ANTHONY BANDIERO, ESQ.

TENNESSEE

Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

Blue to Gold

Tennessee Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

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

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

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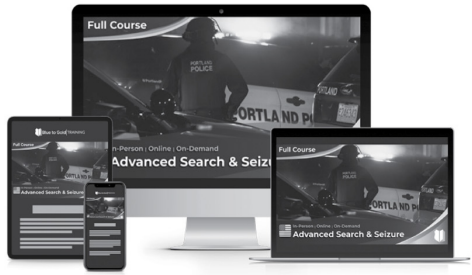

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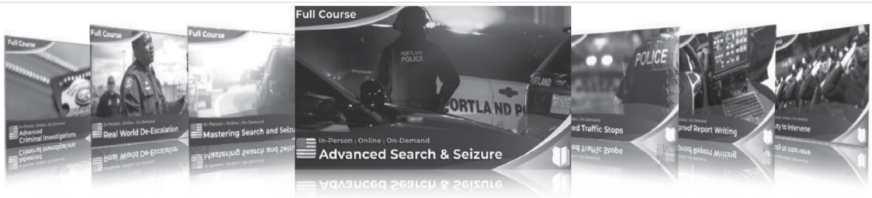

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Overview

Note about case citations:

The case names cited throughout this book are not formatted according to the Bluebook citation style, which is widely recognized in legal writing. Instead, these citations are presented in a more straightforward manner, primarily to facilitate ease of reference for readers who may wish to delve deeper into the cases themselves. This approach is adopted to enhance the accessibility of the material, especially for those who might not be familiar with the intricacies of legal citation formats. By presenting case names in a clear and direct way, the book aims to encourage readers to explore these cases further, providing a gateway to understanding the legal principles and precedents discussed more deeply.

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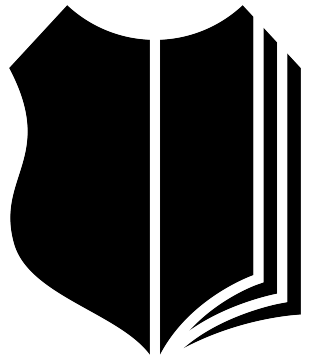
"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

— James Madison, Father of the Fourth Amendment, 1788



Consensual Encounters

Consensual Encounters

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

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

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

Legal Standard

A consensual encounter becomes a seizure when:[2]

- ☐ Under the **totality of the circumstances**;
- ☐ A reasonably **innocent** person;
- ☐ Believes they do not have the freedom to **terminate** the encounter or **leave**; and
- ☐ **Yields** to a show of authority or physical force.

Some factors courts consider include:

- ☐ How the initial contact was made (was an order given?)
- ☐ Use of flashing lights or sirens
- ☐ Uniform versus plain clothes
- ☐ Number of officers
- ☐ Demeanor of officer (conversational v. accusations)
- ☐ Display of weapons

[1] United States v. Drayton, 536 U.S. 194 (2002)
[2] CCDA Shanon Clowers

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

Tennessee Case Examples

These cases represent binding authority from Tennessee, the 6th Circuit, or U.S. Supreme Court. It's important to confirm these cases are consistent with current state law and agency policy which may be more restrictive.

Distinguishing Consensual Encounters From Seizures in Police Interactions:

In State of Tennessee v. Cuben Lagrone, the Court of Criminal Appeals of Tennessee explored the concept of consensual encounters between police and citizens. The court noted that not all interactions between police and citizens are seizures, especially if they are voluntary or consensual. The case underscored, "A consensual police-citizen encounter, such as an accident investigation, can become a seizure, thereby triggering a constitutional analysis of the police action."[1]

Consensual Encounters Are Not Seizures:

This case clarified the boundaries of consensual encounters versus seizures under the Fourth Amendment. The Court stated, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." This ruling emphasized that police questioning, in itself, does not constitute a seizure, and such encounters are

[1] State of Tenn. v. Lagrone, 2016 WL 5667514, Ct. of Crim. App. of Tenn. (2016)

considered consensual, not implicating Fourth Amendment interests.[1]

Police Can Ask People if They Are Willing To Answer Questions:

The Court reinforced the principle that police interactions with individuals in public spaces, such as streets or buses, where they ask questions or request consent to search luggage, do not violate the Fourth Amendment's prohibition of unreasonable seizures. The Court noted, "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." This decision further established that such interactions are considered consensual and do not implicate Fourth Amendment interests.[2]

Briefly Asking Factory Workers Questions Was Not a Seizure:

This case examined the nature of interactions between law enforcement officers and individuals, particularly in the context of questioning by officers in a factory setting. The Court's decision turned on the proposition that the interrogations by the INS were merely brief, "consensual encounters," that did not pose a threat to personal security and freedom, and thus did not amount to seizures under the Fourth Amendment.[3]

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, without returning 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.[4]

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[1] Florida v. Bostick, 111 S. Ct. 2382 (1991)
[2] United States v. Drayton, 122 S. Ct. 2105 (2002)
[3] INS v. Delgado, 104 S. Ct. 1758 (1984)
[4] Fla. v. Royer, 460 U.S. 491 (1983)

Non-binding Case Examples

These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

Order To Come Over and Talk Is Not Consensual:

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

Even if Police Have Probable Cause, They Can Still Seek a Consensual Encounter With the Suspect:

"Therefore, even assuming that probable cause existed at some earlier time, there was no violation of the Fourth Amendment…No Fourth Amendment privacy interests are invaded when an officer seeks a consensual interview with a suspect."[2]

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 he 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.[3] Many cops call this move the "two step." 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.

Violation of a State Law Does Not Equal Automatic Fourth Amendment Violation:

Although the officers may have violated state law requirements in not informing the person answering the door during "knock and talk" investigation that he had a right to terminate the encounter, that circumstance did not render the consent to talk involuntary under the Fourth Amendment.[4]

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[1] People v. Roth, 219 Cal. App. 3d 211 (Cal. App. 4th Dist. 1990)
[2] People v. Coddington, 23 Cal. 4th 529 (2000), as modified on denial of reh'g (Sep 27, 2000)
[3] U.S. v. Rivera, 906 F.2d 319 (7th Cir. 1990)
[4] U.S. v. Cormier, 220 F.3d 1103 (9th Cir. 2000)

Knock and Talks

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

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

What about "No Trespass" signs? Trying to have a consensual conversation with someone is not typically considered trespassing. The same goes with "No Soliciting" signs. Still, there will be situations when a no-trespassing sign along with other factors will indicate to a reasonable person that no one should approach the front door and knock. Still, these rules don't apply to calls for service where there is an ongoing issue, like a domestic violence call or loud party complaint.

Legal Standard

Knock and talks are lawful when:

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

Tennessee Case Examples

These cases represent binding authority from Tennessee, the 6th Circuit, or U.S. Supreme Court. It's important to confirm these cases are consistent with current state law and agency policy which may be more restrictive.

Knock and Talk Is a Valid Investigative Practice:

In the case of State v. Robertson, the Court of Criminal Appeals of Tennessee addressed the legality of law enforcement's use of the knock-and-talk technique. The defendant argued that the police officers had no right to enter onto his aunt's property, where his building was located, because there were "no trespassing" signs posted on the property. The court held that the police officers properly executed a "knock and talk" procedure at the defendant's door, which is a consensual encounter that does not require a warrant. The court quoted with approval that "[a]bsent 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."[1]

Officers May Knock on the Door Reasonably Believed To Be Used by the General Public:

The U.S. Supreme Court addressed the boundaries of the "knock and talk" exception in law enforcement, particularly focusing on where officers can lawfully approach a residence without a warrant. The case revolved around whether police officers could approach a residence at a location other than the front door under the "knock and talk" exception.

The case involved Officer Carroll, who, while searching for a suspect, approached the Carmans' house and entered their deck without a warrant. The Carmans argued that this violated their Fourth Amendment rights, as the "knock and talk" exception should not apply when officers approach areas of the residence other than the front door. The District Court initially ruled in favor of Carroll, but the Third Circuit Court of Appeals reversed this decision, asserting that the "knock and talk" exception requires officers to begin their encounter at the front door.

