Am I being detained?

Am I free to go?

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Am I being detained, or am I free to go? As a Sergeant with the Texarkana Arkansas Police Department, I have discovered, during my twenty-two years on the job, that law enforcement officers are faced with these questions on a daily basis. As a law enforcement officer, you will frequently need to ask yourself if you are actually detaining an individual or if it is merely a consensual encounter. Law enforcement officers make traffic stops, set up roadblocks for various reasons, serve warrants, make arrests, and search houses, vehicles and people. In each of these common duties of the officer, the individual is protected against unreasonable searches and seizures. The Fourth Amendment of the U.S. Constitution requires that no search or seizure shall be carried out unless a warrant has been issued. However, the United States Supreme Court has recognized it is not always possible to obtain a warrant and has provided law enforcement with certain exceptions to the warrant requirement. It is important for every officer to understand his or her limitations under the law. What constitutes a search? What constitutes a seizure? Is an arrest a seizure? An officer makes a traffic stop. Does he automatically have the right to search the vehicle and occupants? An officer responds to a domestic disturbance. Does he automatically have the right to search the residence? An officer sees an individual walking in a residential neighborhood at 3 a.m. Does he automatically have the right to detain that individual? Officers set up a checkpoint looking for intoxicated drivers. Are the citizens required to stop? How long can the officer detain the individual at the checkpoint? At what point does detention become a seizure? These are just a few of the questions an officer working the streets needs to be able to answer. In order to answer these questions effectively, I will be discussing not only the Fourth Amendment, but the seven exceptions to the warrant rule. We'll also look at the difference between reasonable suspicion and probable cause.

Fourth Amendment

To understand our boundaries as police officers, we must take a hard look at the Fourth Amendment because search and seizure law is drafted primarily out of this Amendment. "A man's house is his castle…" Those words were uttered in 1761 by James Otis Jr., an attorney arguing against the use of writs of assistance (Founders of America, 2007). It was from these words that some believe the Fourth Amendment of the U.S. Constitution was born. One of the architects of the Bill of Rights, John Adams, was present inside the courtroom listening to James Otis Jr. argue that landmark case. It was some twenty years later that Adams wrote Article 14 of the Massachusetts Declaration of Rights which embodied many of Otis' arguments. That Article would later be used as the outline for the Fourth Amendment in 1791 (Clancy).

The Fourth Amendment of the United States Constitution states:

> "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" (National Archives).

It seems apparent after reading this Amendment the founders valued a citizen's right to be secure against unreasonable searches and/or seizures. So, that begs us to ask the question: what is unreasonable? In order to answer that question, I think we should begin by examining two terms that should be familiar to all law enforcement: *Reasonable Suspicion* and *Probable Cause*.

There is a fine line between reasonable suspicion and probable cause, and as a law enforcement officer, you need to know that distinction. That minute difference could be the difference between winning your case in criminal court and losing your case in civil court.

Cornell University Law School defines reasonable suspicion as "*A reasonable suspicion exists when a reasonable person under the circumstances, would, based upon specific and articulable facts, suspect that a crime has been committed*" (Cornell). For instance, you are on patrol and dispatched to a shoplifting call at your local Wal-Mart. You receive information the suspect has taken a diamond ring inside a black case. As you get closer to the store, you are informed the suspect has fled from the store, and you are provided a description of the suspect. You see a person matching that description running away from that store. You *now* have reasonable suspicion to believe he is possibly the person who shoplifted. However, you do *not* have probable cause to arrest. Not yet.

Probable cause, in and of itself, is much more difficult to define. The Legal Dictionary defines probable cause as "*Apparent facts discovered through logical inquiry that would lead a reasonably intelligent and prudent person to believe that an accused person has committed a crime, thereby warranting his or her prosecution…*" (Legal Dictionary). For instance, in the above scenario you have stopped someone whom you suspect of shoplifting. Given the circumstances you certainly had a reasonable suspicion to stop that person and inquire further. Once you have him stopped, you observe a black case protruding from his rear pocket. You ask him for consent to retrieve that item and discover a ring inside. The store manager confirms it is the ring that was reported stolen. You *now* have probable cause to arrest. Probable cause must be based on factual evidence—not just suspicion. Most probable cause sources can be placed into four categories: Observation, expertise, information, and circumstantial evidence.

Observation is information the officer obtains through one of the five senses, such as sight, smell or hearing. Expertise refers to the skills in which the officer is specially trained, such as detecting tools used in burglaries or knowing when certain movements or gestures

indicate that criminal activity is afoot. Information is categorized as statements provided by witnesses and victims, information obtained by informants, or announcements made through police bulletins. Finally, circumstantial evidence is indirect evidence that implies a crime has occurred but does not directly prove it.

