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Tailored Police Testimony at Suppression Hearings

by Joel Atlas*

Introduction

Whether a court must suppress evidence typically turns on the conduct or observations of the police officer who discovered the evidence. By falsely testifying to the facts surrounding the discovery of the evidence, a police officer may validate a blatantly unconstitutional search. New York courts have long recognized that police officers sometimes fabricate suppression testimony to meet constitutional restrictions.¹ Indeed, the Appellate Division has rejected police testimony at suppression hearings where the officer's testimony appears to have been "patently tailored to nullify constitutional objections."² Although, to be sure, rejections are rare and their number appears to be declining, the appellate courts' ability to so rule has not changed. This article will explore the various circumstances under which the Appellate Division has discredited police testimony at suppression hearings.

General Principles of Credibility

The Court of Appeals has held that, at a suppression hearing, the prosecution has the burden to go forward to show the legality of the police conduct—to show "that the search was made pursuant to a valid warrant, consent, incident to a lawful arrest or . . . that no search at all occurred . . ."³ To meet this burden, the prosecution must present evidence that is credible.

The determination of a witness's credibility is primarily for the hearing court.⁵ That court has the "peculiar advantages of having seen and heard the witnesses"⁶ and is therefore "in a superior position with respect to [credibility] than an appellate court[,] which reviews but the printed record."⁷ Accordingly, an appellate court must afford "much weight" to a hearing court's credibility determinations.⁸

Nevertheless, the Court of Appeals has noted that the Appellate Division may "effectively curtail the alleged abuses" of false testimony by overturning a hearing court's credibility findings.⁹ Indeed, deference to a hearing court must yield, and the Appellate Division will deem testimony incredible as a matter of law, when the hearing court's fact findings are "manifestly erroneous or so plainly unjustified by the evidence that the interests of justice necessitate their nullification"¹⁰ or where the testimony "has all appearances of having been patently tailored to nullify constitutional objections."¹¹ In making this determination, the Appellate Division must employ

"common sense and common knowledge"¹² and review the totality of the circumstances.¹³

The Appellate Division has ruled that testimony is impossible of belief when, even if uncontradicted, it is "manifestly untrue, physically impossible, contrary to experience, or self-contradictory."¹⁴ Each of these four grounds has spawned its own line of cases.

Specific Theories for Discrediting Police Testimony

A. "Manifestly Untrue"

The first of the categories, testimony that is "manifestly untrue," is the broadest and is perhaps best viewed as a catch-all ground for discrediting police testimony that does not fall within another ground. The Appellate Division has held testimony to be "manifestly untrue" where an officer testified to, but could not substantiate, reliance on third-party information or where an officer's testimony was belied by other evidence.

In several cases, the Appellate Division found inadequate support for an officer's claim to have received information supportive of intrusive conduct.¹⁵ For example, the Appellate Division discredited an officer's testimony that he had arrived at the arrest scene in response to a radio run, given that no tape of the communication could be located.¹⁶ Similarly, the court determined that the police lacked reasonable suspicion to stop the defendant where, although the stop had allegedly been predicated on a radio run, the officer who had been instructed to send the radio run could not remember having done so, the defendant's subpoena of the radio run revealed nothing, and the prosecution failed to bolster the existence of the radio run with testimony from the complainant.¹⁷ The Appellate Division also disbelieved testimony that an officer, while pursuing a suspect to whom the officer had allegedly been alerted by a "kid in the street," had discovered contraband in plain view.¹⁸

Contradiction of an officer's testimony with other evidence has also regularly supported suppression. The Appellate Division determined in one case that a photograph and disinterested defense witnesses cumulatively discredited an officer's testimony that he had seen a bulge in the defendant's shirt.¹⁹ Likewise, in another case, "other, more credible evidence at the hearing" belied an officer's testimony that he had seen the outline of a gun in the defendant's pocket.²⁰ Also rejected was an officer's attempt to justify a search based on his alleged observation of a bulge in the defendant's shorts and the defendant's attempt to flee, where these claims were contradicted by evidence that the defendant had worn baggy jeans and had been cooperative.²¹ Finally, the Appellate Division discredited an officer based on discrepancies between his testimony about the radio run of a robbery pursuant to which he stopped the defendant and the actual Sprint reports of the transmissions regarding the robbery.²²

