

# SEARCHING A VEHICLE WITHOUT A WARRANT

## *Consent Searches*

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### **BACKGROUND**

“It is well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”<sup>1</sup> When a law enforcement officer obtains valid consent to search a vehicle, neither reasonable suspicion, nor probable cause, is required. Thus, “in situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence.”<sup>2</sup>

### **REQUIREMENTS**

There are two requirements for a consent search to be valid. First, the consent must be voluntarily given. Both “the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.”<sup>3</sup> In making this determination, courts will look at the “totality of the circumstances” surrounding the giving of the consent, because “it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.”<sup>4</sup> Factors to

consider in making this determination include, but are not limited to, the age, education, and intelligence of the individual;<sup>5</sup> the individual’s knowledge of his or her right to refuse to give consent;<sup>6</sup> whether the individual cooperated in the search;<sup>7</sup> whether the suspect was in custody at the time the consent was given;<sup>8</sup> the suspect’s belief that no incriminating evidence will be found;<sup>9</sup> the presence of coercive police procedures, such as displaying weapons or using force;<sup>10</sup> and the suspect’s experience in dealing with law enforcement officers.<sup>11</sup> Additionally, a law enforcement officer who has lawfully detained a suspect during a vehicle stop is not required to inform the suspect that he or she is free to leave before obtaining a valid consent to search.<sup>12</sup> If a suspect is under arrest, there is no requirement that law enforcement officers notify the individual of his or her *Miranda* rights<sup>13</sup> prior to requesting consent, even if the individual has previously invoked his right to silence or right to counsel. “A consent to search is not the type of incriminating statement toward which the Fifth Amendment is directed. It is not in itself ‘evidence of a testimonial or communicative nature.’”<sup>14</sup>

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<sup>5</sup> *Id.* at 226

<sup>6</sup> *Id.* at 227

<sup>7</sup> *United States v. Carrate*, 122 F.3d 666, 670 (8<sup>th</sup> Cir. 1997)(Suspect “idly stood by while the troopers searched his car, never indicating that he objected to the search”)

<sup>8</sup> *Id.*

<sup>9</sup> *United States v. Asibor*, 109 F.3d 1023, 1038 n.14 (5<sup>th</sup> Cir.), *cert. denied*, 522 U.S. 902 (1997)(Explaining six factors analyzed to determine voluntariness of consent)

<sup>10</sup> *Id.* See also *Orhorhaghe v. Immigration and Naturalization Service*, 38 F.3d 488, 500 (9<sup>th</sup> Cir. 1994)

<sup>11</sup> *United States v. Barnett*, 989 F.2d 546, 556 (1<sup>st</sup> Cir. 1993)

<sup>12</sup> *Ohio v. Robinette*, 519 U.S. 33, 40 (1996)

<sup>13</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966)

<sup>14</sup> *United States v. Lemon*, 550 F.2d 467, 472 (9<sup>th</sup>

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<sup>1</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)(citation omitted)

<sup>2</sup> *Id.* at 227

<sup>3</sup> *Id.* at 228

<sup>4</sup> *Id.* at 223

Further, “there can be no effective consent to a search or seizure if that consent follows a law enforcement officer’s assertion of an independent right to engage in such conduct.”<sup>15</sup> For example, if an individual gives consent only after a law enforcement officer asserts that he or she has a warrant, the consent is not truly being given voluntarily, because the officer is “announcing in effect that the [individual] has no right to resist the search.”<sup>16</sup> In *Orhorhaghe v. Immigration and Naturalization Service*,<sup>17</sup> the court found that the suspect’s consent had not been voluntarily given because, among other things, a law enforcement officer had informed him “he (the officer) didn’t need a warrant.” This statement on the part of the law enforcement officer “constituted ... an implied claim of a right to conduct the search.”<sup>18</sup> The burden of proving that the consent was voluntarily given rests with the prosecutor, and “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.”<sup>19</sup>

The second requirement for a consent search is that the consent must be

given by an individual with either actual or apparent authority over the place to be searched. “Actual” authority may be obtained “from the individual whose property is searched.”<sup>20</sup> Additionally, consent to search may be given by a third-party “who possesses common authority over or other sufficient relationship to the ... effects sought to be inspected.”<sup>21</sup> As noted by the Supreme Court in *United States v. Matlock*:<sup>22</sup>

Common authority is, of course, not to be implied from the mere property interest a third-party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements ..., but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.<sup>23</sup>

Within the context of vehicle searches, third-party consent most commonly arises in two distinct situations.

