

## Introduction to Drug Interdictions

Tim: Hello. My name is Tim Miller and welcome to the Federal Law Enforcement Training Center's podcasts on Investigative Traffic Stops. This program focuses not only on the legal aspects, but also on some of the practical and tactical aspects of making investigative traffic stops.

I'm an Instructor in the Legal Division at the Federal Law Enforcement Training Center – sometimes called the FLETC. I'm proud to say that the FLETC is responsible for training the federal law enforcement officers that protect our nation. The Legal Division works hand-in-hand with other training divisions to give the young men and women of law enforcement the knowledge, skills, and abilities they need to enforce the law – and to enforce it safely, -- effectively, and in accordance with our Constitution.

This program consists of series of podcasts; each is podcast is 7-10 minutes long. Together they cover the legal and tactical aspects of investigative traffic stops.

Our-focus – again, it's on Investigative Traffic Stops. Our audience –that's you – the young men and women who patrol our city streets and highways to make us safe. Every day you make investigative stops. And a stop for speeding may turn into a felony arrest.

Every traffic stop is dangerous. We teach our students at the FLETC that there's no such thing as a "routine traffic stop." Our goal –is to convince you that our constitution allows you to perform those stops safely and effectively.

I have asked some of my co-workers here at the FLETC to help me put this together. Greg Coffel is currently assigned to the Driver Marine Division. Greg was a former uniformed patrol officer here in Georgia. Greg made hundreds of investigative traffic stops. Greg is going to help us identify some of the factors that may be used to identify a drug trafficker.

Let me give you an overview of what's to come. Investigative traffic stops are generally controlled by the Fourth and Fifth Amendments to the Constitution.

The Fourth Amendment protects people from unreasonable government searches and seizures. Physical evidence must be seized in accordance with the Fourth

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Amendment. The gun you find during a Terry Stop and Frisk, -- the evidence you find pursuant to a search incident to arrest, -- or the narcotics you find while searching a car – that’s physical evidence. It must be collected IAW the Fourth. If it’s not, the court may suppress it from trial under the exclusionary rule. The exclusionary rule is a judicially created remedy designed to deter police misconduct in committing certain constitutional violations.

The Fifth Amendment, on-the-other hand, controls the admissibility of communicative evidence. You know what that is. Communicative evidence is the suspect thought processes; his assertions of fact; or his thoughts about a crime. Communicative evidence is more often called the suspect’s confession or maybe his admissions about the crime. You know what the Fifth Amendment says, too. The government cannot compel a suspect to provide that communicative evidence.

Miranda rights may be described as a Fifth Amendment protective measure. In other words, the Miranda rights advisement is designed to protect the suspect’s Fifth Amendment privilege against self-incrimination. The Supreme Court recognizes that custodial interrogations are inherently coercive. Therefore, the Court requires law enforcement officers to advise the suspect of his Miranda rights or his Fifth Amendment rights against self-incrimination -- prior to custodial interrogation. With few exceptions, failure to read the Miranda rights advisement prior to custodial interrogation, will render the statements inadmissible at the defendant’s criminal trial.

You have heard me say “government” twice – once in connection with the Fourth Amendment and again in connection with the Fifth. Let’s go back to our high school civics class. Recall that the Fourth and Fifth Amendments fall within the Bill of Rights and that the Bills of Rights are protections that the people have from unreasonable government action.

The Fourth protects people from unreasonable government searches and seizures.

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And the Fifth Amendment protects people from government coercion to provide communicative evidence.

It's the government who is bound by these Constitutional rights.

So who's the government? Well -- you are. You are an instrument or agent of the government when you get up in the morning, put on your uniform, and enforce the law.

Private parties can also become instruments or agents of the government. The courts generally ask three questions in order to determine whether someone is acting in a private capacity or really acting as a government agent: (1) whether the government knows of or acquiesces in the private actor's conduct; (2) whether the private party intends to assist law enforcement officers at the time; and (3) whether the government affirmatively encourages, initiates, or instigates the private action.

