



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

# LEGAL BUREAU BULLETIN

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- I. SUBJECT: SEARCH WARRANTS**
- II. QUESTION: MAY A POLICE OFFICER ARREST ALL PERSONS FOUND IN A LOCATION DURING THE EXECUTION OF A SEARCH WARRANT?**
- III. ANSWER: NO. AN INDIVIDUAL'S MERE PRESENCE IN A SEARCHED LOCATION DOES NOT ESTABLISH PROBABLE CAUSE TO ARREST. THEREFORE, DETERMINING WHETHER TO ARREST AN INDIVIDUAL FOUND AT THE LOCATION REQUIRES A FACT-SPECIFIC INQUIRY.**
- IV. DISCUSSION:**

**A. WHY IS THE LEGAL BUREAU ISSUING THIS BULLETIN?**

This bulletin provides a review of the law governing arrests during search warrant executions. The Legal Bureau is issuing this bulletin to assist officers in making proper arrest decisions during the execution of a search warrant.

**B. INTRODUCTION**

New York courts have consistently held that an individual's mere presence at a location that is searched pursuant to a warrant is insufficient to provide the officer with probable cause to make an arrest. Officers have the authority to detain individuals found in searched premises for the duration of the search to ensure officers' safety, to facilitate the completion of the search warrant, and to prevent flight.<sup>1</sup> However, before an arrest may be made there must be individualized probable cause for each person who is arrested. New York courts have provided guidance on when an officer may arrest an individual found in a searched premises, which is summarized below.

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<sup>1</sup> Refer to Legal Bureau Bulletin Vol. 11, No. 8 for a detailed discussion of detaining individuals found at the scene of a search warrant execution.

## **C. WHEN DOES AN OFFICER HAVE INDIVIDUALIZED PROBABLE CAUSE TO ARREST AN INDIVIDUAL FOUND AT A SEARCHED LOCATION?**

### **i. Actual Possession**

Perhaps the most straightforward scenario in determining whether there is individualized probable cause to arrest is where individuals found in a searched premises are in actual possession of contraband. Officers who enter premises pursuant to a warrant clearly have the authority to arrest those individuals who they observe in actual possession of contraband.

### **ii. Persons Named in Warrant**

Officers may also develop probable cause to arrest individuals named in the search warrant. New York law provides that a search warrant directing the search of a location may also direct a search of individuals found therein. The warrant may either specifically name an individual, or provide a sufficiently particular description of the person to be searched. The warrant must also establish probable cause to believe that the property described in the warrant would be found on the persons so described. If officers encounter the named or described individuals at the searched location, officers may then search them for the contraband specified in the warrant. If an officer recovers contraband from a searched person, the officer then has probable cause to arrest that person.

### **iii. Probable Cause Based on Information Supporting the Search Warrant Application**

Further, officers may arrest an individual or individuals found at a searched location on the basis of information supporting the issuance of the search warrant. For example, officers executing a search warrant may have probable cause to make an arrest where they have personally participated in a controlled buy with the individual or individuals found in the premises. Officers may also have probable cause based on information they have received from the officer who monitored the controlled buy. In the latter scenario, the knowledge of the officer who participated in the controlled buy is imputed on the officers who act upon that information. Accordingly, the officers making the arrest have probable cause to do so. In addition, the officers executing the warrant may have probable cause based on information received from a confidential informant about the individual or individuals who the officers find at the searched location.<sup>2</sup>

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<sup>2</sup> As in the case of all arrests based on information received from confidential informants, officers making an arrest during the execution of a search warrant after receiving information from a confidential informant must ensure that: (1) the informant is reliable; and (2) that the informant has some basis for the knowledge he transmits in order to have probable cause.

#### **iv. Constructive Possession**

New York case law states that officers may also rely on the doctrine of constructive possession in determining whether to arrest an individual found on the scene of a search warrant execution. The doctrine of constructive possession provides that officers have probable cause to arrest anyone who resides in a dwelling when:

- contraband is discovered in plain view, and
- it reasonably appears that all residents of the dwelling exercised dominion and control over the area where contraband was found.

The rationale behind this doctrine is that those who regularly reside in a home are in constructive possession of items therein. Accordingly, officers should verify who resides at the searched location to determine whether a person found in the premises constructively possesses the discovered contraband prior to executing the warrant. For example, officers can conduct phone or computer checks to determine who resides at the location to be searched. Officers can also look for signs of residency or regular habitation while they are executing the warrant. New York courts have provided guidance on what particular signs of residency officers can look for while in the premises pursuant to a warrant. For example, individuals constructively possess contraband found in premises where:

- The individual found in the premises is the sole occupant of the room from which officers recover contraband in plain view.
- Officers recover contraband that is in plain view of the individual(s) found in the searched premises.
- Officers recover an individual's personal effects in the searched premises. Personal effects include:
  - driver's licenses
  - passports
  - birth certificates
  - Social Security cards
  - credit cards
  - photographs depicting the individual(s).
- The individual(s) found in the premises admit to possession of or are seen in actual possession of a key to the premises, or to a locked room or closet from which officers recover contraband.
- An individual admits ownership of or regular residence in the searched location.

If officers executing a search warrant do not already have independent probable cause to arrest any of the occupants of the search premises, they should inspect the areas specified in the

warrant, or otherwise searchable under the warrant, to determine whether any of the above factors are present prior to making an arrest.

#### **v. The “Room Presumption”**

Officers may arrest individuals for criminal possession of a controlled substance pursuant to the “room presumption” (also known as the drug factory presumption of possession), which is codified in Penal Law § 220.25(2). The “room presumption” provides that there is probable cause to arrest individuals found in a premises that appears to be used primarily for the manufacture and/or sale of drugs. The purpose of this statute is to hold criminally liable those who are participants in a drug operation, but who officers do not observe in actual, physical possession of drugs at the moment they arrive to conduct a search. Penal Law § 220.25(2) provides:

“The presence of a narcotic drug, narcotic preparation, marihuana or phencyclidine in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package, or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found.”

For the purposes of this statute, an individual need not be in the same room where drugs are found to be in “close proximity” to the drugs. Rather, drugs are in “close proximity” within the meaning of the statute as long as the room in which drugs are found could be observed from the room in which the person is located. To illustrate, New York courts have held that an individual is in “close proximity” to drugs where officers arriving to execute a search warrant find that individual standing next to an open room in which drugs are discovered in plain view. Further, intent to distribute is evident where officers discover, for example, a large quantity of drugs, a large amount of cash, scales, calculators, dilutant powders, and other accessories related to the packaging and sale of drugs.

While the “room presumption” statute can be a very useful law enforcement tool, officers should take note of situations in which New York courts have found the presumption to be inapplicable. For example, the Court of Appeals has held that drugs found on a floor in a small space between a couch and a wall was not in open view. New York courts have also repeatedly declined to apply the “room presumption” where drugs were found under articles of clothing, in a closet or refrigerator, or under a mattress.

#### **V. CONCLUSION**

As in the case of all arrests, it is crucial for officers to be able to articulate their reasons for making an arrest. Where an officer arrests individuals found in a searched premises, the officer must be able to articulate probable cause for *each* individual who was arrested.

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