The Supreme Court, however, reversed the Third Circuit's decision, granting qualified immunity to Officer Carroll. The Court emphasized that the "knock and talk" exception allows officers to approach a

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[1] State v. Robertson, 2013 WL 59372 (2013)

residence in the same manner as any private citizen might, which includes areas like walkways, driveways, porches, and other places where visitors could be expected to go. The Court noted, "A government official sued under §1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct."

The Court's decision highlighted the flexibility of the "knock and talk" exception, allowing law enforcement to approach different parts of a residence, not strictly limited to the front door, as long as those areas are accessible to the general public and used as common entrances. This ruling underscores the balance between law enforcement's need to perform their duties and the protection of individual privacy rights under the Fourth Amendment.[1]

Non-binding Case Examples

These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

Knock and Talk at 4 A.M. Held Invalid:

Officers went to suspect's residence at 4 a.m. with the sole purpose to arrest him. There was no on-going crime and the probable cause was based on an offense that occurred the previous night. Violation of knock and talk because officers exceeded social norms.[2]

Command to Open Door Was Not a Consensual Encounter:

"Officers were stationed at both doors of the duplex and [an officer] had commanded [the defendant] to open the door. A reasonable person in [defendant's] situation would have concluded that he had no choice but to acquiesce and open the door."[3]

Constant Pressure To Consent To Search Held To Be Unlawful:

During a knock and talk, officers continued to press the defendant for permission to enter and search. Later consent-to-search was the product of an illegal detention.[4]

Officer's Statement That He Didn't Need a Warrant To Talk With Occupant Found To Have Tainted Consent To Enter:

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[1] Carroll v. Carman, 135 S. Ct. 348 (2014)
[2] United States v. Lundin, 47 F. Supp. 3d 1003 (N.D. Cal. 2014)
[3] United States v. Poe, 462 F.3d 997 (8th Cir. Mo. 2006)
[4] United States v. Washington, 387 F.3d 1060 (9th Cir. Nev. 2004)

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.[1]

Unless There Is an Express Order Otherwise, Officers Have the Same Right To Knock and Talk as a Pollster or Salesman:

"One court stated more than forty years ago: '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.'"[2]

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

[2] People v. Rivera, 41 Cal. 4th 304 (2007)

Investigative Activities During Consensual Encounter

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

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

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

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

Legal Standard

Questioning

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

- ☐ Your questions are not **overly accusatory** 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

[1] Fla. v. Royer, 460 U.S. 491 (1983)
[2] People v. Bouser, 26 Cal. App. 4th 1280 (1994)
[3] United States v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. Ariz. 1997)

- ☐ 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, express or implied.

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Police Can Ask People if They Are Willing To Answer Questions:

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[1] Florida v. Bostick, 111 S. Ct. 2382 (1991)

further established that such interactions are considered consensual and do not implicate Fourth Amendment interests.[1]

Briefly Asking Factory Workers Questions Was Not a Seizure:

This case examined the nature of interactions between law enforcement officers and individuals, particularly in the context of questioning by officers in a factory setting. The Court's decision turned on the proposition that the interrogations by the INS were merely brief, "consensual encounters," that did not pose a threat to personal security and freedom, and thus did not amount to seizures under the Fourth Amendment.[2]

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, without returning 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.[3]

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Child Illegally Questioned at School While Officer Was Present:

A child was illegally seized and questioned by a caseworker and police officer when they escorted the child off private school property, and interrogated the child for twenty minutes about intimate details of his family life and whether he was being abused. The government argued that this was a consensual encounter, but no reasonable child in that position would have believed they were free to leave.[4]

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[1] United States v. Drayton, 122 S. Ct. 2105 (2002)
[2] INS v. Delgado, 104 S. Ct. 1758 (1984).
[3] Fla. v. Royer, 460 U.S. 491 (1983)
[4] Doe v. Heck, 327 F.3d 492 (7th Cir. 2003)

Note: This case may have come out differently if they did not remove the child from school grounds. Involuntary transportation usually converts an encounter into an arrest.