That's a fairly strict test. The three requirements are inclusive. But in short, if a LEO tells a private party to search -- or the LEO tells a private party to question a suspect about a crime -- or the LEO participates in the search or interrogation with the private party, the test is generally met. The private party becomes a government agent and that person must follow the Constitution. More specifically, the officer who is using this private party as a government informant or in some other capacity must make sure he understands exactly what he can and cannot do during an investigation.

As instruments of the government, law enforcement officer and confidential informants alike, are required to follow the 4<sup>th</sup> and 5<sup>th</sup> Amendment. Evidence obtained in violation of the Constitution is subject to the exclusionary rule. So for those reasons, Confidential Informants should be given careful instructions about when they work for you, where they can go, what they can do, and what they can say to suspects.

That said, purely private action will not trigger the protections of the 4<sup>th</sup> and 5<sup>th</sup> Amendment -- or the exclusionary. Remember the purpose of the exclusionary rule. The exclusionary rule is a judicially created remedy designed to deter police

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misconduct. If a private party coerces a confession, the confession is not suppressible – at least not under the Fifth Amendment and the exclusionary rule. That's not to say that a statement, coerced by a private party, would be admitted into evidence against the person who made it. Such a statement is probably unreliable and may be suppressed under the rules of evidence for the court.

Not so physical evidence. Drugs and other contraband ... *well, it is what it is.* Private parties may find contraband or other evidence of a crime during unreasonable search. The Fourth Amendment does not protect people from unreasonable private action.

For example, a girlfriend – angered by the thought of her X-boyfriend cheating on her -- may break into his apartment and find evidence that can be used against him. She may turn it over to law enforcement and the government may use that evidence against the X-Boyfriend.

Granted, the girlfriend performed an unreasonable search; she probably committed a serious crime by breaking into his apartment. But her breaking and entering is private action. And the Fourth Amendment and the exclusionary rule can only be triggered by *government* action.

Be mindful that many investigations start just that way -- *by private action.* Roommates, private security guards, bounty hunters, and night club bouncers – they are all private parties. They may find evidence of a crime and turn that evidence over to you. Their searches – whether reasonable or not – are not Fourth Amendment searches. They do not trigger constitutional protections. And law enforcement may use the evidence they get from private parties to get a search warrant or to otherwise build a case.

In a similar vein, violating state law will not trigger constitutional protections and the exclusionary rule. The states may put heightened requirements or restrictions on making arrests. In Virginia v. Moore, for example, the defendant was stopped by police officers for driving with a suspended license and arrested. However, Virginia law (the state law) required that the driver only be issued a summons under these circumstances. Instead, the officer arrested the driver, conducted a

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search incident to arrest, and the SIA uncovered crack cocaine. The issue before the Supreme Court was whether the evidence should be suppressed because state law did not authorize an arrest. The Court held that violating state law did not amount to a Fourth Amendment Constitutional violation. The officer had PC to arrest the suspect for a crime and the Fourth Amendment was satisfied.

Our focus is on federal officers, the federal constitution -- and getting evidence before a federal district court. The individual states may surely construe their own constitutions. A state is free to place more stringent restraints on police conduct. And a state constitution may impose more stringent restraints on the admissibility of evidence -- before that state court. However, state law does not alter the Fourth Amendment or the admissibility of evidence, at least not in a federal district court.

Let's review the Fourth Amendment. Most of this is Black Letter Law, but it's a good review because we will use these basic tenets -- over and over again.

The Fourth amendment protects people from unreasonable government searches and seizures. That begs 2-questions. First, what's a search? And second, what's a seizure?

You are more likely to seize something and then search it. You can seize stuff. A seizure of property occurs when a government agent interferes with a suspect's possessory interest in a meaningful way. What's a meaningful interference? It's an objective standard. Would a reasonable person in the shoes of the suspect believe that LEO interfered with his property in a meaningful way?

Some examples of property seizures include taking someone's suitcase out of the luggage compartment of a bus; or telling the owner of car he cannot get back inside his vehicle. Again, a reasonable person would believe that those are meaningful interferences of a possessory interest.

