ANTHONY BANDIERO, ESQ.

PENNSYLVANIA

Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

Blue to Gold

Pennsylvania Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

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Note: This is a general overview of the classical and current United States court decisions related to search and seizure, liability, and confessions. As an overview, it should be used for a basic analysis of the general principles but not as a comprehensive presentation of the entire body of law. It is not to be used as a substitute for the opinion or advice of the appropriate legal counsel from the reader's department. To the extent possible, the information is current. However, very recent statutory and case law developments may not be covered.

Additionally, readers should be aware that all citations in this book are meant to give the reader the necessary information to find the relevant case. Case citations do not comply with court requirements and intentionally omit additional information such as pin cites, internal citations, and subsequent case developments. The citations are intended for police officers. Lawyers must conduct due diligence and read the case completely and cite appropriately.

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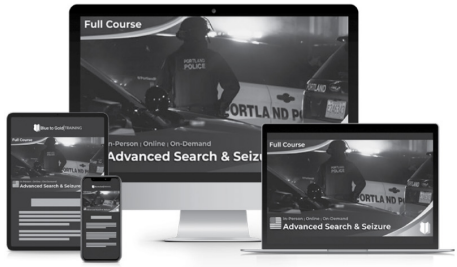

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Overview

Let's Start with the Basics 14
Consensual Encounters 42
Investigative Detentions 62
Arrests 85
Vehicles 110
Homes 136
Businesses & Schools 177
Personal Property 191
Technology Searches 197
Miscellaneous Searches & Seizures 209
Search Warrants 221
Use of Force 239
Interview and Interrogation 248
Law Enforcement Liability 267
Index 289

Table of Contents

Let's Start with the Basics.....14
Fourth Amendment.....15
Pennsylvania Constitution Art. I, Sec. 8 16
Fifth Amendment 17
Three Golden Rules of Search & Seizure 18
The Right 'To be Left Alone'.....20
Decision Sequencing.....21
C.R.E.W. 22
Fourth Amendment Reasonableness.....23
Private Searches.....26
"Hunches" Defined 30
Reasonable Suspicion Defined.....32
Probable Cause Defined.....34
Collective Knowledge Doctrine.....36
What is a "Search" Under the Fourth Amendment? 38
What is a "Seizure" Under the Fourth Amendment?.....40

Consensual Encounters 42
Consensual Encounters 43
Knock and Talks 46
Investigative Activities During Consensual Encounter 48
Asking for Identification 50
Removing Hands from Pockets 52
Transporting to Police Station.....53
Consent to Search.....54
Third Party Consent.....57
Mistaken Authority to Consent.....60

Investigative Detentions 62
Specific Factors to Consider 63
Detaining a Suspect 65
Officer Safety Detentions 67
How Long Can Detentions Last? 68
Investigative Techniques During a Stop 69
Identifications - in the Field 71
Unprovoked Flight Upon Seeing an Officer 72
Detentions Based on an Anonymous Tip 73
Handcuffing and Use of Force 76
Detaining Victims or Witnesses 77
Patdown for Weapons 78
Patdown Based on Anonymous Tips 80
Plain Feel Doctrine 81
Involuntary Transportation 82
Detaining People Who Publicly Record Police Officers ... 84

Arrests 85
Lawful Arrest 86
Entry into Home with Arrest Warrant 88
Warrantless Entry to Make Arrest 89
Meaning of "Committed in the Officer's Presence?" 91
Line-Ups 92
Protective Sweeps 94
When to "Un-arrest" a Suspect 96
"Contempt of Cop" Arrests 98
Arrests at Public Protests 99
Search Incident to Arrest 100
Search Prior to Formal Arrest 101
Search Incident to a "Temporary" Arrest 102

Attempt to Swallow Drugs 104
DUI Breath Tests 106
DUI Blood Tests 107
Searching Vehicle Incident to Arrest 108

Vehicles 110
General Rule 111
Scope of Stop Similar to an Investigative Detention 112
Community Caretaking Stops 113
Reasonable Suspicion Stops 114
Stops to Verify Temporary Registration 115
DUI Checkpoints 116
Information Gathering Checkpoints 117
Legal Considerations for Any Checkpoint 118
Ordering Passengers to Stay in, or Exit Vehicle 119
Detaining a Recent Vehicle Occupant 120
Consent to Search a Vehicle 121
Searching Vehicle and Occupants for Weapons 122
Frisking People Who Ride in Police Vehicle 124
K9 Sniff Around Vehicle 125
Searching Vehicle Incident to Arrest 126
Searching Vehicle with Probable Cause 128
Dangerous Items Left in Vehicle 129
Inventories 130
Identifying Passengers 132
Unrelated Questioning 133
Constructive Possession 134

Homes 136
Warrant Requirement 137

Hotel Rooms, Tents, RVs, and so Forth.....139
Knock and Talks.....143
Open Fields.....145
Curtilage.....146
Plain View, Hearing, Smell.....148
Trash Searches.....150
Consent to Search by Co-Occupants.....151
Parental Consent to Search Child's Room.....154
Mistaken Authority to Consent.....155
Protective Sweeps.....156
Hot Pursuit and Fresh Pursuit.....158
Warrantless Arrest at Doorway.....161
Warrantless Entry to Make Arrest.....163
Warrantless Entry for an Emergency.....165
Warrantless Entry for Officer Safety.....167
Warrantless Entry to Investigate Child Abuse.....169
Warrantless Entry to Protect Property.....170
Warrantless Entry to Investigate Homicide Crime.....171
Warrantless Entry to Prevent Destruction of Evidence.172
Warrantless Entry Based on "Ruse" or Lie.....173
Convincing Suspect to Exit Based on "Ruse" or Lie.....174
Detaining a Home in Anticipation of a Warrant.....175
Surround and Call-Out.....176

Businesses & Schools.....177
Warrantless Arrest Inside Business.....178
Customer Business Records.....179
Heavily Regulated Businesses.....180
Fire, Health, and Safety Inspections.....182
Government Workplace Searches.....183

School Searches 184
Student Drug Testing 187
SROs, Security Guards, and Administrators 188
Use of Force Against Students 190

Personal Property 191
Searching Containers 192
Single Purpose Container Doctrine 193
Searching Abandoned or Lost Property 194
Searching Mail or Packages 196

Technology Searches 197
Sensory Enhancements 198
Flashlights 199
Binoculars 200
Night Vision Goggles 202
Thermal Imaging 203
Cell Phones, Laptops, and Tablets 204
Cell Phone Location Records 205
Aerial Surveillance 206
GPS Devices 207
Obtaining Passwords 208

Miscellaneous Searches & Seizures 209
Cause-of-Injury Searches 210
Medical Procedures 211
Discarded DNA 213
Fingernail Scrapes 214
Arson Investigations 215
Airport & Other Administrative Checkpoints 216
Border Searches 218

Probationer & Parolee Searches 220

Search Warrants 221
Overview 222
Why Get a Warrant, Even if You Don't Need to?.....223
Particularity Requirement 224
Anticipatory Search Warrant 225
Confidential Informants.....226
Sealing Affidavits.....227
Knock and Announce 228
Detaining Occupants Inside and in Immediate Vicinity 231
Frisking Occupants 233
Handcuffing Occupants.....235
Serving Arrest Warrant at Residence.....236
Wrong Address Liability 237
Receipt, Return, and Inventory, ...238

Use of Force.....239
Non-Deadly Force 240
Use of Force to Prevent Escape 241
Deadly Force During Vehicle Pursuit 242
Improper Handcuffing 243
Pointing Gun at Suspect 245
Using Patrol (i.e. Bite) Dogs 246
Hog/Hobble Tie 247

Interview and Interrogation 248
When Miranda is Required.....249
Miranda Elements 252
Coercive Influences and De Facto Arrests 253

Miranda Inside Jail and Prison 254
Miranda for Juveniles.....255
Witnesses and Victims 256
Invocation Prior to Interrogation.....257
Ambiguous Invocations.....258
Suspect Invoked, Now What?.....259
Suspect Invoked, Now Wants to Talk.....261
Intentional Versus Accidental Miranda Violations.....262
When to Provide Miranda Again 263
Public Safety Exception.....264
Routine Booking Questions 265
Evidence Discovered after Miranda Violation 266

Law Enforcement Liability.....267
Exclusionary Rule.....268
Exceptions to the Exclusionary Rule.....270
Fruit of the Poisonous Tree 271
Standing to Object.....272
Good Faith Exception.....273
Attenuation.....275
Inevitable or Independent Discovery.....276
Duty to Protect 278
Duty to Intervene.....279
Supervisor Liability.....280
Unequal Enforcement of the Law 281
Behavior that "Shocks the Conscience" 282
Deliberate Indifference 283
Sharing Crime Scene Photos on Social Media.....284
§ 1983 Civil Rights Violations 285
§ 242 Criminal Charges 286

Bringing Non-Essential Personnel Into the Home 287
Qualified Immunity 288

Index 289

We have an incredible warrior class in this country - people in law enforcement…, and I thank God every night we have them standing fast to protect us from the tremendous amount of evil that exists in the world.

— Brad Thor

Let's Start with the Basics

Fourth Amendment

Out of all of the Bill of Rights, the Fourth Amendment is the most litigated. It is also the most important when it comes to your job as a police officer. At the core of every police action is the Fourth Amendment and you need to understand case law in order to do your job effectively and lawfully. That's what this book is all about.

Legal Standard

The Fourth Amendment is best understood in two separate parts:

Search and seizure clause:

1. The right of the people to be secure in their
2. persons, houses, papers, and effects,
3. against unreasonable searches and seizures,
4. shall not be violated, and

Search warrant clause:

1. no Warrants shall issue, but upon probable cause,
2. supported by Oath or affirmation,
3. and particularly describing the place to be searched,
4. and the persons or things to be seized.

Pennsylvania Constitution Art. I, Sec. 8

The Pennsylvania Constitution has its own search and seizure clause, practically identical in language and intent as the Fourth Amendment. The most significant difference is the particularity required to justify a search or seizure. Pennsylvania requires a description of things to be searched and seized as "nearly as may be."[1] The Pennsylvania constitution pre-existed our Federal constitution, and Pennsylvania case law "embodies a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries."[2]

We have included many Pennsylvania-specific case references where appropriate, but many examples in this book are not from Pennsylvania. Cases from other states and circuit courts are based on interpretations of the Fourth Amendment that are consistent with how Pennsylvania state courts would likely interpret those areas of law. Still, Pennsylvania statutory law and agency policy may be stricter than case law.

