



## RISK MANAGEMENT INFORMATION CONSENT SEARCHES

*\*This information was originally developed in conjunction with the League of Minnesota Cities Insurance Trust's PATROL program (Police Accredited TRaining OnLine). For information on PATROL, contact Laura Honeck at patrol@lmc.org or 651-281-1280. For questions about the material in this memo, contact Ann Gergen at agergen@lmc.org or 651-281-1291.*

### General Principles of Consent:

As one of the warrant exceptions, consent searches are a valuable tool for law enforcement personnel. A person's consent can legitimize a search that what would otherwise be invalid under the Fourth Amendment.<sup>1</sup> A consent search is different than the other warrantless exceptions because it dispenses with *both* the warrant requirement and the need to have probable cause or reasonable suspicion.<sup>2</sup>

A recent Minnesota Supreme Court case, *State v. Fort*, requires officers to have a reasonable articulable suspicion before asking for consent to search a vehicle stopped at a traffic violations.<sup>3</sup> This case limits, but does not prohibit consent searches of vehicles. Officers with reasonable articulable suspicion can still ask for consent to search a vehicle.<sup>4</sup>

For searches not conducted at traffic stops, valid consent acts as a complete waiver of the person's Fourth Amendment rights.<sup>5</sup> Therefore, it is not necessary for officers to have a reasonable suspicion before requesting permission to search residences, businesses, persons, or even cars not involved in traffic stops.

### Obtaining Valid Consent:

Valid consent should ideally be obtained through an express, verbal response from the defendant, but consent can also be implied by a person's actions.<sup>6</sup> Courts have upheld consent searches when the defendant gave a "welcoming action" such as waving officers inside instead of a verbal response.<sup>7</sup> However, consent will not be inferred solely from a person's silence following a

<sup>1</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *State v. George*, 557 N.W.2d 575, 579 (Minn. 1994).

<sup>2</sup> *Schneckloth*, 412 U.S. at 219.

<sup>3</sup> 660 N.W.2d 415, 419 (Minn. 2003).

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

<sup>5</sup> *See id.* (holding limited to traffic stops).

<sup>6</sup> *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992).

<sup>7</sup> *See. e.g., Carlin v. Comm'r of Pub Safety*, 413 N.W.2d 249, 250-51 (finding valid consent was given when driver's

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request to search. For example, the Minnesota Supreme Court ruled that a defendant did not give consent for an officer to search his wallet when he simply handed it to the officer without saying a word.<sup>8</sup> In the words of the Court, “failure to object is not the same as consent.”<sup>9</sup> Because of the conflicting decisions courts have issued when interpreting gestures and silence, the better practice is for officers to obtain verbalized affirmative consent before conducting a search.

### **Voluntariness and the Burden of Proof:**

To constitute valid consent, the consent must be given freely and voluntarily, without the threat of coercion.<sup>10</sup> Because persons agreeing to a consent search are essentially waiving their Fourth Amendment rights, the burden is on the government to prove that their consent was “free and voluntary.”<sup>11</sup> In *Schneekloth v. Bustamonte*, the United States Supreme Court determined that voluntariness is determined by reviewing the “totality of circumstances” surrounding the consent search.<sup>12</sup> Therefore, a court reviewing a challenged search will conduct a balancing test by weighing all relevant factors.

There are two main components to the totality of circumstances test, 1) the details of the encounter, and 2) the defendant’s characteristics.<sup>13</sup> As an example, the Eighth Circuit Court of Appeals, in determining the validity of a consent search, named the following factors as crucial to their determination:

the personal characteristics of the defendant, such as age, education, intelligence, sobriety, and experience with the law; and features of the context in which the consent was given, such as the length of detention, or questioning, the substance of any discussion between the defendant and police preceding the consent, whether the defendant was free to leave or was subject to restraint, and whether the defendant’s contemporaneous reaction to the search was consistent with consent.<sup>14</sup>

No one factor is more important than the others, and the factors can differ on a case by case basis.<sup>15</sup> After weighing all of the factors, courts will determine “whether a reasonable person would have felt free to decline the officers’ request or otherwise determinate the encounter.”<sup>16</sup>

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mother opened the door for the officer and turned around and walked back inside.)

<sup>8</sup> *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

<sup>9</sup> *Id.*

<sup>10</sup> *Schneekloth*, 412 U.S. at 248-49; *Dezso*, 512 N.W.2d at 880.

