

Was That Police Search and Seizure Action Legal?



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I. Introduction

If you ever have watched a television crime drama or taken a high school civics class, then you probably know that the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures by the government. You probably don't know, however, the extent of this prohibition or how the Fourth Amendment applies in everyday, real-life situations. Do you know, for example, when the police are allowed to enter your home; or whether an officer can pat you down during a traffic stop; or when you can walk away from a police encounter?

The Fourth Amendment provides:

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.

These 54 words are meant to protect you from overreaching by the government and level the playing field between you and the larger criminal justice system. In

a perfect world, they allow you to feel secure, while allowing law enforcement enough leeway to do its job.

In the real world, though, any encounter with law enforcement may leave you wondering, “Can they do that?” Here, we’ll try to answer that question by explaining the general nature of your Fourth Amendment rights and providing examples of common situations in which these rights apply.



II. The Ground Rules

A. The Police Must Obtain a Warrant to Invade Your Privacy

The general rule is that law enforcement must have a warrant – written permission from a judge – to search or seize any place or thing in which you have “reasonable expectation of privacy.” Whether you have a reasonable expectation



of privacy in a particular place or thing will depend in large part on the specific circumstances involved, but a judge will consider both your subjective belief that a place or thing was private and whether, objectively, society would consider it to be private. Thus, for example, you have a reasonable expectation of privacy in your

home and the area immediately around your home, but not in the garbage you put out on the curb for pickup.

B. The Warrant Must Be Based on “Probable Cause”



A warrant can only be issued upon a showing of “probable cause.” That is, law enforcement must demonstrate to a judge that there is probable cause to believe that evidence of a crime will be found in the place to be searched and/or that a crime was committed by the person to be arrested (seized). Probable cause is more than a suspicion, but

less than the reasonable doubt required to obtain a criminal conviction. Broad, sweeping allegations generally will not suffice; rather, the warrant must be based on specific, articulable facts. When issued, it must particularly describe the place to be searched and the items or persons to be seized. Thus, the warrant requirement demands that a judge give his or her “okay” to a limited invasion of privacy.

C. Evidence Unlawfully Obtained Cannot Be Used Against You

The right to be free from unlawful searches and seizures is not a trivial one; it is fundamental to our democracy. Accordingly, there are significant consequences if the police violate your rights.



Evidence obtained in violation of the Fourth Amendment cannot be used against you; it must be “suppressed” or thrown out because it is tainted by the officers’ unlawful conduct. Moreover, any evidence that is obtained or derived from the unlawfully obtained evidence also must be suppressed. The law calls this evidence the “fruit of the poisonous tree.” For example, if the police obtain a gun as a result of an unlawful search, the gun may not be used as evidence in a criminal case against you, nor may the fingerprints or any other evidence found on the gun. For legal purposes, it is as if the gun never existed. Thus, depending on the facts and evidence in your case, suppression of the tainted evidence may result in the entire case against you being dismissed.



III. Exceptions to the Ground Rules – When Is a Warrant Not Required?



There are many exceptions to the warrant requirement – situations in which the police may conduct a search, or seize evidence, or stop or arrest an individual without a warrant.

A. When You Consent to the Search

If you consent to the search of your bag, your car, your home, or any other place or item, your consent gives the police free reign to search, without the need for probable cause or any other justification. Your consent amounts to a waiver of your rights; that is, by agreeing to the search, you agree to give up your constitutional right to object to the legality of the search.

In order to be valid, consent must be freely and voluntarily given; however, the police are under no obligation to inform you that you can refuse their request, and you may unintentionally (but still freely and voluntarily) waive your rights.

You do not voluntarily consent to a search when you accede to the officer's apparent authority. Thus, for example, if the officer says, "I'm going to look in the trunk," and you say, "Okay," you have not voluntarily consented to a search. The officer must, in fact, seek and obtain your permission to search.

Your consent to a search essentially nullifies your rights. Accordingly, if an officer asks for your consent to search your purse or the trunk of your car or the box in the back seat, this means the officer does not have a warrant and likely cannot rely on any other exception to the warrant requirement to justify the search. You have the right to say "No." Exercise that right. Do not consent to any search.

B. When Evidence of Criminal Activity Is in Plain View

The “plain view” exception to the search warrant requirement allows law enforcement to seize any object in plain sight that appears to be contraband or evidence of a crime if:

1. The officers are lawfully present at the place where the object is viewed and have lawful access to the object; and
2. The incriminating nature of the object is immediately apparent.

Thus, for example, if the police enter a home on a valid search warrant for weapons, they also may seize the drug paraphernalia sitting in plain view on the kitchen table.



