



CITY OF FAIRFAX POLICE DEPARTMENT

GENERAL ORDER

Subject SEARCH AND SEIZURE		Number 4-7
Effective Date January 15, 2004	Rescinds General Order 4-7, dated 09-01-03	
Accreditation Standards Fifth Edition 1.2.4, 43.1.5	Authority Colonel Richard J. Rappoport Chief of Police	

PURPOSE:

The purpose of this general order is to detail responsibilities, procedures, and considerations in the conduct of search and seizures and the execution of search warrants. The described approaches are intended to result in a lawful search, which withstands the rigors of court, as well as to uphold the rights of citizens.

POLICY:

It is the policy of the City of Fairfax Police Department to (1) provide techniques to accomplish a thorough and legal search; (2) observe the constitutional rights of the person(s) the warrant is being served upon; (3) minimize the level of intrusion experienced by those who are having their premises searched; (4) provide for the highest degree of safety for all persons concerned; and (5) establish a record of the entire search warrant execution process.

Generally, no search or seizure may be conducted without first obtaining a valid search warrant. The requirement of obtaining a search warrant may be excused under circumstances outlined in this directive. All property seized is documented through departmental property procedures.

DISCUSSION:

The Fourth Amendment of the U.S. Constitution provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

In order to ensure the efforts of the Department will not be overturned by the courts on a legal technicality, it is imperative that every officer thoroughly understand the basic constitutional and statutory provisions involved in searches for and seizure of property to be later submitted to the court as evidence in a criminal case. Failure to comply with these technicalities of the law can result in evidence being declared inadmissible for having been illegally obtained. In carrying out their duties in this regard, officers must fulfill their responsibilities to protect the community they serve and at the same time protect the individual rights guaranteed to every citizen by the U.S. Constitution.

PROCEDURE:

I. CONSENT TO SEARCH

A. Consent to search without a warrant may be given in writing or orally and is an abandonment of a Constitutional Right and therefore, will be closely scrutinized. The following considerations should be satisfied:

1. Consent cannot be presumed from silence.

2. Consent must be specifically and intelligently given.
 3. Consent must be given freely, knowingly and voluntarily, free of any coercion, intimidation or threat. Officers must avoid even the appearance of intimidation or duress.
 4. Consent must be given by a person who has immediate right of possession and control of the premises or property. If there is any doubt as to who has the immediate right of possession and control of the premises/property, then a search warrant should be obtained.
 5. Consent must be free of misrepresentation or fraud. Consent obtained by trick, duress or misrepresentation, voids the consent and makes evidence inadmissible.
 6. Consent must be obtained prior to search and after the officers have identified themselves and requested the right to search.
 7. Consent must be limited to the area specified and such consent may be revoked at anytime. Upon such revocation, the search must cease. Evidence found prior to revocation may be retained and used as a basis for immediate arrest or as probable cause for the issuance of an arrest or search warrant.
- B. Written consent is preferred over oral consent (Form PD-80). Do not conduct a search by consent just to avoid obtaining a search warrant.

II. PLAIN VIEW SEIZURES

- A. In certain limited circumstances, a police officer may make a warrantless seizure of objects in plain view.
- B. The following conditions, however, must be met before the plain view doctrine is applicable:
 1. The initial intrusion, which afforded the view, must have been lawful; and
 2. The incriminating nature of the evidence must have been immediately apparent.
- C. Whenever an officer lawfully enters upon premises, contraband that they observe in plain view may be seized without a warrant. In such cases, the usual requirements of obtaining a search warrant are not necessary because no "search" is conducted. A "search" implies looking into private or hidden places for concealed items, and does not include observation of articles that are open to plain view or obvious to the senses. It is also permissible for an officer to use a flashlight to make such observations.
- D. An observant officer, utilizing the "plain view" doctrine, can often be successful in recovering stolen property, unlawful drugs, or weapons used or intended for use in the commission of a crime. Areas in which a person has no expectation of privacy, such as open fields, streets or roadways, may be searched without a warrant. This does not include the "curtilage", which is defined as the immediate yard or out buildings of a dwelling house.
- E. Search of Abandoned Property.
 1. Things thrown away or left in a constitutionally unprotected place may be seized and examined. This includes things dropped or otherwise discarded by a person, but not things temporarily separated from the individual.

