ANTHONY BANDIERO, ESQ.

# MICHIGAN Search & Seizure Survival Guide

## A FIELD GUIDE FOR LAW ENFORCEMENT


Blue to Gold

# Michigan Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT


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Michigan Search & Seizure Survival Guide
ISBN 979-8876283528
Last updated 01-2024

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, read the case completely, and cite appropriately.

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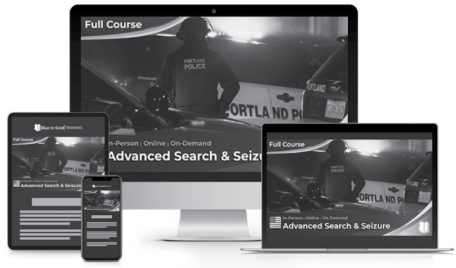


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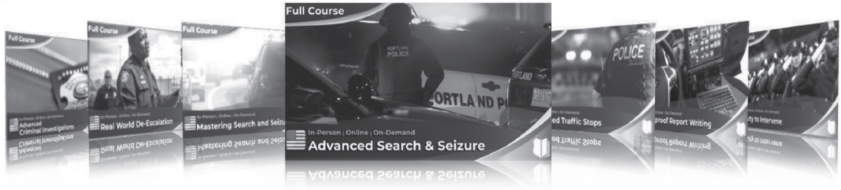


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We have an incredible warrior class in this
country - people in law enforcement…
and I thank God every night
we have them standing fast to protect us
from the tremendous amount of evil
that exists in the world.

— Brad Thor

# 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.[75] As the Supreme Court said, "Police officers act in full accord with the law when they ask citizens for consent."[76]

Start a consensual encounter by asking a question: "Can I talk to you?" instead of giving an order, such as, "Come talk to me." Courts place a high premium on the determination that the interaction was "relaxed" and "conversational."[77] 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.[78]

Finally, your un-communicated state of mind has zero bearing on whether the person would feel free to leave. Therefore, even if you

[75] People v. Sinistaj, 184 Mich. App. 191, 196, 457 N.W.2d 36 (1990).

[76] United States v. Drayton, 536 U.S. 194, 207 (2002).

[77] Michigan v. Miller., No. 353843, 2021 WL 3234358, at *2 (Mich. Ct. App. July 29, 2021) ("Body-camera footage from one of the officers presented compelling evidence that defendant's statements regarding the gun and consent were voluntary and not coerced. When the relevant conversation occurred, only two officers spoke with defendant. They spoke in a calm and conversational tone; they did not have their weapons drawn; they never insinuated that defendant could not decline to consent to the search; they were not touching defendant, and the overall tenor of the conversation made it clear that they were merely asking defendant to tell the truth. The trial court did not clearly err by finding that the police did not coerce defendant into making the pertinent statements."). See also People v. Lucynski, 509 Mich. 618, 666, 983 N.W.2d 827, 852 (2022) (Zahra, J., dissenting) ("The officer did not turn on his emergency lights or siren, he did not draw his gun, and he did not give any orders or commands. The officer's tone was conversational and not harassing or overbearing. Under these circumstances, there is no seizure."); United States v. Preston, 579 F. App'x 495 (6th Cir. 2014) (The Sixth Circuit concluded a reasonable person would feel free to walk away, for purposes of Fourth Amendment, when defendant, who was convicted of possession of a firearm by a felon, voluntarily walked toward police vehicle and officer rolled down his window and asked, "What's up?" or "Where are you heading?" in a conversational tone, asked to see defendant's hands, and asked whether he possessed a weapon).

[78] See United States v. Williams, 615 F.3d 657 (6th Cir. 2010) (Defendant was seized within meaning of the Fourth Amendment when two uniformed police officers exited a marked car, singled defendant out of a group, approached him, and immediately accused him of trespassing. Even though officers did not draw their weapons or touch defendant, the court determined a seizure occurred, as a reasonable person would not have felt free to leave under such circumstances).

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.[79]

## Legal Standard

A consensual encounter does not violate the Fourth Amendment when:

- ☐ A reasonable person would believe he was free to leave or otherwise terminate the encounter.[80] In other words, a reasonable person would have believed he was not detained.

[79] People v. Lucynski, 509 Mich. 618, 638, 983 N.W.2d 827, 838 (2022) ("Because [the officer] did not outwardly communicate his subjective intentions to defendant, they are not relevant in determining when defendant's encounter with Robinson became a seizure.").

[80] Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991). See also People v. Shabaz, 424 Mich. 42, 66, 378 N.W.2d 451 (1985).

## Case Examples

### Factors relevant to a determination of whether a police-citizen encounter is a consensual encounter or a Fourth Amendment "seizure" include:

"[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[81]

### Additional factors the 6th Circuit has identified as relevant:

"(1) [T]he purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as ... whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police."[82]

### Suspect fit drug courier profile and police conduct was not a consensual encounter:

A suspect who fit the so-called "drug-courier profile" was approached at an airport by two detectives. Upon request, but without oral consent, the suspect produced for the detectives his airline ticket and his driver's license. The detectives, retaining the airline ticket and license, asked the suspect to accompany them to a small room approximately 40 feet away, and the suspect went with them. Without the suspect's consent, a detective retrieved the suspect's luggage from the airline and brought it to the room. When the suspect was asked if he would consent to a search of his suitcases, the suspect produced a key and unlocked one of the suitcases, in which drugs were found. Court found this was not a consensual encounter and suppressed the evidence.[83]

### Consensual encounter and search valid after officer released driver following a traffic stop:

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[81] United States v. Cottrell, No. CR 21-20676, 2022 WL 13008904, at *3 (E.D. Mich. Oct. 21, 2022); United States v. Lewis, 843 F. App'x 683, 689 (6th Cir. 2021) (quoting United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980)). "Simple police questioning is insufficient to constitute a seizure." Florida v. Bostick, 501 U.S. 429, 434 (1991)).

[82] United States v. Lewis, 843 F. App'x 683, 688–89 (6th Cir. 2021); see United States v. Garcia, 866 F.2d 147, 151 (6th Cir.1989) ("[T]he one occurrence which seems to distinguish 'seizures' from casual contacts between police and citizens is when the defendant is asked to accompany the police or agents to a place to which the defendant had not planned to go.").

[83] Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983).

Where the officer stopped a vehicle to issue a traffic citation, concluded the traffic stop, indicated to the driver that she was free to leave, but then asked if the driver had drugs and whether or not the officer could search the vehicle, consent to search was voluntary.[84] Many cops call this move the "trooper two-step" – it's more than just a seductive dance move. After releasing the offender, the officer will turn towards his patrol car, stop, turn around, and in a Columbo-like manner say, "Sir, can I ask one more question before you leave..." It's a solid way to separate the stop from the consensual encounter.[85]

### Blocking citizen vehicle supports the finding of a seizure:

Using a police vehicle to block a civilian's path will constitute a seizure.[86] However, if the police vehicle's positioning allows for the citizen's egress, even if it requires "some maneuvering", the police vehicle's position alone will not constitute a per se seizure.[87] Only if officers completely block a person's parked vehicle with a police vehicle is the person seized.[88]

### Using overhead lights does not constitute a per se seizure:

Officers' use of overhead emergency lighting does not automatically constitute a seizure, but is just one factor in the totality of the circumstances a court will consider to determine if an objectively reasonable person would feel free to disregard the officer and go about his business – or if a seizure has occurred.[89]

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[84] People v. Ramos, No. 329057, 2016 WL 7333424, at *3 (Mich. Ct. App. Dec. 15, 2016).