C. When You Are Detained, Arrested, Searched Incident to Arrest



The police need no justification to approach you on the street and ask you questions. As long as there is no official compulsion for you to stop or respond, there is no issue. The Fourth Amendment only comes into play when a person is “seized” by law enforcement.

You do not have to be arrested in order to be “seized.” If the officers’ conduct suggests you are not free to walk away, that is a Fourth Amendment seizure. This conduct might include the use of lights and sirens; the officers’ words or tone of voice; an officer placing his hands on you or displaying a weapon or positioning himself to block your exit. The threatening presence of several officers, in and of itself, may be enough to create a “seizure” situation. Bottom line: If, in light of all the circumstances, a reasonable person would believe he was not free to leave, then a seizure has occurred and Fourth Amendment rights attach.

1. Investigative Stop Based on a Reasonable Suspicion

The police may make an investigative stop, without a warrant, when they have a reasonable suspicion that criminal activity is afoot. A reasonable suspicion is something more than a hunch, but not much more than that is required. However, the officer must be able to articulate specific facts that led him to stop you.

As part of an investigative stop, the officer may ask for your identification; this is not considered to be an unreasonable intrusion into your privacy for purposes of the Fourth Amendment. In addition, the officer may conduct a limited frisk for

weapons, to protect his safety, but only if he has a reasonable suspicion that you are armed and potentially dangerous to him.

An investigative stop is constitutional only if it is “reasonable.” That is, it must be “no longer than necessary” to accomplish the goal of the stop, and the officer must use “the least intrusive means reasonably available” to achieve that goal.

2. Arrest Based on Probable Cause

An arrest is a seizure of a person that is allowed under the Constitution only if it is based on “probable cause.” Probable cause is a higher standard than the “reasonable suspicion” an officer needs for an investigative stop. An officer has probable cause to arrest if, in light of all the facts and circumstances, a reasonable person would believe that a crime was or is being committed and that the person arrested committed it.

Here are some examples of circumstances that might give an officer probable cause to arrest without a warrant:

- An officer who is familiar with drug dealing or is on surveillance or is patrolling a known high crime/high drug use area observes a hand-to-hand transaction that includes the exchange of money for a small item.
- An officer observes erratic driving and pulls the vehicle over. The driver has red, bloodshot eyes; is slurring his speech; smells of alcohol; fails one or more field sobriety tests; and/or admits to having been drinking. Any combination of these facts will create probable cause to arrest.
- An officer detects the unmistakable odor of a particular controlled substance, and that odor can be linked to a particular individual.



The line between a “stop” and an “arrest” is sometimes blurry. In evaluating the situation, a judge will consider all the circumstances, including the reason you were stopped, how long you were detained, and your freedom of movement while you were detained (e.g., were you handcuffed).

3. Search Incident to Arrest



If you are arrested, the police may conduct a limited search “incident to arrest.” This means that the officers may search you *and* the area within your “immediate control.” This is known as the “grab area,” and it extends to any space or container from which you might gain access to a weapon or to destroy evidence (e.g., the interior of the car; your purse on the front seat; the hotel room where you are arrested; the brown paper bag on the coffee table). The “grab area” is significantly reduced if you are handcuffed, and even more so if you are handcuffed and placed inside a locked squad car. The “grab area” rule does not preclude all searches of containers once you are handcuffed. If a bag or other container that may contain a weapon or other evidence is accessible to bystanders or your compatriots, it may be subject to search upon your arrest.

D. When Your Home or Place of Business Is Searched

Law enforcement may not enter or search your home or place of business without a warrant, unless one of these exceptions to the warrant requirement applies.

1. Grounds for Warrantless Entry Into Your Home or Business

In order to gain entry into your home, law enforcement may rely on:

Emergency

Law enforcement may enter a home or business without a warrant in order to save a life, when they believe a person is in need of immediate assistance and there is no time to obtain a warrant. This is known as the “exigent circumstances” or “emergency” doctrine. A fire is an exigent circumstance that would allow police to enter without a warrant. If a home or business is the scene of a murder, the police may enter without a warrant to search for the suspect and/or other victims. In addition, police may enter a home or business to prevent an injury, if it appears to the officers that a physical confrontation is imminent (e.g., on a domestic violence call).

Hot Pursuit

The police may enter a home or place of business in hot pursuit of a felony suspect seeking to avoid arrest. To put it another way, a person trying to evade the police cannot run into a private dwelling and call “Safe!” The police can follow him inside, hot on his heels, without a warrant.

