ANTHONY BANDIERO, ESQ.

FLORIDA

Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT



Florida Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT



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Blue To Gold Law Enforcement Training, LLC SPOKANE, WASHINGTON

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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, read the case completely, and cite appropriately.

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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



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.

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).

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.

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. When you get that "permission slip", and 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 or find fault with their own prior reasoning? 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 explicitly 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, with whom I wanted to speak 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 Brandeis 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, 478 (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 he was never legally permitted to possess the cocaine in the first place.

A great way to conceptualize how this works is to think of constitutional decisions as upright dominos, each stacked next to each other.² 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 matters related to the mission of the stop which do not prolong the stop³ (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 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 you found before the first domino 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.

² This concept came from Bruce-Alan Barnard, JD.

³ See Rodriguez v. United States, 575 U.S. 348, 356 (2015).

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 Exception. "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.⁴ In particular, the Fourth prohibits "unreasonable searches and seizures." Put another way, if a search or seizure is reasonable, it is 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. Remember, courts don't expect you to do your job perfectly - cops are humans and make mistakes. But you must be able to articulate why you're doing something. If you cannot, then it's probably unreasonable.

Legal Standard

The "reasonable person" test asks "not . . . what the defendant himself... thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes."

An otherwise lawful seizure can violate the Fourth Amendment if it is executed in an unreasonable manner.⁶

Finally, the "Fourth Amendment does not mandate that police officers act flawlessly, but only that they act reasonably."⁷

⁴ Riley v. California, 573 U.S. 373, 381 (2014).

⁵United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965).

⁶ United States v. Jacobsen, 466 U.S. 109, 124 (1984).

⁷ U.S. v. Rohrig, 98 F.3d 1506, 1524 (6th Cir. 1996).

Private Searches

The Fourth Amendment controls government officials, not private actors. Therefore, there is 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.⁸

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.

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,
- 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

⁸ Skinner v. Railway Labor Executives' Assn, 489 U.S. 602 (1989).

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.⁹

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.¹⁰ 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 (stood guard) and the manager was motivated to help police (i.e. look at what I just found, boys!).¹¹

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 just because he wanted to find evidence to turn over to the government.¹²

Private search exceeded after laboratory tests performed:

Where a previous private search was limited to visual inspection of pills but the government subsequently had a series of tests performed on the material at a toxicology laboratory that revealed its precise molecular structure, the action exceeded the scope of the private search. The court distinguished a field test that would reveal only whether or not the pills were a particular contraband substance but would not otherwise reveal exactly what they were.¹³

⁹ U.S. v. Garcia-Bercovich, 582 F.3d 1234 (11th Cir. 2009).

¹⁰ Coolidge v. New Hampshire, 403 U.S. 443 (1971).

¹¹ U.S. v. Reed, 15 F.3d 928 (9th Cir. 1994).

¹² U.S. v. Koenig, 856 F.2d 843 (7th Cir. 1988).

¹³ United States v. Mulder, 808 F.2d 1346 (9th Cir. 1987).

No violation where police viewed same child pornography wife viewed:

Police officers who examined defendant's child pornography obtained and brought in by defendant's wife did not violate defendant's privacy expectations, where defendant's wife had performed a private search of the materials, and the police officers only viewed those materials that had already been viewed by defendant's wife. ¹⁴ Still, officers are highly encouraged to get a search warrant for electronic devices, especially those suspected of containing child pornography.

Off-duty police officers working as private security have been held to be government actors under the Fourth Amendment:

At a music festival, off-duty officers working in uniform searched concert-goers at the entrance points. Despite being hired by the concert promoters, the court concluded that the off-duty officers were instruments of the state, as they were wearing full police uniform and their "first priority was to the sheriff's office". ¹⁵

Offender assaulted off-duty police officers who were found to be private actors; offender was incorrectly charged with aggravated assault on law enforcement officer:

Off-duty police officers patrolling apartment complex were not engaged in lawful performance of their duties as law enforcement officers when defendant drove his vehicle into their cruiser in apparent attempt to hit them head-on. The court concluded the "evidence did not establish that the officers in this case deviated from their private employment of providing security to the apartment complex to undertake activity of an official police nature."

A juvenile sexual-assault victim was held to be a government agent when she recovered evidence from her father's bedroom at detectives' suggestion:

Detectives directed juvenile sexual assault victim to enter residence and gather her personal belongings; she was also advised that, "if she wanted to, she could 'grab the condom'" from her father's bedroom. As this direction was made for the purpose of obtaining evidence to support a criminal prosecution, the court concluded the victim was acting as a government agent. The State offered no evidence that

¹⁴ U.S. v. Starr, 533 F.3d 985 (8th Cir. 2008).

¹⁵ State v. Iaccarino, 767 So. 2d 470, 476 (Fla. Dist. Ct. App. 2000).

¹⁶ Bryan v. State, 865 So. 2d 677, 681 (Fla. Dist. Ct. App. 2004).

the daughter shared the room with her father, that she had "joint control" over the house, or that she had "joint-ownership" of the used condoms. 17

¹⁷ State v. Moninger, 957 So. 2d 2, 5 (Fla. Dist. Ct. App. 2007).

"Hunches" Defined

A "mere hunch" is a suspicion based on bare intuition alone without supporting facts. 18

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." The solution is to develop your skillset to identify what factors are piquing your interest. Articulate those factors effectively and what the court may consider to be the "bare intuition" hunch of a less-experienced officer will be your reasonable suspicion, serving as the basis for an investigatory detention. 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.²⁰

To determine whether an officer's suspicions are supported by "more than a mere hunch," the court must look at the "totality of the circumstances," viewed in light of the officer's "experience and specialized training." It has been recognized that "even seemingly innocent behavior may support an inference that criminal activity is afoot when viewed from the perspective of an experienced officer."

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.

¹⁸ Jackson v. State, 36 So. 3d 132, 134 (Fla. Dist. Ct. App. 2010).

¹⁹ In re Tony C, 21 Cal.3d 888 (Cal. 1978); U.S. v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995).

²⁰ United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581 (1989).

²¹ United States v. Arvizu, 534 U.S. 266, 273 (2002).

²² Wallace v. State, 8 So. 3d 492, 494 (Fla. Dist. Ct. App. 2009).