Legal Standard

The Pennsylvania Constitution is best understood in two parts:

Search and seizure clause:

1. The people shall be secure
2. in their persons, homes, papers, and possessions
3. From unreasonable searches and seizures

Search warrant clause:

1. and no warrant to search any place or seize any person or things;
2. shall issue without describing them as nearly as may be,
3. nor without probable cause
4. supported by oath or affirmation subscribed to by the affiant.[3]

1 Pennsylvania Constitution Art. 1 Sec. 8

2 *Commonwealth v. Edmonds*, 586 A.2d 887, 895, 895-905 (Pa. 1991)

3 Pennsylvania Constitution, Art I § 8

5.

Fifth Amendment

The Fifth Amendment is the most famous. Because of Hollywood, everyone seems to know their rights. Yet, the Fifth Amendment is extremely complex. For example, how many times has a suspect complained that you didn't read them his Miranda rights after an arrest, even though you didn't interrogate him? Better yet, what if you forget to read someone his rights and he confesses? How do you fix that mistake? This book gives you these answers (Interview and Interrogation section). But let's start with a look at the law.

Legal Standard

There are a lot of subsections to the Fifth Amendment, and you probably won't deal directly with any of them except #4, the right against self-incrimination (i.e. Miranda):

1. No person shall be held to answer for a capital, or otherwise infamous crime,
2. unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger;
3. nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;
4. **nor shall be compelled in any criminal case to be a witness against himself**,
5. nor be deprived of life, liberty, or property, without due process of law;
6. nor shall private property be taken for public use, without just compensation.

Pennsylvania also provides protection in this regard. Section 9 of the Pennsylvania Constitution, provides for the rights of the accused in criminal prosecutions in that, "he cannot be compelled to give evidence against himself...."[1]

[1] Pennsylvania Constitution, Art I, § 9

Three Golden Rules of Search & Seizure

I want to share three overarching Golden Rules to help provide you with guidance in the field and to keep you out of trouble. These Golden Rules were developed after reading thousands of cases and I realized that there was a "theme" that developed when officers lost their cases or were successfully sued.

Embrace these Golden Rules and your career will benefit.

Three Golden Rules

The three Golden Rules of Search & Seizure are:

1. **The more you articulate why you did something, the more likely it will be upheld in court.**

   This is the first and most important Golden Rule. Every time you make an intrusion into a person's liberty or property interests (i.e. detain them or their property), you need to document why you did it. If not, you may be disciplined or successfully sued. Finally, you don't necessarily need to produce a formal report. CAD and dispatch notes are also effective documentation when a formal report is unnecessary.

2. **The more serious the crime, the more reasonable your actions are likely to be viewed.**

   The Fourth Amendment is like a human-sized rubber band around your body. It's naturally constricting. But when you are dealing with violent people, or emergencies, or rapidly evolving situations, the court will give you more room to breathe. For example, courts may let you enter homes to prevent the destruction of a kilo of cocaine, but will criticize you for entering the same home to prevent the destruction of a marijuana cigarette. Use good judgment. Be willing to back down and seek judicial approval for minor crimes - use good judgment!

3. **Conduct all warrantless searches and seizures in the same manner as if you had a warrant.**

Most searches and seizures are warrantless. But that doesn't mean that you get any extra leeway when you proceed without judicial pre-approval. In fact, you get less leeway.

When you take the time to get judicial pre-approval courts like it. They respect it. And when your case goes to trial there is a legal presumption that you did the right thing. Therefore, the defendant must present evidence that your warrant is invalid. Good luck. The judge presiding over the case is likely the same judge who signed off on your warrant. Do you think that same judge will now decide the warrant was improperly issued? Yeah right!

On the other hand, when you proceed without a warrant there is a legal presumption that your search or seizure was unlawful! It's not personal - it's business. Without a warrant you have the burden to prove that what you did, and how you did it, was reasonable and lawful. Most of the time you will win these arguments with proper articulation (think Golden Rule #1) and your search or seizure was no more intrusive than what a judge would have allowed you to do.

Keep these Golden Rules in mind while in the field and your courtroom experience should be a tad less stressful.

The Right 'To be Left Alone'

The Supreme Court has recognized another "right," though it is not solely defined in the Bill of Rights, and that is the right "to be left alone." (The original phrase is the right "to be let alone." Modern English prefers "left alone.")

Whatever its source, whether common law, civil tort law, or the Bill of Rights, professional law enforcement officers must realize, and accept, that citizens have the right to be left alone. This is especially true today because more and more citizens are refusing police consensual encounters. I witnessed this first hand when subjects, whom I wanted to talk with, in order to develop intel, would bluntly ask me if they were free to go. When I replied "Yes," a few would immediately leave (usually on their bicycle or moped). However, this country was founded on an unwavering respect for individual liberties. It's just one of many reasons why this country is the best.

As Justice Brandies wrote in a dissenting opinion that was later endorsed by courts around the country:

> *The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.*[1]

[1] Olmstead v. United States, 277 U.S. 438 (1928)

Decision Sequencing

Every search and seizure decision you make must be constitutional. If not, the evidence seized later will be "tainted" by the unconstitutional decision and the evidence may be suppressed. More importantly, an unconstitutional decision may have violated someone's constitutional rights. If true, you may be successfully sued even if the suspect suffered no real harm. For example, if you illegally searched a backpack and found cocaine. The suspect may be able to recover damages and attorney's fees even though they were never allowed to possess the cocaine in the first place. The law protects their interest in their backpack, regardless of what they have inside.

A great way to conceptualize how this works is to think of constitutional decisions as upright dominos, each stacked next to each other.[1] Remember doing that as a kid...or last week? You line them up and when one falls, the rest fall *after* that one. In other words, if you just flicked the domino in the middle, only half the dominos would fall. Fourth Amendment decisions work the same way. For example, you make a *lawful* traffic stop (domino #1). You *lawfully* question the occupants about unrelated matters but it does not measurably extend the stop (domino #2). Eventually, you gain consent to search the trunk, but exceed the scope of search by searching inside the vehicle. This would violate the constitution and therefore that domino falls...and so do the decisions and evidence that come after it. Here, if you found drugs in the car, made an arrest, and found more drugs from a search incident to an arrest (another domino), that domino falls over too and that evidence is suppressed because it was tainted by a domino that fell over before.

Finally, remember everything that you found *before* the first domino that fell is constitutional. Any evidence discovered during that period would not be suppressed.

Legal Standard

Constitutional decisions are like upright dominos — an unconstitutional decision will cause the domino to fall over, knocking over (i.e. "tainting") all the dominos that come later.

[1] This concept came from Bruce-Alan Barnard, JD

C.R.E.W.

The Supreme Court stated that all Fourth Amendment searches are presumed unreasonable unless there is a warrant or recognized exception. There are several exceptions, including "consent." C.R.E.W. is an acronym to help you remember this important limitation.

The "C" stands for consent. "R.E." stands for recognized exceptions. "W" stands for—you guessed it, warrant.

Legal Standard

Whenever you conduct a search or a seizure you need one of the following:

1. Consent
2. Recognized Exceptions, examples include:
    - ☐ Exigency
    - ☐ Community caretaking
    - ☐ Reasonable suspicion
    - ☐ Probable cause arrest in public place
    - ☐ Mobile conveyance exception
    - ☐ Plain view (or smell, feel, hear)
    - ☐ Emergency searches
    - ☐ Hot/fresh pursuit
3. Warrant

Fourth Amendment Reasonableness

The ultimate touchstone of the Fourth Amendment is reasonableness.[1] In particular, the Fourth prohibits "unreasonable searches and seizures." In other words, if a search or seizure is reasonable, it's probably lawful.

Yet, how do we define what's reasonable? Most of our definitions come from case law. What we can, and cannot, do is usually spelled out by judges. But remember, courts don't expect you to do your job perfectly—cops are human and make mistakes. But you must be able to articulate why you're doing something. If you cannot, then it's probably unreasonable.

Also, keep in mind that the Constitution focuses on "objective reasonableness," not subjective factors. This means that courts usually ignore personal motives and instead analyze whether an objectively reasonable officer "could" have lawfully done the same thing. As the U.S. Supreme Court stated, "the focus is to be on the [officers'] actions not their motives."[2]

There is one important exception. If an officer decides to impound a car simply to conduct an inventory search as a ruse to rummage around for criminal evidence, without probable cause, that subjective intent can be used against the officer.[3]

Legal Standard

"[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[4]

"An otherwise lawful seizure can violate the Fourth Amendment if it is executed in an unreasonable manner."[5]

---

1 Riley v. California, 134 S. Ct. 2473 (2014)
2 *Scott v. U.S.,* 436 U.S. 128 (1978)
3 *Commonwealth v. Lagenella,* 83 A.3d 94 (Pa. 2013)
4 *Terry v. Ohio,* 392 U.S. 1, 20 (1968)
5 United States V. Jacobsen, 503 U.S. 540 (1992)

Finally, the "Fourth Amendment does not mandate that police officers act flawlessly, but only that they act reasonably."[1]

Case Examples

An arrest would be lawful where the court finds probable cause, even if the officer admitted he didn't think he had enough for an arrest:

An officer searched a vehicle believing that the odor of raw and burnt marijuana provided him with PC, thinking that vaping would not give off a burnt marijuana smell. The court will consider reasonableness not on the officer's intent, but on the objective facts and circumstances. Here, because marijuana is lawful for medical use and the occupant had a medical marijuana card, nothing in state law prohibited vaping. The officer did not have PC and the search was held to be unreasonable.[2]

Stop and drug investigation lawful because there was reasonable suspicion of illegal drug activity despite the officers subjective belief otherwise:

Officers conducting surveillance of a known drug house observed several people arriving late at night, remaining only a short while, then leaving. On more than one occasion, officers saw what they believed was a hand to hand transaction. But when the defendant arrived late at night, it was not a typical drug sale. Occupants of the house came out, got into the car and drove off with the defendant. Police also observed traffic offenses, but did not believe the conduct observed at the house rose to the level of RS. The court disagreed.

