

THIRD DEGREE COMMUNICATIONS, INC.

TRAINING BULLETIN: LEGAL UPDATE

CONSENT SEARCHES

By Charles Gillingham

At the legal update bulletin, we love search warrants. We love search warrants for many reasons—the most important is that when you have a search warrant, the law presumes that you are correct. The defense then has the burden to overcome the warrant. That is an extremely difficult undertaking. They have to show either you lied or omitted or otherwise wrote a defective affidavit or that the judge was wrong in authorizing the warrant. With a warrantless search, however, the burden is on us to show that what you did was legal and proper. Because of the burden switch, we love warrants. Repeat after me, GET A WARRANT!

CONSENT SEARCHES

That said, there are occasions when getting a warrant is impractical or you do not have probable cause. In that instance, of course, you can always ask for consent. We will address some of the legalities and limitations of the consent search.

The United States Supreme Court (USSC) has stated that, “[i]n situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”¹

Courts of Appeal, of course, have continued to uphold the ability to conduct consent searches and the USSC has revisited consent searches and stated that they have become a standard investigatory technique of law enforcement officers.² Some courts have attempted to discourage officers from seeking consent instead of obtaining a warrant, although there is no legal requirement to do so.³

As stated above, the court will decide whether you got valid consent and determine whether it was voluntarily given. The burden is on the prosecution to show that consent was voluntarily given.

VOLUNTARY

Consent must be voluntarily given to be valid. Consent may not be given as a result of any threats, coercion, promises or pressure.⁴ Threatening legal action, however, will not render consent invalid, provided you had a legal right to take such an action and it was explained in a non threatening fashion.⁵ Telling a suspect that you will go down and get

a search warrant does not render consent invalid.⁶ Of course, that threat presupposes that you have the legal right to get the warrant. If you do not have the probable cause to get a warrant, however, threatening to do so will render consent involuntary, and thus invalid.⁷ Also, do not tell a suspect a search warrant is on the way---if one is not, that consent would also be involuntary.⁸

Courts have held that the show of authority may vitiate consent. Many officers believe that they cannot ask for consent after they have arrested or forcibly subdued a suspect. That is not necessarily the case. Consent may be given while a suspect is handcuffed.⁹ A suspect can be in custody and give voluntary consent.¹⁰ Consent can be given where an officer has a drawn weapon, provided that there was a reason to draw the gun, it was reholstered prior to asking for consent and the circumstances weren't coercive.¹¹

Many officers also believe that consent given during an illegal detention is invalid. That is also not necessarily true. Courts have held consent to be valid if the officers did not act in a threatening manner during an illegal detention. Courts have held consent valid in detentions that lacked reasonable suspicion because the suspect would have no way of knowing that the detention was illegal.¹²

INVOLUNTARY CONSENT

The reviewing court will look at the totality of the circumstances to determine whether the situation was coercive in nature.¹³ If the court so finds, any evidence recovered as a result of the search will be suppressed. The test the court considers is whether the suspect gave consent freely and voluntarily. A couple of circumstances that indicate a lack voluntary consent:

Demands---in other words, a circumstance where a suspect would not believe he had a choice.

Lying---suggesting to the suspect that you could just go ahead and search, or go get a warrant when you cannot.

Threats---general threats are an obvious no, no.

Repeated requests---if the suspect refuses and you repeatedly ask for consent, that will likely be judged invalid.

Refusal---telling the suspect that if he refuses it is evidence of guilt.

EXPRESS CONSENT

Express consent is fairly obvious, "yes," "go ahead," "yeah." Other statements may be express consent as well, such as "I don't care," "if you want to," and also if the suspect initiates the search, "I don't have a gun, and if you don't believe me, go ahead and look."¹⁴ There is no equation you can go by and no formal response necessary, consent can be given in many different ways.

Remember, signed consent forms are not required. Also, there is no obligation to tell the suspect that they can refuse to consent.¹⁵

IMPLIED CONSENT

Implied consent exists when a reasonable officer interprets the statement or action as authorizing the entry or search. No particular words or action are required to establish consent to search.¹⁶ There are many examples of implied consent. They vary, from asking for entry to a residence and when the resident opens the door they step aside and the officer enters;¹⁷ asking a suspect whether the officer can search a container and the suspect denies ownership of the container;¹⁸ asking a domestic violence victim who hurt her, she stepped back and pointed inside her house to the defendant;¹⁹ entering through a metal detector, the alarms go off and the defendant is patted down, the defendant impliedly consented to the pat down;²⁰ officers ask where the murder weapon is and the suspect points to a drawer in her residence.²¹

We will address some other legal issues regarding consent next month. In the meantime, stay safe.

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¹ *Schneckloth v. Bustamonte* (1973) 412 U.S. 218.

² *Florida v. Jimeno* (1991) 500 U.S. 248.

³ *People v. Harwood* (1977) 74 Cal.App.3d 460.

⁴ *Florida v. Bostic* (1991) 501 U.S. 429.

⁵ *U.S. v. Rodriguez* (2006) 06 DAR 13453.

⁶ *U.S. v. Whitworth* (9th Cir.1988) 856 F.2d 1268.

⁷ *Hayes v. Florida* (1985) 470 U.S. 811.

⁸ *People v. Baker* (19

⁹ *People v. Monterroso* (2004) 34 Cal.4th 743.

¹⁰ *U.S. v. Watson* (1976) 423 U.S. 411.

¹¹ *People v. Aguilar* (1996) 48 Cal.App.4th 632.

¹² *People v. Llamas* (1991) 235 Cal.App.3d 441, that does not mean the evidence will not be suppressed. It just means that the evidence is not automatically excluded.

¹³ *Schneckloth v. Bustamonte*, Id.

¹⁴ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256.

¹⁵ *U.S. v. Mendenhall* (1980) 446 U.S. 544.

¹⁶ *People v. Perillo* (1969) 275 Cal. App.2d 778.

¹⁷ *People v. Quinn* (1961) 194 Cal.App.2d 172.

¹⁸ *People v. Mendoza* (1985) 176 Cal.App.3d 1127.

¹⁹ *People v. Frye* (1998) 18 Cal.4th 894.

²⁰ *People v. Coston* (1990) 221 Cal.App.3d 898.

²¹ *People v. Superior Court* (1974) 41 Cal.App.3d 636.