Case Examples

Hunches can't support a stop, but are nevertheless valuable:

"A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction." ²³

Criminal history alone is a hunch, not reasonable suspicion:

During a traffic stop, the fact that a computer check revealed driver had once been involved in a hit-and-run incident and had previously been arrested on a drug charge did not provide reasonable suspicion for further detention. Officer was impermissibly acting on a hunch that defendant might presently be involved in criminal activity.²⁴

11th Circuit - Probationer's probation status alone is a hunch, not reasonable suspicion:

Officer made a traffic stop for driving at night without headlights. During a records check, subject was found to be on probation. Prior to the consent to search, officers did not have probable cause or reasonable suspicion to believe a gun or contraband was in Defendant's car. Officers may have had a hunch based on criminal history and his presence in a high crime area after midnight, but the court reiterated that a hunch is not enough to justify a warrantless search of a vehicle.²⁵

11th Circuit – Inconsistencies in travel plans, without more, constitute a hunch, not reasonable suspicion:

Vehicle was traveling 10mph under the speed limit and weaving. While the officer articulated the Defendant appeared nervous, was extremely talkative, and was sweating profusely, the court concluded the video recorded evidence did not support the officer's reported observations and the only two factors supporting reasonable suspicion were 1) driving a rental car on a known drug corridor and 2) planning to return the car two days late. The 11th Circuit recognized that "inconsistencies in travel plans can give rise

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²³ United States v. Dell, 487 F. App'x 440, 447 (10th Cir. 2012).

²⁴ U.S. v. Sandoval, 29 F.3d 537 (10th Cir. 1994).

²⁵ United States v. Williams, 409 F. Supp. 3d 1340, 1345 (M.D. Ga. 2019); see United States v. Yuknavich, 419 F.3d 1302, 1311 (11th Cir. 2005); see also United States v. Knights, 534 U.S. 112, 120 (2001) (warrantless search supported by individualized suspicion of probationer with a Fourth Amendment waiver did not violate Fourth Amendment, but not deciding "whether the probation condition so diminished or completely eliminated, [the probationer's] reasonable expectation of privacy... that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirements of the Fourth Amendment").

to a reasonable suspicion", but only where that "inconsistency was one of several factors considered and was more directly indicative of some sort of criminal activity."²⁶

LET'S START WITH THE BASICS

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.²⁷

Like probable cause, reasonable suspicion is fact-specific. "[R]easonable suspicion must be based on 'the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience." Each situation is different. Therefore, the key is to articulate why this particular person appears to be engaged in criminal activity.

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

Confidential informant may be used to build reasonable suspicion:

An informant known to the officer, who had provided him with information in the past, told him that a person seated in a car nearby was dealing drugs and was armed. Reasonable suspicion for an investigative stop was present.²⁹

Being uncooperative is a hunch, not reasonable suspicion:

²⁶ United States v. Boyce, 351 F.3d 1102, 1109 (11th Cir. 2003).

²⁷ Terry v. Ohio, 392 U.S. 1, 21 (1968).

²⁸ United States v. Hardy, 806 Fed. Appx. 718, 721 (11th Cir 2020) (quoting Terry, 392 U.S. at 27).

²⁹ Adams v. Williams, 407 U.S. 143 (1972).

The mere fact that a suspect refuses to cooperate with police, when the suspect has no duty to do so, is insufficient to support reasonable suspicion.³⁰

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

"That on one occasion a car is parked on a street in front of a house where a fugitive resides is insufficient to create reasonable suspicion that the car's occupants had been or are about to engage in criminal activity."³¹

A defendant parking in front of known drug house, without more, will not constitute reasonable suspicion:

Officers made a traffic stop of vehicle on the "sole basis... that the defendant's car stopped at this residence where the officers suspected drugs were being sold. Neither officer saw any person, including the defendant, engage in such a transaction."³²

Defendant's presence at known drug house, combined with specific actions of defendant from which inferences of criminal activity can be drawn, can constitute reasonable suspicion:

Surveillance of house in area known for drug activity, observance of drug activity at house, defendant's actions (exited passenger side, hand-to-hand with resident, walked behind another car for a few seconds, then quickly walked back to his car), as well as inferences from those actions, combined to give officer well-founded suspicion that defendant had engaged in criminal act of purchasing drugs, which justified stop of vehicle in which defendant was riding.³³

The fact that a legally-parked car is occupied in the earlymorning hours, even in a high crime area, does not constitute reasonable suspicion:

It is "well-settled that merely observing an individual in a legally parked car is insufficient to raise a well-founded suspicion of criminal activity sufficient to support a stop... a legally parked car, even one in a desolate area, does not create reasonable suspicion to

³⁰ Florida v. Bostick, 501 U.S. 429, 437 (1991); INS v. Delgado, 466 U.S. 210, 216–217 (1984); Florida v. Royer, 460 U.S. 491, 498 (1983); Brown v. Texas, 443 U.S. 47, 52–53 (1979).

³¹ United States v. Green, 111 F.3d 515, 524 (7th Cir. 1997).

³² Tinson v. State, 650 So. 2d 189, 190 (Fla. Dist. Ct. App. 1995).

³³ Saadi v. State, 658 So. 2d 112, 113 (Fla. Dist. Ct. App. 1995).

justify a detention."³⁴ A lack of reasonable suspicion has been found where officers ordered a defendant out of his legally-parked vehicle "because it was late at night, the defendant was parked in a gas station in an area of past criminal activity, and the officer believed the defendant was untruthful about his purpose for being there."³⁵

To establish a well-founded, articulable suspicion of criminal activity, officers must rely on the totality of the circumstances³⁶:

A founded suspicion may be based on: 1) time of day; 2) day of week; 3) location; 4) physical appearance of the suspect; 5) appearance and manner of operation of any vehicle; and 6) anything unusual interpreted in light of the officer's knowledge.³⁷

³⁴ State v. Taylor, 826 So. 2d 399, 403 (Fla. Dist. Ct. App. 2002); see also Miranda v. State, 816 So.2d 132 (Fla. 4th DCA 2002) (legally-parked car in back of apartment complex parking lot at 0500 hours in high-crime area. Court held this was insufficient to create reasonable suspicion that a crime had, was, or was about to, occur and reversed the denial of a suppression motion); Popple v. State, 626 So.2d 185, 186 (Fla.1993) (defendant was sitting in a legally-parked car making furtive movements at 12:55 p.m. Supreme court found that Defendant's suppression motion should have been granted); Alvarez v. State, 695 So.2d 1263 (Fla. 2d DCA 1997) (defendant was seated in a legally-parked car near apartment complex at 0400 hours. Officers asked defendant to exit car, despite no reports of criminal activity in the area that evening. Denial of suppression motion reversed).

³⁵ *Ippolito v. State*, 789 So.2d 423 (Fla. 4th DCA 2001).

³⁶ State v. Taylor, 826 So. 2d 399, 402 (Fla. Dist. Ct. App. 2002).

³⁷ State v. Webb. 398 So.2d 820, 822 (Fla. 1981).

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."

Remember, evidence found after a search cannot be used retroactively to establish probable cause.³⁹ 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 – courts have consistently rejected the Machiavellian theory that "the end justifies the means." Similarly, just because the evidence sought was not found does not mean that there was no probable cause at the beginning.⁴⁰

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," and that the defendant is the perpetrator. 42

Probable cause to search:

Probable cause to search, on the other hand, arises when there are reasonable 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,"⁴³

³⁸ Illinois v. Gates, 462 U.S. 213, 231 (1983).

³⁹ Maryland v. Garrison, 480 U.S. 79 (1987).

⁴⁰ Illinois v. Gates, 462 U.S. 213, 238 (1983).