The court held: "[w]e have found no direct Supreme Court authority on this issue, but the analysis applied by the Court in recent cases suggests that the legality of a stop must be judged by the objective facts known to the seizing officers rather than by the justifications articulated by them."[3]

An officer's mistake of fact, if reasonable, will not result in suppression of evidence:

A trooper stopped a car because there was no rear license plate. The officer testified that she could not see a temporary tag until after the stop, due to glare from the sun off the rear window. It was only

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[1] United States V. Rohrig (6th Circuit, 1996)

[2] *Commonwealth v. Barr*, 28 MAP 2021 (Pa. Dec. 29, 2021)

[3] U.S. v. Hawkins, 811 F.2d 210, 213 (3d Cir. 1987)

after she stopped the car and approached that she saw the temporary registration tag in the rear windshield. This was a reasonable mistake of facts which supported probable cause for the stop during which time the trooper found marijuana and a gun.[1]

[1] Commonwealth v. Bright, J. S58004/17 at *6 (Pa. Super. Ct. Oct. 6, 2017)

Private Searches

The Fourth Amendment controls government officials, not private actors. Therefore, there's generally no restriction on using information gained from a private citizen's search as long as he was not acting as a government agent. This is true even when the private search was conducted in a highly offensive, unreasonable, or illegal manner.[1]

Remember, you may not exceed the scope of the original private search. The point here is that the suspect loses any reasonable expectation of privacy in those areas searched by the private person, so police can view the same evidence. But that doesn't mean the suspect lost his expectation of privacy in other, non-searched areas.

An agent is anyone who conducts the search or seizure on your behalf. Government agents must abide by the same rules you do, otherwise agents become a way to violate the Fourth Amendment. Again, as long as the person is not your agent, you can use any evidence they bring to you.

There's another doctrine in play involving private searches known humorously as a "cat out of the bag" search. These searches occur when a private person searches another person's container (i.e.,, backpack, purse, etc.) and finds contraband. The private person then informs police about what they found. Police then conduct the same search on the container and usually seize the evidence. The one in possession of the container may be charged. For example, a snoop searches their roommate's backpack and finds drugs. Cops arrive and can now perform the same search because the "cat is out of the bag." Because the snoop knows what's in the backpack, the roommate has no expectation of privacy anymore. Makes sense?

Legal Standard

Whether a private search becomes a government search depends on three factors:

- ☐ Did you encourage, **direct** or **participate** in the search or seizure? And,
- ☐ Did the private person conduct the search with the **intent to help police** or **discover evidence**? If so;

[1] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)

☐ Did you exceed the **scope** of the private search?

The first two factors must both be present for a private search to turn into a government search. The third factor will turn a private search into an unreasonable government search.

Case Examples

Government did not exceed private search by opening another box on the same pallet:

Private carrier's employee opened one of thirteen boxes on a pallet and discovered marijuana. Police later searched the other boxes without a warrant. Typically, this would have exceeded the "scope" of the original private search. However, the government effectively argued that the additional boxes on the same pallet were essentially a "single" box. The court agreed and the search was upheld.[1]

No government search where wife simply handed over evidence:

Officers went to the defendant's home and questioned his wife. Officers asked if husband owned any guns and what clothes he had worn on the night of the crime. Wife then grabbed the items and gave them to police. This was a private search—no evidence that police *told* her to do it, she did it on her own to clear her husband's name.[2] That last part backfired!

Hotel manager was government agent while searching room for drugs:

Hotel manager called police and asked that police protect him while he searched a suspected drug dealer's room. The officers stood guard at the door and listened to the manager describe the drug evidence found. This was a government search because police participated in (i.e. stood guard) and the manager was motivated to help police (i.e. look at what I just found boys!).[3]

FedEx employee was not an agent despite wanting to find evidence for police:

A FedEx employee who previously found drugs in eight packages, and testified in court two times, was not a government agent simply because he wanted to find evidence to turn over to the government.[4]

---

[1] U.S. v. Garcia-Bercovich, 582 F.3d 1234 (11th Cir. 2009)

[2] Coolidge v. New Hampshire, 403 U.S. 443 (1971)

[3] U.S. v. Reed, 15 F.3d 928 (9th Cir. 1994)

[4] U.S. v. Koenig, 856 F.2d 843 (7th Cir. 1988)

Government did not exceed private search by asking computer repair tech to open thumbnails after tech only observed the small icons:

A computer repair tech discovered thumbnails appearing to depict child porn. The tech invited police to the shop and showed the investigator how he found the thumbnails. The officer asked the tech to open the images, so he could see them full sized, though the tech had not already done so. The court held that this did not intrude on a reasonable expectation of privacy because REP had already been extinguished.[1]

No government search where brother handed over evidence:

A cooperating witness to a first degree murder charge was sent two letters from her murdering boyfriend while he was incarcerated. However, she was no longer living at the address, which was her mom's home. Mom gave the letters to her son, who opened, read, and copied the letters. The letters implicated both in the murder! The son provided copies of the letters to the prosecutor, who used them as evidence. The court held the 4th Amendment, and Art. I Sec. 8 of the PA constitution do not apply to non-state actors, and the prosecutor did no more than the private actor when they read and used the letters in court, so no REP remained.[2]

Landlord not agent despite wanting to find evidence for police:

A landlord who entered an apartment to fix a water leak found what he believed to be methamphetamine. He took a sample of the white powder and gave it to police. Giving the sample to police and testifying against the tenant did not make him an agent. In addition, he had an independent reason to seizing the sample because he was concerned for the safety of the other tenants.[3]

No violation where police waited outside a dorm room while university public safety officers searched a dorm room and seized contraband:

Villanova public safety officers have to wear uniforms and respond to campus incidents and have police-like authority. Two such officers responded to a drug related altercation between three people, including two students. As part of their response, the public safety officers entered a dorm room of the students and discovered LSD and other contraband. Police were called during the search and remained outside the dorm room while public safety officers

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[1] Commonwealth v. Shaffer, 209 A.3d 957, 973 (Pa. 2019)

[2] *Com. v. Harris*, 572 Pa. 489, 515 (Pa. 2002)

[3] U.S. v. Jackson, 617 F. Supp. 2d 316, 326 (M.D. Pa. 2008)

continued their search, seizing evidence turned over to the state for further action. The court concluded this was not state action because the university is a private actor, police did not direct nor encourage the public safety officers, and the University had an independent justification to enter the room to ensure there was nothing that would harm other students.[1]

[1] Commonwealth v. Yim, 195 A.3d 922, 927 (Pa. Super. Ct. 2018)

"Hunches" Defined

You cannot make a stop or detention based "on mere curiosity, rumor, or hunch...even though the officer [you] may be acting in complete good faith."[1] The solution is to work on converting those hunches into reasonable suspicion so they can make investigatory detentions. As the Court said:

> *The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and the level of suspicion required for a Terry stop is obviously less demanding than that for probable cause*[2]

Legal Standard

You **cannot seize** a person or property based merely on a **hunch**. Instead, you may make a consensual encounter or pursue other investigative techniques that are not prohibited by the Fourth Amendment.

Case Examples

Mere nervousness, without more, is just a hunch:

Though nervousness alone does not justify a detention, excessive nervousness coupled with other facts, such as evidence of prior criminal activity, and other suspicious behavior, may contribute to reasonable suspicion. Here, the defendant visibly trembled, did not make eye contact, and had difficulty eating a sandwich, coupled with furtive movement indicating attempts to access the area under the seat, and prior history of flight during an investigation, provided RS for a detention.[3]

Criminal history alone is a hunch, not reasonable suspicion:

During a traffic stop, a computer check revealing that two of the three occupants had convictions for drug related offenses did not provide reasonable suspicion either to believe that money in their possession was for the purchase of drugs nor for further

[1] In re Tony C. 21 Cal.3rd 888 (1978)

[2] U.S. v. Sokolow, 490 U.S. 1 (1989)

[3] *United States v. Foushee*, CRIMINAL ACTION No. 19-452, at *11 (E.D. Pa. Nov. 10, 2020)

detention. Officer needed additional evidence to connect the currency to the purchase of drugs.[1]

[1] *U.S. v. $10,700.00 in U.S. Currency*, 258 F.3d 215, 233 (3d Cir. 2001)

Reasonable Suspicion Defined

You may conduct an investigative detention (i.e. Terry Stop) when you can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" you to detain the suspect for further investigation.[1]

Like probable cause, reasonable suspicion is fact-specific. Each situation is different. Therefore, the key is to articulate why this particular person appears to be engaged in criminal activity at the time.

Legal Standard

Reasonable suspicion exists when:

- ☐ You can articulate **facts and circumstances** that would lead a **reasonable officer** to believe the suspect is, or is about to be, involved in **criminal activity**;
- ☐ If your suspicions are **dispelled**, the person must be **immediately released** or the stop converted into a consensual encounter.

