ANTHONY BANDIERO, ESQ.

ILLINOIS

Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

Blue to Gold

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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— Anthony Bandiero

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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.

Illinois Constitution Art. I, Sec. 6

The Illinois Constitution has its own search and seizure clause, practically identical in language and intent as the Fourth Amendment. However, in 1970, a privacy clause was added. "The language added in 1970 provides citizens with express protection against eavesdropping devices and invasions of privacy."[1] However, despite this additional language, Illinois courts tend to be in "lockstep" with the Federal Constitution. Any variance between the Supreme Court's construction of the provisions of the fourth amendment in the Federal Constitution and similar provisions in the Illinois Constitution must be based on substantial grounds.[2]

Therefore, even though many examples in this book are not from Illinois, they are based on interpretations of the Fourth Amendment that I believe are consistent with how Illinois state courts would likely interpret the law. Still, Illinois statutory law and agency policy may be stricter than case law.

Legal Standard

The Illinois Constitution is best understood in three separate parts:

Search and seizure clause:

1. The people shall have the right to be secure
2. in their persons, houses, papers, and other possessions
3. against unreasonable searches and seizures

Privacy Clause:

1. The right of the people to be secure against
2. Unreasonable invasions of privacy, or
3. Interceptions of communication by eavesdropping devices, or other means.

Search warrant clause:

1. No warrant shall issue without probable cause;
2. supported by affidavit,
3. particularly describing the place to be searched; and

[1] People v. Tisler, 103 Ill. 2d 226, 241 (Ill. 1984)

[2] Id.

4. the persons or things to be seized.[1]

[1] Ill Constitution 1970, Art I § 6

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.

Illinois also provides protection in this regard. Section 10 of the Illinois Constitution states that, "No person shall be compelled in a criminal case to give evidence against himself...."[1]

[1] Illinois Constitution, Art I, § 10

Three Golden Rules of Search & Seizure

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

Embrace these Golden Rules and your career will benefit.

Three Golden Rules

The three Golden Rules of Search & Seizure are:

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

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

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

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

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

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

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

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

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

The Right 'To be Left Alone'

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

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

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

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

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

Decision Sequencing

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

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

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

Legal Standard

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

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

C.R.E.W.

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

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

Legal Standard

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

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

Fourth Amendment Reasonableness

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

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

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

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

Legal Standard

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

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

---

[1] Riley v. California, 134 S. Ct. 2473 (2014)

[2] Scott v. U.S., 436 U.S. 128 (1978)

[3] Doe v. Burnham, 6 F.3d 475, 480 (7th Cir. 1993)

[4] Gama v. State, 112 Nev. 833 (1996)

[5] United States V. Jacobsen, 503 U.S. 540 (1992)

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

Case Examples

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

An officer observed a hand-to-hand transaction and detained the suspects. The officer then conducted a patdown for narcotics despite his belief he did not have enough for the arrest. Narcotics were discovered and the suspect was formally arrested. The court held that despite improperly calling this search a patdown the officer nevertheless had probable cause to arrest and therefore properly upheld the officer's conduct as a formal search incident to arrest.[2]

Arrest lawful despite not having probable cause because court found probable cause for another uncharged offense:

"In Klingler, the officers made an arrest for vagrancy and conducted a contemporaneous search which revealed a pistol that later formed the basis for a Federal Firearms Act charge. The court held that, while there was insufficient probable cause with respect to vagrancy, there was probable cause to arrest for robbery. Upholding the arrest, the court said:

'Because probable cause for an arrest is determined by objective facts, it is immaterial that [the officer] . . . testified that he did not think that he had 'enough facts' upon which to arrest Klingler for . . . robbery. His subjective opinion is not material"[3]

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

Officers sought consent to search an apartment from the defendant's brothers. Officers reasonably believed the brothers lived there because they were sitting in front and told officers there was marijuana inside the apartment. The search resulted in evidence against the defendant. Later, the defendant provided evidence that

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

[2] State v. Rodrihuez-Torres, 77 Wash.App. 687 (1995)

[3] Surianello v. State, 92 Nev. 492 (1976) (Citing Klinger v. U.S. 409 F.2d 299 (8th Cir. 1969)

his brothers did not actually live in the apartment. However, since the officer's mistake was reasonable, evidence was not suppressed.[1]

[1] Snyder v. State, 103 Nev. 275 (1987); Also see People v. Theus, 407 Ill.Dec. 683, 688 (Ill. App. Ct. 2016)

Private Searches

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

An agent is someone whom you encouraged or directed to perform a search or seizure. An agent must comply with the Fourth Amendment. In other words, you cannot direct a private person to do something that you couldn't do. A classic example of an agent is the confidential informant asked to go to a person's house to purchase drugs. This would not violate the Fourth Amendment. However, if you asked the agent to "search around" while the dealer was in another room, that would be problematic since you could not do the same thing. The dealer might be a criminal, but they do have a right not have police or their agents searching their home without consent or a warrant.

