

Warrantless Searches

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Session XXII

November 5, 2003

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Warrantless Searches

Someone in the City of Little Rock is arrested, citizens are stopped and frisked, the SWAT team enters a residence by force, vehicles are stopped and searched, evidence is gathered, citizens give Officers permission to search their homes, vehicles and persons, these are all examples of searches and seizures. Citizens in the United State of America have a fundamental right against unreasonable searches and seizures. The United States Supreme Court has ruled that a police officer is an arm of the government. As an arm of the government, an officer is required to obtain a warrant whenever the officer is going to conduct a search and/or a seizure of a person, or a person's private property within the borders of the United States. The Supreme Court has also ruled that sometimes there are exceptions to this law and a police officer can search and/or seize without first obtaining a warrant. These can be called warrantless searches. As Little Rock police officers, we must know how to protect the citizen's rights by knowing the laws of the United States, State of Arkansas. We must know and follow the policies of the Little Rock Police Department in regard to searches and seizures. Not knowing and not following these laws and policies could result in evidence being excluded from trial, criminals being released from jail, and officers and the City of Little Rock being sued.

The information provided in this paper is a result of twelve years of law enforcement experience at the Little Rock Police Department, research in the area of searches and seizures, personal observation and practical experience conducting searches and seizures throughout my career. I served in the Detective Division for over seven

years investigating financial crimes and robberies. I have been a Sergeant over the Street Narcotics Detail in the Special Investigation Division for two years. I graduated from the University of Arkansas with a Bachelors degree in Criminal Justice in 1991. While my past does not qualify me as an expert, I have practical experience and have developed knowledge in conducting searches and seizures.

This paper will focus on search and seizures that do not require a search warrant. A trip through the history of the Fourth Amendment to the Constitution will give us a better understanding of search and seizure. In order to understand the limits of your authority as a Little Rock police officer to conduct warrantless searches, you must first understand the definition of the words “search and seizure” and the difference of reasonable cause and probable cause. While there are many types of searches and seizures, I am going to discuss the most common searches that are conducted by a Little Rock Police Officer without obtaining a warrant. The most common search is the search of a person that is under arrest. Another warrantless search that can be conducted is when an officer stops and frisks a citizen while investigating a crime. Under some circumstances, officers are able to search vehicles and seize items during traffic stops without a search warrant. Officers can also obtain permission from a citizen to search a citizen’s person, vehicle or other premises. Officers can seize contraband and evidence found in plain view when conducting an investigation without a warrant. Officers are also able to enter a residence or premises without a warrant under exigent circumstances. The protection of every citizen’s right against unreasonable search and seizure is guaranteed by the Fourth and Fourteenth Amendment of the United States Constitution. Historically, most searches and seizures required warrants, and would not have been

considered “reasonable” without them. It is often said that such warrantless conduct is per se unreasonable unless the situation is one in which a recognized warrant exception applies. (Joseph 2002) The person aggrieved by an unlawful search or seizure may invoke the exclusionary rule to prevent its evidentiary fruits from being admitted into evidence against him or her unless one of the recognized exceptions to the rules applies. This paper will explain these exceptions in order for Little Rock Police Officers’ searches to be deemed legal in the sight of the courts while following the policies of the Little Rock Police Department.

History of Search and Seizure

Search and seizure law is drawn primarily from the Fourth Amendment, which has been called the most ambiguous of the 10 amendments that make up the Bill of Rights. Over time, the Supreme Court has come to see the protection of property and privacy as the main purpose of the Fourth Amendment. To understand how the court reached its interpretation of the Fourth Amendment requires a trip through history. (McWhirter 1994)

In England and its American colonies in the late 1700s, popular feeling ran high against the use of what were called “general warrants” and “writs of assistance.” These were government documents police and customs officers used as licenses to search any building or home. The warrants and writs were seldom used to search for evidence of what today would call common crime. Instead, searches were usually conducted to find traitorous writings against the king of England or smuggled goods that legally belonged to the king because customs duties had not been paid. After the American Revolution, the English Parliament passed statutes to limit the use of these kinds of warrants and

writs in England. If government officials invaded private property without good reason, they could be sued personally for trespassing. If they had a warrant, they were immune from such lawsuits. General warrants authorizing government officials to go anywhere gave them complete immunity from such suits and the power to enter any piece of private property to carry out a search. (McWhirter 1994)

In 1761 James Otis Jr., a famous attorney representing 63 Boston merchants, sued customs officials in an effort to stop the use of such writs. Otis's argument lasted five hours and included the statement "A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle." He lost the case, but many believe the resentment against the use of these writs was a major cause of the American Revolution.