Case Examples

Reasonable suspicion must be particular, not just hunch:

"Reasonable suspicion means a particularized and objective basis for suspecting that a person is involved in criminal activity. Something more than an un-particularized suspicion or hunch must be articulated. Reasonable suspicion is based on facts and circumstances known to the officer and defined by reasonable inferences that an officer reaches based on training and experience. Here the officer doing bar checks heard patrons yelling "police are coming in" before seeing the appellant coming from the rear exit drinking from a beer bottle. Though he could not determine the age of the appellant, he had learned from experience that those attempting to evade detection, specifically under-aged drinkers, use the rear exit during bar checks. [2]

The fact that car is parked in front of fugitive's house is not enough for stop:

A suspect's activity around a known drug house may not, alone, be enough for reasonable suspicion, but when coupled with other

[1] Terry v. Ohio, 392 U.S. 1 (1968)

[2] *Com. v. Bennett*, 827 A.2d 469, 478 (Pa. Super. Ct. 2003)

suspicious behavior, such as late at night, out of state plates, and circling the block where drug activity is believed to be, gives rise to an experienced officer's reasonable suspicion of drug activity.[1]

[1] *U.S. v. Martin*, 155 F. Supp. 2d 381 (E.D. Pa. 2001)

Probable Cause Defined

Articulating precisely the definition of "probable cause" or "reasonable cause" is not possible. P.C. is a fluid concept and whether or not you had P.C. to arrest or conduct a search will be evaluated on a case-by-case basis. "On many occasions, we have reiterated that the probable-cause standard is a 'practical, nontechnical conception' that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[1]

Remember, evidence found *after* a search cannot be used retroactively to establish probable cause.[2] It may be tempting to try to cure an unlawful search by telling the prosecutor, "But I found 100 kilos of cocaine! There must have been probable cause!" That's a great argument, but it is legally flawed. Similarly, just because the evidence sought was not found does not mean that there was no probable cause at the beginning.[3]

Legal Standard

Probable cause to arrest:

> Probable cause to arrest exists "where 'the **facts and circumstances** within [the arresting **officer's] knowledge** and of which he had **reasonably trustworthy information** [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed,"[4] and that the **defendant is the perpetrator**.[5]

Probable cause to search:

> Probable cause to search, on the other hand, arises when there are r**easonable grounds to believe**, "not that the owner of the property is suspected of a crime, but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are **located** on the property to which entry is sought,"[6] and there is probable cause to believe the **things sought are**

[1] Illinois v. Gates, 462 U.S. 213 (1983)
[2] Maryland v. Garrison, 480 U.S. 79 (1987)
[3] United States v. Gaschler, 2009 U.S. Dist. LEXIS 48449 (N.D. W. Va. June 3, 2009)
[4] Draper v. United States, 358 U.S. 307 (1959)
[5] United States v. Watson, 423 U.S. 411 (1976)
[6] Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

evidence of a crime.[1] In fact, the identity of the offender need not be known.[2]

Case Examples

Odor of marijuana alone does not provide probable cause:

"[T]he lawful possession and use of marijuana, in conjunction with other articulable facts supporting a finding of probable cause, may be considered in the requisite analysis of the totality of the circumstances." However, since the Medical Marijuana Act (MMA), odor alone does not give rise to probable cause for a search.[3]

Officer had probable cause that tied-off balloon contained narcotics:

Where an officer observed a tied-off, uninflated opaque party balloon in a vehicle together with additional balloons, small plastic vials, and white powder in the glove compartment, and when the officer knew from his experience that such balloons were often used to deal drugs, probable cause existed to believe that the balloon contained narcotics.[4]

Probable cause existed to arrest party-goers in near-empty house:

A reasonable officer could have concluded that there was probable cause to believe the partygoers knew they did not have permission to be in the house, and the officers had probable cause to arrest the partygoers because the officers found a group of people who claimed to be having a bachelor party with no bachelor, in a near-empty house, with strippers in the living room and sexual activity in the bedroom, and who fled at the first sign of police.[5]

Probable cause defines the scope of search:

Pennsylvania's constitution requires additional specificity compared to the 4th Amendment, such that a reasonable officer will know where to search and for what. However, this does not require "lawyer-like" articulation. "When there is probable cause to believe criminal activity is afoot in one room of a single unit household, a warrant to search the entire unit is not overly broad."[6]

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[1] State v. Tamer, 475 So. 2d 918 (Fla. Dist. Ct. App. 3d Dist. 1985)

[2] State v. Warren, 301 S.E.2d 126 (N.C. Ct. App. 1983)

[3] *Commonwealth v. Barr*, 266 A.3d 25, 43 (Pa. 2021)

[4] Tex. v. Brown, 103 S. Ct. 1535 (1983)

[5] District of Columbia v. Wesby, 138 S. Ct. 577 (2018)

[6] *Commonwealth v. Korn*, 139 A.3d 249, 255 (Pa. Super. Ct. 2016), quoting Comm v. Waltson, 703 A.2d 518, 521 (Pa.Super.1997)

Collective Knowledge Doctrine

The collective knowledge doctrine is one of the most powerful and important doctrines in law enforcement. The nature of police work requires efficient and effective investigation, requiring reliance on information from other officers, other jurisdictions, even other sates. Collective knowledge, or the "fellow officer rule," allows a single police officer to benefit from the collective knowledge of all officers working on a case.[1] For example, if one agency puts out a BOLO for a person reasonably believed to have committed a crime, another officer, even one working in a different agency, may lawfully detain the wanted person, even without knowing the specifics of the investigation, so long as the originating investigation gave rise to reasonable suspicion.[2]

The key with the collective knowledge doctrine is that officers communicate with each other. This doesn't mean officers have to know everything about the case, but they at least have to be working together.

Legal Standard

There are two forms of collective knowledge: Vertical and horizontal.

- Vertical collective knowledge occurs when one officer tells/orders/asks another officer to do something that implicates the law. For example, an officer tells his partner to pat down the suspect, but the partner doesn't know why. This is fine only if the first officer can justify the patdown.[3]
- Horizontal knowledge requires two conditions:
  - The officers, even if from different agencies, must be involved in the same investigation, and
  - Officers must be in communication with each other related to the investigation.[4]

[1] *United States v. Hensley,* 469 U.S. 221 (1985)
[2] *Id*.
[3] *Commonwealth v. Yong*, 177 A.3d 876 (Pa. 2018)
[4] Id.

Case Examples

Collective knowledge doctrine applied to officer who made a warrantless arrest:

Officers on a narcotics task force had probable cause for a warrantless arrest. An officer who assisted with a search, but who was not a part of the task force made the lawful arrest based on collective knowledge.[1]

Collective knowledge works both ways when a neighboring agency BOLO was based on a complaint that did not establish PC for a warrant:

Police applied for an arrest warrant, which was issued by a magistrate. Upon review by the district court, the complaint was deemed insufficient to establish PC for an arrest. Where the information available to the investigating officers is insufficient to establish PC for an arrest, an officer reasonably relying on a BOLO or other similar form of interagency communication who then makes the arrest, has acted unlawfully.[2]

Intel from confidential information contributed to collective knowledge:

Officer received a tip from his confidential informant. He passed the information along to officers starting their shift. The information provided reasonable suspicion for an investigative detention, specifically, a prohibited felon who had a gun. The information was two or three days old and not specific to the vehicle the officer's stopped, but still gave rise to reasonable suspicion. Officers were justified in relying on the CI's tip, even if they did not determine reliability of the tipster on their own.[3]

Collective knowledge doctrine can also be used for investigatory detentions:

Officer worked in a fast-paced, dynamic situation in an area known for drug sales, in which the officers worked together as a unified and tight-knit team. One officer developed reasonable suspicion to stop the defendant. A fellow officer, unaware of the officer's reasonable suspicion, stopped the defendant without his own individualized suspicion. The court upheld the stop under the collective knowledge doctrine.[4]

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[1] *Commonwealth v. Yong*, 177 A.3d 876 (Pa. 2018)

[2] *Whiteley v. Warden*, 401 U.S. 560 (1971)

[3] *United States v. Palmer*, CRIMINAL ACTION No. 16-282 (E.D. Pa. Apr. 7, 2017)

[4] U.S. v. Whitfield, 634 F.3d 741 (3d Cir. 2010)

What is a "Search" Under the Fourth Amendment?

The term "search," as used in this book, at least, refers to conduct invoking the protections of the Fourth Amendment and the Pennsylvania State Constitution. Police may engage in hundreds of "searches" every day, and yet invoke constitutional protections only when they pry into hidden places, such as a person or their house, building, premise, or other property, with a view to the discovery of contraband or some other evidence of guilt to be used in the prosecution of a criminal action.[1]

For example, when police look into a stopped vehicle, they may be searching for weapons or contraband, but that conduct is not prohibited by the Fourth Amendment. In other words, just using your senses while lawfully positioned somewhere is not a Fourth Amendment search. On the other hand, opening the trunk of that same vehicle and looking around for contraband would be a protected search because that area is protected as a closed container.

There are two constitutional searches: a "physical intrusion" search; or a search where a person has a "reasonable expectation of privacy."

Legal Standard

Physical intrusion:

A physical intrusion will be a search under the Fourth Amendment if:

- ☐ You make a **physical trespass** into a **constitutionally protected area** (i.e. persons, houses, papers, and effects); and
- ☐ You did it for the **purpose of obtaining information**.[2]

Reasonable expectation of privacy:

A reasonable expectation of privacy will be violated if:

[1] *Commonwealth v. Anderson,* 208 Pa. Super. 323 (Pa. Super. Ct. 1966)

[2] U.S. v. Jones, 565 U.S. 400 (2012)

- ☐ The person exhibited an actual (**subjective**) expectation of privacy; and
- ☐ His expectation is one that society is prepared to recognize as reasonable (**objective**).[1]

[1] Katz v. U.S., 389 U.S. 347 (1967)

What is a "Seizure" Under the Fourth Amendment?

A seizure of a person occurs when a reasonable person would believe that he or she is not free to leave, even if for a brief period.[1]

> *The test is necessarily imprecise because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs....*[2]

There are two ways to seize a person. First; using any physical force, no matter how slight, with the intent to subdue, is a physical seizure.[3] For example, grabbing a person's shoulder or, more drastically, shooting them, are both physical seizures, whether the use of force actually stops them or not! Alternatively, a person is seized when one reasonable believes they are not free to leave.[4] Pennsylvania rejects the Supreme Court's decision requiring a submission to the show of authority before a seizure occurs.[5] This means a that person does not need to act in any particular way in response to your show of authority. The standard is purely one of objective reasonableness: would a reasonable person believe they would face legal consequences if they walked away?

A seizure of property occurs when you intentionally interfere with an individual's interest in their property.[6] The most important element here is intent. For example, if you blow a red light and crash into another car, you have *unintentionally* interfered with their property and may be subject to tort liability, but not a constitutional violation.

You may also seize property vicariously, for example, if you watch while someone removes property from a residence during a civil standby. Therefore, it may be unwise to allow any disputed property to leave the residence.

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[1] *Commonwealth v. Matos*, 672 A.2d 769, 774 (Pa. 1996)
[2] Mich. v. Chesternut, 486 U.S. 567 (1988)
[3] *Torres v. Madrid*, 141 S. Ct. 989 (2021)
[4] *Commonwealth v. Matos*, 672 A.2d at 774
[5] *California v. Hodari*, 499 U.S. 621 (1991)
[6] *Soldal v. Cook County*, 506 U.S. 56, 65-66 (1992)

Legal Standard

A seizure of a **person** occurs under the Fourth Amendment when:

- ☐ You **use force** on a person with the **intent** to seize them, even with minimal force;[1] or
- ☐ There is a sufficient **show of authority** that would lead a **reasonable person** to believe he was **not free to leave** or avoid you without legal consequences.[2]

A seizure of **property** occurs under the Fourth Amendment when:

- ☐ You **intend** some **meaningful interference** with someone's **possessory interest** in their property.[3].

Case Examples

No seizure by DEA agents airport:

The defendant was not seized under the Fourth Amendment when she was asked by airport DEA agents if she would accompany them back to their office to discuss some discrepancies with her plane ticket. Once there, they asked for consent to search and she was informed of her right to refuse. She agreed and a female officer asked her to partially disrobe, after which bundles of heroin were discovered. The whole encounter was consensual.[4]

Consensual contacts on a bus:

Officers boarded a Greyhound bus and spoke with various passengers. They adhered to the bus schedule, left the aisle clear to allow for passengers to come and go as they pleased, and spoke in a low, casual tone. Police saw a bag in the aisle and asked, several times, if it belonged to anyone. No one claimed the bag, so they searched it and found ID and drugs. Defendant claimed she was unlawfully detained and lost, because the tone and procedure was friendly and inquisitive. It was a consensual encounter.[5]

Officers that "kept the peace" liable for seizure of property:

Police were called to "keep the peace" while a trailer park manager illegally removed a trailer. Police prohibited the owner from interfering, transforming it into a government seizure.[6]

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[1] *Torres v. Madrid*, 141 S. Ct. 989 (2021)

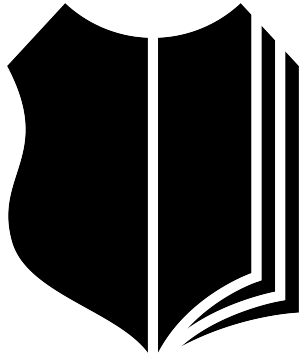
[2] *Commonwealth v. Matos*, 672 A.2d 769, 774 (Pa. 1996)

3 Soldal v. Cook County, 506 U.S. 56, 65-66 (1992), as cited in *Langbord v. U.S. Dept. Of Treasury*, 645 F. Supp. 2d 381 (E.D. Pa. 2009)

[4] United States v. Mendenhall, 446 U.S. 544 (1980)

[5] Fla. v. Bostick, 501 U.S. 429 (1991)

[6] Soldal v. Cook County, 506 U.S. 56 (1992)



Consensual Encounters

Consensual Encounters

The most common police encounter is the consensual one. You don't need a specific reason to speak with people and consensual encounters are a great way to continue an investigation when you have neither reasonable suspicion nor probable cause.[1] As the Supreme Court said, "Police officers act in full accord with the law when they ask citizens for consent."[2]

Start a consensual encounter by asking a question: "Can I talk to you?" Not, "Come talk to me." Also, your conduct during the encounter must be reasonable. Lengthy encounters full of accusatory questioning will likely be deemed an investigative detention, not a consensual encounter.

Finally, your un-communicated state of mind has zero bearing on whether the person would feel free to leave. Therefore, even if you had probable cause to arrest, this factor will not be considered as long as the suspect did not know that you intended to arrest him.

Legal Standard

A consensual encounter becomes a seizure when:[3]

- Under the **totality of the circumstances**;
- A reasonably **innocent** person;
- Reasonably believes they do not have the freedom to **terminate** the encounter or **leave**;

Some factors courts consider include:[4]

- How and where the initial contact was made (was order given?) (where you in a public place, observed or observable by others?);
- Use of flashing lights or sirens;
- Uniform versus plain clothes;
- Number of officers;
- Demeanor of officer (conversational v. accusations);

[1] *Com. v. Reid*, 571 Pa. 1, 26 (Pa. 2002)
[2] United States v. Drayton, 536 U.S. 194 (2002)
[3] US v. Nobles, 69 F.3d 172, 180 (7th Cir. 1995)
[4] *Com. v. Reid*, 811 A.2d 530 (2002)

- Display of weapons;
- Physical touching or patdowns;
- Ordering person to move next to patrol car;
- Blocking their vehicle;
- Telling the person they are free to leave;
- Reading Miranda (not recommended for consensual encounters);
- Duration of the encounter;
- And many others. Use common sense and talk to the person in a professional, yet conversational, inquisitive tone.

Case Examples

Order to come over and talk is not consensual:

Suspect was observed walking in mall parking lot after stores were closed. Officer said, "Come over here, I want to talk to you." Court held officer gave command to suspect and therefore needed reasonable suspicion. Evidence was suppressed.[1]

Police intent to detain does not matter:

Maxon traveled in a car with a passenger. His trip included exiting a suspected drug house with a plastic baggy, getting into a car with a passenger who remained in the car throughout the surveillance, and stopping at three houses. He presumedly went into each home. After exiting the third home, three officers approached Maxon. As one spoke with the passenger, the other two made contact with Maxon and explained they believed he was delivering drugs. They proceeded to ask for consent to search his person, and after some time and a bit of a kerfuffle, police discovered illegal drugs. Court found this was not a consensual encounter (and surprisingly enough, not reasonable suspicion either) and suppressed the evidence.[2]

Consensual encounter and search valid after clean break following a traffic stop:

State troopers made a traffic stop at mid-morning for failing to signal and obstructed registration. The ensuing, cordial, conversation was limited to questions about the signal and registration. The trooper asked the driver to step out of his vehicle

[1] People v. Roth, 219 Cal. App. 3d 211 (Cal. App. 4th Dist. 1990)

[2] *Com. v. Maxon*, 798 A.2d 761 (Pa. Super. Ct. 2002)

so the written warning could be explained. After explaining the warning, the trooper told the driver he was free to leave. Both turned to head back to their respective vehicles. The trooper turned around and asked the driver if he could ask questions about the trip. The driver agreed and eventually consented to a search of the vehicle where drugs were located. Because, among other factors, the traffic stop concluded and evolved into a "mere consensual encounter," the ensuing search was lawful.[1]

Even if police have probable cause, they can still seek a consensual encounter as long as they ask:

Police asked a homicide suspect to meet them at the police department "barracks" and once there, asked about his whereabouts the night two women who filed complaints against him were shot and killed. He said he'd been in his motel room and consented to a search of the room. Just because a person is asked to accompany police from a public location to a private location does not turn the encounter into a detention. Where a person would reasonably believe they can "go about their business" the encounter is consensual.[2]

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[1] *Commonwealth v. Randolph,* 151 A.3d 170, 178 (Pa. Super. Ct. 2016)

[2] *Com. v. Reid*, 571 Pa. 1 (Pa. 2002)

Knock and Talks

There is no Fourth Amendment violation if you try to consensually contact a person at his home. The key to knock and talks is to comply with social norms. Think about it this way; if the Girl Scouts could do it, you can too.

You must be reasonable when you contact the subject. Constant pounding on the door, for example, would likely turn the encounter into a detention if the subject knows that it's the police knocking (an objectively reasonable person would believe that police are *commanding* him to open the door). Additionally, waking a subject up at 4 a.m. was viewed as a detention requiring reasonable suspicion (see below). In other words, if the Girl Scouts wouldn't do it, then it's probably unreasonable.

What about "No Trespassing" signs? Generally, under the Fourth Amendment, you should be able to ignore signs unless they are accompanied by other indicators that would lead a reasonable person to believe the public is clearly not welcome, such a fence with a locked gate. However, Pennsylvania Courts have held that a gated fence with clear "Private Property" and "Beware of Dog" signs constitutes a greater expectation of privacy.[1]

Legal Standard

Knock and talks are lawful when:

- ☐ The **path** used to reach the door does not violate **curtilage** and appears available for **uninvited guests** to use;
- ☐ If the house has multiple doors, you chose the **door reasonably believed** to be available for uninvited guests to make contact with an occupant;
- ☐ You used typical, **non-intrusive methods** to contact the occupant, including making contact during a socially-acceptable time;
- ☐ Your conversation with the occupant remained **consensual**; and
- ☐ When the conversation ended or was terminated, you **immediately left** and didn't snoop around.

[1] *Commonwealth v. Bowmaster*, 101 A.3d 789 (Pa. Super. Ct. 2014)

Case Examples

Knock and talk at 4 a.m. held invalid:

Officers went to suspect's residence at 4 a.m. with the sole purpose to arrest him. There was no on-going crime and the probable cause was based on an offense that occurred the previous night. Violation of knock and talk because officers exceeded social norms.[1]

Command to open door was not a consensual encounter:

Prior to a knock and talk, multiple drug investigators crossed a yard and stood just below the defendant's kitchen window, where they were able to hear the defendant make incriminating statements about drug use. Court excluded the statements because police had no right to stand under the window where no reasonable uninvited guest would be expected to be.[2]

Constant pressure to consent to search held unlawful:

During knock and talk officers continued to press the defendant for permission to enter and search. The later consent-to-search was the product of an illegal detention.[3]

Officer's statement that he didn't need a warrant to talk with occupant found to have tainted consent to enter:

Officers contacted a suspected illegal alien at his apartment. Four officers accompanied the defendant to his apartment where the lead officer said, "Let's go inside." When asked if they had a warrant, the officer said they "didn't need a warrant to talk to him." Then another officer asked if they could come inside. Based on the totality of the circumstances, the consent was involuntary since a reasonable occupant would have thought police didn't need a warrant to enter and talk.[4]

Unless there is an express order otherwise, officers have the same right to knock and talk as a pollster or salesman:

Police may approach a home and knock precisely because it is no more than any private citizen might do. However, a police officer is not free to wander anywhere he or she so chooses within the curtilage of a home without a warrant, consent, or the presence of exigent circumstances.[5]

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[1] United States v. Lundin, 47 F. Supp. 3d 1003 (N.D. Cal. 2014)

[2] People v. Huber, No. 4-19-0087, *9 (Ill. App. Ct. 2021)

[3] United States v. Washington, 387 F.3d 1060 (9th Cir. Nev. 2004)

[4] Orhorgaghe v. I.N.S., 38 F.3d 488, 491 (9th Cir. 1994)

[5] *Commonwealth v. Bowmaster*, 101 A.3d 789 (Pa. Super. Ct. 2014)

Investigative Activities During Consensual Encounter

Just because you're engaged in a consensual encounter doesn't mean you can't investigate. However, be careful as to how you go about it. Be cool, low key, and relaxed. Make small talk and just present yourself as a curious cop versus someone looking to make an arrest (though that may be your goal).