[85] See United States v. Zapata, 180 F.3d 1237, 1240 (11th Cir. 1999).

[86] See, e.g., United States v. See, 574 F.3d 309, 313 (6th Cir. 2009); United States v. Gross, 662 F.3d 393, 399-400 (6th Cir. 2011).

[87] People v. Anthony, 327 Mich. App. 24, 39–40, 932 N.W.2d 202, 212 (2019), citing United States v. Carr, 674 F.3d 570, 573 (6th Cir. 2012) ("To conclude otherwise would be an endorsement of a 'simplistic, bright-line rule' that a detention occurs 'any time the police approach a vehicle and park in a way that allows the driver to merely drive straight ahead in order to leave.'").

[88] People v. Anthony, 327 Mich. App. 24, 40, 932 N.W.2d 202, 212 (2019); United States v. See, 574 F.3d 309 (6th Cir. 2009).

[89] "The officers' use of blue lights was not sufficiently coercive to transform this encounter into a compulsory stop." United States v. Carr, 674 F.3d 570, 573 (6th Cir. 2012). See O'Malley v. City of Flint, 652 F.3d 662, 669 (6th Cir.2011); People v. Anthony, 327 Mich. App. 24, 40, 932 N.W.2d 202, 212 (2019); People v. Phillips, No. 356255, 2022 WL 1591674, at *5 (Mich. Ct. App. May 19, 2022).

# 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. has been 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? You can usually ignore them because trying to have a consensual conversation with someone is not typically considered trespassing.[90] Same goes with "No Soliciting" signs.

## 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.

[90] United States v. Schultz, No. 13-20023, 2013 WL 2352742, at *5 (E.D. Mich. May 29, 2013) (holding that knock-and-talk entry via driveway was valid under the Fourth Amendment despite "No Trespassing" signs); United States v. Hopper, 58 Fed.Appx. 619, 623 (6th Cir. 2003) (holding that knock-and-talk was allowed despite several "No Trespassing" signs near driveway).

## Case Examples

### The Knock and Talk:

The "knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items."[91]

### Knock and talk during the "predawn hours" rendered later consent invalid:

Police approached defendants' home in the "predawn hours" to seek information about marijuana butter. The court concluded they performed an illegal search in violation of the Fourth Amendment because the early hour was not within established social norms, rendering the subjects' later consent invalid.[92]

### 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. Court found a violation of "knock and talk" because officers exceeded social norms.[93]

### Knock and talk at 1:30 a.m. held to be valid:

Knock and talk at 0130 hours was held to be valid where officers were attempting to contact the owner of a motorcycle involved in a 90mph pursuit 30 minutes prior. In so holding, the court considered that the motorcycle's engine was still hot; the motorcycle appeared to be the same involved in a nearby, recent assault and battery with a loaded firearm; the motorcycle was registered out of an adjoining city; the nearest apartment to the motorcycle was the only one that

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[91] People v. Frohriep, 247 Mich.App. 692, 697, 637 N.W.2d 562 (2001).

[92] People v. Frederick, 500 Mich. 228, 895 N.W.2d 541 (2017).

[93] United States v. Lundin, 817 F.3d 1151 (9th Cir. 2016); see also French v. Merrill, 15 F.4th 116 (1st Cir. 2021) (Court found officers' conduct unlawful in going beyond a single warrantless knock-and-talk while attempting to get arrestee to come to door of his house, including four reentries onto property and attempts at a window in the early morning hours. This right was clearly established at the time of the event; thus, officers were not entitled to qualified immunity from arrestee's claim of violation of his Fourth Amendment rights; there was no implicit social license to invade the curtilage repeatedly, forcefully knock on front door and bedroom window frame, and urge arrestee to come outside, all in pursuit of a criminal investigation).

had lights illuminated; and the deputy delivered three to six raps on the door.[94]

### Officers' trespassing rendered later consent invalid:

Police officers conducted a "knock and talk" with defendant regarding their suspicions that he was storing marijuana. Defendant requested that officers leave the premises, but they refused, instead continuing to question him. This violation of the knock-and-talk procedure rendered inadmissible the four pounds of marijuana and $6500 in cash later recovered.[95]

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

Officers made contact with a suspected alien at his apartment. The officers asked to enter the apartment, and the occupant asked whether they needed a warrant for that. The officers said they "didn't need a warrant to talk to him." Based on the totality of the circumstances, the consent was involuntary, since a reasonable occupant would have thought that police didn't need a warrant to enter and talk.[96]

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

Consensual encounters may also take place at the doorway of a home. A "knock and talk," when performed within its proper scope, is not a search at all. The proper scope of a knock and talk is determined by the "implied license" that is granted to "solicitors, hawkers, and peddlers of all kinds." "Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"[97]

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[94] Young v. Borders, 850 F.3d 1274, 1285–86 (11th Cir. 2017) ("Although the officers in this case positioned themselves in front of the only exit to Apartment 114 with their guns drawn, the LCSO officers did not order [residents] out of their apartment[.] [T]here is no evidence to show that [residents] even knew that the officers had their guns drawn. Further, there is no evidence presented... to show that the officers would not have permitted [residents] to stay in Apartment 114; to the contrary, the unrebutted testimony in this case is that the officers would have been required to leave if nobody answered the door. The only activity outside of the apartment that [residents] knew of was that someone had knocked on their door loudly. As discussed above, this is not such a 'show of authority' that would permit [residents] to believe they would not have been permitted to stay inside their apartment.").

[95] People v. Bolduc, 263 Mich. App. 430, 688 N.W.2d 316 (2004).

[96] Orhorhaghe v. I.N.S., 38 F.3d 488 (9th Cir. 1994).

[97] People v. Frederick, 500 Mich. 228, 234–35, 895 N.W.2d 541, 544 (2017) (citation and quotation marks omitted).

**Assuming a "tactical position"[98] does not invalidate a knock and talk where legitimate safety concerns are recognized:**

Agents initiated an encounter to investigate an illegal alien's possession of a rifle. As agents approached, the defendant retreated back into his home and locked the door. The court concluded the agents' positioning themselves alongside the residence did not convert a consensual "knock and talk" into a contact implicating the Fourth Amendment.[99]

**Approaching a subject in his front yard comports with the Knock and Talk procedure:**

Police approached defendant as he was standing in his yard and asked defendant's permission to "look around". These actions were in keeping with the Knock and Talk Procedure, and there was no indication that defendant was not free to end the encounter.[100]

[98] Young v. Borders, 850 F.3d 1274, 1299 (11th Cir. 2017).

[99] United States v. Lara-Mondragon, 516 F. App'x 771, 773 (11th Cir. 2013).