A young John Adams was in the courtroom when James Otis made his argument that private property of the colonists deserved to be respected. John Adams later wrote that he left the courtroom determined to bring an end to such abuses and that, in this opinion, the American Revolution really began with that lawsuit. (McWhirter 1994)

After the successful end of the American Revolution, the new United States struggled to operate as a loose confederation. When that failed, a Constitution was drafted. Many states objected to the Constitution as it was first proposed, saying they would not approve a constitution that did not include a Bill of Rights. These states approved the Constitution only after assurances that a bill of rights would soon be added. When the first Congress assembled after the Constitution was adopted, James Madison proposed the addition of 12 amendments. 10 were ultimately passed by Congress and ratified by the states became the Bill of Rights. (McWhirter 1994)

The Fourth Amendment to the Constitution was passed as follows: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (McWhirter 1994)

The ambiguity of the amendment raises many questions. When is a warrant required? Is a warrant only needed to search a house or building, or is it needed whenever anyone or any thing is to be searched or seized, even out on a public street? Are there situations where a warrant is not needed to search or seize people or property, and if so, what is needed in those circumstances? The amendment says that it protects “persons, houses, papers and effects.” What about apartments or hotel rooms? What about business or warehouses? All of these questions were left up to the United States Supreme Court to answer, and the Court did not begin to answer them until 1886 when it handed down its first decision interpreting the Fourth Amendment. From that time to the present the Court has found that the usual methods of constitutional interpretation provide little guidance in this area. (McWhirter 1994) Now that we know why and how the Fourth Amendment and “search and seizure” came to be, we need to understand the definition of search and seizure.

Definition of Search and Seizure

Webster’s defines search as “to look into or over carefully or thoroughly in an effort to find or discover something.” However the legal term “search” is much more limited. While “seizure” in the dictionary means “the taking of person or property by

legal process,” this definition is only accurate in the legal sense insofar as there are two types of seizures-person or property. (Fisanick 2003) In order to understand the term “search and seizure”, we must understand the definition of both parts of the term. The earliest Fourth Amendment case, *Boyd vs. United States* (1886) gave an expansive reading of the definition of “search.” *Boyd* involved coercive government action directed at revealing the contents of private papers, articles specifically mentioned in the Fourth Amendment. *Boyd* was the first case to define the term “search.” Joseph defined a search as an invasion of a person’s reasonable expectation of privacy. Unless such an invasion has taken place, the action is not a search. (Joseph 2002)

The concept of “seizure” is less clearly defined than the concept of “search.” Early on, the Courts usually spoke of “search and seizure” without separating the two. (Joseph 2002) A person is seized when a reasonable person in his position would believe he was not free to terminate the encounter and go about his business due to physical force applied by government or by an assertion of authority to which the person submits. Real property is seized when government meaningfully interferes with one’s possessory interest in it. An intangible is seized either when a copy of it is obtained or the content discovered through purposeful governmental activity that invades a reasonable privacy interest of meaningfully interferes with one’s possessory interest in it. (Joseph 2002) As an Officer, you are able to seize persons, real property and intangible items if you have a warrant or under conditions that you do not need a warrant. So “search and seizure” could be defined as the government invading a person’s expectation of privacy to interfere with one’s possessory interest in a person, real property and/or intangible items.