During a consensual encounter, there are really three investigative activities you can engage in; questioning, asking for ID, and seeking consent to search.

"[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, and asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen."[1]

Asking for ID and running a subject for warrants doesn't automatically convert an encounter into a detention.[2] Hint: return ID as soon as possible so that a reasonable person would still "feel free to leave."[3]

Legal Standard

Questioning:

Questioning a person does not convert a consensual encounter into an investigative detention as long as:

- ☐ Your questions are not **overly accusatory,** conveying a message that cooperation is required..

Identification:

Asking a person for identification does not convert a consensual encounter into an investigative detention as long as:

- ☐ The identification is **requested**, not demanded; and
- ☐ The license is quickly returned while any ensuing conversation remains completely inquisitive.

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[1] Fla. v. Royer, 460 U.S. 491 (1983)

[2] *Commonwealth v. Cost*, 224 A.3d 641, 651 (Pa. 2020)

[3] United States v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. Ariz. 1997)

Consent to search:

Asking a person for consent to search does not convert the encounter into an investigative detention as long as:

- ☐ The person's consent was **freely and voluntarily given**;
- ☐ He has **apparent authority** to give consent to search the area or item; and
- ☐ You did not exceed the **scope** provided, expressed or implied.

Case Examples

Asking for ID during a mere encounter does not escalate the contact to a detention:

Two men sitting outside an abandoned building were approached by police because of the significant number of property crimes in the area. Officers retained the IDs and started writing down the information in the presence of the men. The Court held the request and brief retention of the ID did not escalate the encounter into a detention. Additionally, the officer's subjective belief of criminal activity plays no role in the objective standard.[1]

Consent to search was involuntary after accusation of criminal conduct:

Officers request for ID does not necessarily escalate a mere encounter into a detention, but where one officer takes an ID to his patrol vehicle while the other asks specific and directed questions about the contents of a backpack, a reasonable person would believe they are the subject of an investigation and no longer free to leave.[2] The consent to search the backpack came only after the mere contact escalated to a detention and was therefore invalid as well.

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[1] Commonwealth v. Lyles, 54 A.3d 76 (Pa. Super. Ct. 2012)

[2] *Commonwealth v. Cost*, 224 A.3d 641, 651 (Pa. 2020)

Asking for Identification

If you make a consensual encounter, you can always request that the subject identify themselves. But remember, there is no requirement that he do so. Additionally, there is likely no crime if the subject lied about his identity during a consensual encounter (however, possession of a fraudulent ID may be a crime).

I know a lot of officers don't understand how a person can lie about his identity and get away with it. But think about it, what law requires a person to identify himself during a consensual encounter? There may be a requirement the suspect identify himself during an investigative detention, but not a consensual one. Therefore, lying about ones' identity while engaged in a consensual conversation with a police officer is not against the law.

On the other hand, lying about ones' identity may help develop reasonable suspicion that the person is engaged in criminal activity, but this can't be the sole reason to detain or arrest the person.

Legal Standard

Asking a person for identification does not convert a consensual encounter into an investigative detention as long as:

- ☐ The identification is **requested**, not demanded; and
- ☐ You **return the identification** as soon as practicable; otherwise a reasonable person may no longer feel free to leave.

Case Examples

Detaining a subject for identification requires reasonable suspicion:

"When the officers detained [suspect] for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment.[1]

Providing a false name not a crime unless lawfully detained or arrested:

Defendant's arrest was premised on his giving a false name. The state statute criminalizes a person's false representation or identification of himself or herself to a peace officer "upon a

[1] Brown v. Tex., 99 S. Ct. 2637 (1979)

lawful detention or arrest of [that] person ...." The law applies only where the false identification is given in connection with lawful detention or arrest, and does not apply to consensual encounters with police. Since defendant's subsequent arrest was based upon an unlawful detention, and the search incident to the arrest was likewise unlawful, suppression is required of contraband seized after search incident to unlawful arrest.[1]

Asking for identification, among other activities, held to be consensual:

Where a narcotics officer approached the defendant after she deplaned, identified himself and asked to speak with her; asked for her ticket, which she gave to him; asked for identification, which was produced; asked for permission to search her purse, which she allowed; and asked whether a female officer could pat her down for drugs, to which she agreed; all consents were voluntary even though the defendant was visibly nervous and became more so as the interview progressed.[2]

Consent to search for identification valid:

Following a patdown of defendant, and after defendant was not "immediately forthright" about his identity, giving only his first name and providing several false dates of birth, the officer asked defendant if he had any identification. Defendant indicated that it could be found in his back pocket. The officer asked for, and was granted, consent to retrieve the identification from defendant's back pocket, but the pocket turned out to be empty. When asked if the identification might be located elsewhere, defendant suggested that it might be in his left front pocket, where the officer found not only an identification card, but what appeared to be cocaine.[3] Double prizes!

Holding passenger's identification while seeking consent to search from driver, held to be an unlawful detention:

After stopping a car, the trooper obtained the driver's license and the passenger's identification card. After writing the citation, the trooper spoke to the driver outside the car. He handed the driver a citation and his license, but held onto the passenger's identification. The trooper sought and obtained consent to search. The court held that since the passenger's ID was still being held, the driver was not truly free to leave and the search was suppressed.[4]

---

[1] People v. Walker, 210 Cal. App. 4th 165 (Cal. App. 6th Dist. 2012)

[2] U.S. v. Galberth, 846 F.2d 983 (5th Cir. 1988)

[3] U.S. v. Chaney, 647 F.3d 401 (1st Cir. 2011)

[4] United States v. Macias, 658 F.3d 509, 524 (5th Cir. 2011)

Removing Hands from Pockets

Generally, you may ask a subject to remove his hands from his pockets without worrying about converting the encounter into a detention. Courts understand the importance of officer safety.[1] What if the subject refuses to comply? If you can articulate a legitimate officer safety issue, then ordering a suspect to show his hands may be deemed reasonable.

However, an *order* to show hands may implicate the Fourth Amendment, because a direction creates an "air of formality" and "projects greater authority."[2]

What if the suspect still refuses to show his hands and tries to leave? Remember, this is a consensual encounter and if you decided to detain the subject you would need reasonable suspicion. An order to show hands may be a minimal intrusion, but a detention is not.

Legal Standard

Asking a person to remove his hands from his pockets does not convert a consensual encounter into an investigative detention as long as:

- ☐ You **requested** that he remove his hands from his pockets; and
- ☐ You did it for **officer safety** purposes.

Ordering a person to remove his hands from his pockets may convert a consensual encounter into an investigative detention if:

- ☐ You convey a **message** that induces cooperation, such as a **command or demand;**
- ☐ You are unable articulate a **legitimate, significant** need for **officer safety**.[3]

[1] *Commonwealth v. Lyles*, 54 A.3d 76, 83 (Pa. Super. Ct. 2012)

[2] *Com. v. Blair*, 860 A.2d 567 (Pa. Super. Ct. 2004)

[3] *Id.*; also see *Com. v. Carter*, 779 A.2d 591 (Pa. Super. Ct. 2001)

Transporting to Police Station

There is no Fourth Amendment violation if you consensually transport a subject to the police station for a consensual interview or to a crime scene. The key is that the subject's consent must be freely and voluntarily given.

Legal Standard

You may voluntarily transport a person in a police vehicle. However, if the person is a suspect to a crime and you are transporting the person for an interview, remember:

- ☐ Make it clear to the person that they are **not under arrest**;
- ☐ Seek **consent to patdown** the suspect for weapons; if the patdown is denied, do not patdown and you probably should not transport.

Case Examples

No violation when a person agrees to accompany police:

Police responded to a call from a women's dorm late at night to find a young man, drunk and "stupefied." Though no crime had been committed, the court reasoned his intent for being at the women's dorm in said condition was likely not "gentlemanly." The officer therefore interceded, and asked the man if he'd like a ride home. He agreed, but before he entered the patrol vehicle he was frisked. The officer discovered a vial and a hypodermic needle. Needless to say, he was eventually convicted for possession of a controlled substance. The court held the frisk was absolutely reasonable under these circumstances. Officer safety, even when the voluntary transport is for purely compassionate reasons, is still a substantial basis for frisking someone who voluntarily gets in a patrol vehicle.[1]

Detention ended when suspect consented to go to police station:

Law enforcement officer's Terry stop of automobile ended when defendant, who was riding in the automobile, agreed to go to police station, rather than when defendant was arrested several hours later.[2]

---

[1] *Commonwealth v. Bedsaul,* 298 Pa. Super. 174 (Pa. Super. Ct. 1982)

[2] United States v. Kimball, 25 F.3d 1 (1st Cir. 1994)

Consent to Search

Absent good reason, you should routinely seek consent to search a person or his property even if you have reasonable suspicion or probable cause. Why? Because this will add an extra layer of protection to your case. For example, let's imagine you have probable cause to search a vehicle for drugs but still receive consent to search, the prosecution essentially needs to prove that consent was freely and voluntarily given.[1] If that fails, the prosecutor would need to fall back on your probable cause and exigency; not an easy task in Pennsylvania!

Without consent your case depends entirely on articulating P.C. Why not have both? Plus, juries like to see officers asking for consent. Either way, do your prosecutor a solid and write a complete and articulate report.

Legal Standard

Asking a person for consent to search does not convert the encounter into an investigative detention as long as:

- The person's consent was **freely and voluntarily given**;
- They had **apparent authority** to give consent to search the area or item; and
- You did not exceed the **scope** provided, expressed, or implied. Scope is determined by objectively viewing the situation from the suspect's position.[2] Where would a reasonable person think you would search, not on where police believe they can search.
- Courts may look at four factors when evaluating whether the scope of search was exceeded: time, duration, area, and intensity.[3]
  - Time: Was the search executed within the time frame contemplated by the suspect?
  - Duration: Was the search unreasonably lengthy?