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B. “Physically Impossible”

Testimony falls within the category of “physically impossible” when it describes an observation or conduct that defies human abilities. Most of the cases within this category involve the scope of an officer’s powers of observation. The Appellate Division has held incredible, for example, officers’ claims to have observed small objects from large distances, such as:

- “a 2-inch glass vial with a dark top, from a distance of approximately 74 feet, from a moving patrol car, after dark”;²³
- a two-inch crack vial from a sharp angle and from at least 200 feet away, through binoculars, at dusk;²⁴
- a waistband bulge, from approximately 50 feet away and while in a taxi at 11:00 P.M.;²⁵ and
- a small burlap bag, the size of a “bank bag,” which was behind the driver’s seat in a car, while looking through the driver’s window.²⁶

The Appellate Division, however, has accepted testimony that an officer could observe a person “passing a white glassine envelope of heroin to a buyer from a distance of approximately 75 feet on a clear[,] sunny day with nothing obstructing [the officer’s] view”;²⁷ “a two-inch long holster clip in defendant’s waistband from a distance of about 23 feet while driving along a four-lane street even though defendant was wearing several layers of loose[-]hanging winter clothing”;²⁸ and, from 30 to 40 feet away, a defendant deliver to another a clear, plastic bag containing white powder.²⁹

The Appellate Division disbelieved testimony that an officer could see from a public sidewalk the lack of tax stamps on individual cigarette packs “in cartons and encased in unopened boxes in the back of an unlighted garage” or make “a similar observation through a convenient tear in a carton in an open bag as [the officer] passed the defendant on the street some two to four feet from him.”³⁰ The Appellate Division also rejected testimony that, at 1:20 A.M., as another vehicle passed by, an officer noted that the driver of that vehicle appeared to be under the legal driving age.³¹

The “physically impossible” test is not limited to the scope of possible observations by the police. Indeed, the alleged conduct of a defendant may be “physically impossible” as well. For example, the Appellate Division has discredited testimony that a defendant reached under a couch to obtain a gun although his hands were cuffed behind his back.³²

C. “Contrary to Experience”

Testimony is “contrary to experience” when it describes human conduct—by either the police or the defendant—that is so empirically unlikely as to be unworthy of belief. In this regard, police claims that they acted on radio communications that a suspect was armed have been

rejected in light of evidence that the officers did not have their guns drawn upon their approach of the suspect.³³ Similarly, the Appellate Division rejected an officer’s assertion that he feared that the defendant was armed because of allegedly furtive movements given that the officer “did not communicate his observation to his sergeant, crossed in front of the defendant’s potential line of fire, . . . did not direct the defendant to freeze,” and did not arrest or handcuff the defendant at the scene of the stop.³⁴ An officer’s decision to take a dinner break before having back-up officers arrest the defendant, whom the officer had allegedly seen sell drugs, contributed to the court’s rejection of his testimony as contrary to experience.³⁵

The alleged behavior of the defendant may also contradict experience. The Appellate Division has refused to credit testimony that a defendant has engaged in behavior that “only a moron would have committed . . .”³⁶ More specifically, appellate courts have discredited assertions that a defendant:

- threw away narcotics in sight of an approaching police officer;³⁷
- left “a cake of marijuana with some strands sticking out” on the front of a car illegally parked on a main street;³⁸
- exited his vehicle and left the driver’s door open with a loaded gun visible on the front seat although aware that he was under surveillance;³⁹
- left a scale and tinfoil packets containing powder in plain view prior to voluntarily admitting at least three police officers into apartment;⁴⁰
- reached for his waistband as the arresting officer approached in the face of a large-scale show of police force;⁴¹
- consented to a search of an apartment in which a substantial amount of cocaine had been stored in plain view;⁴²
- said “[l]et’s get out of here” to a fully secured arrestee and, later, threw himself on the floor during a chase;⁴³ and
- left an open box, protruding from his shirt pocket, envelopes containing white powder.⁴⁴

The Appellate Division will not discredit police testimony that describes behavior by a defendant that is merely surprising or unusual. Indeed, the court has accepted testimony that a defendant, in plain view of uniformed officers, withdrew a loaded gun and placed it in a box on top of an ice machine outside of a store into which he entered;⁴⁵ opened her purse and displayed to another, in plain view, a clear bag containing white powder while seven to 30 feet from the police;⁴⁶ held out his open hand and offered another a small envelope containing vials of cocaine while an officer approached from behind in the vicinity of Port Authority bus terminal;⁴⁷ held out a bag and stated that “it was just marijuana” after the police

stopped his car for his erratic driving;⁴⁸ and “spontaneously turned and placed himself up against the wall,” assuming a frisk position, after being asked by the police whether he lived in the building and answering that he did not.⁴⁹

D. “Self-Contradictory”

In several cases, the Appellate Division has rejected police testimony on the ground that it was “self-contradictory”—that the testimony was contravened by other statements of the same witness. An officer who testified regarding his observation of drugs inside a box was fatally impeached with his own “incident report,” which contained a different version of the officer’s observation with respect to the box.⁵⁰

Disparities between an officer’s testimony and prior statements regarding the content of an informant’s accusation, and between his testimony and his statements at an interview regarding the recovery of a weapon, likewise led the Appellate Division to reject his testimony.⁵¹ The Appellate Division also rejected testimony where there were inconsistencies between the officer’s hearing and grand jury testimony regarding the relayed description of the defendant and where the officer had failed to record in his memo book or arrest report the supposed receipt of information from witnesses at the scene of arrest.⁵² Notably, not merely self-contradiction, but inconsistencies between the testimony of different officers, has also led to suppression. For example, the prosecution did not meet its initial burden to go forward with credible evidence where the testimony of its three police witnesses “disclose[d] confusion, contradictions, uncertainty and conflicting versions of what took place,” including on the key question of whether the search preceded or followed the arrest.⁵³ The Appellate Division also discredited police testimony where one testifying officer not only contradicted himself in many regards but was contradicted by the other testifying officer on the questions of why the officers had, for a time, followed but not stopped the defendant’s car and which officer had removed a bag containing narcotics from the glove compartment.⁵⁴

Conclusion

It is an unfortunate but well-recognized fact that, to justify their conduct, police officers sometimes falsely testify about their observations, the information upon which they acted, or the conduct of the defendant.⁵⁵ An officer’s testimony at a suppression hearing is “patently tailored to nullify constitutional objections”⁵⁶ and therefore incredible as a matter of law when it is “manifestly untrue, physically impossible, contrary to experience, or self-contradictory.”⁵⁷ In such circumstances, the prosecution has failed to meet its burden to present credible evidence to validate the police conduct and the court must suppress

the evidence in issue. When a trial court refuses to do so,⁵⁸ appellate courts must be asked to step in.⁵⁹ ⚡