Consent to Search Was Involuntary After Arrest-Like Behavior:

Suspect did not voluntarily consent to the search of his person, and suppression of a handgun discovered was warranted, where the suspect was in a bus shelter, was surrounded by three patrol cars and five uniformed officers, an officer's initial, accusatory question, combined with the police-dominated atmosphere, clearly communicated to the suspect that he was not free to leave or to refuse the officer's request to conduct the search. The officer never informed the suspect that he had the right to refuse the search, and the suspect never gave verbal or written consent, but instead merely surrendered to an officer's command.[1]

[1] U.S. v. Robertson, 736 F.3d 677 (4th Cir. 2013)

Asking for Identification

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

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

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

Legal Standard

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

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

Tennessee Case Examples

These cases represent binding authority from Tennessee, the 6th Circuit, or U.S. Supreme Court. It's important to confirm these cases are consistent with current state law and agency policy which may be more restrictive.

Seizure During Identification Check;

The Tennessee Supreme Court in State v. Daniel addressed the issue of whether retaining a person's identification for a warrants check constitutes a seizure under the Fourth Amendment. The court held that when an officer retains a person's identification for this purpose, it is a seizure, as no reasonable person would feel free to leave under such circumstances. The court emphasized, "When an officer retains a person's identification for the purpose of running a

computer check for outstanding warrants, no reasonable person would believe that he or she could simply terminate the encounter."[1]

Approaching a Parked Vehicle and Requesting Identification:

In State v. Lowe, the Court of Criminal Appeals of Tennessee dealt with the legality of police officers approaching a parked vehicle and requesting identification without suspicion of illegal activity. The court held that such encounters are generally consensual and do not invoke constitutional protections. The court stated, "A police officer may approach a car parked in a public place and ask for driver identification and proof of vehicle registration, without any reasonable suspicion of illegal activity."[2]

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.[3]

Non-binding Case Examples

These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

Providing a False Name Not a Crime Unless Lawfully Detained or Arrested:

Defendant's arrest was premised on his giving a false name. The state statute criminalizes a person's false representation or identification of himself or herself to a peace officer “upon a lawful detention or arrest of [that] person ….” The law applies only where the false identification is given in connection with lawful detention or arrest, and does not apply to consensual encounters with police. Since defendant's subsequent arrest was based upon an unlawful detention, and the search incident to the arrest was likewise unlawful, suppression is required of contraband seized after search incident to unlawful arrest.[4]

Asking for Identification, Among Other Activities, Held To Be Consensual:

Where a narcotics officer approached the defendant after she deplaned, identified himself and asked to speak with her; asked for

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[1] State v. Daniel, 12 S.W.3d 420, Tenn. S. Ct., (2000)
[2] State v. Lowe, 439 S.W.3d 326, Ct. of Crim. App. of Tenn., (2013)
[3] Brown v. Tex., 99 S. Ct. 2637 (1979)
[4] People v. Walker, 210 Cal. App. 4th 165 (Cal. App. 6th Dist. 2012)

her ticket, which she gave to him; asked for identification, which was produced; asked for permission to search her purse, which she allowed; and asked whether a female officer could pat her down for drugs, to which she agreed; all consents were voluntary even though the defendant was visibly nervous and became more so as the interview progressed.[1]

Consent To Search for Identification Valid:

Following a patdown of defendant, and after defendant was not "immediately forthright" about his identity, giving only his first name and providing several false dates of birth, the officer asked defendant if he had any identification. Defendant indicated that it could be found in his back pocket. The officer asked for, and was granted, consent to retrieve the identification from defendant's back pocket, but the pocket turned out to be empty. When asked if the identification might be located elsewhere, defendant suggested that it might be in his left front pocket, where the officer found not only an identification card, but what appeared to be cocaine.[2] 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.[3]

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

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

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

Removing Hands from Pockets

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

Moreover, an order to show hands may be considered a minimal interference with a person's freedom and therefore may fall under the "minimal intrusion doctrine."[2] However, I do not recommend ordering a person to show their hands unless you have a legitimate and articulated safety concern.

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

Legal Standard

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

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

Ordering a person to remove his hands from his pockets may 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 **minimal intrusion** of his freedom.[3]

[1] People v. Franklin, 192 Cal. App. 3d 935 (Cal. App. 5th Dist. 1987)
[2] Id.
[3] United States v. Enslin, 327 F.3d 788 (9th Cir. Cal. 2003)

Non-binding Case Examples

These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

Asking Person To Remove Hands From Pockets Not a Detention:

State v. Baldwin: In this case, the Florida District Court of Appeal differentiated between a command and a polite request for a suspect to remove their hands from their pockets, emphasizing officer safety. The court stated, "a request for a defendant to remove hands from pockets for reasonable purpose of officer's safety, does not elevate a consensual encounter to a detention." This case highlights that a courteous request for safety does not necessarily convert a consensual encounter into a detention.[1]

Legal Difference Between Mere Request and Command:

The California Court of Appeal in this case clarified that simply asking a suspect to remove their hands from their pockets does not constitute a detention. The court noted, "merely asking a suspect to take his hands out of his pockets is not a detention." The case underscores the distinction between a mere request and a command in the context of police encounters.[2]

Person Must Feel Free To Leave:

In re J.F.: The District of Columbia Court of Appeals discussed the fine line between a consensual encounter and a seizure, stating, "an officer's request that appellant take his hand out of his pocket may be considered merely a pre-seizure consensual encounter." This case illustrates how a consensual encounter can evolve into a seizure based on the perception of freedom to leave.[3]

Request Is Not the Same as a Command:

In re Frank: Similar to People v. Frank V., this case by the California Court of Appeal also dealt with the distinction between a request and a command. The court observed, "A mere request that a citizen remove his hands from his pockets is not the same as a command to stop or stay." This decision further clarifies the difference between a request and a detention during police encounters.[4]

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[1] State v. Baldwin, 686 So. 2d 682 (Fla. Dist. Ct. App. 1996)
[2] People v. Frank V., 233 Cal. App. 3d 1232 (1991)
[3] In re J.F., 19 A.3d 304 (D.C. Ct. App. 2011)
[4] In re Frank, 233 Cal. App. 3d 1232 (1991).

Direct Order To Remove Hands Likely a Seizure:

In re Rafeal E., the Appellate Court of Illinois found that a police command can transform a consensual encounter into a seizure. The court stated, "when a police officer approaches an individual and immediately tells him 'to remove his hands from his pockets,' a reasonable person would understand that statement as a command, not a request." This case demonstrates how a direct order from police can constitute a seizure.[1]

Refusal To Remove Hands Is a Factor Justifying Frisk:

“The officers, after initiating the stop, twice ordered that [defendant] remove his hands from his pockets, which he refused to do. The report of an assault in progress, the matching description, and the additional factors that supported the stop provided the officers with reason to believe that [defendant] was armed and dangerous, and that the refusal to remove his hands was an effort to conceal a weapon.[2]

D.C. Court Upheld Request To Remove Hands:

The District of Columbia Court of Appeals held that a non-intimidating request by a police officer does not constitute a seizure. The court observed, "Officer’s request that appellee remove his hands from his pockets, followed by two questions and appellee’s voluntary answers, met the Supreme Court test for a pre-seizure, consensual encounter." This case underscores that certain police interactions can remain within the bounds of a consensual encounter.[3]

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[1] In re Rafeal E., 2014 IL App (1st) 133027 (Ill. App. Ct. 2014)
[2] United States v. Simmons, 560 F.3d 98 (2d Cir. 2009)
[3] United States v. Barnes, 496 A.2d 1040 (D.C. Ct. App. 1985)

Transporting to Police Station

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

Legal Standard

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

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

Tennessee Case Examples

These cases represent binding authority from Tennessee, the 6th Circuit, or U.S. Supreme Court. It's important to confirm these cases are consistent with current state law and agency policy which may be more restrictive.

Incriminating Statements Made During Transport Is Not Custodial Interrogation:

In State v. Armstrong, the Supreme Court of Tennessee ruled that the trial court did not err in refusing to suppress the defendant's incriminating statement that he had driven a motor vehicle after being declared a habitual motor vehicle offender. The Court determined that the statement was not the product of a custodial interrogation, because the defendant was not under arrest or deprived of his freedom in any significant way. The Court pointed out that the defendant was transported to the police station at his own request, after his car became inoperable. The Court also observed that the defendant was not subjected to any physical restraint, intimidation, or pressure during the transport.[1]

[1] State v. Armstrong, 126 S.W.3d 908 (2003)

Incriminating Statements Made During Transport Established Probable Cause

In the case of State v. Peebles, the Court of Criminal Appeals of Tennessee focused on the actions of law enforcement in detaining and transporting suspects. The case involved officers detaining suspects based on descriptions and subsequently transporting them to the police station. The court held that the police officers had probable cause to arrest the defendant after the victim identified his co-defendant as one of the robbers and the defendant made incriminating statements while being transported to the police station. The Court noted, "The defendant stated to Officer Clark that the officer 'knew it was us the whole time' and asked Officer Clark if his bond would be lower given the fact that the gun was not real."[1]

Involuntary Transportation to Station Will Normally Be an Arrest:

In the case of Dunaway v. New York, the U.S. Supreme Court addressed the issue of whether police actions violated the Fourth and Fourteenth Amendments. The case revolved around the petitioner, Dunaway, who was taken into custody without probable cause, transported to a police station, and detained for interrogation. The Court's analysis centered on the nature of the seizure and the lack of probable cause. The key excerpt from the case is: "We first consider whether the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took petitioner into custody, transported him to the police station, and detained him there for interrogation. [...] There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station. And respondent State concedes that the police lacked probable cause to arrest petitioner before his incriminating statement during interrogation."[2]

Non-binding Case Examples

These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

No Violation When a Person Agrees To Accompany Police:

[1] State v. Peebles, 2014 WL 279536 (2014)

[2] Dunaway v. New York, 1979 U.S. LEXIS 126, 442 U.S. 200 (1979)

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.[1]

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.[2]

Detention Ended When Suspect Consented To Go to Police Station:

Law enforcement officer's Terry stop of automobile ended when defendant, who was riding in the automobile, agreed to go to police station, rather than when defendant was arrested several hours later.[3]

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[1] In re Gilbert R., 25 Cal. App. 4th 1121 (Cal. App. 2d Dist. 1994)
[2] Craig v. Singletary 27 F.3d 1030 (11th Cir.1997)
[3] United States v. Kimball, 25 F.3d 1 (1st Cir. 1994)

Consent to Search

Absent good reason, you should routinely seek consent to search a person or his property even if you have reasonable suspicion or probable cause. Why? Because this will add an extra layer of protection to your case. For example, let's imagine you have probable cause to search a vehicle for drugs but still receive consent to search, the prosecution essentially needs to prove that consent was freely and voluntarily given.[1] If that fails, the prosecutor can fall back on your probable cause.

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

Legal Standard

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

- ☐ The person's consent was **freely and voluntarily given**;
- ☐ He had **apparent authority** to give consent to search the area or item; and
- ☐ You did not exceed the **scope** provided, expressed or implied. Scope is determined by objectively viewing the situation from the suspect's position.[2] Where would a reasonable person think you would search? It's not based only on where police think evidence would be found. .
- ☐ Courts may look at four factors when evaluating whether or not the scope of search was exceeded: **time**, **duration**, **area**, and **intensity**.[3] See case examples below.
  - ☐ Time: Was the search executed within the time frame contemplated by the suspect?
  - ☐ Duration: Was the search unreasonably lengthy?
  - ☐ Area: Did officers search areas where the item sought could be found?

[1] Bumper v. North Carolina, 391 U.S. 543 (1968)
[2] State v. Ruscetta, 123 Nev. 299 (2007)
[3] Id.

- ☐ Intensity: Did the methods used to search exceed the bounds of consent?

Things that help consent:[1]

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

Things that hurt consent:[2]

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

Tennessee Case Examples

These cases represent binding authority from Tennessee, the 6th Circuit, or U.S. Supreme Court. It's important to confirm these cases are consistent with current state law and agency policy which may be more restrictive.