[1] Schneckloth v. Bustamonte, 412, U.S. 218 (1973)

[2] Commonwealth v. Valdivia, J-81-2017 (Pa. Oct. 17, 2018)

[3] Com. v. Reid, 571 Pa. 1 (Pa. 2002)

- Area: Did officers search areas where the item sought could be found?
- Intensity: Did the methods used to search exceed the bounds of consent?

Things that help consent:[1]

- Telling the person that they do not have to allow search;
- Telling person what you are searching for;
- Fewer officers;
- Plain clothes;
- No weapons displayed;
- No trickery such as hinting "no prosecution;"
- Relatively short contact before consent given;
- Friendly tone of voice, not threatening or commanding.
- Giving Miranda warnings (especially if person in custody);
- All factors about person giving consent such as: age, experience with the police, physical and mental condition, fluency in English.

Things that hurt consent:[2]

- Display of weapons or hand on weapon;
- Large number of police, especially uniformed;
- Deceit or trickery about either purpose or outcome;
- Officer's threatening demeanor, tone of voice;
- A claim that police have authority to do the search anyway, such as a ;false claim that police have a warrant;
- Negatives about person giving consent (young, lower intelligence, drunk, poor English).

Case Examples

Time: Search of car immediately, and then again, two days after signed consent to search, was lawful:

---

[1] Clark County Nevada DA Search and Seizure Manual for Lawyers (2015); Com. v. Reid, 571 Pa. 1, 31 (Pa. 2002)

[2] Id.

Suspect signed a consent-to-search form after voluntarily accompanying officers to the "barracks." He was arrested at some point after consent was granted and the car was initially searched. After his arrest, his car was impounded, where it was searched again, two days later. The court found the suspect did nothing to notify police he was changing the terms of the free and voluntarily granted consent. However, be cautious here. In a concurring opinion which has been cited as persuasive, since timing may become an issue, best practice would be to refresh consent or get a warrant.[1]

Duration: Request for a "real quick" search exceeded after 15 minutes and unscrewing speaker box:

With defendant agreeing to the officer's request to "check (defendant's car) real quick and get you on your way," the scope of that consent was exceeded at some point before the search had continued for fifteen minutes without finding anything, and certainly when the officer later pulled a box from the trunk and removed the back panel to the box by unscrewing some screws.[2]

Area: Directly "touching" genitals outside implied consent:

Officer got consent to search for drugs and "within seconds" reached down the defendant's crotch and felt the suspect's genital area searching for drugs. This area was not included in the consent to search. Note, searching "near" genital area is often upheld.[3]

Intensity: Damaging property requires "express consent:"

Officer got consent to search for drugs and opened a "tamales in gravy" can. Drugs were found inside. Since the officer "rendered the can useless" express permission was required.[4]

Invasive search requires "express consent:"

Invasive search, such as a blood draw, even in light of an implied consent statute, requires express consent, which gives the suspect an opportunity to revoke consent. Where a driver was anesthetized by medical personal prior to giving express consent, the subsequent warrantless blood draw was unlawful.[5]

---

[1] Com. v. Reid, 571 Pa. 1, 33 (Pa. 2002); but see *Commonwealth v. Valdivia*, 195 A.3d 855, 878 n.8 (Pa. 2018)

[2] People v. Cantor, 149 Cal.App.4th 961 (2007)

[3] U.S. v. Blake, 888 F.2d 795 (11th Cir. 1989)

[4] U.S. v. Osage, 235 F.3d 518 (10th Cir. 2000)

[5] Florida v. Jimeno, 500 U.S. 248 (1991); Commonwealth v. Myers, 164 A.3d 1162 (Pa. 2017)

Third Party Consent

You may seek consent to search a residence from co-occupants. However, the situation changes when there is a present non-consenting co-occupant. If one occupant tells you to "Come on in and bring your friends!" and another yells "Get the hell out, I'm watching Netflix!" Well, you must stay out.

What about areas under the exclusive control of the consenter? For example, the "cooperative" tenant says you can still search his bedroom? Or a shed that he has exclusive control over in the backyard? There is no case that deals directly with this issue, but if the area is truly under the exclusive control of the consenting party, and you can articulate that the non-consenting party has no reasonable expectation of privacy in that area, it would likely be reasonable to search just that area. But one thing is certain, you still may not be able to access the area under the cooperative tenant's control without walking through common areas—common areas would still be off limits.[1]

The best practice is to wait until the non-consenting occupant has left the residence and then seek consent from the cooperative occupant. In other words, if the non-consenting occupant goes to work, a store, or is lawfully arrested, the remaining occupant can consent to a search. Still; do not search areas under the exclusive control of the non-consenting party. This may include file cabinets, "man-caves," purses, backpacks, and so forth.

Finally, if the consenting party has greater authority over the residence, then police may rely on that consent. For example, if a casual visitor or babysitter objected to police entry, it may be overruled by the homeowner. Remember, you may not search personal property under the exclusive control of the visitor or babysitter.

Legal Standard

Spouses and Co-Occupants:

Spouses or co-occupants may consent to search inside a home if:

- ☐ The person has **apparent authority**;

[1] U.S. v. Matlock, 415 U.S. 164 (1974); Georgia v. Randolph, 547 U.S. 103 (2006)

- ☐ Consent is only given for **common areas,** areas under his **exclusive control,** or areas or things the person has **authorized access** to; and
- ☐ A **non-consenting** spouse or co-occupant with the same or greater authority **is not present.**
- ☐ Note: The consenting party does not need to be present.[1]

Articulating Greater Authority:

An occupant with greater authority over the premises may consent to search even if the objecting occupant is present if:

- ☐ The co-occupant had **greater authority** over the area or item searched (e.g.,, parents versus child); and
- ☐ Your search **did not exceed the scope** provided by the consenting occupant.
- ☐ You **did not search** any property under the **exclusive control** of the non-consenting occupant; and
- ☐ Note: A mature child can consent to search common areas or exclusive areas/items under his control. A child cannot consent to search private areas like parents' bedroom.[2]

Case Examples

If a non-consenting occupant is arrested or leaves, remaining occupant may consent to search despite prior objection:

Police could conduct a warrantless search of defendant's apartment following defendant's arrest, based on consent to the search by a woman who also occupied the apartment, although defendant had objected to the search prior to his arrest and was absent at the time of the woman's consent because of his arrest.[3]

Consent of wife valid after the non-consenting husband left the residence:

"The consent of one who possesses common authority over premises or effects" generally "is valid as against the absent, non-consenting person with whom that authority is shared."[4]

---

1 Commonwealth v. Simmen, 58 A.3d 811 (Pa. Super. Ct. 2012)

2 See Georgia v. Randolph, 547 U.S. 103 (2006)

3 Fernandez v. California, 571 U.S. 292 (2014)

4 United States v. Cordero-Rosario, 786 F.3d 64 (1st Cir. P.R. 2015)

Mental disability or immaturity can be barriers to free and voluntary consent from a third party, but can be overcome:

Six officers went to the home of a man suspected of a violent homicide. He shared a home with a woman known to have mental disabilities, so only one officer, one who was familiar with her from prior contacts, approached and spoke with her. He determined her relationship with the suspect and calmly and politely asked for permission to search for him. Her consent was free and voluntary.[1]

[1] Commonwealth v. Reese, 31 A.3d 708, 724 (Pa. Super. Ct. 2011)

Mistaken Authority to Consent

Sometimes you may think you're dealing with someone who has the authority to consent, but later find out you were wrong. For example, the consent was received from a guest, not the homeowner. Here, courts will look to see if your mistake was reasonable.

However, ignorance is not bliss: "[O]fficers cannot use the apparent authority doctrine to justify a warrantless search when they fail to make a sufficient inquiry into the consenting party's "mutual use of the property rather than a mere property interest."[1] especially when circumstances exist that would lead a reasonable person to question the person's authority.

For example, if an adult female answers the door and consents to the search of an apartment apparently occupied by only a man, then courts expect officers to stop searching and ask more questions about her connection to the apartment. In the end, she may be an overnight guest with no apparent authority over the defendant's property. Best practice, ask first, search later!

Legal Standard

If you mistakenly receive consent from a person who had "apparent authority," courts will employ a three-part analysis to determine if your mistake was reasonable:

- ☐ Did you believe some **untrue fact**;
- ☐ Was it **objectively reasonable** for you to believe that the fact was true under the circumstances at the time; and
- ☐ If it was true, would the consent giver have had **actual authority?**

Case Examples

Police may assume that the adult who answered the door had authority:

Police were trying to locate a robbery suspect and knocked on his door. A visitor answered and consented to their request to enter. "Police may assume, without further inquiry, that [an adult] person

[1] *Commonwealth v. Gutierrez*, 750 A.2d 906, 910 (Pa.Super. 2000);

who answers the door in response to their knock has the authority to let them enter."[1]

A minor child may not have sufficient authority to consent to the search of their parents' home:

A sixteen year old daughter may not have sufficient authority to consent to the search of her mother's home. The general rule of mutual use or control is whether the third party has co-equal or greater authority. Here, a parent can limit a minor child's authority over property the parent owns. And where police did not enquire into the nature of the relationship or mutual use of the home, they had no reasonable fact to rely upon. The search was unlawful.[2]

Simply having access and control will not be enough without more info:

Officers asked a nurse to give them clothing removed from a patient and stored at the hospital. The nurse retrieved the clothing and turned it over to police. Inspection of the clothes revealed evidence connecting the patient to a homicide. However, a nurse who has joint access and control of a patient's clothes does not have sufficient authority to consent to their search. Here, police should have known a nurse does not have sufficient mutual use of a patient's clothes. The search was unlawful.[3]

---

[1] People v. Ledesma, 39 Cal. 4th 641 (Cal. 2006)

[2] Com. v. Garcia, 478 Pa. 406 (Pa. 1978)

[3] Com. v. Silo, 480 Pa. 15 (Pa. 1978)

Qualified Immunity

You work in a dynamic and unpredictable environment. Therefore, you encounter situations where you are tasked to solve unique problems despite no direct training or case law to guide them. Qualified immunity protects you whenever you venture into constitutionally-unchartered territories.