We as law enforcement officers must be mindful of the citizen's rights not only to protect the citizen but also to protect ourselves. A rights violation can result in discipline by your agency, civil liability, or even criminal prosecution. It would appear that as law enforcement officers our hands are tied and that we cannot do our job, but alas, the United States Supreme Court has recognized certain exceptions to the warrant rule.

Exceptions

The U.S. Supreme Court and federal courts have carved out specific, limited exceptions to the Fourth Amendment search warrant requirement, which are commonly referred to as the seven exceptions to the warrant rule. The seven exceptions to the Fourth Amendment are consent, the plain view exception, exigent circumstances, the motor vehicle exception, the inventory search, search incident to arrest, and the caretaker function.

The first exception we will discuss is "*Consent"*. Of all of the exceptions, this is perhaps the most problematic one. The biggest obstacle for the officer is the burden of proof that the defendant voluntarily consented to the search and that there were no threats or promises made by the officer to the defendant. The most preferred way to protect you and to ensure the consent is valid in court is to have the defendant sign a written consent form. If your agency does not utilize Consent to Search forms, I would strongly suggest a policy be developed. The following is an example of such a form: *"I, _____having been informed of my constitutional right not*

to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize Officer(s) / Detective(s)_____of the _____ Department to conduct a complete search of my premises/auto located at: _____

These Officers are authorized by me to take from my premises/auto any letters, papers, materials, or other property, which they may desire. I am giving this written permission to the above named Officers voluntarily and without threats or promises of any kind".

If it is not possible to obtain written consent, another method is to audio or video tape the consent being given. If you use this method, it is important to ensure you inform the defendant he or she is not required to give the consent and he or she can retract consent at any time. Another thing officers need to be aware of is the age of the consenter. A child cannot give consent, so it is important to know the age a person is considered a child in your state. You must also determine if the person giving the consent is impaired by alcohol, drugs, or even a mental condition. Yet another important aspect of obtaining consent has to do with the person's authority to grant consent. The person consenting must have actual or apparent authority to permit the search (Miles, Richardson, & Scudellari, 2011). For instance, a landlord can't consent to a search of a tenant's premises. The owner or employee of a hotel or motel can't consent to a search of a guest's room, unless the rental period is over. In some states, a parent can't consent to the search of a child's room. However, if the facts make it reasonable for you to believe that a person has such access or control, you may rely on his consent. The search you make will be upheld even if it turns out that the person had no actual authority to give the consent. As you can see, consent to search has many burdens the officer has to consider and overcome, but is nevertheless a valuable exception to the warrant requirement.

The second exception to the warrant requirement is "*Plain View"*. The courts have held that if the officer is lawfully present and sees an item he knows to be contraband, stolen, or evidence of a crime, the officer can seize it without a search warrant. In the court case *Minnesota v. Dickerson* the court ruled that "one generally does not have a legitimate expectation of privacy in contraband left out in the open which is viewed by an officer from a lawful vantage point" (Grantham 2010). For instance, an officer is called to a residence on a domestic disturbance. He is allowed into the residence by the female victim. *He is now legally in the place*. While inside the residence, he observed a bundle of a green leafy substance he knew to be marijuana on the kitchen table. *This would be considered in plain view*. He can legally seize the contraband; however, he must obtain a search warrant to search the residence further. Another aspect of the plain view doctrine is "plain smell". The courts have held that an officer does not only have to use his sense of sight to articulate contraband is present. For instance, you stop a motorist for running a red light. As you approach the driver's side door, you smell what you know through your training and experience to be burning marijuana. You may enter that vehicle and conduct a search to find that marijuana. Yet another aspect of the plain view doctrine is the "plain touch". The courts have held that if during a *Terry* frisk, the officer feels an object whose contour or mass makes its identity immediately apparent as drugs or other contraband, then the object may be seized. The final aspect is that of "plain hearing". As long as the officer is lawfully in the place and hears conversations or sounds which may be criminal in nature, he may respond and search to locate the origin and nature of that sound. For instance, if an officer is parked in his vehicle and hears what he knows to be gunshots coming from a residence and sees a muzzle flash in one of the windows, he may enter that residence without a warrant.

The third exception to the warrant rule is called "*Exigent Circumstances*". The word exigent is defined by the Merriam-Webster dictionary as "requiring immediate attention: needing to be dealt with immediately". There may be situations in which an officer gains entry into a home because of the existence of an exigent circumstance requiring swift action without first obtaining a warrant or consent. In *Mincey v. Arizona* the court ruled "Police are not required to obtain a search warrant to enter a home if the gravity of the situation makes the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment" (Grantham 2010). For instance, you respond to a residential fire. You may enter the residence, search for victims, and extinguish the fire without a warrant. You may also enter if lives are in danger or if there is a medical emergency. Exigent circumstances also include "hot pursuit". An officer need not obtain a search warrant if while pursuing a fleeing felon he follows the suspect into a residence. These are just a few examples of situations that could be classified as exigent. You should review your agency's policy regarding search and seizure to determine what your particular agency allows.