Implied Consent and Fourth Amendment in DUI Cases:

In State of Tennessee v. James Dean Wells, the Court of Criminal Appeals of Tennessee dealt with the issue of implied consent in the

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[1] Clark County Nevada DA Search and Seizure Manual for Lawyers (2015)
[2] Id.

context of DUI cases and its relation to the Fourth Amendment. The court discussed whether the implied consent law provides an exception to the warrant requirement for forced blood draws in DUI cases. This case highlights the tension between state laws that deem driving as implied consent for blood alcohol testing and the Fourth Amendment's protection against unreasonable searches and seizures. The court noted that while some decisions have considered driving as consent for Fourth Amendment purposes, especially in DUI cases, this does not always apply in the context of a forcible blood draw.[1]

The Officer Has the Burden To Prove Consent Was Voluntary:

In the Supreme Court case Bumper v. North Carolina, the Court addressed the issue of whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. The Court held that there can be no consent under such circumstances, stating, "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."[2]

Consent Is Based on the Totality of the Circumstances:

In Schneckloth v. Bustamonte, the Supreme Court dealt with the issue of consent in the context of law enforcement searches. The Court held that the voluntariness of consent to search must be determined from the totality of all the circumstances, and knowledge of the right to refuse consent is not a prerequisite to establishing a voluntary consent. The Court stated, "It is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced." This decision highlights the Court's recognition of the practical challenges in requiring law enforcement to provide warnings about the right to refuse consent in the context of routine investigations.[3]

Non-binding Case Examples

These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

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[1] State of Tenn. v. Wells, Ct. of Cr. App. of Tenn., 2014 WL 4977356 (2014)

[2] Bumper v. North Carolina, 391 U.S. 543 (1968)

[3] Schneckloth v. Bustamonte is 412 U.S. 218 (1973)

"I Don't Care," Response Implied Consent:

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.[1]

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.[2]

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.[3]

Note: Ideally, the suspect would have been told the search would be executed two days later. But since he was in custody and never revoked consent, the court upheld it.

Directly "Touching" Genitals Outside Implied Consent:

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

Note: Searching "near" genital area is often upheld.[4]

Damaging Property Requires "Express Consent":

Officer got consent to search for drugs and opened a "tamales in gravy" can. Drugs were found inside. Since the officer "rendered the can useless" express permission was required.[5]

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[1] United States v. Polly, 630 F.3d 991 (10th Cir. Okla. 2011)
[2] State v. Cunningham, 26 N.E.3d 21 (Ind. 2015)
[3] U.S. v. White, 617 F.2d 1131 (5th Cir. 1989)
[4] U.S. v. Blake, 888 F.2d 795 (11th Cir. 1989)
[5] U.S. v. Osage, 235 F.3d 518 (10th Cir. 2000)

Third-Party Consent

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

What about areas under the exclusive control of the consenter? For example, the "cooperative" tenant says you can still search his bedroom? Or a shed that he has exclusive control over in the backyard? There is no case that deals directly with this issue, but if the area is truly under the exclusive control of the consenting party, and you can articulate that the non-consenting party has no reasonable expectation of privacy in that area, it would likely be reasonable to search just that area. But one issue remains; 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 because the non-consenting party has authority over them.

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

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

Legal Standard

Spouses and Co-Occupants:

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

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

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

Articulating Greater Authority:

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

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

Tennessee Case Examples

These cases represent binding authority from Tennessee, the 6th Circuit, or U.S. Supreme Court. It's important to confirm these cases are consistent with current state law and agency policy which may be more restrictive.

Minor's Authority in Third-Party Consent for Premises Searches:

In the case of United States v. Mathis, decided by the District Court for the Middle District of Tennessee, the court dealt with the issue of third-party consent in the context of law enforcement searches. The facts involve Harold Mathis, who was investigated for possession of pornographic material. The case hinged on whether Mathis's sixteen-year-old son had the authority to admit law enforcement officers into their residence, and whether Mathis's consent to search his computer and related equipment was voluntary. The court held that a minor who has common authority over premises may give third-party consent to search the premises, as established in United States v. Clutter. The court found that Mathis's son had apparent, if not actual, authority to admit the officers. Furthermore, the court determined that Mathis voluntarily and intelligently consented to the search of his computer and related equipment, as evidenced by his written consent and the absence of coercion. The court

emphasized, "A minor who has common authority over the premises may give third-party consent to search the premises."[1]