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Cir. 1977). See also *Cody v. Solem*, 755 F.2d 1323, 1330 (8<sup>th</sup> Cir.), cert. denied, 474 U.S. 833 (1985) (“Simply put, a consent to search is not an incriminating statement”); *Smith v. Wainwright*, 581 F.2d 1149, 1152 (5<sup>th</sup> Cir. 1978) (“A consent to search is not a self-incriminating statement”); *United States v. Faruolo*, 506 F.2d 490, 495 (2<sup>nd</sup> Cir. 1974) (“There is no possible violation of Fifth Amendment rights since consent to search is not ‘evidence of a testimonial or communicative nature.’”); and *United States v. Glenna*, 878 F.2d 967, 971 (7<sup>th</sup> Cir. 1989).

<sup>15</sup> *Orhorhaghe*, supra at note 15. See also *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968)

<sup>16</sup> *Bumper*, 391 U.S. at 550

<sup>17</sup> *Supra*, at note 15

<sup>18</sup> *Id.* at 501

<sup>19</sup> *Bumper*, 391 U.S. at 550

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<sup>20</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)(citation omitted)

<sup>21</sup> *United States v. Matlock*, 415 U.S. 164, 171 (1974)

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 171 n.7

In the first, a third-party has sole possession and control of the vehicle of another. In that case, the third-party has the authority to consent to a search of the vehicle<sup>24</sup> and any evidence discovered during the consensual search may be used against the actual owner of the vehicle.<sup>25</sup>

By relinquishing possession to another, the owner or lessee of the vehicle evidences an abandonment of his or her privacy interest in the vehicle; thus, it is reasonable to conclude that the third party to whom possession was surrendered was also given authority to consent to a search of all areas of the vehicle.<sup>26</sup>

In a second, but distinct, third-party consent scenario, the third-party driver of the vehicle consents to a search while the owner is present as a passenger. In such a case, “it is clear ... that even if the owner/lessee is present as a passenger, the driver of a vehicle has some amount of joint access to the vehicle, and, in fact, the driver has immediate control over the vehicle.”<sup>27</sup> Nonetheless, a critical factor considered by the courts in these scenarios is whether the owner/passenger objected to the search. If so, the driver’s consent is most likely inadequate. However, where the owner/passenger remained silent during the search, courts are inclined to find the driver’s consent valid. For

example, in *United States v. Fuget*,<sup>28</sup> the court noted that:

The driver of a car has the authority to consent to a search of that vehicle. As the driver, he is the person having immediate possession of and control over the vehicle. The ‘driver may consent to a full search of the vehicle, including its trunk, glove box and other components.’ This is true even when some other person who also has control over the car is present, if the other person remains silent when the driver consents and does not object to the search.<sup>29</sup>

Finally, a law enforcement officer may obtain consent from an individual who has “apparent” authority over the place or item to be searched. This typically occurs when a law enforcement officer conducts a warrantless search of a vehicle based upon the consent of a third-party whom the officer, at the time of the search, reasonably, but erroneously, believed possessed common authority over the vehicle.<sup>30</sup> If the officer’s belief that the third-party had authority to consent is “reasonable,” considering all of the facts available at the time the search is conducted, the search will still be valid.

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<sup>24</sup> *United States v. Morales*, 861 F.2d 396, 399 n.8 (3<sup>rd</sup> Cir. 1988); *United States v. Diaz-Albertina*, 772 F.2d 654, 658-659 (10<sup>th</sup> Cir. 1985), *cert. denied*, 484 U.S. 822 (1987)

<sup>25</sup> *Matlock*, 415 U.S. at 170

<sup>26</sup> *United States v. Dunkley*, 911 F.2d 522, 526 (11<sup>th</sup> Cir. 1990)(per curiam), *cert. denied*, 498 U.S. 1096 (1991)(citation omitted)

<sup>27</sup> *Id.*

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<sup>28</sup> 984 F.2d 943, 948 (8<sup>th</sup> Cir. 1993)

<sup>29</sup> *Id.* (citations omitted). See also *Dunkley*, *supra* at 526 (Driver’s consent valid where passenger with superior possessory interest failed to object, thus confirming that driver “had the requisite authority to consent to the search of the vehicle”); *Morales*, *supra* at 400 (Passenger’s silence during officer’s inspection of vehicle “material in assessing driver’s authority”)