Legal Standard

Even if a constitutional violation occurred and evidence is suppressed under the exclusionary rule, there is no § 1983 violation when:

- ☐ You **violated a constitutionally or federally right**; but
- ☐ That right was **not clearly established** at the time of the violation.

Case Examples

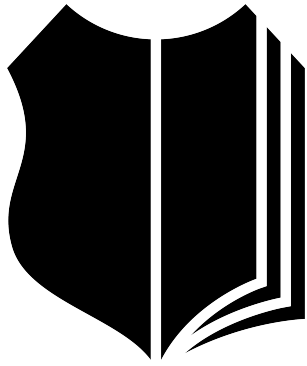
Officer who attempted knock and talk on side door, versus front door, entitled to qualified immunity:

It is an open, undecided issue, with authority going both ways, as to whether it is lawful for an officer to conduct a "knock and talk" at other than the front door. A trooper was sued by homeowners because he knocked on a side door, instead of the front door. The Supreme Court determined that the officer was entitled to qualified immunity in that the issue is the subject of conflicting authority.[1]

No qualified immunity for prison guard who obviously violated rights:

Guard who handcuffed a shirtless prisoner to a hitching post as punishment was not eligible for qualified immunity since it obviously violated the Fourth Amendment.[2]

[1] Carroll v. Carman, 135 S. Ct. 348 (2014)
[2] Hope v. Pelzer, 536 U.S. 730 (2002)



Index

AIRPORT & OTHER ADMINISTRATIVE CHECKPOINTS, 216

ARRESTS
"Contempt of Cop" Arrests, 98
Collective Knowledge Doctrine, 36,
Drugs, attempt to swallow, 104
DUI blood tests, 107
DUI breath tests, 106
Lawful, 86
Line-Ups, 92
Meaning of "Committed in the Officer's Presence?" 91
Private searches, 26
Protective sweeps, 94
Public protests, arrests at, 99
Search, "temporary" arrest, 102
Search, incident to, 100
Search, prior to formal arrest, 101
Vehicle search, incident to, 108
Warrant, entry with, 88
Warrantless entry, 89
When to "Un-arrest" a Suspect, 96

ARSON INVESTIGATIONS, 215

BORDER SEARCHES, 218

BUSINESSES & SCHOOLS
Customer business records, 179
Fire, health, and safety inspections, 182
Government workplace searches, 183
Heavily regulated businesses, 180
School searches, 184
SROs, security guards, and administrators, 188
Student drug testing, 187
Use of force against students, 190
Warrantless arrest inside business, 158

C.R.E.W., 22, 139, 165, 171, 172

CAUSE-OF-INJURY SEARCHES, 210

CHECKPOINTS
Airport & other administrative, 216
DUI, 116

COLLECTIVE KNOWLEDGE DOCTRINE, 36

CONFIDENTIAL INFORMANTS, 226

CONSENSUAL ENCOUNTERS, 43

DECISION SEQUENCING, 21

DISCARDED DNA, 213

DUI
blood tests, 107
breath tests, 106
checkpoints, 116

FIFTH AMENDMENT, 17

FINGERNAIL SCRAPES, 214

FOURTH AMENDMENT, 15
Reasonableness, 23
Search, 38
Seizure, 40

"HOMES
"Ruse" or lie, convincing suspect to exit, 174
Child's room, parental consent to search, 154
Co-occupants, consent to search, 151
Curtilage, 146
Detaining a home in anticipation of a warrant, 175
Fresh pursuit, 158
Hot pursuit, 158
Hotel rooms, 139
Knock and talks, 143
Mistaken authority to consent, 155
Open fields, 145
Plain view, hearing, smell, 148
Protective sweeps, 156
RVs, 139
Surround and call-out, 176
Tents, 139
Trash searches, 150
Warrant requirement, 137
Warrantless arrest at doorway, 161
Warrantless entry based on "ruse" or lie, 173
Warrantless entry for an emergency, 165

Warrantless entry for officer safety, 167
Warrantless entry to investigate child abuse, 169
Warrantless entry to investigate homicide crime, 171
Warrantless entry to make arrest, 163
Warrantless entry to prevent destruction of evidence, 172
Warrantless entry to protect property, 170

HUNCHES, 30

INTERVIEW AND INTERROGATION,
Ambiguous invocations, 258
Coercive influences and de facto arrests, 253
Evidence discovered after Miranda violation, 266
Invocation prior to interrogation, 257
Miranda violations, intentional versus accidental, 262
Miranda, elements, 252
Miranda, inside jail and prison, 254
Miranda, juveniles 255
Miranda, when required, 249
Miranda, when to provide again, 263
Public safety exception, 264
Routine booking questions, 265
Suspect invoked, 259, 261
Witnesses and victims, 256

INVESTIGATIVE ACTIVITIES, 48

INVESTIGATIVE DETENTIONS
Anonymous tip, 73
Detaining a suspect, 65
During stop, 69
Factors to consider, 63
Field identifications, 71
Flight, upon seeing officer, 72
Handcuffing, 76
Involuntary Transportation, 82
Length of detention, 68
Officer safety detentions, 67
Patdown, 78, 80
Plain Feel Doctrine, 81
Recording of Officer, 84
Use of force, 76
Victims, detaining, 77
Witnesses, detaining, 77

KNOCK AND ANNOUNCE, 228

KNOCK AND TALKS,
Homes, 46, 143

LAW ENFORCEMENT LIABILITY
Attenuation, 275
Behavior that "shocks the conscience", 282
Deliberate indifference, 283
Duty to protect, 278
Duty to intervene, 279
Exclusionary rule, 268
Exclusionary rule, exceptions, 270
Fruit of the poisonous tree, 271
Good faith exception, 273
Inevitable or independent discovery, 276
Non-essential personnel, bringing into the home, 287
Qualified immunity, 288
Section 1983 civil rights violations, 285
Section 242 criminal charges, 286
Social media, sharing crime scene photos on, 284
Standing to object, 272
Supervisor liability, 280
Unequal enforcement of the law, 281

LEFT ALONE, RIGHT TO BE, 20

MEDICAL PROCEDURES, 211

MISCELLANEOUS SEARCHES & SEIZURES
Airport & other administrative checkpoints, 216
Arson investigations, 215
Border searches, 218
Cause-of-injury searches, 210
Discarded DNA, 213
Fingernail scrapes, 214
Medical procedures, 211
Probationer & parolee searches, 220

PATDOWNS
Based on anonymous tip, 80
For weapons, 78

PERSONAL PROPERTY,
Abandoned or Lost Property, 194

Containers, 192
Mail or Packages, 196
Single Purpose Container Doctrine, 193

PLAIN FEEL DOCTRINE, 81

PRIVATE SEARCHES, 26

PROBABLE CAUSE, 34

PROBATIONER & PAROLEE SEARCHES, 220

PROTECTIVE SWEEPS
Arrests, 94
Homes, 156

REASONABLE SUSPICION
Border search, 218
Community caretaking, 113
Confidential informants, 226
Consensual encounters, 43
Defined, 32
Detaining suspect, 65
Drug testing, students, 187
Handcuffing, 76
Hands in pockets, removing, 52
Hot pursuit, 158
Hunches, 30
Identification, asking for, 50
Investigative detentions, 62
K9, 125
Knock and talks, 46, 143
Length of detention, 68
Passengers, 119, 132, 134
Protective sweep, 94, 156
Recording of police, 84
School search, 184, 188
Stops, 69, 114
Unrelated questioning, 133
Vehicles, 114, 116, 117

REASONABLENESS, 23

RIGHT 'TO BE LEFT ALONE', 20

SEARCH WARRANTS
Anticipatory search warrant, 225
Confidential informants, 226
Detaining occupants inside and in immediate vicinity, 231
Frisking occupants, 233
Handcuffing occupants, 235
Knock and announce, 228
Overview, 222
Particularity requirement, 224
Receipt, return, and inventory, 238
Sealing affidavits, 227
Serving arrest warrant at residence, 236
Wrong address liability, 237

SEARCH
Arrest, incident to, 100
Border searches, 218
Child's room, parental consent to search, 154
Consent to search a vehicle, 121
Co-occupants, consent to search by, 151
Defined, 38
Government workplace searches, 183
Prior to formal arrest, 101
Private Searches, 26
Probationer & parolee searches, 220
School searches, 184
Searching vehicle incident to arrest, 108
Searching vehicle with probable cause, 128
Technology searches, 198 thru 208
"Temporary" arrest, 102
Trash searches, 150
Vehicle search, incident to arrest, 126

SEIZURE (See also MISCELLANEOUS SEARCHES & SEIZURES)
Defined, 40

TECHNOLOGY SEARCHES
Aerial surveillance, 206
Binoculars, 200
Cell phone location records, 205
Cell phones, laptops, and tablets, 204
Flashlights, 199
GPS devices, 207
Night vision goggles, 202
Obtaining passwords, 20
Sensory enhancements, 198
Thermal imaging, 203

USE OF FORCE
Escape, use of force to prevent 241
Deadly force during vehicle pursuit, 242
Handcuffing, improper 243
Hog/hobble tie, 247
Non-deadly force, 240
Pointing gun at suspect, 245
Using patrol (i.e., bite) dogs, 246

VEHICLES
Checkpoints, DUI, 116
Checkpoints, information gathering, 117
Checkpoints, legal considerations, 118
Community caretaking, 113
Consent to search a vehicle, 121
Constructive possession, 134
Dangerous items left in vehicle, 129
Detaining a recent vehicle occupant, 120
Frisking people who ride in police vehicle, 124
Frisking vehicle and occupants for weapons, 122
General rule, 111
Inventories, 130
K9 sniff around vehicle, 125
Ordering passengers to stay in, or exit vehicle, 119
Passengers, identifying, 132
Reasonable suspicion, 114
Scope of stop similar to an investigative detention, 112
Searching vehicle incident to arrest, 126
Searching vehicle with probable cause, 128
Temporary registration, verification of, 115
Unrelated questioning, 133

WRONG ADDRESS LIABILITY, 237

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View his bio at BlueToGold.com/about

PENNSYLVANIA

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