Consent

When you give the police permission to enter and/or search your home or place of business, your consent amounts to a waiver – a voluntary abdication – of your Fourth Amendment rights, and the police are free to search without the need for a warrant. Moreover, anyone with control over the premises has the authority to consent to a search of the premises. Thus, for example, if you are away, your roommate has the authority to let the police in and to consent to a search of your apartment. That authority may not extend to all areas of the property, however. In general, your roommate’s consent would extend to common areas (the kitchen, living area) and to his or her room. If you have taken steps to protect the privacy

of your personal space (e.g., locked your bedroom door, placed your belongings in a locked footlocker or chest), then your roommate may not have the authority to consent to a search of that space.

2. Scope of a Warrantless Search

Once inside your home or business, law enforcement may conduct a limited search without a warrant, on the following grounds. A more extensive search of your home or business generally will require a warrant.

Protective Sweep

When police enter a home or business, they are allowed to make a “protective sweep” of the entire premises to ensure their safety and protect themselves from dangerous persons who might be on the premises. A protective sweep is not meant to be as intrusive as full-blown search; it should be no more than a quick and cursory inspection.

Search Incident to Arrest

When police officers enter a home or business to make an arrest, the officers may search the area of the home that is immediately accessible to the person being arrested. This exception does not justify a full-blown search of the entire home or business.



Plain View

When police are lawfully in your home or business (pursuant to a valid search warrant, or consent, or an emergency, or any other exception to the warrant requirement), the officers may seize any contraband or obvious evidence of a crime that that is in “plain view.”

E. When You Are in a Car

1. Traffic Stop

The police may stop a car based on a mere reasonable suspicion that a traffic offense has been committed. This is an easy standard to meet; rarely is a traffic stop found to be unconstitutional. Whether the officer's conduct *after* the stop is constitutional will depend on the specific circumstances.

If you are pulled over, the police may:

- Ask to see your driver's license and registration, and ask other questions related to your identity.
- Shine a flashlight inside the car and seize any contraband in plain view.
- Move papers to look at the vehicle identification number; and
- Order you and any passengers out of the vehicle.

The officer's conduct must be reasonable, in light of the reason for the stop. He cannot ask any questions or take any actions that are unrelated to the stop or that unnecessarily prolong the stop. So, for example, a dog sniff of a car during a lawful traffic stop is permissible, as long as it occurs during the time deemed reasonably necessary to conduct the traffic stop. A prolonged detention to conduct the dog sniff is not permissible.

If the officer gives you a ticket (issues a citation for a traffic offense), the officer may not search your car or pat you down, unless the officer has a particular and reasonable suspicion that you may pose a danger.



If the officer orders you out of the vehicle, this alone does not allow the officer to frisk you. The same holds true for any passengers in the car. If, however, someone makes a furtive movement, or refuses to obey the officer's orders, or otherwise acts suspiciously, then the officer may be justified in patting down all the vehicle's occupants.

If the officer has probable cause to believe that your car contains evidence of a crime, he can search the vehicle, and any containers in the vehicle that may hold that evidence, without a warrant. This includes luggage, purses, backpacks, wallets, or any other container in the car.

2. Arrest

If the traffic stop evolves into the arrest of you and/or one of your passengers, then the officer may search your vehicle "incident to arrest":

1. To protect his safety, but only when the person being arrested is unsecured and within reaching distance of the passenger compartment at the time of the search; or
2. When the officer believes that evidence related to the crime might be found in the vehicle.



Since the police usually will handcuff and secure the person being arrested, the "safety" argument seldom applies. The evidence preservation argument might justify a search of the vehicle, depending on the crime for which you or your

passenger is being arrested. If, for example, your passenger is being arrested for possession of drugs or weapons, the police generally will be justified in searching the car and everything in it.

F. Other Items and Places Commonly Subject to Search and/or Seizure

1. Computers

Computer searches are tricky for law enforcement, and the line between what is constitutional and what is not, is still being determined in many respects.

A computer is not the same as a metal filing cabinet or a desk drawer. Access to the computer gives a person virtually unlimited access to a whole host of information stored on the computer. Computers, tablets, and smart phones can, and often do, hold documents, contact lists, photos, text messages, email and web history, and a GPS record. All of this information is highly personal and justifies the highest expectation of privacy, as well as the highest level of Fourth Amendment protection. Accordingly, in most cases the police will need a warrant to search your computer or cell phone, and the scope of the search must be narrowly defined.