[100] People v. Frohriep, 247 Mich. App. 692, 637 N.W.2d 562 (2001).

# 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 in which you can engage: 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."[101]

Asking for ID and running a subject for warrants doesn't automatically convert an encounter into a detention.[102] Hint: return ID as soon as possible so that a reasonable person would still "feel free" to leave.[103]

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[101] Florida v. Royer, 460 U.S. 491, 497 (1983).

[102] Florida v. Bostick, 501 U.S. 429, 437 (1991).

[103] United States v. Drayton, 536 U.S. 194, 200-01 (2002) ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized"); see also United States v. Clariot, 655 F.3d 550, 554 (6th Cir. 2011) ("[E]ven if we assume the officers seized the men while they held the defendants' identifications and ran a warrant check, any seizure became consensual once they returned the identifications and commenced a conversation that had no threatening or incriminating overtones to it."); United States v. Alston, 375 F.3d 408 (6th Cir. 2004) (Defendant's encounter in airport with police officers, who approached her after she exited airplane after learning that circumstances surrounding purchase of her ticket indicated that she might be involved in drug trafficking, did not constitute a "seizure." Defendant was asked if she would speak to them, officers spoke in a non-threatening manner and did not display any weapons, requested identification and ticket which were immediately returned, and encounter was brief and occurred in atmosphere that was not police-dominated); United States v. Bueno, 21 F.3d 120 (6th Cir. 1994) (Approaching defendant in airport was a consensual encounter, where sergeant identified himself as a police officer, asked defendant about identity and travel itinerary, did not display weapon or physically touch defendant, and promptly returned ticket and identification); United States v. Blount, No. 09-20536-11-BC, 2011 WL 3426189, at *3 (E.D. Mich. Aug. 5, 2011) ("The officers did not ask Defendant for permission to return with his identification to the patrol car to conduct the check. When the officer left with the identification, Defendant was no longer free to leave."); United States v. De La Rosa, 922 F.2d 675,

## 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 in a manner that would make a reasonable person believe they were being detained for criminal activity.[104]

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
- ☐ You returned the identification as soon as practicable; otherwise, a reasonable person may no longer feel free to leave.

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.

678 (11th Cir. 1991)("Factors relevant to this inquiry include, among other things: 'whether a citizen's path is blocked or impeded; **whether identification is retained**; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police.'") (emphasis added).

[104] United States v. Williams, 615 F.3d 657, 665 (6th Cir. 2010) ("[A] criminal accusation by law enforcement [has been cited] as a factor indicating that an individual is seized"). See United States v. Tyler, 512 F.3d 405, 410 (7th Cir.2008) (holding that defendant with open beer bottle in hand was seized by officers who "told him he was violating the law"); United States v. Smith, 423 F.3d 25, 30 (1st Cir.2005) (In support of holding that defendant was not seized during encounter, the court cited the fact that officers "did not accuse him of any crime"); Jordan v. City of Eugene, 299 Fed.Appx. 707, 708 (9th Cir.2008) (unpublished opinion) (holding that encounter "became a non-consensual seizure when the officer told the plaintiff he needed to speak with him because the officer believed the plaintiff was carrying a gun").

## Case Examples

### Questioning:

At approximately 12:55pm, officers working an interdiction task force observed a subject arrive at the last minute to catch a bus. As two officers approached the subject, he began moving away from his bag as he walked toward the ticket counter. When officers attempted to speak with him, he began asking them questions and looked around the station frantically. The subject did not answer officers when they asked him why he had left his bag behind, and why he needed to purchase a ticket when he had one in his hand. According to the officers, the subject appeared nervous and evasive, behavior they found "consistent with subjects who are attempting to traffic narcotics when they come in contact with law enforcement." Ultimately, the court concluded that a subject is not seized when officers approach him and "simply [ask] to see his bus ticket, train ticket, or other identification, whether he had any luggage, and his purpose for travel." If a subject is unable to present evidence of "coercive activity" on the part of the officers, "the stop remain[s] a consensual encounter, which does not require reasonable suspicion for Fourth Amendment purposes."[105] A subject is not seized if officers approach and request to speak with him[106] or if officers inquire whether they can ask the subject some questions.[107]

### Identification:

Where officers contact a subject and request identification in such a manner that does not imply compliance is mandatory, no seizure will be found for purposes of the Fourth Amendment.[108] The Supreme Court has noted that "interrogation relating to one's

[105] United States v. Vining, No. 221CR20715TGBDRG1, 2023 WL 3720911, at *1–2 (E.D. Mich. May 30, 2023).

[106] See United States v. Peters, 194 F.3d 692, 694, 698 (6th Cir.1999).

[107] See United States v. Frazier, 936 F.2d 262, 265 (6th Cir.1991); United States v. Moore, 675 F.2d 802, 808 (6th Cir.1982) (DEA agent did not seize defendant when he approached him and inquired in a non-threatening manner, "Can I ask you a few questions?").

[108] United States v. Campbell, 486 F.3d 949, 956 (6th Cir. 2007) ("[Officer's] first statement was that he would like to see [the subject's] ID. The use of the word 'like,' as opposed to 'need' or 'want,' suggests that a reasonable person would feel free to decline this request and leave the scene. Moreover, [the officer] had not yet called for backup. He was alone with [the suspect] at this point in the encounter and had neither drawn his weapon nor activated his emergency lights or siren."); United States v. Peters, 194 F.3d 692, 698 (6th Cir.1999) ("Absent coercive or intimidating behavior which negates the reasonable belief that compliance is not compelled, the [officer's] request for additional identification and voluntarily given information from the defendant does not constitute a seizure under the Fourth Amendment.").

identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."[109]

### Consent to Search:

The government has the obligation to prove consent was voluntary and not "mere acquiescence to claims of lawful authority".[110] Bus passengers were determined to have voluntarily consented to a search of their luggage and persons by officers who had boarded a bus as part of a routine drug and weapons interdiction effort, notwithstanding officers' failure to explicitly inform passengers that they were free to refuse to cooperate. This was determined to be a consensual encounter, as officers did not draw or brandish their weapons, made no intimidating movements, left aisle free so that passengers could exit, and spoke to passengers one by one and in polite, quiet voices.[111]

[109] INS v. Delgado, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984).

[110] People v. Farrow, 461 Mich. 202, 208, 600 N.W.2d 634 (1999), quoting Bumper v. North Carolina, 391 U.S. 543, 548–549, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

[111] United States v. Drayton, 536 U.S. 194, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002).

# Asking for Identification

If you make a consensual encounter, you can always request that the subject identify himself; 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).

Many 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? Michigan is not a "stop and identify" state, meaning there is no explicit statute requiring a subject identify himself when lawfully detained.[112] However, Michigan Compiled Laws (M.C.L.) § 750.479(8)(a) defines "obstruct" an officer as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." Courts have upheld that a lawfully-detained subject's failure to identify himself is a violation of M.C.L. § 750.479(8)(a), as long as the officers show that the refusal to identify was reasonably related to a criminal investigation.[113] While an arrest or detention may trigger the applicability of M.C.L. § 750.479(8)(a), refusing to identify oneself during a consensual conversation with a police officer is not against the law.