⁴¹ Draper v. United States, 358 U.S. 307, 313 (1959).

⁴² United States v. Watson, 423 U.S. 411 (1976).

⁴³ Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

and there is probable cause to believe the things sought are evidence of a crime.⁴⁴ In fact, the identity of the offender need not be known.⁴⁵

Case Examples

Officer had probable cause to search vehicle:

There was probable cause to search a vehicle where police knew that a "blue compact station wagon" with four men in it had been circling a service station shortly before it was robbed by two men, and sped away from an area near the scene shortly thereafter; that one occupant wore a green sweater as did one of the robbers, and that there was a trench coat in the auto similar to that worn by another of the robbers. ⁴⁶

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.⁴⁷

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.⁴⁸

Probable cause defines the scope of search:

Smelling the odor of drugs can give probable cause to search for drugs. Scope is always an issue with probable cause. For example, the odor of burnt marijuana may give probable cause to search the passenger compartment while a powerful smell of unburnt

⁴⁴ State v. Tamer, 475 So. 2d 918, 919 (Fla. Dist. Ct. App. 1985).

⁴⁵ Rule 3.121 - ARREST WARRANT, Fla. R. Crim. P. 3.121.

⁴⁶ Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975 (1970).

⁴⁷ Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535 (1983).

⁴⁸ Dist. of Columbia v. Wesby, 138 S. Ct. 577 (2018).

marijuana may constitute probable cause to search the vehicle's trunk. 49

⁴⁹ State v. Sarria, 97 So. 3d 282 (Fla. Dist. Ct. App. 2012).

Collective Knowledge Doctrine

The collective knowledge doctrine is one of the most powerful and important doctrines in law enforcement. It allows a single police officer to benefit from the collective knowledge of all officers working on a case. For example, if a detective asks another officer to search a vehicle for drugs, the search would be valid even if the officer conducting the search had no idea why he was authorized to search the vehicle, as long as the detective had probable cause.

The key with the collective knowledge doctrine is that officers must 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

The collective knowledge doctrine has two requirements:

- The officers must be involved in the same investigation, but may be from different departments (i.e. task forces); and
- Officers must be in communication with each other related to the investigation.

Case Examples

Collective knowledge doctrine applied to officer who stopped vehicle:

A narcotics task force requested that an officer stop a vehicle for any observed traffic violation. Though the arresting officer only observed a traffic offense, the collective knowledge of the task force permitted the later arrest and warrantless search of the vehicle for drugs.⁵⁰

⁵⁰ State v. Bowers, 87 So. 3d 704, 707 (Fla. 2012) (officers can rely on their collective knowledge to act in the field. The collective knowledge of officers investigating a crime is imputed to each officer and one officer may rely on the knowledge and information possessed by another officer to establish probable cause). See also Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 568, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); State v. Maynard, 783 So.2d 226, 229 (Fla. 2001); Strickroth v. State, 963 So.2d 366, 368 n. 1 (Fla. 2d DCA 2007) ("It can involve direct communications between officers who have sufficient information and the officer who stops the suspect, or it can involve general communications among officers of whom at least one possesses the required level of suspicion."); Johnson v. State, 660 So.2d 648, 657 (Fla. 1995)) ("[T]he collective knowledge of police investigating a crime is imputed to each member..."); State v. Boatman, 901 So.2d 222, 224 (Fla. 2d DCA 2005) ("[T]he rule operates to impute the knowledge of one officer in the chain of investigation to another.").

Officer may wholly rely on the probable cause of a fellow officer:

A police sergeant relied on the instruction of a fellow detective, who was assigned to a DEA task force and had probable cause to believe that drugs were in a vehicle. The police sergeant stopped the vehicle and performed a warrantless search. Even though the initiating sergeant did not have probable cause, because he was in communication with a fellow officer who did, the stop and search were lawful.⁵¹

Intel from confidential informant contributed to collective knowledge:

Confidential informant, who had previously provided reliable information leading to discovery of rock cocaine and subsequent arrests about six times, stated individual of particular description was in possession of \$50 worth of rock cocaine at particular location at 10:49 p.m. Search of individual matching that description occurred at approximately 10:52 p.m., and firsthand basis of knowledge could reasonably be inferred under the circumstances.⁵²

Intel from confidential informant can support the basis for a search warrant, as long as one officer involved has knowledge of Cl's reliability:

Based on the "fellow officer" rule, the affiant-officer of search warrant affidavit need not have personal knowledge of the confidential informant's veracity if another officer working in connection with the affiant has such knowledge.⁵³

Collective knowledge doctrine controls even when agent told officer to develop his own probable cause:

A DEA agent had probable cause that the defendant was in possession of drugs. He told a local officer to watch out for the defendant, and to develop his own probable cause and stop the vehicle, but the officer had limited knowledge of the facts underlying the DEA's probable cause. The officer stopped the vehicle

⁵¹ United States v. Olmedo, 552 F. Supp. 2d 1347 (S.D. Fla. 2008). See also United States v. Hensley, 469 U.S. 221, 231 ("[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another." (quoting United States v. Robinson, 536 F.2d 1298, 1300 (9th Cir.1976)). The information need not be detailed. "[O]fficers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." Id. (quoting Robinson, 536 F.2d at 1299).

⁵² Hopkins v. State, 524 So. 2d 1136 (Fla. Dist. Ct. App. 1988).

⁵³ State v. Peterson, 739 So. 2d 561, 567–68 (Fla. 1999) (The "fellow officer" rule obviates the need for the affiant to have personal knowledge of the informant's veracity, as the knowledge of the law enforcement officers that the informant previously dealt with is imputed to officer).

and searched it. The court held that the officer had probable cause under the collective knowledge doctrine.⁵⁴

Collective knowledge doctrine can also be used for investigatory detentions:

Police sergeant had reasonable suspicion to detain defendant based on collective knowledge doctrine / fellow officer rule. Police deputy witnessed defendant hand currency to a known drug dealer. Drug dealer then retrieved an object from his mouth and placed it in defendant's mouth. Deputy then relayed his observations to other officers, including police sergeant. Sergeant approached defendant and witnessed him throw an object to the ground. Sergeant recovered the item, conducted a field test on the item, which came back positive for crack cocaine, and arrested defendant.⁵⁵

Supervisor's knowledge, uncommunicated to any other officer, was too remote for collective knowledge doctrine:

Knowledge of all officers on the scene is imputed to each officer in determining whether "collective knowledge" provided probable cause. Trooper lacked imputed probable cause knowledge of Defendant's intoxication under fellow officer rule, as required to support a blood draw from Defendant following a single-vehicle accident. Even though the sergeant, who was first on scene, noticed that Defendant was disoriented and emitted an odor of alcohol, neither the sergeant nor any other officer directed Trooper to conduct a blood draw on Defendant, gave any indication that probable cause existed for blood draw, nor communicated anything regarding Defendant to Trooper. Trooper testified that he did not detect the odor of alcohol while speaking to Defendant, and he could not recall whether Defendant appeared to be under the influence of alcohol.⁵⁶

The collective knowledge doctrine does not permit an officer who was not present at the initiation of the stop to testify as to its validity:

⁵⁴ United States v. Burton, No. 3:13-CR-50-J-34JBT, 2013 WL 5954727, at *8 (M.D. Fla. Sept. 6, 2013).