But it's not a Fourth Amendment seizure to merely pick a suit case up as it sits in the luggage bin of the bus and to examine its exterior. Moreover, an officer does not seize a car parked beside a public road by merely pressing his face against the

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windshield to look inside. Those are not seizures. They are not meaningful interferences of the owner's possessory interest in the items.

What's the significance of seizing something under the Fourth Amendment? The seizure must be reasonable. In drug interdiction cases, the officer must be ready to articulate facts justifying why he seized the property. The court may ask, "Officer, why did you take the defendant's suitcase off the based and hold it until the drug dog arrived to sniff it?" or "Why did you tell the defendant he could not get back in his car?" The officer must be ready to articulate facts demonstrating that those seizures are reasonable. For example, maybe the officer can articulate facts rising to at least a reasonable suspicion that the suitcase or the car contains contraband or some other evidence of a crime.

There are three types of police-citizen encounters: (1) voluntary contacts; (2) Terry Stops or investigative detentions; and (3) arrests. Terry Stops and arrests are seizures and trigger Fourth Amendment protections.

Voluntary contacts are consensual encounters and do not trigger Fourth Amendment protections. Why not? Because based on your words and action a reasonable person in the shoes of the suspect would not feel seized. Rather a reasonable person should feel free to leave or otherwise terminate the encounter. Since voluntary contacts do not trigger the Fourth Amendment, no fact articulation is required. In other words, the officer does not have constitutional requirement to explain or set-forth facts as to why he approached the suspect. A law enforcement officer can approach someone on the street, based on just a mere hunch. But if the suspect wants to leave or terminate the encounter, the officer has to let him go – assuming the officer has not gathered sufficient facts to seize the suspect.

A person can be seized by a show of authority or physical force. A person is seized by a show of authority when a reasonable person in the shoes of the suspect would not feel free to leave based on the words and actions of the officer. Examples include an officer yelling to a suspect, "Stop right there!" Flipping on the overhead blue lights of a police cruiser signaling for a suspect to stop is a show of force.

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The officer may also effect a Fourth Amendment seizure with physical force. Grabbing a suspect's arm, tackling him, shooting him in the face with OC pepper spray; hitting his leg with a baton; and shooting a suspect – those are all examples of physical force. The Supreme Court held in *Brendlin v. California* and *Brower v. County of Inyo* that a police officer may seize by a show of authority or physical force, but there is no a seizure without actual submission to governmental authority. Any Fourth Amendment seizure must be objectively reasonable.

You are more likely to seize someone or something first and then search what you seized. After flipping on your overhead blue lights, you may search the suspect's car – or his person – or both. The search must be – you guessed it - *reasonable*.

A search is a government intrusion into a place where a person has a reasonable expectation of privacy. To trigger the Fourth Amendment, the intrusion must be made by a government agent. Private searches don't count. And the agent must intrude into a place where someone has a reasonable expectation of privacy.

Warrantless government searches are per se unreasonable. Absent one of the well defined exceptions to the probable cause and warrant requirement, the evidence is subject to the exclusionary rule. There are several such exception that are relevant in drug interdiction cases. They are Terry Frisks, searches incident to arrest, consent, the mobile conveyance exception to the warrant requirement, and inventories.

You may also gather communicative evidence during a stop. Again, communicative evidence is a fancy way of referring to the suspect's admissions or confession to a crime. They must be voluntary under the Fifth Amendment privilege against self-incrimination. Prior to custodial interrogations, officers must read the suspect his Miranda rights. Miranda dispels the inherent coercion to respond to custodial interrogation. Custody means an arrest or the functional equivalent of an arrest. Telling a suspect "your under arrest" triggers Miranda and is easy to identify. The more difficult issue is defining the functional equivalent of an arrest.

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But that's enough law. When I come back, we'll talk to Officer Greg Coffel. Greg is going to help me identify some of the factors and evidence that may be used to identify a drug trafficker.