On the other hand, lying about one's 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.

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[112] Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004) (Court reasoned that a state statute can require a suspect to disclose his or her name in the course of a brief stop, if the detention was based on reasonable suspicion of a crime. Therefore, if state law requires a subject identify himself to an officer, refusing to answer a request for one's name during a stop can lead to an arrest). As of 2024, Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, Utah, Vermont, and Wisconsin have laws requiring a subject to identify himself when lawfully detained, and making it a crime to fail to do so.

[113] Barrera v. City of Mt. Pleasant, 476 F. Supp. 3d 604 (E.D. Mich. 2020), aff'd sub nom. Barrera v. City of Mount Pleasant, 12 F.4th 617 (6th Cir. 2021) (Barrera, who was a passenger during a traffic stop, refused to comply with officer's request for identification, in violation of the Michigan resisting and obstructing arrest statute. The officers conducted the stop for speeding and, after determining the driver was unlicensed, they sought to identify plaintiff as part of their attempt to identify the vehicle owner for the violation of M.C.L. § 257.904 (permit an unauthorized driver to operate a motor vehicle).

## 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."[114]

### Providing a false name not a crime unless subject is lawfully detained or arrested - *and* informed of criminal investigation:

Although Michigan is not a "stop and identify" state,[115] refusing to identify oneself when lawfully detained has been found to constitute obstruction in violation of Michigan state law, where the refusal to identify is related to the criminal investigation.[116] Lying about one's identity has also been found to be a violation of M.C.L. § 750.749c(b)[117], as long as the officers informed the subject they were conducting a criminal investigation.[118]

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[114] Brown v. Texas, 443 U.S. 47 (1979).

[115] "State stop and identify statutes… vary from State to State, but all permit an officer to ask or require a suspect to disclose his identity." Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty., 542 U.S. 177, 177 (2004).

[116] Mich. Comp. Laws § 750.479(1)(a): A person shall not knowingly and willfully do any of the following … Assault, batter, wound, obstruct, or endanger a[n] … officer or duly authorized person serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority or otherwise acting in the performance of his or her duties). See Barrera v. City of Mt. Pleasant, 476 F. Supp. 3d 604, 615 (E.D. Mich. 2020), aff'd sub nom. Barrera v. City of Mount Pleasant, 12 F.4th 617 (6th Cir. 2021); see also Devoe v. Rebant, 2006 WL 334297, at *4 (E.D. Mich. Feb. 13, 2006) (holding that police had probable cause to arrest an individual that did not comply with multiple requests to identify himself) ("By modifying the statute, particularly by defining 'obstruct' to include a 'knowing failure to comply with a lawful command,' the Court believes the legislature intended the statute to specifically encompass nonphysical-for example verbal-interferences with an officer's performance of his or her duties."); Chesney v. City of Jackson, 171 F. Supp. 3d 605, 630 (E.D. Mich. 2016) ("Indeed, the case law lends support to the proposition that a refusal to comply with a police officer's request for identification, without more, may provide probable cause to arrest the non-compliant individual for resisting and obstructing a police officer in the performance of his duties.").

[117] Mich. Comp. Laws § 750.479c (2012): (1) Except as provided in this section, a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not do any of the following:

a) By any trick, scheme, or device, knowingly and willfully conceal from the peace officer any material fact relating to the criminal investigation.

b) Knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation.

[118] People v. Lacey, No. 327728, 2016 WL 6992184, at *7 (Mich. Ct. App. Nov. 29, 2016) ("[D]efendant was informed by two MSP detectives that they were conducting a criminal investigation regarding a stolen car. It is undisputed that defendant thereafter gave the detectives three false names. Defendant admitted as much during trial and acknowledged that the names were false. Defendant argues, however, that his name was not a material fact because the detectives could have conducted their investigation without it. We

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

Under the totality of the circumstances, defendant was not seized within meaning of Fourth Amendment when police officer asked defendant whether he lived in housing complex and requested identification after approaching him on stairs of housing unit. As there was no evidence indicating the officer told defendant to remain where he was or that he was required to answer officer's questions, the contact was consensual. The consensual encounter became a seizure when, after he started walking away from the officer who was checking his identification, the officer followed him, orally discouraged him from leaving, and put a hand on his back and told him to wait for the results of the identification check. In reaching the conclusion that reasonable suspicion justifying the detention existed, the court considered that the officer knew a female resident had challenged defendant's unconsented-to presence on her front porch, defendant immediately began to act nervously and reached toward his pocket when he saw that officer was initiating the identification check, defendant began to walk away from officer - apparently so intent on leaving that he was willing to lose possession of his identification card - and, even though defendant did not live in the area, various people invited him into their homes, offering him respite and nepenthe from further police questioning.[119]

**Consent to search for identification valid:**

During a traffic stop, a state trooper asked the driver if there was "anything of an illegal nature in the vehicle ... any alcohol, guns, anything like that." Defendant answered, "no." The trooper then replied, "I want to look in it for ID and things like that, do you have a problem with that?" Defendant answered, "no." While the defendant later argued that the consent to search was solely for identification, the court determined that a reasonable person would have understood this exchange to consent to a search of the car for identification, pictures, or items of an illegal nature such as drugs,

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disagree."); see also People v. Smith, No. 347604, 2021 WL 70574, at *7 (Mich. Ct. App. Jan. 7, 2021), appeal denied, 507 Mich. 1005, 961 N.W.2d 180 (2021) ("No direct evidence was offered at trial establishing that Trooper White informed defendant he was conducting a criminal investigation. Rather, only circumstantial evidence was offered at trial."); People v. Edwards, No. 337354, 2018 WL 5629738, at *3 (Mich. Ct. App. Oct. 30, 2018) ("The statute, however, does not make it a crime for a person who is aware that a police officer is conducting a criminal investigation to make a false or misleading statement about a material fact of that investigation. Instead, it expressly requires that the person be informed by the police officer that the officer is conducting a criminal investigation into a specific matter.").

[119] People v. Jenkins, 472 Mich. 26, 691 N.W.2d 759 (2005).

alcohol, or guns. Regardless, even if the consent to search did not extend to the two 35-lb containers of cat litter, the automobile exception the warrant requirement applied based on the trooper's observations while searching the vehicle in areas that could have reasonably contained the driver's identification.[120]

**Retaining passenger's identification while seeking driver's consent to search 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.[121]

[120] United States v. Guajardo, 388 F. App'x 483 (6th Cir. 2010).

[121] U.S. v. Macias, 658 F.3d 509 (5th Cir. 2011).