⁵⁵ State v. Watson, 187 So. 3d 349 (Fla. Dist. Ct. App. 2016).

⁵⁶ Montes-Valeton v. State, 216 So. 3d 475 (Fla. 2017); See also United States v. Kreimes, 649 F.2d 1185, 1189 (5th Cir. Unit B Jul.1981) ("[W]here there is at least minimal communication[] between officers, we look to the 'collective knowledge' of all officers in assessing [a reasonable suspicion] determination").

The "fellow officer rule," providing a mechanism by which officers can rely on their collective knowledge to act in the field, does not allow an officer, who does not have firsthand knowledge of the traffic stop and was not yet involved in the investigation at its inception, to testify as to hearsay regarding what the initial officer, who conducted the stop, told him in order to establish the validity of the initial stop.⁵⁷

⁵⁷ State v. Bowers, 87 So. 3d 704 (Fla. 2012).

What is a "Search" Under the Fourth Amendment?

It is important to understand that the term "search," as used in this book at least, refers to conduct that invokes the protections of the Fourth Amendment. Police may engage in hundreds of "searches" every day, and yet invoke the Fourth Amendment only a few times.

For example, when police look into a stopped vehicle, they may be searching for weapons or contraband, but that conduct is not protected 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 constitutionallyprotected area (i.e. persons, houses, papers, and effects); and
- You did it for the purpose of obtaining information.⁵⁸

Reasonable expectation of privacy:

A reasonable expectation of privacy will be violated if:

- The person exhibited an actual (subjective) expectation of privacy; and
- His expectation is one that society is prepared to recognize as reasonable (objective).⁵⁹

⁵⁸ United States v. Jones, 565 U.S. 400 (2012).

⁵⁹ Katz v. United States, 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 was not free to leave, even if for a brief period of time.

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....

There are two ways to seize a person. First, and most obviously, you may use physical force to make the seizure. For example, intentionally grabbing a person's shoulder or - more drastically - shooting him are both seizures. Alternatively, and more commonly, police may seize a person when there is a show of authority sufficient enough to lead a reasonable person to believe he was not free to avoid the officer without legal consequences and the person submits (i.e. doesn't run away).

A Fourth Amendment seizure of property occurs whenever you intentionally interfere with an individual's possessory interest in his property. The most important element here is intent. For example, if you blow a red light and run into another person's car, you have unintentionally interfered with his property and will be subject to tort liability, not a constitutional violation.

Remember you can be held vicariously liable if you "keep the peace" while someone takes another person's property. For example, if you're called to a civil standby while a subject removes property from a residence, it may be unwise to allow any disputed property to leave the residence.

Legal Standard

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

⁶⁰ Michigan v. Chesternut, 486 U.S. 567, 573 (1988).

- You use force on a person with the intent to restrain,⁶¹ even with minimal force. Additionally, a seizure occurs even if the suspect is trying to escape (submission is not required);⁶² 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, and submits.⁶³

A seizure of property occurs under the Fourth Amendment when:

You intend some meaningful interference with someone's possessory interest in his property.⁶⁴

Case Examples

No seizure by DEA Agents at 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 entire encounter was determined to be consensual.⁶⁵

Consensual contacts on a bus:

Narcotics agents boarded a Greyhound bus and without any reasonable suspicion asked various passengers for consent to search their luggage. Arrested smuggler later argued that he was not free to leave because he was stuck on the bus in order to complete his journey and therefore consent was tainted. The Supreme Court disagreed, and stated the test for a consensual encounter is not only the ability to leave, but also the ability to terminate the encounter while staying on the bus (e.g. "Leave me alone, officer").⁶⁶

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 mobile home for non-payment. The trailer was removed and the homeowner was told by police to not interfere

⁶¹ Brower v. County of Inyo, 489 U.S. 593 (1989).

⁶² Torres v. Madrid, 141 S. Ct. 989 (2021).

⁶³ California v. Hodari D, 499 U.S. 621 (1991).

⁶⁴ United States v. Jacobsen, 466 U.S. 109, 113 (1984).

⁶⁵ United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870 (1980).

⁶⁶ Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991).

with the park manager. The Court said police transformed the situation into a government seizure.⁶⁷



Consensual Encounters

⁶⁷ Soldal v. Cook County, 506 U.S. 56 (1992).

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

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." 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 does not violate the Fourth Amendment when:

A reasonable person would believe he was free to leave or otherwise terminate the encounter. ⁷⁰ In other words, a reasonable person would have believed he was not detained.

⁶⁸ United States v. Drayton, 536 U.S. 194, 207 (2002).

⁶⁹ United States v. Aponte, 662 F. App'x 780, 786 (11th Cir. 2016) (Trooper "spoke in relaxed and conversational speech, he did not raise his voice, and he phrased his inquiries as requests rather than demands"); see also United States v. Moran-Ramos, No. 3:17-CR-52-J-20MCR, 2017 WL 9360897, at *2 (M.D. Fla. Oct. 12, 2017) (USBP Agent "never raised his voice above a conversational tone, the agents never threatened the Defendant[...], the agents never used physical force against the Defendant[...], the agents kept their firearms holstered during the conversation, and the agents never handcuffed the Defendant[.]"); Garcia v. State, 979 So. 2d 1189, 1193 (Fla. Dist. Ct. App. 2008) (court found consensual encounter where "exchanges were cordial and conversational"); State v. Scott, 786 So. 2d 606, 607 (Fla. Dist. Ct. App. 2001) (Officer's "normal conversational tone" supported the determination that interaction with motel maid theft suspect was a consensual encounter).

⁷⁰ Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991).

Case Examples

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

(1) whether citizen's path is blocked or impeded; (2) whether identification is retained; (3) citizen's age, education and intelligence; (4) length of citizen's detention and questioning; (5) number of police officers present; (6) display of weapons; (7) any physical touching of citizen; and (8) language and tone of voice of police.⁷¹

Order to come over and talk is not consensual:

Suspect was observed near a closed daycare center late at night. Detective said, ""Yo, come here." The court concluded a reasonable person would not feel free to disobey that directive, given the command and the knowledge the detective was an officer in the middle of a police action in which four or five other officers were involved. The detective's words were more indicative of a command than a question; as such, the court concluded this was an investigatory stop and not a consensual encounter.⁷²

Requesting to talk to a citizen, where there is no evidence to suggest the officer's manner was "coercive, oppressive, or dominating" and the officer did not "hinder or restrict the person's freedom to leave or freedom to refuse to answer", has consistently been determined to be a consensual encounter:

"Come here for a minute, can I talk to you?"⁷³, "Hey, come over here; I'd like to talk with you"⁷⁴, "You guys okay? What are you doing here so late?"⁷⁵, "Hey, may I talk to you for a minute"?⁷⁶ have all been determined to be initiators of a consensual encounter.