If Non-Consenting Occupant Is Arrested or Leaves, Remaining Occupant May Consent To Search Despite Prior Objection:

Police could conduct a warrantless search of defendant's apartment following defendant's arrest, based on consent to the search by a woman who also occupied the apartment, although defendant had objected to the search prior to his arrest and was absent at the time of the woman's consent because of his arrest.[2]

If an Occupant Invites Police Inside, Police May Assume Other Occupants Wouldn't Object Unless They Speak Up:

In the case of Georgia v. Randolph, the Supreme Court of the United States addressed the issue of whether a warrantless search of a residence is lawful with the permission of one occupant when another occupant, who is present at the scene, expressly refuses to consent. The Court held that "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." This decision was made in the context of a domestic dispute where the wife, after returning to the marital home, informed the police of her husband's cocaine use and consented to a search of their home, while the husband objected. The Court emphasized the importance of the refusal of a present co-occupant in determining the legality of a warrantless search. This ruling underscores the balance between law enforcement interests and the constitutional rights of individuals in shared living situations.[3]

Non-binding Case Examples

These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

Consent of Wife Valid After Non-Consenting Husband Left Residence:

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

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[1] United States v. Mathis, 377 F. Supp. 2d 640 (M.D. Tenn. 2005)
[2] Fernandez v. California, 571 U.S. 292 (2014)
[3] Georgia v. Randolph, 547 U.S. 103 (2006)
[4] United States v. Cordero-Rosario, 786 F.3d 64 (1st Cir. P.R. 2015)

Mistaken Authority to Consent

If you're 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're 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.

For example, if an adult female answers the door and consents to a search and cops look around the apartment and it's fairly obvious that only a man lives there, then courts expect officers to stop searching and ask more questions about her connection to the apartment. In the end, she may be an overnight guest with no apparent authority over the defendant's property.

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?**

Tennessee Case Examples

These cases represent binding authority from Tennessee, the 6th Circuit, or U.S. Supreme Court. It's important to confirm these cases are consistent with current state law and agency policy which may be more restrictive.

Police May Rely on Apparent Authority:

In Illinois v. Rodriguez, the Supreme Court of the United States addressed the validity of a warrantless entry based on the consent of a third party who the police reasonably believe possesses authority over the premises, but who in fact does not. The Court held that a warrantless entry does not violate the Fourth Amendment if the officers have obtained the consent of a third party who they reasonably believe to possess common authority over the premises. Justice Scalia, delivering the opinion of the Court, stated,

"The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises." This case involved the arrest of Edward Rodriguez in his apartment by law enforcement officers, who gained entry with the consent and assistance of Gail Fischer, who had lived there with Rodriguez for several months but did not have actual authority over the premises at the time of the search."[1]

Non-binding Case Examples

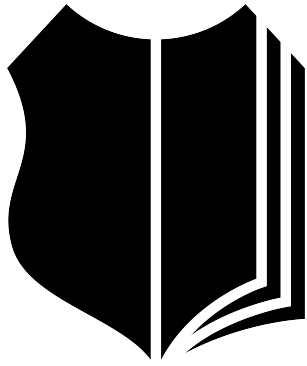
These cases represent persuasive authority from other courts outside of Tennessee and the 6th Circuit. Though not binding, they have been selected for inclusion here because if officers in Tennessee find themselves in a similar situation, the outcome will likely be the same, at least in federal court.

Police May Assume That the Adult Who Answered the Door Had Authority:

Police were trying to locate a robbery suspect and knocked on his door. A visitor answered and consented to their request to enter. "Police may assume, without further inquiry, that [an adult] person who answers the door in response to their knock has the authority to let them enter."[2]

[1] Ill. v. Rodriguez, 497 U.S. 177 (1990)

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



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View his bio at BlueToGold.com/about

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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.

There are other legal references out there and I highly recommend you read them. But this book has one serious competitive advantage: it was written by a retired police officer-turned-attorney who has been in your shoes, and knows what you need to know.

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TENNESSEE Search & Seizure Survival Guide

Anthony Bandiero, ESQ.