<sup>11</sup> *State v. Schluter*, 653 N.W.2d 787, 793 (Minn. Ct. App. 2002) (citing *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997)).

<sup>12</sup> 412 U.S. at 223.

<sup>13</sup> *U.S. v. Va Lerie*, 424 F.3d 694, 709 (8<sup>th</sup> Cir. 2005).

<sup>14</sup> *Id.*

<sup>15</sup> See *Schneekloth*, 412 U.S. at 227 (totality of circumstances does not rely on “the presence or absence of a single controlling criterion”).

<sup>16</sup> *Dezso*, 512 N.W.2d at 880 (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)).

## Best Practices When Seeking Consent:

Court decisions reveal that while there are no magic words that an officer can or cannot use while asking for consent, there are certain things an officer can do to ensure that consent is voluntary. First, courts are less likely to find coercion when the officer asked for permission to search only once.<sup>17</sup> Second, a search is more likely to be valid if the defendant gives a clear, affirmative response to an officer's request to search.<sup>18</sup> Finally, any type of physical intimidation, even if unintentional, can negate consent.<sup>19</sup>

## No Duty to Inform of Right to Refuse:

Unlike custodial interrogations, officers are not required to tell a person that they have a right to refuse a consent search.<sup>20</sup> Courts have routinely upheld consent searches in which officers did not tell the defendant that he or she had a right to refuse.<sup>21</sup>

Even though no duty exists, instances of officers informing defendants of their right to refuse are often viewed favorably by courts when determining voluntariness.<sup>22</sup> However, informing the defendant of the right to refuse does not automatically guarantee the consent will be valid. For example, a defendant that had signed a State Patrol consent card stating that he understood that he had a right to refuse a consent request was later held to not to have given voluntary consent because he was detained in the back of a squad car when he signed it.<sup>23</sup>

While informing a person that they can refuse consent searches is not law, some departments may have policies that require or recommend officers to inform the subject of this right.<sup>24</sup> Officers in these departments need to know and follow this policy.

## Police Misconduct to Obtain Consent:

Officers cannot engage in trickery or misrepresentation to gain consent. Officers cannot pretend that they have a warrant when they do not,<sup>25</sup> and even threatening to obtain a warrant when asking for consent has been construed by courts as being coercive behavior.<sup>26</sup> The validity of a consent search prefaced on officers' statements that they can or will obtain a warrant depend on whether the officer actually had sufficient probable cause to get a warrant at the time the statement

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<sup>17</sup> Compare *State v. Crea*, 2000 W.L. 1780299 (Minn. Ct. App. Dec. 5, 2000) (consent was voluntary when the officer sought permission to search only once) with *Deszo*, 512 N.W.2d at 881 (no voluntary consent when officer repeated his request four times).

<sup>18</sup> See *Deszo*, 512 N.W.2d at 880 (defendant's equivocal responses were more to avoid a search than to submit to it).

<sup>19</sup> *Id.* (no voluntary consent when officer leaned over the defendant while asking for consent).

<sup>20</sup> *Schneckloth*, 412 U.S. at 248-49.

<sup>21</sup> See, e.g., *State v. Harris*, 572 N.W.2d 333 (Minn. Ct. App. 1997).

<sup>22</sup> See, e.g., *State v. Underwood*, W.L. 623272 (Minn. Ct. App. March 15, 2005).

<sup>23</sup> *State v. Bell*, 557 N.W.2d 603 (Minn. Ct. App. 1996).

<sup>24</sup> See <http://www.stpaul.gov/depts/police/agreement.pdf>

<sup>25</sup> *Bumper v. North Carolina*, 391 U.S. 543 (1968).