# Removing Hands from Pockets

In Michigan, the mere request for a subject to remove his hands from his pockets does not convert a consensual encounter into a seizure.[122] However, ordering a subject to remove his hands from his pockets has repeatedly been a factor in determining that a seizure has occurred.[123] 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.[124]

Moreover, an order to show hands may not even implicate the Fourth Amendment because the interference with a person's freedom is so minimal that it may fall under the "minimal intrusion doctrine."[125]

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[122] United States v. Preston, 579 F. App'x 495, 497 (6th Cir. 2014); People v. Chong Yeng Hang, No. 297666, 2011 WL 2463653, at *5 (Mich. Ct. App. June 21, 2011); People v. Dabelstein, No. 278346, 2008 WL 1914902, at *1 (Mich. Ct. App. May 1, 2008); People v. Franklin, No. 264589, 2007 WL 601464, at *1 (Mich. Ct. App. Feb. 27, 2007); People v. Laube, 154 Mich. App. 400, 403 (1986); See also United States v. Barnes, 496 A.2d 1040 (DC App, 1985) (no seizure where police officers approached defendant on the street, asked two questions, and requested that defendant remove his hands from his pockets); United States v. De Castro, 905 F.3d 676 (3d Cir. 2018), aff'd on other grounds, 49 F.4th 836 (3d Cir. 2022) (Police officer's request for suspect to remove his hands from his pockets did not constitute a "seizure" under the Fourth Amendment; there was only one officer present, officer made polite and conversational request, rather than an order for suspect to show his hands, no weapons were drawn, no threats were made, and officer did not communicate to suspect that he was not free to leave).

[123] People v. Butsinas, No. 322390, 2015 WL 6087197, at *3 (Mich. Ct. App. Oct. 15, 2015); People v. Dunbar, 264 Mich.App 240; 690 NW2d 476 (2004); People v. Pierce, No. 217110, 2001 WL 793867, at *1 (Mich. Ct. App. July 13, 2001);

[124] United States v. Moore, 8 F. App'x 354 (6th Cir. 2001); People v. Champion, 452 Mich. 92, 549 N.W.2d 849 (1996) (Investigative stop and pat-down for weapons was reasonable under the totality of the circumstances; particularized suspicion arose as a result of the following factors: (1) the area in which stop occurred was a known drug crime area; (2) upon seeing a marked police car, a man ran around a corner, out of sight; (3) as officers turned the corner, two men got out of a car parked midblock; (4) the passenger and the man at the corner ran away; (5) the driver made some movement away from the car; (6) he was known by the police to have previous drug and weapons convictions; (7) he held his hands inside the front of his sweatpants, and (8) he refused several police orders to remove his hands from his sweatpants).

[125] Illinois v. McArthur, 531 U.S. 326, 330 (2001) ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, [it] has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.") (italics added.) It has been found that "such searches, which intrude upon the 'sanctity of the person' (Terry v. Ohio, 392 U.S. 1, 17 (1968)), may be outside the scope of the minimal intrusion exception, at least absent an especially compelling rationale such as officer safety." People v. Robinson, 208 Cal.App.4th 232, 249 (Cal. Ct. App. 2012). See also United States v. Street, 614 F.3d 228 (6th Cir. 2010) (Following lawful traffic stop, officer legitimately grabbed defendant's arm when he reached into his pocket and permissibly asked him whether

What if the suspect still refuses to show his hands and tries to leave? Remember, this is a consensual encounter and if you decide to detain the subject you will need reasonable suspicion. An order to show hands may be a minimal intrusion, but a detention is not.[126]

## 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 not convert a consensual encounter into an investigative detention if:

- ☐ You had a legitimate safety reason for ordering it; and
- ☐ You articulate that ordering the person to remove his hands was a permissible minimal intrusion.

## Case Examples

**Combined with other factors, a subject placing his hands in his pockets despite an officer's request to not do so can constitute specific, articulable facts justifying a *Terry* frisk:**

Officer's requests of defendant to "please" not put his hands in his pockets, viewed in the totality of the circumstances, did not convert what was a consensual encounter into a seizure, and at the point subject placed his hand in his pocket despite officer's request not to do so, it was reasonable for officer to conduct a brief protective patdown frisk to check defendant for weapons. Among the other factors articulated were that the parking lot in which defendant's car was parked was in a high-crime area known for burglaries, there was a television in the back seat of defendant's car, defendant was acting

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he had anything in his pocket; grabbing defendant's arm was a minor infringement on his physical liberty, one proportionate to the risk created by a suspect's reaching into his pockets during a traffic stop, and the officer did not immediately reach into defendant's pocket or demand that defendant empty his pockets).

[126] People v. Clark, 24 Mich. App. 440, 180 N.W.2d 342 (1970) (Store employee called police and requested an officer be sent to his store reference three subjects he believed were planning to rob him. Officers arrived while defendant and two other men were still in the store. Defendant had his hand in his pocket, as he had during time he was in the store, and when one of the policemen requested defendant to take his hand out of his pocket, defendant refused to do so and refused to talk with the officer. The officers then physically removed defendant from store, an altercation ensued, and defendant was handcuffed and taken to the police station where a gun was found in his pocket. The court concluded the search was reasonable, and the weapon was admissible).

nervously and was sweating profusely, defendant was not making eye contact, and defendant was touching his front pockets.[127]

[127] United States v. Debona, 759 Fed. Appx. 892 (11th Cir. 2019); see also People v. Laube, 154 Mich. App. 400, 403–04, 397 N.W.2d 325, 326 (1986) (When officers were conducting a warrant check during a consensual encounter, subject was asked to remove his hands from his pockets. He did so, but only momentarily, before putting his hands back in his pockets. The subject also appeared nervous and, although he testified at trial he put his hands back in his pockets despite the request to not do so because he was cold, he admitted he never told the deputies he was cold. When officers conducted a pat-down for weapons because of this behavior, plain-feel marijuana was discovered).

# 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.[128]

## Legal Standard

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

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

## Case Examples

**No violation when a person agrees to accompany police to police station:**

Appellate courts have held that when a person agrees to accompany the police to a station for an interrogation or some other purpose, the Fourth Amendment is not violated.[129]

**No seizure after agreeing to accompany police to the station and staying for five hours:**

No seizure where defendant went with police to station and stayed there five hours before probable cause developed for his arrest.[130]

**Failing to first return identification or documents before police request a subject accompany them will be considered "highly material" in analyzing the coerciveness of the police conduct:**

[128] Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797 (1968).

[129] United States v. Butler, 223 F.3d 368 (6th Cir. 2000); Caldwell v. City of Detroit, No. 04-74998, 2006 WL 799220, at *1 (E.D. Mich. Mar. 29, 2006); People v. Richardson, No. 174853, 1996 WL 33364160, at *1 (Mich. Ct. App. May 28, 1996) ("The evidence clearly establishes that not only did defendant himself initiate contact with the police, he consented to being transported from one police station to another, to being temporarily handcuffed for safety purposes, and to speak to several different officers concerning his confession.").

[130] Craig v. Singletary, 127 F.3d 1030 (11th Cir. 1997).

While not decisive under the totality of circumstances test, police officers' failure to return defendant's airline ticket and driver's license until he consented to accompany them was highly material in analyzing the coerciveness of police conduct for Fourth Amendment purposes. A second factor weighing heavily in favor of finding a seizure was the officers' failure to notify defendant of his freedom to leave, his right to refuse consent to search, or his right to consult with counsel before reaching a decision.[131]

**Consent to be transported must be "freely and voluntarily given":**

Detectives said to a 17-year-old suspect, "[W]e need to go and talk", the suspect responded, "Okay", and he was subsequently transported to the police station. The government's argument that this was consensual transportation was undermined by the facts – the suspect was awakened in his bedroom at three in the morning by three police officers, the words "we need to go and talk" present "no option but 'to go'", and the suspect was then taken from his home for questioning in handcuffs, in his underwear and without shoes, in January. [132] "Consent must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress and coercion."[133]

[131] United States v. Waksal, 709 F.2d 653 (11th Cir. 1983).

