

WARRANTLESS SEARCHES AND SEIZURES

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Introduction

Unless one of the exceptions to the warrant requirement exists, searches and seizures without a warrant are *per se* illegal under the Fourth Amendment to the United States Constitution.¹ Article I, § 11 of the Indiana Constitution is nearly identical to the Fourth Amendment. The state carries the burden of proving that a warrantless search falls under an exception to the warrant requirement.² The following information is a general summary of the law in Indiana with respect to warrantless searches and seizures.

Part I - Exceptions to the Warrant Requirement

Circumstances where a search warrant is not required include:

- Search incident to a lawful, custodial arrest
- Voluntary consent and waiver
- Search of a vehicle with probable cause
- Inventory after lawful impoundment of a vehicle
- Stop and frisk searches (Investigatory Detention)
- Plain view, smell & touch
- Open fields
- Exigent circumstances - hot pursuit
- Abandoned property
- Protective sweep

Search Incident to Arrest.

In order for a search to be valid incident to an arrest it must be 1) a lawful arrest; and 2) the search must be made contemporaneously with the arrest. No probable cause for the search is required for a search made incident to a custodial arrest. A civil traffic infraction is not an arrest for these purposes. The scope of the search is limited to the suspect, his/her clothes and the area under his/her immediate control.³ When a vehicle is involved, officers may search the passenger compartment and any containers found in the passenger compartment of a vehicle incident to a lawful arrest.⁴

¹ U.S. Const. amend. IV; *Thompson v. Louisiana*, 469 U.S. 17 (1984).

² *Johnson v. State*, 593 N.E.2d 559 (Ind. App. 1 Dist. 1993).

³ *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

⁴ *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

The good faith requirement that an officer not arrest a person, even with probable cause, as a pretext to conduct a search incident to an arrest⁵ may no longer apply. The United States Supreme Court decided on June 10, 1996 that so long as the police have probable cause to stop a vehicle, the officer's subjective reason for stopping the vehicle, such as suspecting the driver is a drug dealer, does not make the stop unreasonable.⁶ Indiana appellate courts have also found that the subjective reason an officer stops a vehicle does not transform an otherwise legal stop into a subsequent violation of the Fourth Amendment.⁷ **Caveat:** The cases cited in the footnotes involved temporary civil traffic stop detentions that lead to seizures. The courts might draw a distinction if a custodial arrest was made of a person solely for the purpose of conducting a search incident to arrest. Prior to *Whren v. United States*, the courts consistently held that if the arrest was ostensibly made as a pretext for a search, the use of the evidence was inadmissible.

Voluntary Consent and Waiver

A valid consent precludes the need for a search warrant.⁸ As a general rule of law, the courts will take the position that a person is presumed not to have waived his/her rights. The burden of proving that a person waived their rights is on the state. The consent must be voluntary. Any duress or compulsion by the police will render the consent invalid. Repeated attempts by the police to obtain consent from a person might be seen as duress. When the person who is giving the consent is not in custody,⁹ there is no requirement that the police tell the person they have a right to refuse to give consent. Since, voluntariness is determined from all the circumstances, the subject's knowledge of the right to refuse may be a factor a court will use to determine whether the consent was voluntary.¹⁰ However, if the person **is** in custody, Indiana case law requires that the accused must be advised of his/her right to counsel and must execute a written consent for the waiver to be valid.¹¹

Consent may be withdrawn at **any** time. If the consent is withdrawn the officer must stop the search.¹² The officer may use any evidence he/she has already obtained up to this point and seize any evidence in plain view.

The person giving the consent must have authority to give consent. The general rule is that a person who has common authority over the premises or effects can give consent even if there is an absent non-consenting person with "whom the authority is shared."¹³ If the police reasonably believe that the person giving the consent has "apparent authority" then the search is also valid.¹⁴ In the case where articles are left in another's care, the person who has custody of the articles can

⁵ *United States v. Pampinella*, 131 F. Supp. 595 (N.D. Ill. 1955).

⁶ *Whren v. United States*, 116 S.Ct. 1769, 64 USLW 4409 (1996).

⁷ *Fair v. State*, 627 N.E.2d 427 (Ind. 1993). *Banks v. State*, 578 N.E.2d 667 (Ind. 1991).

State v. Heuck, 577 N.E.2d 608 (Ind. Ct. App. 1991). *State v. Hillins*, 672 N.E.2d 427 (Ind. Ct. App. 1996).

⁸ *Stallings v. State*, 508 N.E.2d: *Wright v. State*, 593 N.E.2d 1192 (Ind. 1992).

⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 361 L. Ed. 2d 854 (1973).

¹⁰ *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

¹¹ *Sims v. State*, 413 N.E.2d 556 (Ind. 1980).

¹² *Strong v. United States*, 46 F.2d 257 (1st Cir. 1931).

¹³ *United States v. Matlock*, 415 U.S. 164 (1974).

¹⁴ *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

give consent unless the owner has specifically told the care taker that he/she had no authority to give such consent.¹⁵

Search of a Vehicle With Probable Cause

Probable cause means that “the facts and circumstances within [an officer’s] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed . . .”¹⁶ With regard to searches, probable cause must exist to believe that the items being sought will be found in the place searched.

Generally, there is no warrant requirement to search a vehicle when an officer has probable cause to search.¹⁷ However, the Indiana Supreme Court held in *Brown v. State* that when there is little likelihood that a vehicle would be moved, no shortage of time nor an emergency, and the police are not engaged in a community care-taking function, a warrant is required.¹⁸ Also, if the police 1) have probable cause, 2) have the time to obtain an “anticipatory” search warrant, evidence seized without a warrant is inadmissible.¹⁹ An anticipatory search warrant have been defined as valid warrants issued contingent upon the occurrence of an event that will consummate the finding of probable cause.²⁰ However, in *Newby v State*²¹ an Indiana appellate court held that a magistrate may not issue a warrant that is not supported by probable cause when the warrant is issued. The *Newby* court did not invalidate warrants that contain condition(s) precedent, which must occur prior to the warrant’s execution. However, according to *Newby*, there must first exist probable cause at the time the warrant is issued and the court cannot rely on the occurrence of a future event to supply the probable cause. Provided an officer has probable cause to search, the vehicle and all of its contents, including closed containers, may be searched.²²

The scope of the search is limited to that which the probable cause for the search allows. If, for example, an officer has probable cause to search a vehicle for stolen television sets, the scope of the search would not include removing door panels. (Search only where TV sets could be reasonably hidden.)

Note:

Can a police officer order the occupants of a vehicle out of a car during a routine traffic stop? The United States Supreme Court on February 19, 1997 held in *Maryland v. Wilso*, that officers may, for their personal protection and the protection of others, order occupants out of a vehicle stopped for traffic a violation(s). A recent Indiana Court of Appeals decision held that an officer can not detain a passenger of a vehicle stopped for a traffic infraction absent articulable suspicion that a crime has been or about to be committed.

¹⁵ *Marshall v. United States*, 352 F.2d 1013 (9th Cir. 1965).

¹⁶ *Brinegar v. United States*, 338 U.S. 160 (1949).

¹⁷ *Carroll v. United States*, 267 U.S. 132 (1925).

¹⁸ *Brown v. State*, 653 N.E.2d 77 (Ind. 1995).

¹⁹ *Green v. State*, 647 N.E.2d 694 (Ind. App. 1 Dist. 1995).

²⁰ *United States ex rel. Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969); *Russell v. State*, 395 N.E.2d 791 (Ind. App. 1979).

²¹ 701 N.E.2d 593 (Ind. App. 1998).

²² *California v. Acevedo*, 500 U.S. 565 (1991); *Wyoming v. Houghton*, 119 S.Ct. 1297 (1999).

Inventory After Lawful Impoundment of a Vehicle

When police consistently follow a written agency policy that provides procedures for vehicle inventories a vehicle lawfully impounded, including closed containers in the vehicle, can be searched, and evidence discovered is admissible.²³ No probable cause is required. The justifications for inventories are 1) to protect the officer and third parties from false allegations of theft, 2) protect third parties from dangerous contents secreted in the vehicle and 3) protect the true owner of the contents of the vehicle from the goods being lost, damaged or destroyed. An Indiana court held that if the owner or driver is present (and not in custody), he first must be given the opportunity to remove his belongings prior to the inventory.²⁴ If a vehicle is unlawfully towed (by the police), evidence found during an otherwise properly conducted inventory is not admissible.²⁵

Stop and Frisk Searches

The leading case on stop and frisk is *Terry v. Ohio*.²⁶ *Terry* and the cases developing the stop and frisk doctrine are a bifurcated proposition. First, in order to “stop” a suspect without probable cause that he/she has violated a law, the officer must have an “articulable suspicion” that a crime has been committed or is about to be committed. The term “articulable suspicion” means 1) that a trained officer looking at the whole picture, draws inferences and deductions that might escape an untrained person; and 2) that the assessment raises a suspicion that the person being stopped is engaged in wrongdoing. Second, the “frisk” is only permitted if 1) the crime the officers suspects is of the type that normally involves a weapon, such as bank robbery; or 2) the officer can articulate a suspicion that the subject is “armed and dangerous”. Noticing a bulge in a subject’s coat has been held to be reasonable suspicion enough to authorize a “frisk”.²⁷

Terry stops are intended to be brief investigatory stops that allow an officer to question subjects when there is no probable cause to arrest. Suspects are not required to answer questions. How long may an officer detain a suspect under the *Terry* doctrine? In determining whether a detention is too long in duration to be justified as an investigative stop, the court will examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.²⁸ A twenty-minute detention has been found not to be too long.²⁹ A 90-minute wait for a drug-sniffing dog has been found to be too long a detention.³⁰ That case was transformed from an investigatory stop to an arrest. In *Kenner v. State*, an Indiana Court of Appeals held that a 45-minute detention (while waiting for a drug-sniffing dog) was not too long for a valid investigatory detention.³¹

²³ *Colorado v. Bertine*, 479 U.S. 376 (1987).

²⁴ *Bartruff v. State*, 706 N.E.2d 225 (Ind. App. 1999)

²⁵ *Id.*

²⁶ *Terry v. Ohio*, 392 U.S. 1 (1968).

²⁷ *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

²⁸ *United States, v. Sharpe*, 470 U.S. 675 (1985).

²⁹ *Id.*

³⁰ *United States v. Place*, 462 U.S. 696 (1983).

³¹ 703 N.E.2d 1122 (Ind. App. 1999).

The *Terry* frisk only allows a “pat down” of the outer garments.³² Reaching inside of the subject’s pockets, et cetera is not permitted under *Terry* unless the officer feels something during the frisk that could be used as a weapon. If the officer feels something that could be a weapon, he/she is permitted to remove the object from the suspect. Provided the before stated requisites are met, evidence found as a result of the pat down is admissible.

If an officer feels something during a *Terry* frisk that he believes is contraband, there are circumstances where he/she may seize the item.³³ This is known as the “plain feel” exception. The officer must immediately recognize, without manipulating or squeezing the item, the item’s incriminating nature.³⁴ In *Minnesota v. Dickerson* the court ruled a baggie of drugs found in a suspect’s pocket was inadmissible evidence. In *Dickerson*, the officer conducting the frisk squeezed and examined the pocketed baggie with his fingers to determine the baggie likely contained drugs.

Additionally, if an officer can articulate that a present danger exists, he/she, even without probable cause, can search the passenger compartment of a vehicle for weapons.³⁵ Luggage and other items may be briefly detained for further investigation, such as obtaining a search warrant or obtaining a consent to search, only when an officer has a reasonable suspicion that the item(s) contain narcotics.³⁶

Plain View

No warrant is required when 1) the officer is in a place where he/she has a legal right to be, and 2) the officer recognizes that the article is contraband, illegally possessed, stolen property, or otherwise subject to seizure.³⁷ Plain view detection is not a search within the meaning of the Fourth Amendment.³⁸ Shining a flashlight into a darkened car window does not invalidate an otherwise plain view discovery.³⁹ Plain “smell” can also give rise to probable cause. If an officer standing outside a person’s car smells an odor he/she knows to be marijuana coming from the car, and the officer is in a place he/she has a right to be, probable cause might exist for the search of the car. Even though there is authority outside of Indiana, there are no Indiana appellate court cases that hold that an officer who smells marijuana has probable cause to search. The Indiana Court of Appeals has held that plain smell (by an officer) at least authorizes and investigatory detention.⁴⁰

³² *United States v. Sharpe, Id.*

³³ *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

³⁴ *Id.*

³⁵ *Michigan v. Long*, 463 U.S. 1032 (1983).

³⁶ *United States v. Place*, 462 U.S. 696 (1983).

³⁷ *Washington v. Chrisman*, 455 U.S. 1(1982).

³⁸ *United States v. Barnes*, 909 F2d 1059 (Ind. 7th Cir. App. 1990); *State v. Kitt*, 577 N.E.2d (Ind. App. 1st Dist. 1991).

³⁹ *Texas v. Brown*, 460 U.S. 730 (1983).

⁴⁰ *Kenner*, 703 N.E.2d 1122.

Open Fields

The “open fields” doctrine means that land outside the “curtilage” of a person’s residence is not protected by the Fourth Amendment warrant requirement.⁴¹ Where does the curtilage end and the open fields begin? The United States Supreme Court has indicated that this question can be resolved by examination of the following factors: 1) the proximity of the area of the home; 2) whether the area is within an enclosure surrounding the home; 3) the nature and uses to which the area is put; and 4) the steps the owner has taken to protect the area from observation by passersby.⁴²

Exigent Circumstances

An officer may conduct a search without a warrant if exigent circumstances exist, which require the officer to act immediately. For example, when a search is necessary to prevent the destruction of evidence, when an officer is in hot pursuit of a fleeing suspect or when the public safety is endangered.⁴³ An officer must be able to articulate precisely what exigent circumstances existed at the time he/she conducted the search.⁴⁴

Abandoned property

The general rule is that the Fourth Amendment and Article I § 11 of the Indiana Constitution does not protect abandoned property from search and seizure by the police.⁴⁵ To seize abandoned property, the officer must still be in a place he/she has a right to be. For example, an officer could not enter a person’s home to seize property that has been abandoned inside the home without the home owner’s consent, a search warrant or some other exception to the warrant requirement.

Protective sweep

A warrant is not required to conduct a protective sweep when an officer can articulate facts that support a reasonable belief that other persons may be present and pose a danger or threat to safety.⁴⁶

Part II - Interdiction Stops

The United States Court of Appeals in *United States v. Ornelas-Ledesma*, decided a highway drug interdiction case.⁴⁷ The court held that when a person is listed as a suspected drug dealer in a computerized drug courier computer system, and exhibits several characteristics that match drug courier profiles, the police have reasonable suspicion of criminal activity for an

⁴¹ *Oliver v. United States*, 466 U.S. 170 (1984).

⁴² *United States v. Dunn*, 480 U.S. 227 (1987).

⁴³ *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

⁴⁴ *Benefiel v. State*, 578 N.E.2d 344 (Ind. 1988); *Esquerdo v. State*, 640 N.E.2d 1023 (Ind. 1994).

⁴⁵ *Moran v. State*, 644 N.E.2d 536 (Ind. 1994).

⁴⁶ *Smith v. State*, 565 N.E.2d 1059 (Ind. 1991).

⁴⁷ *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir., 1994).

investigatory (*Terry*) stop. These facts alone, however, do **not** equate to probable cause for the search of the vehicle. Police officers may proceed to ask for consent to search or develop probable cause in other ways, such as using drug-sniffing dogs.⁴⁸ Under these circumstances, if no consent is obtained, a drug dog may “sniff” the exterior of the car. Opening a car door or trunk lid, and allowing the dog inside constitutes a search.