Endnotes

1. See *People v Garafolo*, 44 AD2d 86, 88 (2d Dept 1974); see generally *People v Berrios*, 28 NY2d 361, 368 (1971) (“Some police officers . . . may be tempted to tamper with the truth”). In fact, a New York City Mayoral Commission concluded that police perjury was “a serious problem” and noted that, within the police department, falsification by police even had its own nickname: “testilying.” *Report of Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department*, July 7, 1994, at 36.
2. *People v Garafolo*, 44 AD2d at 88.
3. *People v Berrios*, 28 NY2d at 367-68; see *People v Malinsky*, 15 NY2d 86, 91 n.2 (1965).
4. *People v Berrios*, 28 NY2d at 369; *People v Quinones*, 61 AD2d 765, 766 (1st Dept 1978).
5. *People v Prochilo*, 41 NY2d 759, 761 (1977).
6. *Id.*
7. *People v Wright*, 71 AD2d 585, 586 (1st Dept 1979); see *People v Cohen*, 223 NY 406, 422-23 (1918).
8. *People v Prochilo*, 41 NY2d at 761.
9. *People v Berrios*, 28 NY2d at 369. Notably, “credibility is a factual issue which is not generally within the competence of [Court of Appeals] review.” *People v Concepcion*, 38 NY2d 211, 213 (1975); see *People v Rivera*, 68 NY2d 786 (1986) (holding that, despite inconsistencies between officer’s hearing testimony and prior accounts, testimony was not “so flawed that [the] findings as to [the] witness’s credibility made from the unique perspective of the trier of fact must be overridden”). Thus, it is the Appellate Division, which possesses full factual-review power, that generally reviews hearing courts’ credibility determinations.
10. *People v Garafolo*, 44 AD2d at 88.
11. *People v Garafolo*, 44 AD2d at 88; see also *People v Carmona*, 233 AD2d 142, 144 (1st Dept 1996); *People v Miret-Gonzalez*, 159 AD2d 647 (2d Dept 1990).
12. *People v Garafolo*, 44 AD2d at 88; see *People v Lewis*, 195 AD2d 523, 523 (2d Dept 1991).
13. *People v Carmona*, 233 AD2d at 145 (ruling that the “combination of circumstances” “strain[ed] the officer’s credibility beyond the breaking point”).
14. *People v Garafolo*, 44 AD2d at 88 (quoting 22 NY Jur. § 649); see *People v Burns*, 281 AD2d 704, 705 (3d Dept 2001); *People v Carmona*, 233 AD2d at 144; *People v Lebron*, 184 AD2d 784, 785 (2d Dept 1992); *People v Shedrick*, 104 AD2d 263, 274 (4th Dept 1984), *aff’d*, 66 NY2d 1015 (1985).
15. This line of cases is consistent with the caution of the Court of Appeals that the use of anonymous information as the basis for police intrusions “should be subject to the most careful and critical scrutiny” *People v Taggart*, 20 NY2d 335, 343 (1967).
16. *People v Quinones*, 61 AD2d at 766.
17. *People v Moses*, 71 AD2d 930, 931 (2d Dept 1979).
18. *People v Smith*, 77 AD2d 544, 546 (1st Dept 1980).
19. *People v Auletta*, 88 AD2d 867 (1st Dept 1982).
20. *In re Pierre N.*, 224 AD2d 243, 244 (1st Dept 1996).
21. *In re Bernice J.*, 248 AD2d 538, 539 (2d Dept 1998).
22. *People v Nunez*, 126 AD2d 576 (2d Dept 1987).
23. *People v Heath*, 214 AD2d 519, 520-21 (1st Dept 1995).
24. *People v Carmona*, 233 AD2d at 144.