[132] Kaupp v. Texas, 538 U.S. 626, 631 (2003).

[133] United States v. Williams, 754 F.2d 672, 674–75 (6th Cir.1985).

# 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, imagine you have probable cause to search a vehicle for drugs but still receive consent to search; the prosecutor need only prove the consent was freely and voluntarily given.[134] If that fails, the prosecutor can fall back on your probable cause. Build a high degree of redundancy into your legal justifications!

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 well-articulated 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;
- ☐ He had apparent authority to give consent to search the area or item; and
- ☐ You did not exceed the scope of the consent, expressed or implied. Courts may look at four factors when evaluating whether or not the scope of search was exceeded: time, duration, area, and intensity.

Both the United States and Michigan Constitutions prohibit unreasonable search and seizures, and it is incontrovertible that a "warrantless search and seizure is per se unreasonable unless shown to fall within one of the various exceptions to the warrant requirement. When consent is alleged, the burden is on the prosecution to prove by clear and positive evidence that the consent was unequivocal and specific, freely and intelligently given. Whether a consent is valid is a question of fact to be decided upon

[134] Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045, 36 L. Ed. 2d 854 (1973).

the evidence and all reasonable inferences drawn from it. The totality of the circumstances must be examined."[135]

[135] People v. Brown, 127 Mich.App. 436, 440–441, 339 N.W.2d 38 (1983) (internal citations omitted).

## Case Examples

### Consent must be "unequivocal and specific, freely and intelligently given":

Michigan courts, in determining whether consent serves as a valid exception to the warrant requirement, will apply the Kaigler test: "It is elementary that the obtaining of a search warrant may be waived by an individual and he may give his consent to search and seizure; but such waiver or consent must be proved by clear and positive testimony and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given."

### To determine the voluntariness of consent, courts consider the totality of the circumstances:

Several factors should be examined in the consent calculus. First, a court should examine the characteristics of the accused, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; and whether the individual understands his or her constitutional rights. [136] Second, a court should consider the details of the detention, including the length and nature of detention, the use of coercive or punishing conduct by the police, and indications of "more subtle forms of coercion that might flaw [an individual's] judgment."[137]

### Subject does not need to be advised of his right to refuse:

While the police do not have to inform an individual of his right to refuse, the absence of such a warning is considered in the totality of the circumstances analysis.[138]

### "I don't care":

Suspect was stopped for speeding. He was suspected of drug possession and officer asked for consent to search. Suspect responded, "I don't care." The search revealed crack cocaine. Suspect's statement implied consent to search.[139] Note: this type of

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[136] See United States v. Jones, 846 F.2d 358, 360 (6th Cir.1988).

[137] United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); see also People v. Chism, 390 Mich. 104, 123; 211 NW2d 193 (1973) (whether a consent is valid is a question of fact to be decided upon the evidence and all reasonable inferences drawn from it); People v. Reed, 393 Mich 342, 363, 224 NW2d 867 [1975], cert. den. 422 US 1044 (1975) (in determining voluntariness of consent, the totality of the circumstances must be examined).

[138] Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854 (1973).

[139] U.S. v. Polly, 630 F.3d 991 (10th Cir. 2011) (imagine you ask a stone-cold fox out for a night on the town, and she replies, "I don't care." Are you on for dinner and drinks, or is it going to be another sad, lonely night eating lukewarm Chinese take-out hunched over the sink?).

consent is not ideal and officers should try to get unambiguous consent to search.

**Patdown of suspect who wanted to get out of vehicle upheld:**

Vehicle was stopped for an equipment violation. Driver wanted to get out and see proof that his taillight was broken. Officer said only on the condition that he be subject to a patdown. Suspect said "that was fine" and stepped out. Patdown revealed drugs. Suspect voluntarily consented to patdown.[140]

**Time: Search of van two days after written consent received was upheld as reasonable:**

In-custody suspect gave written consent to search van for forensic evidence of a rape. Van was searched two days later by different agents. Under these particular circumstances, the time of the search was reasonable.[141] Note: Ideally, the suspect would have been told the search would be executed two days later. However, since he was in custody and never revoked consent, the court upheld the search.

**Duration: Consent given for a "real quick" search; scope 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.[142]

**Area: Directly "touching" genitals outside implied consent:**

Officer got consent to search for drugs and "within seconds" reached down to the defendant's crotch and felt the suspect's genital area, searching for drugs. This area was not included in the consent to

[140] State v. Cunningham, 26 N.E.3d 21 (Ind. 2015).

[141] United States v. White, 617 F.2d 1131 (5th Cir. 1980).

[142] People v. Cantor, 149 Cal.App.4th 961, 57 Cal. Rptr. 3d 478 (Cal. Ct. App. 2007).

search. Note, searching "near" genital area is often upheld,[143] just don't lead the court to believe you are "targeting the genitalia."[144]

### Number of officers present may serve to vitiate consent:

Michigan courts have recognized that coercive factors, including presence of at least five - and possibly ten - police officers, several of whom had their weapons drawn at some point during the investigation, combined with the threat that defendant's automobile would be impounded at his expense if he refused to consent to search, and fact that it was only after appearance of tow truck that defendant turned over keys to trunk, outweighed any inference which might have otherwise been drawn and were such as to establish an involuntary and coercive consent to search.[145]

### State of undress indicates a lack of voluntariness:

Female suspect removed to hallway, naked but for a sheet after consent to search was requested by two male deputies. The court found that these facts made "it even more likely that the naked Ms. Sierra was intimidated by the show of authority."[146]

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[143] U.S. v. Blake, 888 F.2d 795 (11th Cir. 1989); but cf. United States v. Russell, 664 F.3d 1279, 1281 (9th Cir. 2012) (officer engaged in "his 'standard operating procedure' for a frisk. He squeezed the shin, knee and thigh. When [Officer] reached into [Defendant's] groin area he 'lifted up to feel.'" After feeling something "hard and unnatural," Officer arrested Defendant. Court concluded the search was reasonable, as Defendant "certainly did nothing to manifest any change of heart about his consent to search."); United States v. Doxey, 833 F.3d 692, 705–06 (6th Cir. 2016) (Parolee consented to a body search and even voluntarily pulled his pants and underwear down so that the officers could examine his genitals and rectum. Parolee only went "out of his way ... not to relax his butt cheeks" once it became obvious to the officers that he was hiding something in his rectum); Derrick v. M.I.N.T., No. CV 19-13109, 2020 WL 7017384, at *4 (E.D. Mich. Sept. 16, 2020) ("After continued questioning about whether he had drugs on him, [suspect], unprompted by Lieutenant Rice, stood up and pulled down his pants and underwear.").