Constructive possession

Even when a person is not in “actual” possession of an item he/she may be in constructive possession of the item. Constructive possession doctrine means that an inference can be drawn from facts of that a person, although not in actual possession, still possesses the item. The question of possession often arises in vehicle stops where the driver or passenger(s) deny ownership of drugs found in the vehicle. Generally, the state must prove that the suspect had knowledge of the item(s), and had dominion and control over the item(s).⁴⁹ If the suspect has exclusive control of the area where the item(s) is found, the court may allow the inference that the suspect knew of the item(s) and was capable of controlling it.⁵⁰

When a suspect does not have exclusive control over the area where an item(s) is found, the court will examine “additional circumstances.”⁵¹ These circumstances include:

1. Incriminating statements made by the suspect
2. Attempted flight or elusive gestures
3. A drug manufacturing setting
4. Proximity of suspect to the item
5. Whether the item is in plain view
6. Location of item in proximity to items owned by the suspect⁵²

Forfeiture

What if a person is holding a large sum of money? There is no law that prohibits citizens from carrying large sums of money. Taking money from citizens constitutes a seizure that requires probable cause of the commission of a crime; articulable suspicion is not enough to justify seizing money from suspects. Even if a drug dog “hits” on the money in question, the hit by itself will not likely represent sufficient cause to justify a seizure. Officers must be able to develop probable cause from all the surrounding circumstances.

Summary

Several exceptions to the search warrant requirement were discussed in this article:

- Search incident to a lawful, custodial arrest
- Voluntary consent and waiver

⁴⁸ *United States v. Dovali-Avila*, 895 F.2d 206 (5th Cir. 1990); *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980); *Kenner*, 703 N.E.2d 1122.

⁴⁹ *Person v. State*, 661 N.E.2d 587 (Ind. Ct. App. 1996).

⁵⁰ *Moore v. State*, 613 N.E.2d 849 (Ind. Ct. App. 1993).

⁵¹ *Id.*

⁵² *Id.*

- Search of a vehicle with probable cause
- Stop and frisk searches
- Plain view
- Open fields
- Exigent circumstances
- Abandoned property
- Protective sweep

Generally, all warrantless searches and seizures are illegal unless one of the before stated exceptions exists. Exceptions to the search warrant requirement that **do not require probable cause** to search are:

1. Inventory after lawful impoundment of a vehicle
2. Search incident to a lawful, custodial arrest
3. Plain view, touch and smell
4. Open fields
5. Voluntary consent
6. Stop and frisk searches⁵³
7. Abandoned property
8. Protective sweeps⁵⁴ Exceptions to the search warrant requirement that **do require probable cause** to search include:
 - Search of a vehicle without consent/valid inventory
 - Exigent circumstances

Investigatory stops are intended to be brief detentions that allow for officers to resolve their suspicions in a reasonable amount of time. The courts have held that 45 minutes is not too long a time, but 90 minutes can be. Generally, so long as the officer is uncovering new, meaningful information that relates to the reason for the investigatory stop, the officer may continue. Once the officer is no longer turning up new information and no probable cause exists, the suspect must be released.

Taking property from persons during traffic stops is a seizure. Even if there is no requirement for probable cause for the search, such as a search incident to a lawful, custodial arrest, there still must be some legal grounds for taking a person's property.

Both the United States Constitution and the Indiana State Constitution protect citizens from unreasonable searches and seizures. The State Supreme Court in *Brown* adopted a slightly different standard of review than that of the United States Supreme Court. When determining whether a search violates the State's Constitution the Court will examine police behavior on a case by case basis to ascertain if the police behavior was reasonable. Thus, in Indiana, regarding vehicle searches, an officer might satisfy the requirements of *Carroll and Carney*,⁵⁵ but his/her actions might still be held unreasonable under the State Constitution. Since the Indiana Supreme

⁵³ These are limited pat down searches that require an articulable suspicion that the suspect is armed and dangerous.

⁵⁴ The police must be able to articulate a that there may be other persons present who may present a danger.

⁵⁵ *California v. Carney*, 471 U.S. 386 (1985) In *Carney* a motor home fell under *Carroll's* vehicle exception because it was readily mobile, and there was a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on highways.

Court has held that the existence of a valid warrant to search and seize provides preeminent support for the standard of probable cause **and** reasonableness, officers should consider obtaining a warrant when: 1) considerable time has passed since the commission of the crime and the search (*Brown* it was one day.); 2) there is little likelihood the vehicle will be moved; 3) there is no shortage of time; 4) there is no emergency; and 5) the police are not performing a community care-taking function.