Repeating a request to speak with a subject does not convert a consensual encounter into an investigatory detention, as long as it is a request and there is no additional coercive police conduct:

⁷¹ United States v. Perez, 443 F.3d 772, 778 (11th Cir. 2006); United States v. De La Rosa, 922 F.2d 675, 678 (11th Cir.1991).

⁷² F.E.H., Jr. v. State, 28 So. 3d 213, 216 (Fla. Dist. Ct. App. 2010).

⁷³ Chapman v. State, 780 So. 2d 1036, 1037 (Fla. Dist. Ct. App. 2001).

⁷⁴ Lewis v. State, 143 So. 3d 998, 1000 (Fla. Dist. Ct. App. 2014).

⁷⁵ United States v. Perez, 443 F.3d 772, 775 (11th Cir. 2006).

 $^{^{76}}$ United States v. Cusick, No. 8:11-CR-134-T-17TBM, 2012 WL 4194729, at *3 (M.D. Fla. Sept. 19, 2012), aff'd, 559 F. App'x 790 (11th Cir. 2014).

Officer who believed suspect was involved in a drug transaction, but lacked reasonable suspicion, asked suspect to come over to him. Suspect responded he was not doing anything wrong; when officer asked a second time, suspect walked over to him, resulting in a finding of plain view evidence. The court concluded that, as "there was nothing preventing [suspect] from continuing to walk away, no police equipment was used to intimidate [suspect], and there was only one officer who did nothing more than ask [suspect], twice, to come speak with him", a reasonable person would have felt free to ignore the officer's requests.⁷⁷ Compare these facts to the following: finding a seizure where, after subject ignored officer's first call, officer continued to call him by name, and ordered him to "hold it right there"78; finding a seizure where officer asked pedestrian to come speak with him and a second officer blocked the sidewalk which prevented pedestrian from continuing to walk away⁷⁹; finding a seizure occurred when officers shined a spotlight, activated the patrol car's air horn, and repeatedly called to defendant.⁸⁰

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.⁸¹

Even if police have probable cause, they can still seek a consensual encounter with the suspect:

Even assuming that probable cause existed at some earlier time, no violation of the Fourth Amendment will be found, as no Fourth

⁷⁷ State v. Albert, 193 So. 3d 7, 11-12 (Fla. Dist. Ct. App. 2016).

⁷⁸ Beckham v. State, 934 So.2d 681 (Fla. 2d DCA 2006).

⁷⁹ Young v. State, 982 So.2d 1274, 1275 (Fla. 4th DCA 2008).

⁸⁰ Oslin v. State, 912 So.2d 672, 675 (Fla. 5th DCA 2005).

⁸¹ Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983).

Amendment privacy interests are invaded when an officer seeks a consensual interview with a suspect.⁸²

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

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. 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. 84

Violation of a state law does not equal automatic Fourth Amendment violation:

Although officers may have violated Florida state law requirements - which permit boarding a vessel for a safety inspection only if there is consent or probable cause to believe a crime is being committed - that circumstance did not require the suppression of over 100 pounds of marijuana under the Fourth Amendment. ⁸⁵ The Supreme Court decided that Florida law, and not federal law or any decision of the Court, is responsible for "the untoward result in this case." ⁸⁶

⁸² Delhall v. State, 95 So. 3d 134 (Fla. 2012).

⁸³ State v. Sosa, 932 So.2d 582, 584 (Fla. 5th DCA 2006); Crist v. State, 98 So. 3d 81, 83 (Fla. Dist. Ct. App. 2012).

⁸⁴ See United States v. Zapata, 180 F.3d 1237, 1240 (11th Cir. 1999).

⁸⁵ Fla. v. Casal, 462 U.S. 637, 638–39 (1983); see also Olmstead v. United States, 277 U.S. 438 (1928) (holding that a violation of state law does not render evidence excludible, since the exclusionary rule operated only on evidence seized in violation of the Constitution).

⁸⁶ Fla. v. Casal, 462 U.S. at 637 (Burger, C.J., concurring); see, e.g., Sherman v. State, 419 So. 2d 375, 376 (Fla. Dist. Ct. App. 1982) ("The officers unquestionably were authorized by Section 371.58, Florida Statutes (1979), to board the motor boat once they had probable cause to believe that a violation of Chapter 371 had occurred. We consider that the marine patrol officers clearly possessed such belief since neither of the two appellants were able to produce the certificate of registration generally required of all motorboats using the waters of this state, see Sections 371.041 and 371.051(4), Florida Statutes (1979), or give a reason why the boat was exempt from the numbering provisions of Chapter 371. See Section 371.131.").

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. 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 sociallyacceptable time;
- Your conversation with the occupant remained consensual; and
- When the conversation ended or was terminated, you immediately left and didn't snoop around.

Case Examples

Time of day is not the only factor a court will consider with regard to the reasonableness of a knock and talk, but it is significant:

Deputies initiated a "knock and talk" encounter in the early morning hours. Although not dispositive, the lateness of the hour "add[s] to the intimidating circumstance[s]" faced by defendants.⁸⁷

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.⁸⁸

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 had lights illuminated; and the deputy delivered three to six raps on the door.⁸⁹

Command to open door was not a consensual encounter:

⁸⁷ Hardin v. State, 18 So. 3d 1246, 1248 (Fla. Dist. Ct. App. 2009).

⁸⁸ 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). ⁸⁹ 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.").

Officers knocked "loudly" and continuously for approximately two minutes, "accompanied by repeated announcements that it was the police at the door". Suspect's mother opened the side door while another occupant (the mother's boyfriend) opened the front door. Court concluded officers violated the occupants' Fourth Amendment rights by ordering them from their home. ⁹⁰

Constant pressure to consent to search held unlawful:

During knock and talk officers continued to press defendant for permission to enter and search. Later consent-to-search was product of illegal detention. ⁹¹

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. ⁹²

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. "Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof - whether the questioner be a pollster, a salesman, or an officer of the law."⁹³

⁹⁰ Calloway v. State, 118 So. 3d 277, 278 (Fla. Dist. Ct. App. 2013).

⁹¹ Hardin v. State, 18 So. 3d 1246, 1250 (Fla. Dist. Ct. App. 2009) ("[R]epeated requests for consent may be significant in showing that the ostensible request was in reality a demand" and when "an individual is informed of the suspicions of the police in a hectoring manner... the specter of coercion may arise.") (citing Luna–Martinez v. State, 984 So.2d 592, 600-01 (Fla. 2d DCA 2008)).

⁹² Orhorhaghe v. I.N.S., 38 F.3d 488 (9th Cir. 1994).

⁹³ United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991) (citing Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964)).

Assuming a "tactical position"⁹⁴ 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.⁹⁵

⁹⁴ Young v. Borders, 850 F.3d 1274, 1299 (11th Cir. 2017).