III. SEARCH INCIDENT TO ARREST AND INVENTORY

- A. During the arrest and booking process, a routine warrantless search of the arrestee and those areas under the immediate control or reach of the arrestee is authorized.
- B. Those arrestees who are in possession of unsecured property coming into police custody may have such property inventoried under property procedures. Such inventory is not considered a "search" under Fourth Amendment protections.

IV. WARRANTLESS SEARCHES OF MOTOR VEHICLES

- A. The expectation of privacy in a motor vehicle is lower than the expectation of privacy in the home. Searches of motor vehicles should be conducted upon probable cause and in accordance with the following:
1. If practical, a search warrant is obtained. The issuance of a traffic summons alone is not considered an arrest and would not justify the search incident to arrest of the violator or their vehicle.
 2. Practical considerations often dictate that a search of a motor vehicle be conducted without a warrant because a moveable vehicle creates the possibility that it might be transported before a warrant can be obtained. A warrantless search of a motor vehicle is authorized when there is probable cause to believe that the vehicle contains evidence of a crime and securing a search warrant is impractical.
 3. If probable cause exists to believe that a motor vehicle contains contraband somewhere in the vehicle, but not in any particular place, then the entire vehicle, including closed containers found in the vehicle, may be searched without a warrant.
 - a. Containers searched must be likely repositories for the item(s) being sought.
 - b. If the investigation is focused on a particular container that just happens to be in a vehicle, a search warrant is required for a search of the vehicle for that particular container; and
 - c. Containers may be searched under other exceptions to the warrant requirement, such as exigent circumstances.
- B. If a lawful search of a motor vehicle is conducted without a warrant, anything of evidentiary value is admissible whether or not it is related to the arrest. For example, if an officer is justified in searching an automobile for narcotics, and stolen property is found, such stolen property is admissible in evidence as long as it was found in an area reasonably likely to contain the narcotics originally searched for.
- C. The routine inventory of a motor vehicle in police custody is not considered a search, but rather a legitimate "housekeeping" procedure. For further information on the inventory of motor vehicles, see General Order #6-12, Towing Vehicles.

V. WARRANTLESS ENTRY - EXIGENT CIRCUMSTANCES

- A. No court has attempted to formulate a final and comprehensive list of all exigent circumstances, which might justify a warrantless entry, but some of those considered relevant have been:
1. The degree of urgency involved and the time required getting a warrant.
 2. The officer's reasonable belief that contraband is about to be removed or destroyed.
 3. The possibility of dangers to others, including police officers left to guard the site.
 4. Information that the possessors of the contraband are aware that the police may be on their trail.
 5. Whether the offense is serious, or involves violence.
 6. Whether officers reasonably believe the suspects are armed.
 7. Whether there is, at the time of entry, a clear showing of probable cause.
 8. Whether the officers have strong reason to believe the suspects are actually present on the premises.
 9. The likelihood of escape if the suspects are not swiftly apprehended.
 10. The suspect's recent entry into the premises after hot pursuit.

- B. An officer may make a warrantless entry to secure the premises prior to or while seeking a search warrant, if the need to preserve evidence and protect officers outweighs the individual's privacy interest in maintaining the sanctity of the home.
- C. The following two factors must be present for the warrantless entry:
1. Officers have probable cause to believe evidence is on the premises.
 2. Delaying entry would create a substantial risk that evidence will be lost or destroyed or the critical nature of the circumstances prevents the use of the warrant procedure (exigency).
- D. Exigent circumstances which present a compelling need for immediate official action or which present a substantial threat of imminent danger to life or public safety include the need to seize evanescent evidence, such as blood or fingernail scrapings, or the need to search in an emergency, such as a burning fire; but no general emergency exception (such as occupational/safety violation, murder scene or extinguished fire).
- E. Exigent/exceptional circumstances include the right to enter and search an enclosure when in hot pursuit of a felon if there is reasonable cause to believe that the felon is inside.
- F. Exigent/exceptional circumstances must exist and be known to the officer prior to the conduct of the search and seizure and not be developed as the search and seizure takes place.
- G. Officers cannot be responsible for creating their own exigencies.
- H. In the Commonwealth of Virginia a law enforcement officer may temporarily detain a person if reasonable suspicion exists that a crime has been committed, is being committed, or is about to be committed; or the officer reasonably suspects that a person is illegally carrying a concealed weapon.
- I. A temporary detention as recognized by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, is a seizure as controlled by the fourth amendment. The court recognized that police officers must be able to take action when probable cause to arrest does not exist. The Virginia Supreme Court supported the necessity of stop and frisk in a 1977 case, Simmons v. Commonwealth, 231 S.E. 2D, 218, when it stated:
1. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be reasonable in light of the facts."
- J. Within stop and frisk, two distinct acts exist: (1) the stop and, (2) the frisk of person(s) stopped. Each is presented individually.
- K. The stop is the detention of a subject for a brief period of time. In order to make the stop, the officer must have reasonable suspicion to believe that a person is committing, has committed or is about to commit a crime or possesses a concealed weapon. The Courts are likely to rule that the following factors may be considered in building a foundation:
1. The officer has valid knowledge that the individual has a prior criminal record.
 2. The individual fits the description of a wanted notice or lookout.
 3. The individual exhibits furtive conduct, such as fleeing from the presence of an officer or attempts to conceal an object from the officer's view.
 4. Clothing worn by the individual is similar to the clothing described in a lookout for a known offense.
 5. The vehicle observed is similar to a broadcast description for a known offense.

6. The individual exhibits unusual behavior, such as staggering or appearing to be in need of medical attention.
 7. The location and time of day are consistent with past patterns of criminal activity.
- L. Hearsay information is acceptable in basing the foundation for stop and frisk. In order for the information to be credible, the officer must have some means to gauge the reliability of the informant's knowledge.
- M. The Frisk:
1. Should the officer reasonably believe that the person stopped may attempt to do them bodily harm or is carrying a concealed weapon, the officer may conduct a limited search for weapons of the person's outer clothing.
 2. Officers should review and remain familiar with court decisions regarding these areas of Stop & Frisk.
- N. Search Beyond the Person:
1. The United States Supreme Court held in Michigan v. Long, (1983) that although Terry v. Ohio involved the stop and subsequent pat down search for weapons of a person suspected of criminal activity, it did not restrict the protective search of the person of the detained suspect, but allowed search of the area within the suspect's immediate control as well.
 2. The Court recognized that protection of police and others could justify protective searches of the area under the immediate control of the suspect when there exists a reasonable belief that the suspect poses a danger. Thus, the search of a passenger compartment of an automobile when constituting the area immediately under the person's control, limited to those areas in which a weapon may be placed or hidden, is permissible.
 3. A lawful protective search for weapons, which extends to an area beyond the person in the absence of probable cause to arrest, must have all of the following elements present:
 - a. A lawful investigative stop or a lawful vehicle stop.
 - b. A reasonable belief that the suspect poses a danger. As defined by the Court in Michigan v. Long, reasonable belief is based on:
 - “. . . specific and articulable facts, which taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons.”
 - c. The search must be limited to those areas in which a weapon may be placed or hidden.
 - d. The search must be limited to an area, which would ensure that there are no weapons within the subject's immediate grasp, i.e., an area within the subject's immediate control.
 - e. The Court added in Michigan v. Long that, although the subject was under the control of two officers during the investigative stop, it did not render unreasonable a belief that he could injure them.

VI. SEARCH WARRANTS - RESPONSIBILITIES

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C. Promptness In Execution.