<sup>30</sup> *Rodriguez*, 497 U.S. at 186

## SCOPE

The scope of where a law enforcement officer may search is generally controlled by the degree of consent given to the officer. “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?”<sup>31</sup> An individual may limit the scope of any consent.<sup>32</sup> In such a case, the scope of a consent search “shall not exceed, in duration or physical scope, the limits of the consent given.”<sup>33</sup> Should a law enforcement officer fail to comply with the limitations placed on the consent, “the search is impermissible.”<sup>34</sup> Individuals may also revoke their consent. When consent is revoked, a law enforcement officer must cease searching, unless another exception to the Fourth Amendment’s warrant requirement is present (e.g., probable cause to search a vehicle).<sup>35</sup>

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<sup>31</sup> *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)[citing *United States v. Ross*, 456 U.S. 798 (1982)]

<sup>32</sup> *Id.* at 252 (“A suspect may of course delimit as he chooses the scope of the search to which he consents”). See also *Walter v. United States*, 447 U.S. 649, 656 (1980)(plurality opinion)(“When an official search is properly authorized – whether by consent or by issuance of a valid warrant – the scope of the search is limited by the terms of its authorization”)

<sup>33</sup> ARTICLE, “*Supreme Court Review: Fourth Amendment – Expanding the Scope of Automobile Consent Searches*,” 82 J. CRIM. L. & CRIMINOLOGY 773, 777 (1992)

<sup>34</sup> *United States v. Strickland*, 902 F.2d 937, 941 (11<sup>th</sup> Cir. 1990)

<sup>35</sup> *United States v. Fuentes*, 105 F.3d 487, 489 (9<sup>th</sup> Cir. 1997)(Suspect effectively revoked consent by shouting “No, wait” before officer could pull cocaine out of pocket)

When dealing with vehicles, law enforcement officers may specifically ask for permission to search both the passenger compartment of the vehicle, as well as the vehicle’s trunk. If consent is given, a valid search of those areas may proceed. However, a more common scenario in consent search cases involves a law enforcement officer asking, in general terms, for permission to search “the car.” “When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather, it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass.”<sup>36</sup> When a law enforcement officer asks for permission to “search the car,” and “the consent given in response is general and unqualified, then the officer may proceed to conduct a general search of that [vehicle].”<sup>37</sup> In *United States v. Rich*,<sup>38</sup> the Fifth Circuit Court of Appeals held that “an individual’s consent to an officer’s request to ‘look inside’ his vehicle is equivalent to general consent to search the vehicle and its contents, including containers such as luggage.”<sup>39</sup>

The court in *Rich* raises the issue of when a consent search will allow a law enforcement officer to search a container located inside of a vehicle. Turning first to unlocked containers, a law enforcement officer may specifically seek permission to search any unlocked container in the vehicle. If the permission is granted, a search may commence. May a law

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<sup>36</sup> *Strickland*, 902 F.2d at 941

<sup>37</sup> Lafave, Wayne, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 8.1(c) p. 610 (1996)

<sup>38</sup> *United States v. Crain*, 33 F.3d 480 (5<sup>th</sup> Cir. 1994)

<sup>39</sup> *Id.* at 484

enforcement officer who seeks general permission from a suspect to “search the car” also search any unlocked containers found within the vehicle? This issue was addressed by the Supreme Court in *Florida v. Jimeno*,<sup>40</sup> where a law enforcement officer stopped the defendant for a traffic violation. The officer believed that the suspect was carrying drugs in the vehicle and requested permission to search it. The defendant gave the officer permission to search the vehicle, stating that he had “nothing to hide.” While searching, the officer came across a brown paper bag located on the floorboard of the vehicle. He opened it and found cocaine inside. In response to the defendant’s claim that the officer had exceeded the scope of the consent he was given, the Supreme Court held that where a suspect consents to a general search of his vehicle, it is reasonable for an officer to search any unlocked containers located inside the vehicle. According to the Court:

We think it was objectively reasonable for the police to conclude that the general consent to search the respondent’s car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. ‘Contraband goods rarely are strewn across the trunk or floor of a car.’ The authorization to search in this case, therefore, extended beyond the surfaces of the car’s interior

to the paper bag lying on the car’s floor.<sup>41</sup>

The Court further noted that, if the consent “would reasonably be understood to extend to a particular container,”<sup>42</sup> a law enforcement officer does not have to specifically request permission to search each closed container found within the vehicle. In *United States v. Snow*,<sup>43</sup> the Second Circuit Court of Appeals held that “an individual who consents to a search of his car should reasonably expect that readily-opened, closed containers discovered inside the car will be opened and examined.”<sup>44</sup>

However, law enforcement officers must remember that the individual giving consent must have either actual or apparent authority over the item to be searched. If the individual does not have the requisite authority, the container may not be searched. For example, in *United States v. Welch*,<sup>45</sup> the driver gave consent to search his rental car. A female passenger in the vehicle had a purse stored in the trunk. Upon opening the purse, the police discovered \$500.00 in counterfeit bills. The woman appealed her conviction, claiming that the police had illegally searched her purse without probable cause or valid consent. The Ninth Circuit Court of Appeals agreed, noting that the key issue in the case was not whether the driver could consent to a search of the vehicle generally, but rather whether the driver “had the *authority*, either actual or apparent, to give effective

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<sup>40</sup> *Jimeno*, 500 U.S. at 251

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<sup>41</sup> *Id.* (citation omitted)

<sup>42</sup> *Id.* at 252

<sup>43</sup> *United States v. Snow*, 44 F.3d 133 (2<sup>nd</sup> Cir. 1995)

<sup>44</sup> *Id.* at 135

<sup>45</sup> 4 F.3d 761 (9<sup>th</sup> Cir. 1993)

consent to the search of his companion's purse."<sup>46</sup>

By sharing access to and use of the car with McGee, Welch relinquished, in part, her expectation of privacy in the vehicle. McGee's voluntary consent to a search is sufficient to waive Welch's Fourth Amendment interests in the car. Welch's purse is another matter entirely. The fact that she had a limited expectation of privacy in the car by virtue of her sharing arrangement with McGee does not mean that she had similarly limited privacy expectation in items within the car which are independently the subject of such expectations. The shared control of 'host' property does not serve to forfeit the expectation of privacy in containers within that property.<sup>47</sup>

We see that when dealing with passenger's belongings located in a vehicle, a law enforcement officer must seek a separate consent from that individual to search those containers. A failure to do so may result in a finding that the officer exceeded the scope of the consent given, and the suppression of any evidence found in the container as a result.

The search of a locked container located in a vehicle presents distinct

problems for a law enforcement officer. For example, while upholding the officer's actions in *Jimeno*, the Supreme Court emphasized that the result may have been different had the container in question been locked, such as a locked briefcase: "[I]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."<sup>48</sup> In assessing whether the consent given encompassed a locked container, the court will look to the exchange between the law enforcement officer and the suspect, as well as "the manner in which the officer gained access to the container."<sup>49</sup> For example, in *United States v. Strickland*,<sup>50</sup> the Eleventh Circuit Court of Appeals addressed whether it was reasonable for a law enforcement officer to slash the spare tire found in the trunk of the suspect's vehicle after being given permission for a general search. In finding that the officers exceeded the permissible scope of the consent given, the court stated:

[U]nder the circumstances of this case, a police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or the property contained within it. Although an individual consenting to a vehicle search should

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<sup>46</sup> *Id.* at 764 (emphasis in original)(footnote omitted)

<sup>47</sup> *Id.* (citation omitted)

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<sup>48</sup> *Jimeno*, 500 U.S. at 251

<sup>49</sup> *United States v. Gutierrez-Mederos*, 965 F.2d 800, 804, (9<sup>th</sup> Cir. 1992), *cert. denied*, 507 U.S. 932 (1993)

<sup>50</sup> *Supra* at note 38

expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents. Indeed, it is difficult to conceive of any circumstance in which an individual would voluntarily consent to have the spare tire of their automobile slashed. Unless an individual specifically consents to police conduct that exceeds the reasonable bounds of a general statement of consent, that portion of the search is impermissible.<sup>51</sup>

obtain the key and utilize it to gain access to the container.

Similarly, the court in *Snow, supra*, reached the same conclusion, where the searches of a duffel bag and another bag were upheld because, among other things, “no damage to the bags was required to gain access.”<sup>52</sup>

In sum, it is unreasonable to believe that individuals who give a general consent to search are consenting to having their property damaged or destroyed. When dealing with a locked container, a law enforcement officer should seek express permission to search that item. If the consent is granted, the search may proceed. In order to support the reasonableness of any such search, a law enforcement officer should refrain from damaging or destroying the container in the process of opening it. If a key is necessary, for example, the officer should

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<sup>51</sup> *Id.* at 941-942

<sup>52</sup> *Snow, supra* at note 48