⁹⁵ United States v. Lara-Mondragon, 516 F. App'x 771, 773 (11th Cir. 2013).

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."⁹⁶

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

Legal Standard

Questioning:

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

⁹⁶ Florida v. Royer, 460 U.S. 491, 497 (1983).

⁹⁷ June v. State, 131 So. 3d 2, 4 (Fla. Dist. Ct. App. 2012).

⁹⁸ U.S. v. Perez, 443 F.3d 772, 778 (11th Cir. 2006) (citing 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 Horne v. State, 113 So.3d 158, 161 (Fla. 2d DCA 2013) (Retention of a defendant's driver's license when the officer asks for consent to search should be heavily factored in determining the nature of the encounter); United States v. De La Rosa, 922 F.2d 675, 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).

Your questions are not overly accusatory in a manner that would make a reasonable person believe they were being detained for criminal activity.

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.

Case Examples

Questioning:

At around 9:00–9:30 a.m., officer was patrolling an area where a burglary had been reported several days earlier. Officer spotted Defendant riding his bicycle. She stopped her patrol car and approached. She inquired why the defendant was in the area. Defendant stated he was visiting a friend, but was unable to tell the officer where the friend lived. Officer told the defendant there had been burglaries in the area and he should stay out of the area if he had no legitimate reason to be there. Defendant said he would and rode away. The court concluded that, as "an officer may approach a defendant on a public street and ask questions of the defendant[, this contact was] nothing more than a consensual encounter."

Identification:

Defendant was riding his bicycle when officer pulled his car off to the side of the road behind defendant without activating his patrol

⁹⁹ A.L. v. State, 133 So. 3d 1239, 1240 (Fla. Dist. Ct. App. 2014); see, e.g., D.T. v. State, 87 So.3d 1235, 1238 (Fla. 4th DCA 2012). This is true even where the defendant is on a bike and stops to speak with the officer. See State v. Davis, 543 So.2d 375, 376 (Fla. 3d DCA 1989).

light. Officer exited his vehicle and, without ordering defendant to stop, began conversing with him. Officer asked defendant if he had identification, at which point defendant handed him his identification card; officer conducted a records check through dispatch, but handed the identification card back to defendant while officer waited for a return. The court concluded that nothing about the interaction at this point indicated it was anything more than a "mere" consensual encounter. ¹⁰⁰

Consent to Search:

Government has the obligation to prove consent was voluntary and not "mere acquiescence to police authority". 101 Officer approached subject loitering behind bar at 1100 hours, but did not suspect him of any criminal activity. As the officer approached, the subject stuck his hands in the top of his elastic waistband and, in response to officer's question, explained he always placed his hands down the front of his pants. When officer requested suspect pull his waistband forward so that the officer could observe the inside of his clothing, the consensual encounter became an investigatory stop; a reasonable person would not believe that they were free to leave or to disobey a uniformed officer's request to pull open their clothing in such a manner that the officer could observe the inside of their clothing. 102

¹⁰⁰ June v. State, 131 So. 3d 2, 4 (Fla. Dist. Ct. App. 2012).

¹⁰¹ Alvarez v. State, 515 So.2d 286, 288 (Fla. 4th DCA 1987).

¹⁰² Williams v. State, 694 So. 2d 878, 879 (Fla. Dist. Ct. App. 1997).

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? There may be a requirement the suspect identify himself during an investigative detention, but not a consensual one. Florida State Statute 901.151 permits officers to temporarily detain that person for the purpose of ascertaining his identity, but only when there is reasonable suspicion that the subject is, was, or is about to commit a crime. 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 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.

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.

¹⁰³ 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).

¹⁰⁴ Fla. Stat. § 901.151 (2022).

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." 105

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

In order to support a charge for providing false information to police officer, the giving of a false information must occur following arrest or lawful detention. Officer investigating a domestic violence situation asked victim for his name; victim lied about his name and stated he did not want to "press charges". The court held that nothing in the record suggested there was a subjective or objective reason for defendant to have known he was detained; i.e. that he was not free to leave. As he was not detained, Florida State Statute § 901.36¹⁰⁶ requiring truthful identification was not triggered.¹⁰⁷

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

Under the totality of the circumstances, defendant was not seized for purposes of the Fourth Amendment when police officer used and retained the identification defendant had consensually and voluntarily provided to conduct a computerized check for warrants, where officer had approached group of men, including defendant, in a casual manner, without use of sirens, lights, or weapons, and without blocking the egress from the area, others in the group walked away, but defendant remained to speak with officer, officer requested defendant's identification, and officer did not remove herself from the immediate vicinity of defendant, and continued to talk with him throughout the course of the warrants check. 108

¹⁰⁵ Brown v. Texas, 443 U.S. 47 (1979).

¹⁰⁶ Fla. Stat. § 901.36(1) (2022) (stating that "[i]t is unlawful for a person who has been arrested or lawfully detained ... to give a false name, or otherwise falsely identify himself or herself in any way").

¹⁰⁷ Brevick v. State, 965 So. 2d 1246, 1249 (Fla. Dist. Ct. App. 2007); see Baptiste v. State, 995 So.2d 285, 294 (Fla. 2008) ("[T]he reasonableness of the officers' suspicion must be measured by the information that the officers knew before [the seizure]") (citing Florida v. J.L., 529 U.S. 266, 271 (U.S. 2000)); see also Whyte v. State, 940 So. 2d 1174, 1175–76 (Fla. Dist. Ct. App. 2006) (officer's arrest report and testimony clearly reflect that he arrested defendant solely because defendant had given him a false name, and that both the arrest and search occurred before he discovered evidence of a vehicle burglary).

¹⁰⁸ Golphin v. State, 945 So. 2d 1174 (Fla. 2006).

Consent to search for identification valid:

Legally-detained subject was asked if he had a concealed weapons permit and identification. The subject responded, "Yes." When asked where the documents were, the subject motioned with his head towards his back. The officer then asked if the documents were in subject's wallet, to which subject responded, "Yes." The court concluded that the defendant provided the officer with consent to search his wallet for identification and a concealed weapons permit through his non-verbal gestures and responses. The court also noted that the officer told subject he was going to go into the defendant's back pocket, and subject made no objection. Agent then searched the wallet and found the subject's identification and stolen credit cards. ¹⁰⁹ 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. 110

¹⁰⁹ United States v. Labrada, No. 11-20167-CR, 2011 WL 13134195, at *5 (S.D. Fla. Sept. 9, 2011), report and recommendation adopted, No. 11-20167-CR, 2012 WL 12893063 (S.D. Fla. Jan. 3, 2012).

¹¹⁰ U.S. v. Macias, 658 F.3d 509 (5th Cir. 2011).

Removing Hands from Pockets

In Florida, some courts have concluded that the mere request for a subject to remove his hands from his pockets can convert a consensual encounter into a seizure. However, even those courts which have adopted this extreme understand the importance of officer safety. 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.