25. *People v Otero*, 51 AD2d 705, 706 (1st Dept 1976).
26. *People v Feingold*, 106 AD2d 583, 584 (2d Dept 1984).
27. *People v Rivera*, 221 AD2d 157 (1st Dept 1995).
28. *People v Rodriguez*, 205 AD2d 453 (1st Dept 1994).
29. *People v Maylor*, 184 AD2d 371 (1st Dept 1992).
30. *People v Garafolo*, 44 AD2d at 88-89.
31. *People v Lewis*, 195 AD2d at 524.
32. *People v Void*, 170 AD2d 239, 241 (1st Dept 1991).
33. *People v Moses*, 71 AD2d at 931; *People v Quinones*, 61 AD2d at 766.
34. *People v Guzman*, 116 AD2d 528, 530-31 (1st Dept 1986).
35. *People v Carmona*, 233 AD2d at 143-44.
36. *People v Sanders*, 49 AD2d 610, 611 (2d Dept 1975) (reviewing sufficiency of trial evidence, court discredited testimony that defendant openly sold heroin in front of two persons known to him as police officers).
37. *People v Quinones*, 61 AD2d 765 (2d Dept 1978). Although in *Quinones* the court's rejection of the testimony relied on multiple factors, the court did note that so-called "dropsy" cases, in which the police claim that a defendant dropped contraband upon their approach, have been "criticized frequently as attempts to legitimize searches and seizures. . . ." *Id.* at 766.
38. *People v Rivera*, 48 AD2d 305, 307 (1st Dept 1975).
39. *People v Lastorino*, 185 AD2d 284, 285 (2d Dept 1992).
40. *People v Flores*, 181 AD2d 570, 572 (1st Dept 1992).
41. *People v Addison*, 116 AD2d 472, 474 (1st Dept 1986).
42. *People v Void*, 170 AD2d at 241.
43. *In re Carl W.*, 174 AD2d 678, 680 (2d Dept 1991).
44. *People v Salzman*, 1999 WL 1034760 (Appellate Term, Ninth and Tenth Judicial Districts, Oct. 5, 1999).
45. *People v Rodriguez*, 205 AD2d at 453.
46. *People v Fryer*, 186 AD2d 405 (1st Dept 1992).
47. *People v Ellis*, 198 AD2d 90, 90-91 (1st Dept 1993).
48. *People v Davis*, 233 AD2d 148 (1st Dept 1996).
49. *People v Vasquez*, 217 AD2d 466, 467, 468 (1st Dept), *app dismd*, 87 NY2d 894 (1995). The Appellate Division remarked that the defendant's action, "while unusual[,] was not incredible

under the circumstances," in which the defendant may have been "seeking a break."

50. *People v Miret-Gonzalez*, 159 AD2d 647, 648-49, 650 (2d Dept 1990).
51. *People v Lebron*, 184 AD2d at 785-86.
52. *People v Addison*, 116 AD2d 472 (1st Dept 1986).
53. *People v Pepitone*, 48 AD2d 135, 136 (1st Dept 1975), *affd for reasons stated by the majority below*, 39 NY2d907 (1976).
54. *People v Martinez*, 71 AD2d 905 (2d Dept 1979).
55. For further reading, see the following law review articles: David N. Dorfman, "Proving the Lie: Litigating Police Credibility," 26 AM. J. CRIM. L. 455 (1999); Gabriel J. Chin and Scott C. Wells, "The 'Blue Wall of Silence' as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury," 59 U. PITT. L. REV. 233 (1998).
56. *People v Garafolo*, 44 AD2d at 88.
57. *Id.*
58. Examples of recent trial court decisions that *have* found officers incredible include:
 - *People v. Brown*, NYLJ, 7/22/02, at 22, col. 2 (Sup. Ct. Bronx Co): "I found the police officers' testimony in large measure not to be creditworthy. Their recitation of the events in question were bereft of those details that lend credibility to a witness. Moreover, their answers were often evasive and they failed to recall many significant aspects of their encounter with the defendant."
 - *People v Felder*, 2001 NY Misc LEXIS 430 (Sup Ct NY Co 5/16/01): "The Court finds the testimony of the police officers to be both not credible and tailored to nullify constitutional objections."
59. Just this year, the Appellate Term, Second and Eleventh Districts, cited the seminal case involving incredible suppression hearing testimony when reversing a civil case on the ground that the plaintiff's testimony "was incredible as a matter of law." *Bonanno v Loungecraft American Red Ball*, No. 2001-365 Q C, 2002 NY Slip Op 40069U; 2002 NY Misc LEXIS 290 (2nd and 11th Districts 1/23/02) (citing *People v Garafolo*, 44 AD2d 86).

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