The fourth exception to the warrant rule is the "*motor vehicle*" exception. In *Carroll v. United States* the court held that "…as long as officers had probable cause to believe that the car contained alcohol, they could search it without first obtaining a warrant" (Connors 2010). While that case referred to vehicles as movable, other courts have since upheld that the vehicle doesn't necessarily have to be on the side of the road for the vehicle exception to apply. For example, in *Chambers v. Maroney* the court determined "that since the officers had probable cause that a crime was committed and since it was unreasonable to expect the officers to conduct a search late at night on the side of the road, they did not have to obtain a warrant even after taking the car to the station" (Connors 2010). Furthermore, *Cady v. Dombrowski* determined "holding that a

warrantless search of a car that had been disabled in an accident and moved to a commercial garage did not violate the Fourth Amendment because the vehicle was towed at an officer's request to clear it from the roadway and because exigent circumstances existed since the owner of the vehicle was a police officer whose service revolver had not been located." (Connors 2010). In all of these cases, courts have repeatedly stated that probable cause must exist for the exception to be valid. It is important to note that probable cause to search a vehicle may not necessarily mean you can search any locked containers inside that vehicle. In *United States v. Chadwick* the court held "…that a search of a car after a suitcase suspected of containing marijuana was placed in it constituted an illegal search because the police purposely waited for the suitcase to be placed in the car before encountering the suspect so that the police created the exigent circumstance" (Connors). The same may also apply when dealing with multiple occupants of a vehicle. Probable cause to search one of the occupants doesn't necessarily give you probable cause to search all of the occupants. *United States v. Di Re* determined "that a warrantless search of a car does not extend to a search of the person of an occupant even if it is reasonable that the occupant could be secreting contraband on the grounds that mere presence in a car does not result in an individual waiving his rights" (Connors).

The fifth exception to the warrant rule is the "*inventory search*". A vehicle inventory search does not require probable cause or a warrant because it not based on discovering evidence. This type of search is meant to protect the defendant's interest in any personal property he may have inside the vehicle as well as protect the officer against any allegations of theft that may derive from the impoundment of the vehicle. In *State v. Atkinson* the court stated the following elements must be met in order for the inventory to be valid: "The vehicle must be lawfully impounded; the inventory must be conducted pursuant to a properly authorized policy

promulgated by a politically accountable body; the inventory policy must be designed and administered such that the officer executing it retains no discretion; and the officer executing the inventory must not deviate from the dictates of the policy" (Hubner 2010). Officers should be cautioned against using the inventory search as a pretext for searching the vehicle. The inventory search does not give you the authority to pry open locked containers or to destroy any of the vehicle's interior. Depending upon your agency's policy regarding vehicle inventories, you may be able to open locked containers if the key is accessible. The Texarkana Arkansas Police Department's General Order 1105.08 addresses this issue stating:

C. When conducting vehicle inventories, officers of the Texarkana Police Department shall inventory all spaces located within the vehicle to include the vehicle's trunk and the beds of passenger trucks. All closed containers found within the vehicle shall be opened and the contents located therein shall be inventoried.

1. *Colorado v. Bertine, 479 U.S. 367 (1987)*—a case argued and ruled on in the U.S. Supreme Court—provides guidance for officers who conduct vehicle inventories. According to the ruling, warrantless inventory searches of impounded vehicles may—in addition to all of the other accessible areas within the vehicle—include closed containers; however, closed containers may only be opened if the inventory is conducted pursuant to a police policy requiring such searches and is not undertaken in bad faith for the sole purpose of uncovering evidence of a crime.

2. Those containers which are found locked shall not be forced open, but the officer conducting the inventory shall document the condition of the locked container within the narrative of their report. If a key or the lock's combination is available, all locked containers will be opened and inventoried (TAPD General Orders).

It is very important to be familiar with your agency's policy regarding vehicle inventory searches.