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." ¹¹³

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.¹¹⁴

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:

¹¹¹ *R.J.C. v. State*, 84 So. 3d 1250, 1255 (Fla. Dist. Ct. App. 2012) (the court "disagreed with the state's argument that the mere request by the officer that [Defendant] take his hand out of his pocket was insufficient to constitute a stop.") *referencing Lee v. State*, 868 So.2d 577, 579–80 (Fla. 4th DCA 2004); *see also Gestewitz v. State*, 34 So.3d 832, 835 (Fla. 4th DCA 2010); *Johnson v. State*, 989 So.2d 1228, 1230 (Fla. 4th DCA 2008); *Delorenzo v. State*, 921 So.2d 873, 876 (Fla. 4th DCA 2006).

See State v. Woodard, 681 So.2d 733, 735 (Fla. 2d DCA 1996); Lang v. State, 671 So.2d 292, 294 (Fla. 5th DCA 1996); Sander v. State, 595 So.2d 1099, 1100 (Fla. 2d DCA 1992).

¹¹³ *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).

¹¹⁴ Johnson v. State, 610 So.2d 581 (Fla. 1st DCA 1992) (seizure where officer told appellant to remove his hands from his pockets and to turn around so that officer could get a good look at him); <u>Canion</u> v. State, 550 So.2d 562 (Fla. 4th DCA 1989) ("[W]hat began as a mere encounter between the deputy sheriff escalated to a temporary detention when the deputy sheriff demanded that appellant remove his hand from his pocket"); <u>Harrison v. State</u>, 627 So.2d 583, 584 (Fla. 5th DCA 1993) (consensual encounter between police officer and defendant evolved into a seizure when officer told defendant to take his hand out of his pocket).

- 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 nervously and was sweating profusely, defendant was not making eye contact, and defendant was touching his front pockets. 115

Repeated requests for a subject to remove his hands can convert a consensual encounter into a detention:

Officer's request, repeated several times, that juvenile remove his hands from his pockets constituted a show of authority that would convey to a reasonable person that his movement was being restricted and that he was not free to disregard the officer and go about his business and, thus, juvenile was seized for purposes of the Fourth Amendment when he submitted to officer's show of authority by complying with officer's request; a reasonable person would have interpreted officer's repeated requests as a command, not a suggestion. ¹¹⁶

¹¹⁵ United States v. Debona, 759 Fed. Appx. 892 (11th Cir. 2019).

¹¹⁶ R.J.C. v. State, 84 So. 3d 1250 (Fla. Dist. Ct. App. 2012).

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. 117

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.¹¹⁸

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. 119

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:

¹¹⁷ Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797 (1968).

¹¹⁸ *Ladson v. State*, 63 So. 3d 807 (Fla. Dist. Ct. App. 2011) (officers encountered juvenile shooting suspect as he was leaving his home and asked him if he would come in and answer questions, to which he replied, "No problem." Juvenile suspect was subsequently interrogated and confessed; his transportation was consensual, and therefore was not involuntary transportation indicative of an illegal arrest. Court held that, under the circumstances as presented, a reasonable person would not have believed he was under arrest and not free to go).

¹¹⁹ 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. 120

¹²⁰ United States v. Waksal, 709 F.2d 653 (11th Cir. 1983).

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. ¹²¹ 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.

Case Examples

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

Three factors have been found to inform this analysis: "(1) the time and place of the encounter[,] (2) the number of [deputies] present[,] and (3) the [deputies'] words and actions." We analyze these factors "from the perspective of a reasonable person,

¹²¹ Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045, 36 L. Ed. 2d 854 (1973).

¹²² Montes-Valeton v. State, 216 So.3d 475, 480 (Fla. 2017); see also Miller v. State, 865 So.2d 584, 587 (Fla. 5th DCA 2004) ("Among the factors that the court should consider in its analysis are the place and time of the encounter, the number of officers, and the words and actions of the officers.").

untrained in the law, deciding whether he or she is free to end the encounter." ¹²³

"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." Search revealed crack cocaine. Suspect's statement implied consent to search. Note: this type of 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.¹²⁵

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. 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.¹²⁷

Area: Directly "touching" genitals outside implied consent:

¹²³ Smith v. State, 753 So.2d 713, 716 (Fla. 2d DCA 2000) (Altenbernd, Acting C.J., concurring).

¹²⁴ 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?).

¹²⁵ State v. Cunningham, 26 N.E.3d 21 (Ind. 2015).

¹²⁶ United States v. White, 617 F.2d 1131 (5th Cir. 1980).

¹²⁷ People v. Cantor, 149 Cal.App.4th 961, 57 Cal. Rptr. 3d 478 (Cal. Ct. App. 2007).

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 search. Note, searching "near" genital area is often upheld, ¹²⁸ just don't lead the court to believe you are "targeting the genitalia."

Number of officers present may serve to vitiate consent:

Florida courts have concluded the presence of three officers in uniform was a considerable show of authority sufficient to create the perception that a major criminal investigation was underway and, while not a *per se* rule, was implicative of coercion.¹³⁰

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

¹²⁸ 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.").

130 Miller v. State, 865 So. 2d 584, 588 (Fla. Dist. Ct. App. 2004); Kutzorik v. State, 891 So.2d 645, 647 (Fla. 2d DCA 2005) (presence of three uniformed police officers in the defendant's small trailer implied coercion); but see United States v. Ramirez-Chilel, 289 F.3d 744, 751 (11th Cir.2002) (stating the presence of five officers did not render consent involuntary); Luna-Martinez v. State, 984 So.2d 592, 600 (Fla. 2d DCA 2008) (stating presence of three to four officers outside defendant's apartment did not render consent per se involuntary); State v. Triana, 979 So.2d 1039, 1044–45 (Fla. 3d DCA 2008) (four officers did not render consent involuntary); Wilson v. State, 952 So.2d 564, 570 (Fla. 5th DCA 2007) (three officers who had trespassed onto property and initially accosted defendant at gunpoint did not vitiate consent to search given after time passed); Putnel v. State, 746 So.2d 521, 523 (Fla. 2d DCA 1999) (two officers did not render consent involuntary). Most authorities opine it is not so much the police presence that undermines otherwise lawful police action, but rather the verbal acts of those officers. See, e.g., Luna-Martinez, 984 So.2d at 600 ("A suspect is more likely to be overawed by one officer speaking in an insistent, demanding tone than is a suspect who is addressed in a low-key manner in an encounter with several officers.").