1. Search Warrants must be executed within 15 days of being issued. Prompt execution will decrease the possibility that the target of the search will be aware of the warrant's existence and will prevent the warrant from becoming stale due to passage of time and possible loss of probable cause. Warrants not served within 15 days must be returned to the court.

D. [REDACTED]

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XI. PERSONS WITHIN THE PREMISES

- A. Persons within the premises must be treated with as much restraint and courtesy as possible under the circumstances.
- B. Permissible Search of Persons.
 - 1. Mere presence at a search site is not a factor, which gives sufficient reason to search a person within the premises. In order for the search to be valid, the officer must articulate facts or circumstances within the search warrant affidavit which provide probable cause to support the action taken. The affidavit must normally identify the persons to be searched by name and the basis for such search whenever possible. Probable cause may arise after entry.
- C. Arrests.
 - 1. Probable cause to arrest a person at the search site may arise at any time during the execution of a search warrant. In that event, a search incidental to that arrest and independent of the warrant may be conducted.
- D. Permissible Frisk of Persons.
 - 1. Any person within the premises at the time the warrant is executed or any person that voluntarily enters the premises after the search has commenced may be frisked, if the officer reasonably suspects that such person has a concealed weapon or dangerous instrument. Mere presence at the search site is not normally a sufficient reason to frisk a person within the premises. In order for the frisk to be proper, the officer must be able to articulate facts or circumstances, which provide reasonable suspicion to support the action taken. Nothing in this section should be construed as limiting the entry team from frisking those persons already present to assure their own safety and the safety of others present.
- E. Restricting Movement of Persons.
 - 1. Restrictions may be placed on the movement of any person at the search site. This restriction is essential to prevent interference with the search and to safeguard the search/entry team and other persons involved. The restriction must be limited to the time needed to assure security. Persons not under arrest must be permitted free movement as soon as practical after determining that no security interest is in jeopardy. This includes the right to leave the premises, if a person so desires.

XII. SEIZURE OF ITEMS INADVERTENTLY FOUND

- 1. If contraband items are found, but not listed in the search warrant, they may be seized when the item could logically be seen within the scope of the warrant, in an area controlled by the search warrant.

XIII. ACTION AFTER SEARCH WARRANTS

- A. Protecting Damaged Property.
 - 1. If damage occurs during entry, a supervisor at the scene should evaluate the need to assure the protection of the search site until repairs can be made. If it is in the Department's best interest, the supervisor should assign personnel for protection of the property until the person in control of the property is able to assure security or other security means are taken.
 - 2. Whenever damage occurs during the execution of a search warrant, i.e., broken door, window, furniture, no officer should make any statement regarding liability for the damage(s).
 - 3. In situations where an innocent third person is the property owner, the senior police official should ensure notification of the property owner. Property owners should put any concerns in writing to the Chief of Police.

4. Damage occurring as a result of entry or execution of a search warrant must be thoroughly documented in the case report and photographed whenever possible.

B. Warrant Return.

1. As required by VA State Code 19.2-57, the lead officer must return the warrant within three days (72 hours) of execution to the Clerk of the Circuit Court in the jurisdiction where the search was conducted. The seventy-two hour timeframe does not include Saturdays, Sundays, and all federal and state holidays. An inventory of items seized must be filed with and sworn to under oath with the Clerk of the Circuit Court. If nothing was seized, a sworn statement to that effect must be written on the back of the warrant under the heading "Search Inventory and Return". Per VA State Code 19.2-56, if the warrant is not executed within fifteen days of issuance, the warrant must be returned to, and voided by, the issuing officer (normally the magistrate).

C. Return of Non-Contraband Items.

1. All seized property is properly documented and secured in accordance with current property procedures.
2. Whenever non-contraband items seized during the execution of a warrant are no longer needed for prosecution, they may be returned to the proper person, with authority of the Commonwealth's Attorney and in accordance with property procedures.

Colonel Richard J. Rappoport / Chief of Police

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