Now that we know the definition of search and seizure, we can proceed to the warrantless exceptions involving search and seizure. (Joseph 2002)

Probable Cause and Reasonable Suspicion

Both probable cause and reasonable suspicion are fact-based tests based on the totality of the circumstances. Both ask whether a reasonable person in the officer's position would act on information (to search or seize). Both are standards less than that needed to convict a person of the crime. Because probable cause authorizes more severe intrusions, it is a higher standard than reasonable suspicion. PROBABLE CAUSE: A fair probability, reasonable grounds to believe. REASONABLE SUSPICION: Less than probable cause but more than just a subjective belief. Some objective fact can be articulated that was the basis for the suspicion. (Joseph 2002)

Both probable cause and reasonable suspicion are fact-based case-by-case determinations based on the totality of the circumstances. There are so many cases analyzing whether the standard was met on the particular facts that it is impossible to do more than include a small sample of them. (Joseph 2002) Probable cause is the standard required for warrants. It is the standard for arrests, whether or not a warrant is required. It is also the standard required for most evidentiary searches. (Joseph 2002) Reasonable Suspicion justifies brief seizures of persons or chattels for additional investigation and may justify limited searches. More recently, some more extensive searches have been permitted on less than probable cause. (Joseph 2002)

Search incident to Arrest

The most basic warrantless search and seizure allowable by law is the search of a person that has been legally arrested. We, as law enforcement, take this search and

seizure for granted. A lawful arrest alone authorizes a search of the person of the arrestee and the area within his immediate control (defined as the area from which he could obtain a weapon or destructible evidence). A search beyond the limits of this rule must be independently justified in order to be reasonable under the Fourth Amendment.

Reasonable suspicion that another person is present who poses a threat to the officer will support a cursory walk through “protective sweep” of the premises. (Joseph 2002)

The basic requirement for a search incident to a lawful arrest is that there be a lawful arrest. Obviously, an illegal seizure cannot be the basis for a search incident to that arrest. Similarly, while a lesser seizure might justify the limited frisk for weapons, only an arrest can justify the search incident to arrest doctrine. (Joseph 2002)

In *Chimel v. California* (1969), officers with an arrest (but no search) warrant arrested the defendant in his home and then proceeded to thoroughly search the entire house from top to bottom for evidence of the crime. The Court struck down the search and established the limits of the search incident doctrine: (Joseph 2002)

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officers to search for and seized any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area “within his immediate control”-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. (Hermann 2003)

A search incident to a lawful arrest must be contemporaneous in time and place. The search of the area around the arrestee can be searched when the person is arrested or within a reasonable amount of time. (Shipley v. California 1996)

If a person is arrested after a vehicle stop, the passenger compartment of the vehicle, including containers, may be searched incident to the arrest. The Court ruled in *New York v. Belton*:

“When a policeman has made a lawful arrest custodial arrest of the occupant of a automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will the containers in it be within his reach.” (Checklist 2003)

The Little Rock Police Department General Orders address the issue of searching a person incident to an arrest. It states the following:

D. Search of Vehicles: Permissible Circumstances

1. If, at the time of arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest was made, the arresting officer may search the vehicle for such things and seize any thing subject to seizure and discovered in the course of the search. [CALEA 1.2.4d]
2. The search of a vehicle pursuant to this section shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

E. Search of Premises: Permissible Circumstances, Time and Scope

1. The arresting officer may search such premises or part thereof for such things, and seize any things subject to seizure, if at the time of arrest:
 - a) The accused is in or on premises, all or part of which he is apparently entitled to occupy; and
 - b) In view of the circumstances, the officer has reason to believe that such premises or part thereof contain things which are:
 - 1) Subject to seizure;
 - 2) Connected with the offense for which the arrest is made; and,
 - 3) Likely to be removed or destroyed before a search warrant can be obtained and served.
2. Search of premises pursuant to this subsection shall only be made contemporaneously with the arrest, and search of building interiors shall only be made consequent upon an entry into the building made in order to effect an arrest therein. In determining the necessity for and scope of the search to be undertaken, the officer shall take into account, among other things, the nature of the offense for which the arrest is made, the behavior of the individual arrested and others on the premises, the size and other characteristics of things to be searched for, and whether or not any such things are observed while making the arrest. (Little Rock General Orders 107 D-E)

D. Searching of Persons in Police Custody

1. Persons in custody will be searched prior to being placed in a police unit.
2. When removing a person, held in police custody, from a police unit, officers shall search under the rear seat and surrounding area.
3. Whenever a person, held in police custody, is moved from one room of any police facility to another (e.g., from an interview room to a restroom), the suspect and the vacated room will be searched. (Little Rock General Orders 306 ID)

Stop & Frisk “Terry Stop”

With reasonable suspicion that a person has committed, is committing, or is about to commit a crime, the person may be briefly seized for investigation. With reasonable suspicion to believe the person is armed, a frisk of the person to locate the weapon and the seizure of the weapon, if found, is also authorized. If the person seized is the occupant of a vehicle, with reasonable suspicion, a limited search of the vehicle for weapons is authorized. With reasonable suspicion, a chattel (real property) may be seized for investigation. No search for evidence is authorized by this doctrine and the length and scope of the detention must be reasonable. During a lawful frisk for weapons (within the narrow bounds approved in Terry), if it is immediately apparent (probable cause) that an item which is felt is contraband, the item may be seized. (Joseph 2002)

As with probable cause, reasonable suspicion is a fact-based test based on the totality of the circumstances. Essentially, what is required is that some objective basis for the suspicion be shown. As the standard has been applied by the Court, it seems that almost anything more than pure subjective suspicion may be enough. Terry v. Ohio, clearly established that reasonable suspicion meant something less than probable cause, and that “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion.” (Joseph 2002)

The case of Terry v. Ohio was a landmark decision defining the issues of whether a brief field detention for interrogation constituted a seizure of the person. In Terry, an officer observed activity that gave rise to a reasonable suspicion (but not probable cause)

that Terry and his companions were preparing to commit an armed robbery. The officer intervened:

Officer McFadden approached the three men, identified himself as a police officer and asked for their names..... When the men “mumbled something” in response to his inquires, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry’s overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker’s store. As they went in, he removed Terry’s overcoat completely, removed the .38 caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton’s overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. (Joseph 2002)

Balancing the government’s interest in crime prevention against the interest in a person’s interest in freedom of movement, the Court determined that a brief seizure for investigation would be reasonable when the officer had reasonable suspicion of criminal activity that would make further investigation reasonable. The standard is an objective one and requires that “the police officer” to be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. (Joseph 2002)

Since the Terry case, there have been thousands of cases adjudicated in reference to stopping and frisking a person. These cases have had an impact on all police officers and the way in which investigations are conducted. Each case must be judged individually by the totality of the circumstances to determine reasonable suspicion. If an

officer has reasonable suspicion that a crime is being committed, about to be committed, the officer may stop and detain the suspect(s) briefly for investigative purposes. The officer may also conduct a pat-down search for weapons. While conducting a pat-down search, any object that the officer might construe as possibly being a weapon can be seized from the person to determine if it is a weapon. The officer then may develop probable cause for a more intrusive search of the individual's person. Remember, an officer can always ask permission from a person to search that person's pockets.

The Little Rock Police Department General Orders address the stopping and detention of persons during an investigation. It states the following:

IV. Stopping and Detaining of Persons

- A. An officer lawfully present in any place may, in the performance of their duties, stop and detain any person who they reasonably suspect is committing, has committed, or is about to commit a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.
- B. Officers who have detained a person shall immediately advise that person of their official identity and the reason for the detention.
- C. Officers may use such non-deadly force as may be reasonably necessary under the circumstances to stop and detain any person for the purpose authorized in this General Order. [CALEA 1.3.1]
- D. If an officer has detained a person he reasonably suspects is armed and presently dangerous to the officer or others, the officer or someone designated by him may search

the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others. [CALEA 1.2.4b]

- E. Whenever an officer has reasonable cause to believe that any person found at or near the scene of a felony is a witness to the offense, he may stop that person. After having identified himself, the officer must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the offense. Such detention shall in all cases be reasonable and shall not exceed 15 minutes unless the person shall refuse to give such information, in which case the person, if detained further, shall immediately be brought before any judicial officer or Prosecuting Attorney to be examined with reference to his name, address, or the information he may have regarding the offense. (Little Rock General Order 107 IV)

Consent to Search

Obtaining consent to search a person's pockets, vehicle, house or business is legal if certain guidelines are followed. Police may conduct a warrantless search without probable cause if an authorized person or a person with apparent authority has consented to the search. A person granting consent to search may limit the scope of the consent or later withdraw the consent. Consent searches have long been recognized as an exception to the Fourth Amendment warrant requirement (Fisanick 2003).

When reviewing a consent situation, there are three questions that must be answered:

1. Did the person voluntarily consent to search?

2. Did the person consenting to the search have actual or apparent authority to do so?
3. What was the scope of the consent?