¹²⁹ 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 patdown 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.

found that these facts made "it even more likely that the naked Ms. Sierra was intimidated by the show of authority." ¹³¹

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

Florida courts have concluded, where a subject was alerted she was the target of the investigation and that law enforcement believed she was hiding drugs in her home, to be suggestive of a seizure rather than a consensual encounter.¹³²

11th Circuit has a high tolerance before it will determine consent to search was involuntary:

Fourteen DEA agents arrested a subject in his front yard for drug trafficking, and then moved him into the residence while they conducted a protective sweep for dangerous confederates. An agent then led suspect to the living room and placed him on the couch, handcuffed. After being read his Miranda rights, suspect's consent to search the house was sought. Suspect responded that officers could search only certain rooms, because he did not want the agents to see various personal items. The agents did not accept this conditional consent, and responded they would have to secure the house and attempt to obtain a search warrant. Suspect responded that the agents need not procure a search warrant; they could "go ahead and search the house." The 11th Circuit concluded, "This is not a case in which the consent was merely acquiescence to a claim of lawful authority[...] agents never represented to Garcia that they were in possession of a search warrant, or that they could lawfully search his premises without his consent. The agents merely stated that they would not accept Garcia's conditional consent, and that if he refused to consent to a full search, the agents would attempt to obtain a warrant."133

¹³¹ Hardin v. State, 18 So. 3d 1246, 1249 (Fla. Dist. Ct. App. 2009); see also 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 humiliation and his subsequent consent was therefore rendered invalid).

¹³² *Kutzorik v. State,* 891 So.2d 645, 648 (Fla. 2d DCA 2005); *see also Luna–Martinez v. State,* 984 So.2d 592, 600 (Fla. 2d DCA 2008) (holding that when the police unequivocally assert that they "know" the suspect is hiding contraband, it may point to the conclusion that the suspect reasonably believed he would be required to allow a search).

¹³³ United States v. Garcia, 890 F.2d 355, 361 (11th Cir. 1989); see also United States v. Long, 866 F.2d 402 (11th Cir.1989) (officers, who suspected counterfeit currency was buried in the backyard, stated they would

11th Circuit will examine whether the "officers employed any tactics that would augment the degree of coercion that is inherent in any arrest," ¹³⁴ and consider the totality of the circumstances to determine whether consent was voluntary:

Officers activated their overhead lights to detain suspects at a gas station. After suspects were placed in handcuffs, detective asked each of the men, in Spanish, if they consented to searches of their trucks, but he did not mention that they had the right to decline the search. All four men responded affirmatively in Spanish. The court concluded that, based on past precedent, the consent was voluntary.¹³⁵

A non-exhaustive list of factors Florida courts have considered in determining whether defendant freely consented to a search for purposes of the Fourth Amendment:

(1) the time and place of the encounter; (2) the number of officers present; (3) the officers' words and actions; (4) the age and maturity of the defendant; (5) the defendant's prior contacts with the police; (6) whether the defendant executed a written consent form; (7) whether the defendant was informed that he could refuse to give consent; and (8) the length of time the defendant was interrogated before consent was given. ¹³⁶

return and "dig the place up" if consent was refused; 11th Circuit found that "such a statement does not amount to coercion."); *United States v. Espinosa-Orlando*, 704 F.2d 507 (11th Cir.1983) (court held that despite the fact that arrested defendant was lying on the ground near the officials and that one agent on the scene still had his weapon drawn, albeit pointed elsewhere, defendant's consent to search vehicle was voluntary and uncoerced).

¹³⁴ United States v. Rodriguez-Perez, 798 F. App'x 536, 541 (11th Cir. 2020).

¹³⁵ United States v. Rodriguez-Perez, 798 F. App'x 536 (11th Cir. 2020).

¹³⁶ State v. Hernandez, 146 So. 3d 163 (Fla. Dist. Ct. App. 2014).

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.¹³⁷

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." ¹³⁸

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

¹³⁷ Fernandez v. California, 571 U.S. 292 (2014).

¹³⁸ United States v. Marchante, 514 F. App'x 878, 881 (11th Cir. 2013).

no one could admit a guest without the agreement of all, police need not assume that's the case." $^{\rm 139}$

¹³⁹ 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. 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. 141

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:

Police did not have a reasonable belief that woman who gave them permission to enter motel room had actual or apparent authority to consent to entry, where at the time of entry woman was unidentified and had no known connection to room other than her act of opening door; although it was later determined that woman was manager of motel and defendant's girlfriend, those facts could not be used in

¹⁴⁰ Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

¹⁴¹ Walker v. State, 243 So. 3d 512, 515 (Fla. Dist. Ct. App. 2018).

determining person's authority to consent to search, where police did not know those facts at time they entered. 142

Simply claiming to live at a home may not be enough without more information:

Even if a person claims to live at a home, "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." 143

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:

Defendant's girlfriend lacked apparent authority to consent to search of defendant's shaving kit; testimony made clear that contents were wholly male, girlfriend seemed uncertain of contents of suitcase, which was closed and sitting against wall, there was no indication that she had been given permission to access either item or that she mutually used either item, and girlfriend informed police that defendant was hiding drugs from her and that they might be hidden in suitcase or shaving kit.¹⁴⁴

The reasonableness of an officer's reliance on a person's apparent authority will be considered based on the totality of the circumstances:

Apparent authority was found where a female informed officers she had been living in the residence for two weeks, her personal belongings were in the apartment, and she was in a relationship with defendant.¹⁴⁵

¹⁴² Williams v. State, 788 So. 2d 334 (Fla. Dist. Ct. App. 2001).

¹⁴³ *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793 (1990) *See also Ferguson v. State*, 58 So. 3d 360, 364 (Fla. Dist. Ct. App. 2011) (identifying a non-exhaustive list of facts which militate in favor of a finding of a person's authority over the premises: (1) possession of a key to the premises; (2) a person's admission that he or she lives at the residence in question; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at the residence; (6) having one's children reside at that address; (7) keeping personal belongings such as a diary or a pet at that residence; (8) performing household chores at the home; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present).

¹⁴⁴ Marganet v. State, 927 So. 2d 52 (Fla. Dist. Ct. App. 2006).

¹⁴⁵ Brock v. State, 24 So. 3d 703, 704 (Fla. Dist. Ct. App. 2009) see, e.g., Ferguson v. State, 58 So.3d 360 (Fla. 4th DCA 2011) (defendant's co-occupant girlfriend had authority to consent to entry where girlfriend's clothes were inside apartment and she was living in apartment for past two months, notwithstanding she had not changed her address on either her license or other mailings and was not in actual possession of key when police found her in a traumatized state just outside apartment); see also Kohn v. State, 69 So.3d 388

When facts and circumstances exist to give officers reason to doubt authority to consent, officers are obligated to make inquiries sufficient to confirm the person has authority prior to relying on consent:

Officers' belief that the male subject who invited them into the residence had the authority to consent to entry was unreasonable, and thus officers' warrantless entry violated the Fourth Amendment: officers failed to inquire into man's authority to give consent, officers were aware that a female and two children were the only tenants, and the man was not known by officers to frequent the residence.¹⁴⁶

(Fla. 1st DCA 2011); *United States v. McGee*, 564 F.3d 136 (2d Cir.2009); *Hernandez v. State*, 98 So. 3d 702, 705 (Fla. Dist. Ct. App. 2012).

¹⁴⁶ *Moore v. State*, 830 So. 2d 883 (Fla. Dist. Ct. App. 2002).



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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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