<sup>26</sup> *State v. Schalker*, 2000 W.L. 1341396 (Minn. Ct. App. Sept. 19, 2000).

was made. If officers lacked probable cause, courts find their behavior to be coercive. However, if the officers had probable cause and actually could have obtained a warrant, then the consent is voluntary.<sup>27</sup>

### **Third Party Consent – Common Authority:**

Third parties with an equal right to use and access the property can give valid consent to a search of the property.<sup>28</sup> Therefore, roommates, cohabitants, parents, or spouses can give consent to search property that they share with the subject of a consent search. The determining factor is whether a person has “common authority” over a particular premise.<sup>29</sup> Common authority is determined not by ownership, but whether the person consenting has joint access or control over the property.<sup>30</sup>

### **Georgia v. Rudolph:**

In a recent case, *Georgia v. Rudolph*, the U.S. Supreme Court established an exception to the common authority rule.<sup>31</sup> The holding in *Rudolph* states that police cannot search based on the consent from an occupant if a co-tenant is also present and objects to the search.<sup>32</sup> In other words, if a person that has mutual use or control over the property is both present and objects to the search, the police cannot overcome that objection by asking another person with common authority to consent to the search. The first refusal negates consent given by any other co-occupant. Additionally, police may not remove a potentially objecting occupant from the discussion purely for the sake of avoiding a possible objection.<sup>33</sup>

However, the burden is on the co-tenant to be both present and make their objection known. The police have no duty to try to locate the potential objector.<sup>34</sup>

### **Third Party Consent - Apparent Authority:**

Consent is valid even if it turns out that the person consenting to the search did not actually have joint access or control over the property, as long as the police reasonably believed that the person had authority to consent.<sup>35</sup> However, if the police knew or should have known that the person lacked the authority to grant consent for the search any evidence found will be suppressed. In

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<sup>27</sup> *Id.* at \*2; see also *State v. Hanley*, 363 N.W.2d 735, 739 (Minn. 1985).

<sup>28</sup> *U.S. v. Matlock*, 415 U.S. 164 (1974).

<sup>29</sup> *Id.*

<sup>30</sup> *Compare State v. Hodges*, 287 N.W.2d 483 (Minn. Ct. App. 1979) (landlord lacks common authority even though he was the property owner) with *State v. Thompson*, 427 N.W.2d 266 (Minn. Ct. App. 1988) (wife has common authority and her consent is valid).

<sup>31</sup> 547 U.S. 103 (2006).

<sup>32</sup> *Id.* at 123-24.

<sup>33</sup> *Id.* at 123.

<sup>34</sup> *Id.*

<sup>35</sup> *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

other words, police officers are allowed to make mistakes of fact concerning who has common authority, but cannot make mistakes of law.<sup>36</sup>

### Scope of Consent:

Officers cannot exceed the scope of the consent granted.<sup>37</sup> The scope of the search is limited by the scope of the consent, which is often defined by the size of the object being sought.<sup>38</sup> Therefore, an officer who received consent to search a car for drugs was allowed to open a brown paper bag containing cocaine,<sup>39</sup> but an officer who received consent to retrieve a handgun from a window sill was not authorized to search a nearby duffel bag.<sup>40</sup>

### Recommended Practices for Consent Searches

To the extent possible, officers should follow these recommended practices to avoid having evidence suppressed in court.

- Officers need to assess the person being searched and the circumstances surrounding it. If there is so much “pressure” present that a reasonable person would feel like they are being pushed into giving consent, officers should try to ratchet down the level of pressure.
- Officers should try to frame questions as though they are asking for permission: “Can I take a look through your backpack?” is better than questions like “would you mind”, “would you have a problem with me looking” or “do you have any objections to me searching your bag.”
- Because the burden is on the government to prove that consent was given freely and voluntarily, officers should include all relevant questions, gestures, and conversations related to the consent transaction in their report.
- Officers should avoid narrowing the scope of the search when asking for consent. When possible, officers should ask to search a whole house instead of a bedroom and to search for large items instead of small ones. Doing so expands the permissible area to be searched.
- Finally, officers should allow and document any behavior by the defendant that shows cooperation and consent. For example, in a consent search for drugs, it is better to have a defendant lead officers to the drugs if doing so does not compromise officer safety.

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<sup>36</sup> Compare *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (consent search not valid when detective mistakenly believed that storage locker-landlord could give consent to enter) with *State v. Thompson*, 578 N.W.2d 734,740-41 (Minn. 1998) (consent search valid because it was reasonable for officers to believe that a person answering the door at 6 a.m. lived at the residence and could consent to a search.)

<sup>37</sup> *State v. Schweich*, 414 N.W.2d 227 (Minn. Ct. App. 1987).

<sup>38</sup> *Florida v. Jimeno*, 500 U.S. 248 (1991).

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

<sup>40</sup> *Schweich*, 414 N.W.2d at 230.