While the doctrine itself is not conceptionally difficult, problems arise in the actually obtaining consent and the performance of the search (Fisanick 2003)

The United States Supreme Court did not establish the standard necessary for a valid consent until *Schneckloth v. Bustamonte* (1976). The Court was faced with competing principles: whether to require a “waiver,” i.e., a “knowing, intelligent, and voluntary” consent such as required in *Miranda Rights* or simply a “voluntary” consent similar to the standard for determining voluntariness of confessions. The court chose the later version (Fisanick 2003)

Voluntariness of Consent

The prosecutor, and therefore the police have the burden of proving that a defendant’s consent to a warrantless search was given freely and voluntarily. The voluntariness of a person’s consent is determined by the totality of the circumstances (Checklist 2003). Voluntariness of the consent given depends greatly on the situation and circumstances surrounding the asking of consent. These circumstances include time of day, whom is present, demeanor of officer obtaining consent, if the person giving the consent is intimidated into saying yes. All of these circumstances are reviewed by the courts and they make a determination of whether the consent was voluntary.

Authority of consent

It is self-evident that the owner of property, such as a vehicle, is authorized to consent to its search. Further, a co-owner or joint owner of property may also consent to

a search. As one court put it, there are three different types of authority to consent to a search: (1) shared use and joint access to or control demonstrating actual authority, (2) express authorization to a third person and (3) the “apparent authority doctrine.”

(Fisanick 2003)

If someone has shared use of and/or joint access to or control over property then that person has the authority to authorize consent. If a person gives a third party control over property then that third person can authorize consent. An example of this is if a person loaned a vehicle to another person. The person that borrowed the vehicle can consent to a search of the vehicle.

A more difficult situation arises where it appears that the person giving consent was authorized to do so, but later facts show that they had no authority. The issue was decided by the Court in *Illinois v. Rodriguez*.

In that case, police went to the defendant’s apartment with defendant’s girlfriend. She had told them that the apartment was “our apartment” referring to herself and defendant and stated that she had clothes and furniture there. She unlocked the door with her key and allowed the police to enter. Inside, they discovered controlled substances. The trial court found that the girlfriend’s name was not on the apartment lease and she had vacated the apartment sometime earlier. She was an “infrequent visitor” to the premises and thus had no authority to consent to the entry and the subsequent search.

The Supreme Court held that, even though the police were mistaken as to the authorization of the person granting consent, the consent was nonetheless valid. (Fisanick 2003)

Scope of Consent

Consent is not a monolithic concept. It can be limited in scope. Thus, a person might give consent to search a car but not a house. Furthermore, consent to search can be

revoked. To be justified by consent, the scope of the search actually conducted should be no broader than the scope of consent given. Generally, if the scope of a search warrant exceeds the scope of the consent actually given, the search is unreasonable. (Joseph 2002) The Court also held that any consent given with limitations, the limitations must be explicitly expressed to the officers. If a person gives consent to search a residence and does not explicitly express their opposition to the searching of a particular room, then the officers are free to search the entire residence. This would also apply to a person or vehicle or any search. This does not apply to a locked container within the scope of the search. If a locked safe is located in a residence you are searching after obtaining consent, then you must obtain consent to search the locked safe. It would not be legal to force the locked container open. Consent can be withdrawn at any time during a search. Since consent can be withdrawn, a person who is consenting to a search must be present during the search to have the opportunity to withdrawal the consent.

A recent case in Arkansas focused on obtaining consent to search a residence. In David Griffin vs. State of Arkansas (2002), four county deputies obtained information at 1000 AM that David Griffin was selling narcotics from his residence. The deputies waited until 10:00 PM, under the cover of darkness, to approach the residence. The deputies approached the residence from the cover of nearby woods and searched a shed and a vehicle prior to approaching the residence. All four uniformed deputies approached the door and made contact with a female that did not live at the residence. She was a visitor and alone at the door. The owner, David Griffin, was in another room on the phone. The deputies obtained consent from the female and began to search the residence.

Narcotics were located in the residence and David Griffin was arrested. The case was appealed to the Arkansas Supreme Court.

The Court ruled that the deputies in the case made numerous mistakes involving obtaining the consent and searching within the scope of the consent. The court ruled that the searches that were conducted outside the residence were unauthorized and therefore illegal. The deputies intenually approached the residence late at night in order to catch Griffin off guard. All four uniformed deputies approached the female that possibly intimidated the female to granting consent. The deputies obtained consent from the female even though they knew she was not the owner and did not live at the residence.

The Arkansas Supreme court inferred that unless extenuating circumstances exist, it would be preferable to conduct consent to searches during the hours a warrant can be served without a “night time clause”, 6:00 AM-8:00 PM. An Officer must approach the residence or business in an open and upfront manner not trying to conceal themselves or their identity. They also suggested that the consenter prior to the search of any residence should sign a written consent form.

While I am not an expert in conducting consent searches, I want to share some suggestions to obtaining a legal consent to search: 1) Officers must make contact with someone that can authorize consent. 2) Officers must take steps not to intimidate the person they are obtaining consent. Try to avoid any action that might intimidate the consenter. Limit the number of officers that approach the consenter. Two officers would be the limit. If you cannot cover your weapon (uniformed), do not place you hand on your weapon while talking with the consenter. Do not carry shotguns/rifles or anything else that will intimidate the consenter. Do not mention obtaining a search warrant if the

person refuses entry. 3) Use the Little Rock Police Department Consent to Search Form that notifies the consenter that they have the right to refuse, revoke, or limit the scope of the consent. According to Joseph 2002, this is not a requirement but if this is told to the consenter, the probability that the consent will hold up in court is very high. Some officers record the conversation to show there was no intimidation and that the consenter understood their rights. The consenter needs to be inside the residence at the time of the search so they have the opportunity to stop the search or limit the scope of the search. I have attached a Little Rock Police Department Consent to Search Form. (See Attached form 20A) This form needs to be fully completed.

The Little Rock Police General Orders give the following general instructions on steps that need to be completed by the officer when obtaining a consent to search:

VIII. Consent to Search [CALEA 1.2.4]

A. Authority To Search And Seize Pursuant To Consent [CALEA 1.2.4]

1. An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search or seizure.
2. Prior to a search by consent, officers of the Little Rock Police Department will whenever possible have the person consenting to the search sign a Little Rock Police Department Consent to Search Form.
3. A verbal consent may be given under certain circumstances when a written consent to search form is not practical. Wherever possible two sworn officers should witness consent, and a written report will immediately be prepared listing facts surrounding the verbal consent and any and all witness of the consent. A supervisor will immediately be notified of the circumstances involving the consent to search and the documentation involved.

B. The consent justifying a search and seizure can only be given, in the case of: [CALEA 1.2.4g]

1. Search of an individual's person, by the individual in question or, if the person is under fourteen years of age, by both the individual and his parent, guardian, or a person in loco parentis;
 2. Search of a vehicle, by the person registered as its owner or in apparent control of its operation or contents at the time consent is given; and,
 3. Search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent.
- C. A search based on consent shall not exceed, in duration or physical scope, the limits of the consent given.
- D. A consent given may be withdrawn or limited at any time prior to the completion of the search, and if so withdrawn or limited, the search under authority of the consent shall cease, or be restricted to the new limits, as the case may be. Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent. (Little Rock Police General Order 107 VIII)

Plain View Doctrine

If police are lawfully in a position to observe an object in “plain view,” and they have probable cause to believe that the object is contraband or evidence of criminality, they may seize it without a warrant. (Fisanick 2003)

The “plain view” doctrine is a well recognized and a relatively easy to apply exception to the warrant requirement of the Fourth Amendment. Police are not required to shield their eyes from objects in “plain view” that are contraband or evidence of a crime, merely because they do not have a search warrant. (Fisanick 2003)

Before examining plain view, mention must be made of the often-confused concept of “open view.” Where a law enforcement officer while not conducting a Fourth

Amendment search or seizure observes an object, it is said that the object is in “open view.” The owner of the object has no reasonable expectation of privacy to it, since he allowed it to be open to peering public eyes. Therefore, the Fourth Amendment does not apply. (Fisanick 2003)

If the item is observed from a place considered in public view, it is considered to be in “open view.” If the item is in a location where the object’s owner has a reasonable expectation of privacy, then the plain view doctrine applies, and the officer must justify his presence at the place.

To summarize, the plain view doctrine now only has these requirements: 1) Police, while doing lawful Fourth Amendment business, must be at a lawful observation point; and 2) There must be probable cause to believe that the object observed is evidence of criminality, contraband, or otherwise seizable. 3) Police had lawful access to the object to seize it. (Fisanick 2003)

Plain view concerns observation. As most courts and commentators have pointed out, there is no reason the doctrine cannot be extended to the other senses-smell, hearing, and touch.

Similar to plain view is “plain smell,” which in the majority of cases, deals with the distinctive odor of burnt marijuana. If a police officer lawfully stops a vehicle and from outside the vehicle smells a burning-hemp odor emanating from within, there is no doubt that the smell comes within the “plain smell” and may give the officer probable cause to search the vehicle.

“Plain hearing” concerns conversations or sounds loud enough to be overheard by police from a lawful place of perception.

“Plain touch” was officially recognized in *Minnesota v. Dickerson*. The Court held that, if during a Terry frisk, an officer “feels an object whose contour or mass makes its identity immediately apparent” that the object is drugs or other contraband, then the object may be seized. The officer may not, however, squeeze, slide or manipulate the pocket’s contents in order to determine what it is. (Fisanick 2003)

While the Little Rock Police Department does not address the plain view doctrine, it does observe the obligation to seize any contraband and to store it per departmental policy.

Vehicle Exception

The vehicle exception to the warrant requirement is another of the traditional warrant exceptions. Although it began as an exigency doctrine dealing with situations in which probable cause developed to seize and search an automobile found “on the move” along the road, it has since expanded into a general right to search vehicles or movable chattels located therein, with probable cause but without a warrant. (Joseph 2002)

When there is probable cause to search a vehicle for evidence of crime, the vehicle may be searched without a warrant under the “vehicle exception” to the warrant requirement. Although the exception is justified partly by the inherent mobility of vehicles, the exception does not require any actual showing of exigency in the particular case. Whether or not the area to be searched is a “vehicle” (or inside one) must be determined, as the exception does not apply unless the search is of a vehicle and/or its contents. The scope of the permissible search is controlled by the object of the search and extends to containers (a suitcase or jacket for example) in the vehicle which could

physically contain the evidence which is the object of the search. It does not matter whether the container(s) searched belong to the driver or a passenger. (Joseph 2002)

Persons in vehicles are not “containers” and neither they nor their clothes nor their personal property when actually carried on their person may be searched merely because there is probable cause to search the vehicle. Some such searches may be authorized by warrant or by other recognized warrant exceptions such as search incident to lawful arrest, investigative seizure/weapons frisk (Terry), or actual probable cause to believe that evidence is to be found on a particular person who is a vehicle occupant (coupled with the exigency of mobility). Where there is probable cause to believe that the vehicle is, itself, contraband and subject to forfeiture, and the vehicle is located in a public place, the vehicle may be seized without a warrant even though there is no probable cause to search the vehicle. (Joseph 2002)

The key here words are “probable cause”. If police have probable cause to search a vehicle or a container within the vehicle, a warrantless search may be made of the vehicle and any containers contained therein likely to conceal the object of the search. (Fisanick 2003)

If a person is arrested after a vehicle stop, the passenger compartment of the vehicle may be searched incident to the arrest. (Hermann 2003) When police have lawfully stopped a vehicle and have reasonable suspicion that it contains weapons that may be dangerous to the officers, they may conduct a protective search of the passenger compartment. (Hermann 2003)

The Little Rock Police Department General Orders address the vehicle exception by stating the following:

G. Vehicular Searches

1. An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is: [CALEA 1.2.4c]
 - a) On a public way or waters or other area open to the public;
 - b) In a private area unlawfully entered by the vehicle; or,
 - c) In a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.
[CALEA 1.2.4c]
2. The officer may search the suspected occupants (except that this subsection shall not apply to individuals traveling as passengers in a vehicle operating as a common carrier) if the officer does not find the things subject to seizure by his search of the vehicle, and if:
 - a) The things subject to seizure are of such a size and nature that they could be concealed on the person; and,
 - b) The officer has reason to suspect that one or more of the occupants of the vehicle may have the things subject to seizure so concealed; (Little Rock General Order 107 IXG)

Inventory Searches

Police may, without a warrant or probable cause, inventory a vehicle and its contents if the vehicle is lawfully in police custody and the inventory search is done pursuant to a standardized policy sets forth guidelines for their inventory. (Fisanick 2003)

A vehicle inventory search does not require either a warrant or probable cause. It is unusual, because it is not based on discovering evidence of criminality but rather serves to protect property. Although this “caretaking” exception is widely recognized today, it took several Supreme Court decisions to gestate. (Fisanick 2003)

The courts held that a valid inventory search requires the following: 1) An inventory search policy; 2) Legal impoundment of the vehicle of the vehicle pursuant to policy; and 3) Scope of search limited to carrying out the purposes of the inventory. The policy itself is necessary to limit the officer’s discretion regarding whether to search an impounded vehicle and the scope of the search, especially regarding containers. (Fisanick 2003)

Prerequisite to a valid inventory search is a valid impoundment of the vehicle. Police cannot randomly or indiscriminately decide which vehicles they are going to impound. While there must be a legitimate reason to justify impoundment, the courts have been hesitant to second-guess law enforcement. Police are not required to allow the owner of vehicle to make arrangements for custody of the vehicle as an alternative to impoundment. (Fisanick 2003)

The Little Rock Police Department General Orders addresses conducting an inventory search by stating the following:

- G. Inventory of Stored Vehicles [CALEA 1.2.4f]
1. A complete inventory search will be conducted on all vehicles stored by officers of this Department.
 2. This inventory search shall include all spaces within the vehicle and the trunk or bed of the vehicle, and shall include an inventory of all containers, including those that are locked.
 3. The owner or driver (if available) will be asked specifically if there are any valuables inside the vehicle, which should be stored separately from the vehicle, and this information shall be recorded as part of the Offense Report and/or Storage Report filed by the impounding officer. (Little Rock Police General Order 305 IG)

Exigency Circumstances

When a warrant would normally be required for a given search and seizure, and when probable cause to obtain a warrant exists, but where, due to exigent circumstances (an emergency situation) it is not possible to obtain a warrant, the search or seizure may be made without one. The “knock and announce” requirement for entries into the home does not apply when there is reasonable suspicion to believe an exigency exists. (Joseph 2002)

In order to fit under this category, the situation must be a type of search or seizure that requires a search warrant, probable cause that would support the issuance of a warrant must exist, and an emergency situation must exist that prevents the warrant from being obtained. If these conditions are met the search or seizure without the warrant will often be upheld. (Joseph 2002)

Examples of exigent circumstances include hot pursuit, a fleeing suspect, destruction of evidence, or other situations in which speed is essential. (Hermann 2003)

The fact that evidence is in the process of destruction can create an exigency justifying a warrantless search and seizure, at least where the crime is not minor and/or the circumstances of the seizure and search are not usually severe. (Joseph 2002)

Where a lawful warrantless arrest began in public but the arrestee then retreated inside a private premise, an exigency existed justifying the police to enter the premise without a warrant and effectuate an arrest. Where an armed defendant fled the scene of a robbery and entered a house, and where police arrived “within minutes,” they could enter to find the defendant, and conduct a search to find him as well as his weapons. These are both examples of hot pursuit. (Joseph 2002)

Officers entering to fight a fire, medical emergency, armed suspect endangering lives, entering a victim’s home for a crime in progress. These examples are all considered exigent circumstances.

The Little Rock Police Department General Orders address entering a premise without a search warrant by stating the following:

- I. An officer may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction, if he has reasonable cause to believe that the premises or a vehicle contain: [CALEA 1.2.4e]
 - a) Individuals in imminent danger of death or serious bodily harm;

- b) Things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; and/or,
- 1. Things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed. (Little Rock Police Department General Orders 107 IX I)

Conclusion

I have attempted to briefly describe the most common warrantless searches and seizures that are performed by Little Rock Police Officers. Each warrantless search that I have described has been the product of many court decisions and has had many books written about the subjects. I have briefly described each in order for you to get a better understanding. I encourage you to read the books I have referenced in order to obtain a more detailed understanding of warrantless searches. A better understanding may assist you in making a more informed decision on difficult problems.

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