[144] James v. State, 129 So. 3d 1206 (Fla. Dist. Ct. App. 2014) (officer's pat-down search of defendant following traffic stop, during which officer felt an "unusual" object that he could not identify in area of defendant's crotch, did not exceed the scope of defendant's consent to search; police officer's search did not involve targeting genitalia but was rather a typical, over-the-clothes pat-down, and officer patted-down area around the crotch but avoided manipulating or pulling at the "unusual" object); but see Sims v. State, 743 So.2d 97 (Fla. 1st DCA 1999) (officer asked if he could pat down defendant's genital area and the defendant did not respond; officer proceeded to search his genitals, identified an object, unzipped the defendant's pants, and retrieved cocaine. The court concluded that, "by feeling his person through his clothing, then unzipping his trousers to remove [the cocaine] from his undergarments," the search exceeded the scope of the defendant's consent under the totality of the circumstances). Silence is not consent, and will render a "tactile search of the groin" unlawful.

[145] United States v. Edmond, 413 F. Supp. 1388 (E.D. Mich. 1976).

[146] Hardin v. State, 18 So. 3d 1246, 1249 (Fla. Dist. Ct. App. 2009); see also Schneckloth v. Bustamonte, 412 U.S. 218, 229, 93 S. Ct. 2041, 2049, 36 L. Ed. 2d 854 (1973) (a court must take account of "the possibly vulnerable subjective state of the person who consents"); Malinski v. New York, 324 U.S. 401, 407 (1945) (holding that questioning defendant in hotel room with only a blanket covering him was a tactic of

### Identifying subject as target of investigation factors into voluntariness of consent:

The Sixth Circuit and Michigan courts have repeatedly concluded that a subject being alerted he is the target of an investigation, that law enforcement believes he is hiding drugs, or officers suspect he is actively engaged in criminal activity, is suggestive of a seizure rather than a consensual encounter.[147]

### Knowledge of the right to refuse is but one factor in determining the voluntariness of consent:

Defendant reported his wife's murder to police, who responded and discovered her shot once in the head with a .38-caliber bullet. While on scene, officers began to process the home. As defendant was present and fully aware of police activities in his home, and at no time registered objection or attempted to limit police access to home – instead encouraging them to conduct their investigation quickly and thoroughly - defendant consented to a warrantless search of his home and the surrounding area. Although defendant was never told he had a right to refuse to allow officers to search, this factor did not invalidate the consensual nature of the search. Accordingly, the murder weapon found in his garage during that search was admissible. Defendant told police, "I want you to go and do

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humiliation and his subsequent consent was therefore rendered invalid); United States v. Boyd, 910 F. Supp. 2d 995, 1005 (W.D. Mich. 2011) ("[I]t was also clear that she was not ready to meet people. She had been undressed […] and when she did open the door she was in pajamas or a robe. In this vulnerable position, Ms. Martin faced two men on the doorstep. Both were dressed for the February Michigan weather in coats, and both were armed.").

[147] United States v. Beauchamp, 659 F.3d 560, 567 (6th Cir. 2011) (The "fact that Beauchamp first walked away from [the officer] before Officer Fain located him and pulled up next to him would suggest to a reasonable person that the officers were targeting Beauchamp and therefore he would not feel free to leave"). See also United States v. Tyler, 512 F.3d 405, 410 (7th Cir.2008) (noting that "whether the police informed the person that he was suspected of a crime or the target of an investigation" is a relevant factor when determining whether a reasonable person would feel free to leave); United States v. Salvo, 133 F.3d 943, 952 (6th Cir. 1998) (While the agents' statements made it clear that Salvo was the target of a criminal investigation, Salvo's freedom of action, during and after the interview, mitigated against the possibility he would feel "in custody."); United States v. Kerr, 817 F.2d 1384, 1387 (9th Cir.1987) ("[S]everal facts suggest that [the defendant] reasonably perceived that he was the target of [the officer's] investigation and thus was not free to leave."); United States v. Saperstein, 723 F.2d 1221, 1226 (6th Cir.1983) (concluding that a reasonable person in the defendant's position would not feel free to leave when, among other factors, the DEA agent informed the defendant that he had information about the defendant's involvement in drug trafficking); People v. Zahn, 234 Mich. App. 438, 452–53 (1999) (that defendant was the target of police investigation was a factor in determining whether a person would reasonably have believed he was not free to leave, even though the officer told him otherwise).

everything in your power to get the killer of my wife". They did just that.[148]

**Conduct alone can, under proper circumstances, be sufficient to constitute consent:**

When a subject went to Jackson Prison to visit an inmate. After placing her personal belongings in a locker and walking past several signs that alerted visitors they would be subject to search and would be prosecuted for introducing contraband into the prison, she was approached by a guard. The guard stated, "We shake down at random and, if you don't mind, I'm going to shake you down before you go in." The subject made no response, and the guard conducted a pat-down search, finding a balloon containing valium and marijuana tucked inside the waistband of the subject's jeans. The court concluded there was sufficient evidence of defendant's consent, notwithstanding the fact that such consent was based solely on defendant's actions and silence at the time of the search.[149]

**Actions can constitute voluntary consent, even when seized during a traffic stop:**

The 6th Circuit concluded that a Defendant's consent to a search of his vehicle's glove box was voluntary, even though he was seized during a traffic stop (to the extent he was not free to leave) and was not given *Miranda* warnings. The court recognized officers are not required to advise a defendant that he can refuse consent to search and, as none of officers had their weapons drawn, they spoke with defendant in conversational tone, defendant seemed calm and cooperative, and when the officer informed defendant that the glove box was locked - and asked specific permission to search the glove box - defendant reached into his pocket and handed keys to officer. The illegally-possessed 1911 discovered therein was properly admitted against the defendant at trial.[150]

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[148] People v. Lobaito, 133 Mich. App. 547, 351 N.W.2d 233 (1984). See also People v. Klager, 107 Mich App 812, 816; 310 N.W.2d 36 (1981) (prosecution need not demonstrate that defendant had knowledge of the right to refuse to allow the search; such knowledge is but one factor to be considered in a suppression hearing).

[149] People v. Whisnant, 103 Mich App 772, 780–781; 303 NW2d 887 [1981], lv den 411 Mich 960 (1981).

[150] United States v. Thurman, 525 F. App'x 401 (6th Cir. 2013).

# 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, what if the "cooperative" tenant says you can still search his bedroom, or a shed over which he has exclusive control 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. 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.

The best practice is to wait until the non-consenting occupant has left the residence and to 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," "she-sheds," 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, this objection 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;

- ☐ Consent is only given for common areas, areas under his exclusive control, or areas or things to which the person has authorized access; and
- ☐ A non-consenting spouse or co-occupant with the same or greater authority is not present.

Articulating Greater Authority:

An occupant with greater authority over the premises may consent to search areas either under his exclusive control or common areas if:

- ☐ The co-occupant has greater authority over the area searched;
- ☐ You do not enter or walk through any area over which the non-consenting occupant has equal or greater authority;
- ☐ You do not search any property under the exclusive control of the non-consenting occupant; and
- ☐ Your search does not exceed the scope provided by the consenting occupant.