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

Keep two important limitations in mind regarding these private searches. First, cops must not exceed the scope of the private search even if they have probable cause. If the roommate only searched the main compartment of the backpack, then searching other closed compartments would be off limits unless another exception applies such as exigency or the owner's consent. Second, cat out of the bag searches require lawful access to the container. If the snoop left the contraband-laden backpack in the roommate's room, then cops

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

would likely not have lawful access to the backpack as the room would generally be off-limits. Telling the snoop to go get it would make them your agent! If you are in doubt or are dealing with a big case the best response is to seek a search warrant.

Legal Standard

Whether a private actor becomes a government actor depends on two factors:[1]

- ☐ Whether police encouraged, directed, or participated in the search or seizure; and,
- ☐ Whether the private person conducts the search with the **intent to assist police** or is just furthering his own ends.

There are two important restrictions if police replicate a private search of a container (i.e., cat out of the bag search):[2].

- ☐ Police must not exceed the scope of the private search; and
- ☐ Police must have lawful access to the container.

Examples

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

Private carrier's employee opened one of thirteen boxes on a pallet and discovered marijuana. Police later searched the other boxes without a warrant. Typically, this would have exceeded the "scope" of the original private search. However, the government effectively argued that the additional boxes on the same pallet were essentially a "single" box. The court agreed and the search was upheld.[3]

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.[4] That last part backfired!

Hotel manager was government agent while searching room for drugs:

---

1 People v. Heflin, 71 Ill. 2d. 525 (Ill. 1978)

2 See U.S. v. Jacobsen, 466 U.S. 109 (1984)

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

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

Hotel manager called police and asked that police protect him while he searched a suspected drug dealer's room. The officers stood guard at the door and listened to the manager describe the drug evidence found. This was a government search because police participated in (i.e. stood guard) and the manager was motivated to help police (i.e. look at what I just found boys!).[1]

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

A FedEx employee who previously found drugs in eight packages, and testified in court two times, was not a government agent simply because he wanted to find evidence to turn over to the government.[2]

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 was a search because of the danger that private facts about the items could be revealed and because the search 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.[3]

No violation where police viewed same child pornography wife viewed:

Police officers who examined defendant's child pornography obtained and brought to the officers 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.[4] Still, officers are highly encouraged to get a search warrant for electronic devices, especially those suspected of containing child pornography.

If cops don't exceed the private search, then no Fourth Amendment violation occurs:[5]

"Here, the action by law enforcement officers was preceded by a private search. Under these circumstances, the reasonableness of

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

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

[3] U.S. v. Mulder, 808 F.2d 1346 (9th Cir. 1987)

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

[5] State v. Windes, 13 Kan. App. 2d 577 (1989)

the official conduct must be tested by the degree to which it exceeded the private search which preceded it. If the law enforcement officers do not exceed the scope of the prior private search, they do not infringe upon any privacy interest that has not already been frustrated as a result of the private conduct; therefore, the governmental action is not a 'search' within the meaning of the Fourth Amendment."

"Hunches" Defined

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

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

Legal Standard

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

Case Examples

Mere nervousness, without more, is just a hunch:

Though nervousness alone does not justify a detention, excessive nervousness coupled with other facts, such as evidence of criminal activity, or other suspicious behavior, may contribute to reasonable suspicion.[3]

Criminal history alone is a hunch, not reasonable suspicion:

During a traffic stop, the facts that a computer check reveals that driver had once been involved in a hit-and-run incident and had once 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.[4]

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[1] In re Tony C. 21 Cal.3rd 888 (1978)
[2] U.S. v. Sokolow, 490 U.S. 1 (1989)
[3] People v. Roa, 398 Ill. App. 3d 158, 161 (Ill. App. Ct. 2010)
[4] U.S. v. Sandoval, 29 F.3d 537, 543 (10th Cir. 1994)

Reasonable Suspicion Defined

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

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

Legal Standard

Reasonable suspicion exists when:

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

Case Examples

Reasonable suspicion must be particular, not just hunch:

"Reasonable suspicion means a particularized and objective basis for suspecting that a person is involved in criminal activity. Something more than an unparticularized suspicion or hunch must be articulated. Reasonable suspicion can arise from information that is less reliable than that required to show probable cause."[2]

Being unco-operative is a hunch, not reasonable suspicion:

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.[3]

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

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

[2] State v. Hovhannisyan, 42 Kan. App. 2d 371 (2009); See People v. Lampitok, 207 Ill.2d 231, 254 (Ill. 2003)

[3] I.N.S. v. Delgado, 466 U.S. 210, 216 (1984)

suspicion that the car's occupants had been or are about to engage in criminal activity."[1]

[1] U.S. v. Green, 111 F.3d 515 (7th Cir. 1997)

Probable Cause Defined

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

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

Legal Standard

Probable cause to arrest:

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

Probable cause to search:

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

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

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

Case Examples

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."[3]

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

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

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

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

Probable cause defines the scope of search:

Where police found one open container of alcohol in a car, officers were justified in searching a passenger's bag for more open containers, because the scope of the search "extends to every part of the vehicle and its contents that may conceal the object of the search."[6]

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

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

[3] Chambers v. Maroney, 90 S. Ct. 1975 (1970)

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

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

[6] People v. Crump, No. 1-19-0134, *7 (Ill. App. Ct. 2021)

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 communicate with each other. This doesn't mean officers have to know everything about the case, but they at least have to be working together.

Legal Standard

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

- ☐ Vertical collective knowledge occurs when one officer tells/orders/asks another officer to do something that implicates the law. For example, an officer tells his partner to patdown the suspect, but the partner doesn't know why. This is fine only if the first officer can justify the patdown.[1]
- ☐ Horizontal knowledge requires two conditions:
  - ☐ The officers, even if from different agencies, must be involved in the same investigation; and
  - ☐ Officers must be in **communication** with each other related to the investigation.[2]

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

1 People v. Hoekstra, 371 Ill. App. 3d 720 (Ill. App. Ct. 2007)

2 People v. Green, 2014 Ill. App. 3d 120522 (Ill. App. Ct. 2014)

permitted the later arrest and warrantless search of the vehicle for drugs.[1]

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

A police officer relied on the instruction of a fellow officer, who had probable cause to believe that drugs were in a vehicle. The police officer stopped the vehicle and searched it under the automobile exception. Even though the initiating officer did not have probable cause, because he was in communication with a fellow officer who did, the stop and search were lawful.[2]

Intel from confidential informant contributed to collective knowledge:

Officers who stopped defendant for a traffic violation had probable cause to arrest him for drug trafficking. At the time of the stop, law enforcement collectively knew that a confidential informant made a controlled drug purchase from defendant five days earlier, the informant made a controlled drug payment of $5,000 to defendant on the day of the stop, and defendant engaged in what appeared to be other drug transactions shortly before the stop.[3]

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 no knowledge of the facts underlying the DEA's probable cause. The officer stopped the vehicle and searched it. The court held that the officer had probable cause under the collective knowledge doctrine.[4]

Collective knowledge doctrine can also be used for investigatory detentions:

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

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[1] United States v. Thompson, 533 F.3d 964 (8th Cir. Mo. 2008)

[2] U.S. v. Chavez, 534 F.3d 1338 (10th Cir. 2008)

[3] U.S. v. Nicksion, 628 F.3d 368 (7th Cir. 2010)

[4] U.S. v. Williams, 627 F.3d 247 (7th Cir. 2010)

individualized suspicion. The court upheld the stop under the collective knowledge doctrine.[1]

Let's Start with the Basics

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

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, by prying into hidden places [1]

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

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

Legal Standard

Physical intrusion:

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

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

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**).[3]

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[1] People v. Bers, 67 Ill.2d 65, 68 (Ill. 1977)

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

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

What is a "Seizure" Under the Fourth Amendment?

A seizure of a person occurs when a reasonable person would believe that he or she 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....*[1]

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:

[1] Mich. v. Chesternut, 486 U.S. 567 (1988)

- ☐ You **use force** on a person with the **intent** to seize him,[1] even with minimal force;[2] 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**.[3]

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

- ☐ You **intend** some **meaningful interference** with someone's **possessory interest** in his property.