The sixth exception to the warrant rule is the "*Search Incident to Arrest*". This exception pertains to the search of the person of the defendant after arrest and prior to incarceration. "At the time you make an arrest, or immediately after the arrest, you may search for weapons and evidence on the person of the suspect and in the immediate area" (Miles, Richardson, &

Scudellari, 2011). The search does not have to be target specific. In other words, you do not have to be looking for a weapon or contraband specifically. This rule also applies to the immediate area the suspect occupied at the time of the arrest. "This search is limited to the area in which the suspect could theoretically gain access to a weapon or destroy evidence. This means that if you arrest a suspect in one room of a house, you may not search other rooms or even places in the same room if the suspect could not get to them quickly and easily" (Miles, Richardson, & Scudellari, 2011). If you have probable cause to believe contraband or evidence is outside the scope of the suspect's immediate area, obtain a search warrant. If you go beyond your authority to search incident to arrest, you may spoil evidence that could have been obtained with a warrant. For instance, you stop a motorist and arrest the driver on an outstanding warrant. You may then search the area of that automobile that was within the driver's immediate reach. This may also include the passenger compartment and any containers you may find inside. If you open the trunk and find contraband, the chances are great the contraband would be inadmissible. The courts have become stricter in regards to the search incident to arrest exception. In years past, courts gave broad approval for these searches even though there was no possibility the suspect could realistically gain access to a weapon or evidence. This is no longer the case. Courts now state that if the arrestee has been removed from the area, such as in the back seat of your patrol car, he no longer has access to the vehicle, and search incident to arrest of the vehicle does not apply. It is also important to understand that the term "arrest" is broad in nature when it comes to interpretation of the law in regards to search incident to arrest. For instance, you stop a motorist for a traffic violation and arrest him on an outstanding warrant and subsequently release him on some type of bond. The motorist is not in custody and the search incident to arrest exception does not apply. It is always a good idea to obtain a warrant if you are

ever in doubt as to whether your search will be valid. It is important to remember that evidence obtained by a search incident to arrest cannot be used if the arrest itself is unlawful.

The last exception to the warrant rule falls under the "*caretaker function"* and often referred to as the *"abandoned property exception"*. "You may, without a warrant, seize and search property that you have good reason to think has been abandoned" (Miles, Richardson, & Scudellari, 2011). Abandoned property could be a vehicle left on a parking lot so long it would be reasonable to assume it has been abandoned by the owner. The officer can legally enter and search the vehicle for possible ownership. Courts have held that officers can retrieve household trash left at the curb; however there are some state courts that still require a warrant for trash searches. Lost property could fall under this exception as well. For instance, a citizen finds a locked briefcase and brings it to the police station to turn in. The officer can legally open, forcefully if needed, the briefcase to determine if the briefcase is safe for storage and to determine ownership.

What is a Seizure?

Now that we've discussed the Fourth Amendment and the exceptions to the warrant rule, it is important for us as law enforcement officers to know exactly what constitutes a seizure. We have to understand when a consensual encounter with a person becomes a seizure. "An encounter with a person does not amount to a "seizure" unless a reasonable person would believe, under all the circumstances, that he is not free to end the encounter" (Miles, Richardson, & Scudellari, 2011). For instance, you and another officer board a passenger bus and begin speaking with one of the passengers. You position yourself in the aisle and the other officer is blocking the exit door. In this scenario the passenger could proclaim that he was not free to end the encounter because there was no avenue of escape. The courts have determined in similar

scenarios that the actions of the officers amounted to a seizure of the passenger. However, a person has not been detained if you simply ask him for identification and exert no physical control or official authority over the person. There has been a lot of controversy lately whether checkpoints are constitutional. The website YouTube is full of videos entitled "Am I being Detained, Am I Free to Go". The most upsetting thing for me when I watch some of these videos is the fact that the officers were not prepared to answer the simple question "Am I being detained?" The officers I've seen in the videos generally lose their temper and ultimately end up making a simple contact turn into a cluster, often violating the citizens' rights. The U.S. Constitution certainly permits roadblocks and in the *Sitz v. Michigan* case, the court held that roadblocks did not violate the Fourth Amendment. "Brief, systematic stops of vehicles as part of a roadblock or checkpoint program can be constitutional" (Miles, Richardson, & Scudellari, 2011). As long as the checkpoint is not primarily intended to serve a general interest in enforcement of criminal laws, the roadblock can be constitutional. Courts have held that roadblocks are constitutional when they conducted according to a detailed plan devised by supervisory officers, and the field officers do not exercise any discretion in deciding whom to stop and use a neutral selection system.

Conclusion

Every individual is protected against unreasonable searches and seizures. Officers need to understand the perimeters of the Fourth Amendment; the exceptions to the warrant rule, and the difference between reasonable suspicion and probable cause. It is important for officers to understand his limitations under the law. The law enforcement officer's duties are vast and the law we operate under is complex and ever changing. It is incumbent upon officers to keep

abreast of current law and court cases to protect ourselves and the rights of the individuals we swore an oath to protect.

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