## Case Examples

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

Police could conduct a warrantless search of defendant's apartment following defendant's arrest, based on consent to 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.[151]

**Consent of juvenile to search phone in her possession valid, despite the phone being owned by her trafficker:**

Upon being contacted during a trafficking sting, a female juvenile gave officers consent to search the phone in her possession, which was actually owned by her trafficker. The Defendant not only maintained a passcode on his cell phone, but also changed it somewhat regularly. However, he did not keep the passcode to himself, but rather shared the passcode with the minor each time he updated it so that she could also use his cell phone. Accordingly, even if she told officers the phone was not hers and belonged to her

[151] Fernandez v. California, 571 U.S. 292 (2014).

"boyfriend", she had common authority to consent based on mutual use and joint access to the phone.[152]

**If co-tenants are nearby but do not actually object, officers are not required to "seek out" objection:**

If a defendant with self-interest in the premises or effects is nearby but is not invited to take part in discussion regarding consent to search, that potential objector "loses out," and the search will be deemed valid.[153]

**If an occupant invites police inside, police may assume other occupants wouldn't object:**

"[S]hared tenancy is understood to include an 'assumption of risk,' on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, police need not assume that's the case."[154]

[152] United States v. Gardner, No. 16-CR-20135, 2016 WL 5110190, at *6 (E.D. Mich. Sept. 21, 2016), aff'd, 887 F.3d 780 (6th Cir. 2018).

[153] United States v. Ayoub, 498 F.3d 532, 537 (6th Cir. 2007) (citing Georgia v. Randolph, 547 U.S. 103, 121 (2006).

[154] Georgia v. Randolph, 547 U.S. 103 (2006).

# Mistaken Authority to Consent

If you are a prudent officer, you normally ask for consent to search, even if you have P.C. Why? Because valid consent adds an extra layer of protection for your criminal case.

But sometimes you may think you are dealing with an occupant who has the authority to consent, but later find out you were wrong. For example, the consent was received from a guest, not homeowner. Here, courts will look to see if your mistake was reasonable, using an objective standard based on the facts available at the time the consent was given.[155] The government has the burden of proving the officer reasonably believed the third party who consented to the entry had the authority to grant access.[156]

## 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

**The mere fact that a person answers the door when an officer knocks cannot, by itself, support a reasonable belief that the person possesses authority to consent to the officers' entry:**

After being denied consent to search by the homeowner, officers later made contact with two subjects inside the residence who identified themselves to officers as employees of the homeowner. The court concluded that an employee whose duties include the granting of access to the premises is more likely to have authority to consent. However, where the subject's access is limited to the duties of a handyman, as here, there was neither actual nor apparent

[155] Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

[156] United States v. Taylor, 600 F.3d 678, 681 (6th Cir. 2010).

authority to allow access, especially considering the earlier denial of consent from someone with greater authority.[157]

**Simply claiming to live at a home or have an ownership interest in an effect may not be enough without more information:**

Even if a person claims to live at a home or own an effect, "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."[158]

**Where items are gender-specific, this factor (when combined with others), may serve to undermine a finding of apparent authority where consenting party is of the opposite gender:**

After arresting a male subject, officers obtained consent from a female tenant to search the premises. During the search, the female tenant told officers the arrestee stored his belongings in the spare bedroom. Officers searched a closed but unsealed shoebox and located a handgun and ammunition. The shoebox announced its contents as men's Nike Air Jordans, size 10.5, and was partially covered by men's clothing. Based on these factors, the 6th Circuit concluded the female tenant lacked apparent authority.[159]

**The touchstone in determining whether apparent authority exists is objective reasonableness**:

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[157] United States v. Jones, 335 F.3d 527, 531 (6th Cir. 2003) ("Although it is true that an employee does in some instances have sufficient authority to consent to entry into or a search of his employer's residence, the lesser, and necessarily derivative, interest of the employee cannot override the greater interest of the owner. When the primary occupant has denied permission to enter and conduct a search, his employee does not have the authority to override that denial.").

[158] Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793 (1990). See also People v. Gary, 150 Mich. App. 446, 451, 387 N.W.2d 877, 880 (1986) ("We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers. Moreover, a warrantless search will not be justified merely upon a bald assertion by the consenting party that they possess the requisite authority. Nor may the police proceed without making some inquiry into the actual state of authority when they are faced with a situation which would cause a reasonable person to question the consenting party's power or control over the premises or property to be inspected. In such instances, bare reliance on the third party's authority to consent would not be reasonable and would, therefore, subject any such search to the strictures of the exclusionary rule.").

[159] United States v. Taylor, 600 F.3d 678, 681 (6th Cir. 2010) ("The government cannot establish that its agents reasonably relied upon a third party's apparent authority if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to mutual use by the person giving consent, then warrantless entry is unlawful without further inquiry. Where the circumstances presented would cause a person of reasonable caution to question whether the third party has mutual use of the property, warrantless entry without further inquiry is unlawful.").

Apparent authority was found where police officers knew from numerous visits to house on prior D.V. calls that defendant and the woman had been involved in off-and-on relationship for approximately six years, that when the relationship was on, she lived with defendant, and on day of search, she came to police station and told officer that she and defendant had reconciled after a break-up and she had moved back into his house the day before. This apparent authority remained, even though defendant arrived at the police station and demanded that officers remove her from his house; the record established that officers knew of numerous occasions when the couple had quarreled violently and then quickly reconciled.[160]

**To effectively argue apparent authority, officers have an obligation to ensure any ambiguity is reasonably resolved:**

If questions arise as to the legitimacy of a subject's authority to consent, officers must resolve them before proceeding if a court is to find they reasonably relied on the person's authority. "It is not difficult for the searching officers to reestablish the would-be-consenter's authority. The options for searching officers are simple: either they may get a warrant, or they may simply ask the would-be-consenter whether he or she possesses the authority to consent to the search of the other items that the officers wish to explore."[161]

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[160] United States v. Penney, 576 F.3d 297 (6th Cir. 2009). See also United States v. Purcell, 526 F.3d 953, 963–64 (6th Cir. 2008) (When a situation starts as unambiguous but subsequent discoveries create ambiguity, any apparent authority evaporates. Even when an invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry) (internal citation omitted). See also United States v. Jenkins, 92 F.3d 430, 437 (6th Cir. 1996) ("Of course, if the consenter provides additional information, the context may change in such a manner that no reasonable officer would maintain the default assumption.").

[161] United States v. Purcell, 526 F.3d 953, 964 (6th Cir. 2008); citing United States v. Waller, 426 F.3d 838, 849 (6th Cir. 2005) ("The officers' failure to make further inquiry is especially pronounced in this case because [Defendant] was in the next room when the police found the luggage, and [Co-Tenant] was being detained outside the apartment. It would not have been burdensome for the officers to have asked [Defendant] whether the luggage belonged to him (or to either of the women who were present in the apartment) prior to opening the bag.").

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# Search & Seizure

## Survival Guide

Your job as an officer is almost completely controlled by the Fourth and Fifth Amendments. Therefore, you need a reference that can break down these important constitutional doctrines into easy-to-apply checklists. That's what this book does. If you need guidance in the field, pick up this book. When you get back to the station and need help articulating the legal standards for your report, pick up this book.

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