Case Examples

No seizure by DEA agents airport:

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

Consensual contacts on a bus:

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 that 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").[5]

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

Police were called to "keep the peace" while a trailer park manager illegally removed a mobile home for non-payment. The trailer was removed and the homeowner was told by police to not interfere with the park manager. The Court said police transformed the situation into a government seizure.[6]

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

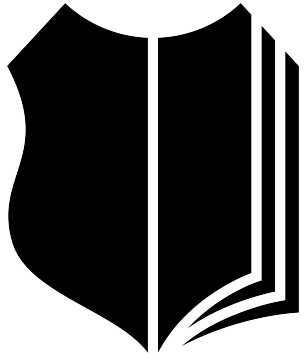
2 United States V. McClendon (9th Circuit, 2013)

3 California V. Hodari 499 U.S. 621 (1991)

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

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

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



Consensual Encounters

Consensual Encounters

The most common police encounter is the consensual one. You don't need a specific reason to speak with people and consensual encounters are a great way to continue an investigation when you have neither reasonable suspicion nor probable cause. 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 that they do not have the freedom to terminate the encounter or **leave;** and
- ☐ Yields to a show of authority or physical force.

Some factors to consider include:

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

[1] United States v. Drayton, 536 U.S. 194 (2002)
[2] US v. Nobles, 69 F.3d 172, 180 (7th Cir. 1995)

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

Case Examples

Order to come over and talk is not consensual:

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

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.[2]

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

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

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

Fourth Amendment privacy interests are invaded when an officer seeks a consensual interview with a suspect."[1]

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.[2] 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.

Whether someone feels "detained" is based on objective facts:

"The test provides that the police can be said to have seized an individual 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' As the test is an objective standard—looking to a reasonable person's interpretation of the situation in question..." "This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."[3]

Illinois law does not require reasonable suspicion before making a consensual encounter:

"It is well settled that a seizure does not occur simply because an officer approaches an individual and puts questions to that person if he or she is willing to listen."[4]

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[1] People v. Coddington, 23 Cal. 4th 529 (2000), as modified on denial of reh'g (Sep 27, 2000)

[2] U.S. v. Rivera, 906 F.2d 319 (7th Cir. 1990)

[3] State v. McKellips, 118 Nev. 465, 469 (2002)

[4] People v. Clark, No. 1-13-4026, *5 (Ill. App. Ct 2014)

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 Trespassing" signs? You can usually ignore them unless they are accompanied with other indicators that would lead a reasonable person to believe the public is clearly not welcome; such a fence with a locked gate. Trying to have a consensual conversation with someone is not typically considered trespassing. The same goes for "no soliciting" signs.

Legal Standard

Knock and talks are lawful when:

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

Case Examples

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

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

Drug use statements obtained by listening under a window excluded:

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

Constant pressure to consent to search held unlawful:

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

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

Officers contacted a suspected illegal alien at his apartment. Four officers accompanied the defendant to his apartment where the lead officer said, "Let's go inside." When asked if they had a warrant, the officer said they "didn't need a warrant to talk to him." Then another officer asked him if they could come inside. 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.[4]

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

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

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

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

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

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

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

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 accusative,** conveying a message that cooperation is required.

Identification

Asking a person for identification generally 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. McNealy, No. 2-12-0858, at *5 (Ill. App. Ct 2013)
[3] Id.

- ☐ You **return** 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

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.[1]

Note: This case may have come out differently if they had not removed the child from the 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 backpack, where the suspect was contacted by plain clothes officers and told "we know what you're up to," prior to asking to search his backpack. The court held the accusation deemed the consent to search the backpack involuntary.[2]

[1] Doe v. Heck, 327 F.3d 492 (7th Cir. 2003)

[2] People v. Kveton, 362 Ill. App. 3d 822 (Ill. App. Ct. 2005)

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 they do so. Additionally, there is likely no crime if the subject lies about their 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, a consensual encounter is no different than two private people agreeing to have a conversation. What requires you to be truthful to the person at the bar trying to "get to know you"? There may be a requirement that 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.

Case Examples

Detaining a subject for identification requires reasonable suspicion:

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

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

A narcotics officer approached the defendant after she deplaned, identified himself and asked to speak with her; asked for her ticket, which she gave to him; asked for identification, which was

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

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]

Holding passenger's identification during stop, however, is generally lawful.

Police collected a driver's license, then asked the passenger for his ID. He returned to the patrol and ran both of them for status and warrants. The passenger had a confirmed warrant, was arrested, and evidence of drug possession seized during the search incident to arrest. The court held the request for the license and subsequent warrant check was lawful so long as it does not extend the stop.[4]

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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)

[4] People v. Harris, 886 N.E.2d 947, 956 (Ill. 2008)

Removing Hands from Pockets

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

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

What if the suspect still refuses to show his hands and tries to leave? Remember, this is a consensual encounter and if you decided to detain the subject you would need reasonable suspicion.Legal Standard

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

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

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

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

[1] People v. Franklin, 192 Cal. App. 3d 935 (Cal. App. 5th Dist. 1987)
[2] People v Jackson, 389 Ill App. 3d 283, 287 (Ill App. Ct. 2009)
[3] Id.

Voluntary Transport

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.

Case Examples

No violation when a person agrees to accompany police:

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, not on where police believe they can search.
- ☐ Courts may look at four factors when evaluating whether the scope of search was exceeded: time, duration, area, and intensity.[3]
  - ▫ **Time:** Was the search executed within the time frame contemplated by the suspect?
  - ▫ **Duration:** Was the search unreasonably lengthy?
  - ▫ **Area:** Did officers search areas where the item sought could be found?

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

2 People v. Kats, 359 Ill. Dec. 605, 614 (Ill App. Ct. 2012)

3 People v. Roa, 398 Ill. App. 3d 158 (Ill. App. Ct. 2010)

- **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 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 is given;
- Friendly tone of voice, not threatening or commanding;
- Giving Miranda warnings (especially if the person is in custody);
- All factors about the person giving the consent, such as: age, experience with the police, physical and mental condition, fluency in English, etc.

Things that hurt consent:[2]

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

Case Examples

"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.[3] Note: this type of consent is

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

[2] Id.

[3] United States v. Polly, 630 F.3d 991 (10th Cir. Okla. 2011)

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.[1]

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.[2] 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.

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

With defendant agreeing to the officer's request to "check (defendant's car) real quick and get you on your way," the scope of that consent was exceeded at some point before the search had continued for fifteen minutes without finding anything, and certainly when the officer later pulled a box from the trunk and removed the back panel to the box by unscrewing some screws.[3]

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]

---

[1] State v. Cunningham, 26 N.E.3d 21 (Ind. 2015)
[2] U.S. v. White, 617 F.2d 1131 (5th Cir. 1989)
[3] People v. Cantor, 149 Cal.App.4th 961 (2007)
[4] U.S. v. Blake, 888 F.2d 795 (11th Cir. 1989)
[5] People v. Kats, 359 Ill Dec. 605, 614 (Ill App. Ct. 2012)

Providing a right to refuse search not required, but helps:

The defendant's knowledge of a right to refuse to consent is a factor to be considered, even though the State is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.[1]

[1] People v Casazza, 202 Ill. App. 3d 792, 794 (Ill App. Ct. 1990)

Third-Party Consent

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

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

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

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

Legal Standard

Spouses and Co-Occupants:

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

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

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

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

Articulating Greater Authority:

An occupant with greater authority over the premises may consent to search areas either under his exclusive control or common areas, even when the objecting occupant is present, if:

- ☐ The co-occupant had **greater authority** over the area or item searched (e.g., parent versus child);
- ☐ 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;
- ☐ Note: A mature child can consent to search common areas or exclusive areas/items under his control. A child cannot consent to search private areas like the parents' bedroom.[2]

Case Examples

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.[3]

A person with common authority may consent to search:

"A third party who has common authority over the property at issue may give valid consent to search."[4]

---

[1] Casteel v. State, 122 Nev. 356 (2018)

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

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

[4] People v. Miller, 346 Ill. App. 3d 972, 985 (Ill. App. Ct 2004)

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

"[S]hared tenancy is understood to include an "assumption of risk," on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, police need not assume that's the case"[1]

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

Mistaken Authority to Consent

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

However, ignorance is not bliss: "[O]fficers cannot use the apparent authority doctrine to justify a warrantless search when they fail to make a sufficient inquiry into the consenting party's 'use, access, or control over' the area to be searched,"[1] especially when circumstances exist that would lead a reasonable person to question the person's authority.

For example, if an adult female answers the door and consents to 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?**

Case Examples

Illinois has adopted the common authority rule:

Common authority is determined by the mutual use of the property by those with joint access or control for most purposes. Is it reasonable for the non-owner to expect some level of privacy, even if they are only a co-user or in control in some way (think driver of car)? Then they have a right to permit inspection. [2]

---

[1] Lastine v. State, 134 Nev. 538 (Nev. App. 2018)

[2] People v. Miller, 346 Ill App. 3d 972, 985 (Ill. App. Ct. 2004)

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

Even if 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."[1]

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

Qualified Immunity

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

Legal Standard

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

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

Case Examples

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

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

No qualified immunity for prison guard who obviously violated rights:

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

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

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