 1 day, but may be adjourned by the Court in the interests of justice (though absent a showing of good cause, the adjournment may not be for more than 1 day)

I. If the People do not run the Hearing in the allotted time, the Court must release the defendant on his own recognizance unless the People can show good cause, e.g., the victim is still in the hospital, etc. (CPL §180.80[3])

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III. Restitution Hearings (PL §60.27[2]; CPL §400.30[4])

A. When amount of Restitution is in Dispute

B. Prosecution has Burden of Proof by a Preponderance of the Evidence to establish the amount of the restitution (People v. Consalvo, 89 NY2d 140 [1996])

C. An itemized Probation Department report may provide a sufficient basis for the Court to make a finding as to the amount without a hearing (People v. Kim, 91 NY2d 407 [1998]; People v. Leonidow, 256 AD2d 917 [3rd Dept 1998])

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