Your consent eliminates the need for a warrant. If you share your computer with another person, that person may have authority to consent to a search of your computer. However, if you have taken steps to protect your privacy – e.g., if your files are password-protected or if you have a separate username and password so that the other users cannot open your files – then the other users will not have authority to consent to a search of your files.

The plain view exception obviates the need for a warrant, but only if the evidence and its incriminating character are “immediately apparent” while looking for the authorized objects of the search. Thus, for example, tapping a keyboard or moving a mouse to disable a screensaver and reveal the last file viewed



is a search that is not justified by the officer's observing in plain view a dark screen or computer monitor. Similarly, if the police claim that they encountered incriminating files in plain view while searching for other files, they should have probable cause to believe the folder and file contain contraband or evidence, based solely on the name of the file or folder. A file labeled "creative writing," for example, would not support a plain view search for evidence of drug transactions.

Your phone, which is basically a handheld computer, may be seized incident to arrest because it might contain evidence that could be destroyed. However, because of the personal and private nature of the information it likely contains, and the fact that it is not likely to conceal a dangerous weapon, the police may need a warrant to search it. A growing number of courts are refusing to allow police to search a cell phone incident to arrest, rejecting the analogy that a cell phone is similar to other physical "containers" immediately associated with a person, like a wallet or a pack of cigarettes.

2. Luggage

You have a reasonable expectation of privacy in your luggage and other personal "containers," such as a purse, wallet or backpack. Whether the police may search your luggage without a warrant depends on the circumstances. Luggage in airports may be searched, x-rayed or sniffed by a dog without a warrant when traveling on an airplane. If, on the other hand, you are stopped on your way to the airport, and your suitcase is in the backseat, it may be searched only if the officer has probable cause to believe it may conceal evidence of a crime.



3. Mail and Packages

Federal law prohibits the opening of first-class mail and packages without a warrant. However, law enforcement may hold a package overnight, or delay delivery of a package, in order to obtain a warrant. It is not uncommon, for example, for postal authorities to hold a suspicious package so that law enforcement can conduct a dog sniff and obtain a warrant if the dog alerts. There is no magic formula for determining how many days or hours constitute a reasonable delay before conducting a dog sniff of the package; whether the delay was unreasonable, and therefore unconstitutional, is decided on a case-by-case basis.

Private carriers, such as Fed Ex or UPS, are not subject to the Fourth Amendment and employees of these carriers may search packages and call in law enforcement to view what they have inspected and conduct drug field tests.

4. Roadblocks

Absent special circumstances, the Fourth Amendment forbids police from setting up a roadblock and stopping drivers for general “crime control” purposes. However, roadblocks are permissible:

- To maintain border security;
- To curb drunk driving (sobriety checkpoints); and
- To ask for information about a crime likely committed by other (that is, not to determine if the vehicle occupants themselves were committing a crime).



5. Border Searches

Any person crossing a United States border, whether coming or going, is subject to search and seizure, without a warrant and without probable cause or even a reasonable suspicion that criminal activity is afoot. The United States border includes land borders with other countries, as well as other points of entry, including airports and ship docks.

A border search can be extensive, including, for example, dismantling a gas tank or cutting open a spare tire. However, the border agents' authority is not unlimited. The more extensive and/or prolonged the detention or search, the greater the justification for it must be.

A search that occurs after the border has been crossed, at some distance from the border, is considered more intrusive and must be justified by (a) a reasonable certainty that the border was, in fact, recently crossed and (b) a reasonable suspicion of criminal activity.



IV. Conclusion

The Fourth Amendment's protection against unlawful searches and seizures serves to protect you from overreaching by the government, and aims to strike a balance between individual privacy and public safety. The touchstone for all Fourth Amendment issues is "reasonableness":

- Did you have a reasonable expectation of privacy in the place or items searched?



- Did the officer have a warrant, based on probable cause?
- Was there an emergency or other reasonable basis to justify a warrantless search or seizure?
- Did the officer have reasonable grounds to stop you? Probable cause to arrest you?
- Did the officer behave reasonably in carrying out the search: Were you detained for no longer than necessary? Was the search limited to areas reasonably necessary to protect the officer's safety and/or reasonably likely to hold evidence of a crime? Was it no more intrusive than necessary?

It is these principles of reasonableness, as applied to the specific facts of your situation, that your criminal defense lawyer will rely on in crafting a motion to suppress the evidence against you. You can help by remaining calm during any encounter with the police, and closely observing the officers' behavior. The more details you can provide your attorney, the stronger the argument he can make that the evidence was obtained in violation of your Fourth Amendment rights.

I hope this information has been helpful. If I can provide legal assistance, please contact me at: