

1.08 WARRANTLESS SEARCHES AND SEIZURES



WARRANTLESS SEARCHES AND SEIZURES

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I. GENERAL CONSIDERATIONS AND GUIDELINES

The Fourth Amendment to the U.S. Constitution has been interpreted by the U.S. Supreme Court to require that, whenever possible and practicable, with certain limited exceptions, a police officer should always obtain a valid search warrant prior to initiating a search.¹

The Fourth Amendment of the U.S. Constitution declares:

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 Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article XIV of the Massachusetts Constitution provides as follows:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation

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of the persons or object of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

It can be frustrating to a police officer to learn that evidence which could have supported a finding of guilty, has been ruled inadmissible and excluded because of the manner in which it was obtained. In order to ensure that their efforts will not become lost in the maze of legal technicalities, it is imperative that all police officers thoroughly understand the basic constitutional and statutory requirements involved in searching for and seizing criminal evidence. The Fourth Amendment to the U.S. Constitution prohibits "unreasonable" searches and seizures and the Supreme Court has consistently held that unless they come within one of the few carefully limited exceptions to the search warrant requirement, warrantless searches and seizures are considered unreasonable. ² Searches with prior judicial approval with a valid search warrant are preferred. The burden of showing that a valid exception exists rests upon the government when the circumstances of a warrantless search are challenged in court.

The following procedures have been prepared to provide basic guidelines that are both legal and practical in the technical area of searches and seizures. In their implementation, officers should consider all related department policies on the following topics: Arrests, Threshold Inquiries, Search Warrant Affidavits, Confidential Informants and the Evidence Collection.

II. POLICY

Searches shall be conducted in observance of the constitutional rights of the parties involved, and with due regard for the safety of all officers and other persons involved. Warrants shall be obtained for all searches whenever possible and practicable.

III. DEFINITIONS

IV. PROCEDURES

WARRANT EXCEPTIONS

The following are not considered invasions of any privacy interest and, therefore, do not generally implicate the Fourth Amendment:

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THE “PLAIN VIEW” DOCTRINE [41.4.1]

Officers may seize contraband or evidence without a warrant under the "plain view" exception to the warrant requirement when they are lawfully present, the item seized is in plain view, it is immediately apparent that the item being seized is contraband or evidence of a crime, and the discovery of the evidence is inadvertent. The use of a light to illuminate a dark area is permissible under this doctrine.

THE “OPEN FIELDS” DOCTRINE [41.4.1]

An open field references that portion of privately owned land surrounding a person’s dwelling that is too remote or removed from the physical dwelling to be considered part of the “house” or surrounding curtilage such that it is protected by the Fourth Amendment. Open fields may be searched without a warrant even though the terrain in question is not easily accessible to the public and even though the owner may have posted “No Trespassing” signs and may even have a locked gate.³

ABANDONED PROPERTY [41.4.1]

Abandoned or discarded property may be searched by the police and seized. Examples of abandoned property include trash placed in a collection area accessible to the public,⁴ the contents of a hotel room wastebasket once an individual has vacated the room,⁵ or items thrown on the ground by a suspect.⁶

Note: An apartment or hotel room may be searched without a warrant provided the guest or tenant has left with an intention not to return and the landlord or owner has given permission to search.⁷

K-9

Under Article 14, an exterior dog sniff by a police K-9 is not a search because the dog does not intrude into the vehicle and the dog only visibly reacts to the scent of contraband. Citizens do not have an expectation of privacy in the odor of contraband emanating from their vehicle. Reasonable suspicion must be present in order to detain a vehicle and its occupants for the purpose of conducting a K-9 sniff.

WARRANTLESS SEARCHES

Officers may make a warrantless search, at the scene of a crime or in another location, when one of the following major exceptions to the search warrant requirement applies. **[41.4.1]**

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SEARCH INCIDENT TO LAWFUL ARREST

A warrantless search of a lawfully arrested person may be conducted for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest was made in order to prevent its destruction or concealment; and/or to remove any weapons that the arrested person might use to resist arrest or to affect their escape.;⁸ The search is limited in scope to the arrestee, the clothing they are wearing, the items in their possession, and the immediate surrounding area at the time of the arrest (that area from which the arrestee can either obtain a weapon or destroy evidence). If the arrestee was in a motor vehicle, a search is limited to the area from which the person could obtain a weapon or reach destructible evidence.⁹ Any search should be substantially contemporaneous with the arrest and conducted in the immediate vicinity of the arrest.

During a search incident to arrest the officer conducting the search may use the degree of force reasonably necessary to

1. Protect themselves and others present;
2. Prevent escape; and
3. Prevent the destruction of evidence.

In addition to a careful search of the area within the arrested person's immediate control, an examination of the entire premises may also be justified at the time of or immediately following a valid arrest if there is a reasonable belief that it was imperative for the officers' safety because of the presence of others in the house or apartment.¹⁰

This search is limited to areas where an accomplice or other person who might come to the aid of the arrestee might reasonably be hiding. Any item or object recognizable as criminal evidence discovered in plain view during a justifiable "protective sweep" may be properly seized.¹¹

SEARCHES IN EMERGENCY OR EXIGENT CIRCUMSTANCES [41.4.1]

A police officer is authorized to conduct a search without a warrant when faced with an emergency situation where delay would endanger officer's or the public's safety or might result in the escape of the offender or the destruction of evidence.¹²

The authority of the police to make warrantless entries in emergency situations, whether criminal or non-criminal, is based upon their

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fundamental responsibility to preserve the peace and to protect the public safety.¹³

The doctrine that permits warrantless entries and searches because of emergency or exigent circumstances requires justification by the police that it was impractical for them to obtain a search warrant in advance and that the warrantless search was truly necessitated by the emergency circumstances which could not have been anticipated.¹⁴

While conducting a lawful search justified by emergency or exigent circumstances, a police officer may seize any incriminating evidence inadvertently discovered in plain view.

Many emergencies justifying a warrantless entry and search do not necessarily involve criminal acts; for example, when a police officer hears a call for assistance, when they observe smoke or flame, or when they learn of an actual or potential natural or man-made calamity or disaster, they have the duty and obligation to respond immediately.

A warrantless entry into a burning building is permissible in an emergency and officials may remain for a reasonable time to investigate the cause of the fire and any evidence of arson discovered is admissible at trial. Any reentry after the fire has been extinguished and fire officials have left the scene should be made pursuant to a search warrant, unless the re-entry is justified by a recognized exception to the warrant requirement such as consent, emergency or abandonment.¹⁵

When an officer has reasonable cause to believe premises contain things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property they may, without a search warrant, enter and search such premises to the extent reasonably necessary for the prevention of such death, bodily harm or destruction.¹⁶

FRESH AND CONTINUED PURSUIT

The U.S. Supreme Court case of *U.S. v. Santana*¹⁷ set out factors supporting justification of exigent circumstances under this doctrine including:

1. There is fresh and continued pursuit of the suspect;
2. A crime of violence was involved;
3. There was a strong possibility that the suspect was armed;
4. The suspect was known or reasonably believed to be in the building;

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5. There was a likelihood that the suspect might escape unless immediately apprehended; and
6. There was sufficient justification for failure to obtain a search warrant.

Where the above or other emergency factors are not present, police may stake out the building or premises until a warrant is obtained.¹⁸

SEARCH BY CONSENT [41.4.1]

Because such issues as who may give lawful consent to a police entry and search or whether the consent was given voluntarily will be carefully scrutinized by the court, police should not unduly rely on such consent. On the other hand, when properly elicited, consent to a search may expedite a criminal investigation. Police may engage in a warrantless search after obtaining consent even in circumstances where they do not have probable cause.

For there to be a valid consent to search, the consenting party must have sufficient lawful authority over the premises or property and consent must be given freely and voluntarily.¹⁹ Consent to search may be given orally but preferably, it should be in writing.²⁰

In order for consent to be valid:

1. Consent cannot be presumed from silence.
2. Consent must be free of any coercion, intimidation, or threat, so officers must avoid even the appearance of intimidation or duress.
3. Consent cannot be attained through the use of misrepresentation or fraud.
4. Consent must be requested prior to search and after the police officers have identified themselves.

A consent search shall be limited to the area specified. Consent may be revoked at any time and the search shall cease upon revocation, unless additional factors or information have come to light, which justify a continued warrantless, non-consensual search. For example, evidence found prior to revocation of consent may be retained and used as a basis for an immediate arrest or as probable cause for a further search (if exigent circumstances exist) or for obtaining a search warrant.

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MOTOR VEHICLE SEARCHES

If a motor vehicle is lawfully stopped on a public way or is found parked in a public place,²¹ a warrantless search may be conducted under the motor vehicle exception if there is probable cause to believe that the vehicle contains contraband or other evidence. **[41.4.1]**

Note: If the vehicle is impounded and there is no probable cause to believe that there is evidence contained within the vehicle, the vehicle shall be searched in accordance with the departmental policy on **Motor Vehicle Inventory**.

In stopping and searching motor vehicles, officers shall take all reasonable precautions for their personal safety, such as directing the occupants to exit the vehicle and frisking them for weapons when the officer has a reasonable belief that they may be armed and dangerous.²² Many officers have been seriously injured, some fatally, while stopping and searching vehicles. This action should never be considered "routine." The vehicle may be searched on the street or moved to a safer location. If the vehicle is moved, the search should begin with undo delay.

BOOKING INVENTORY SEARCHES [41.4.1]

Prior to incarcerating a detainee in a police lockup, police shall conduct an inventory search of their person and inspection of their belongings in accordance with the departmental policies on **Processing Detainees** and **Protective Custody**. This shall be done to uncover and safeguard any weapons or implements the detainee could use to injure themselves or others, to safeguard valuables and to protect the police against false claims of theft or loss of the detainee's belongings.

ADMINISTRATIVE SEARCHES [41.4.1]

The police may, under certain circumstances, engage in warrantless searches or inspections as part of their administrative functions. For example, it is proper to search a person who is about to visit a detainee. See departmental policy on **Holding Detainees**.

SEARCHES BY PERSONS OTHER THAN LAW ENFORCEMENT OFFICERS

Evidence obtained by a private individual, as a result of searching someone else's property, when that person is not acting as an employee or agent of the government, is admissible.²³

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- ¹ *Mincey v. Arizona*, 437 U.S. 385, 89 S.Ct. 2408 (1978)
- ² *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964)
- ³ *Oliver v. U.S.*, 466 U.S. 170, 104 S.Ct. 1735 (1984); *Hester v. U.S.*, 265 U.S. 57, 44 S.Ct. 445 (1924)
- ⁴ *Com. v Pratt*, 407 Mass. 647, 555 N.E.2d 559 (1990)
- ⁵ *Abel v. U.S.*, 362 U.S. 217, 80 S.Ct. 683 (1960)
- ⁶ *Com. v. Wedderburn*, 36 Mass. App. Ct. 558, 633 N.E.2d 1058 (1995); *Com. v. Marrero*, 414 Mass. 1102, 606 N.E.2d 915 (1992)
- ⁷ *Com. v. Lanigan*, 12 Mass. App. Ct. 913, 423 N.E.2d 800 (1981)
- ⁸ M.G.L. c. 276, s. 1
- ⁹ *Com. v. Clermy*, 37 Mass. App. Ct. 774, 643 N.E.2d 1059 (1995)
- ¹⁰ *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990)
- ¹¹ *Com. v. Bowden*, 379 Mass. 472, 399 N.E.2d 482 (1980)
- ¹² *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967); *Com v. Moran*, 370 Mass. 10, 345 N.E.2d 380 (1976)
- ¹³ *Thurlow v. Crossman*, 336 Mass. 248, 143 N.E.2d 812 (1957)
- ¹⁴ *Com v. Guaba*, 417 Mass. 746, 632 N.E.2d 1217 (1994)
- ¹⁵ *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942 (1978); *Michigan v. Clifford*, 464 U.S. 287, 104 S.Ct. 641 (1984)
- ¹⁶ *Com. v. Marchione*, 384 Mass. 8, 422 N.E.2d 1361 (1981)
- ¹⁷ *U.S. v. Santana*, 427 U.S. 39, 96 S.Ct. 2406 (1976); *Com v. Moran*, 370 Mass. 10, 345 N.E.2d 380 (1976)
- ¹⁸ *U.S. v. Adams*, 621 F.2d 41 (1st Cir. 1980)
- ¹⁹ *Com. v. McGrath*, 365 Mass. 631, 310 N.E.2d 601 (1974)
- ²⁰ *Com. v. Reed*, 417 Mass. 558, 631 N.E.2d 552 (1994)
- ²¹ *Com. v. Wunder*, 407 Mass. 909, 556 N.E.2d 65 (1990)
- ²² *Com. v. Gonsalves*, 429 Mass. 658, 711 N.E.2d 108 (1999) rejecting *Penn. v. Mimms*, 434 U.S. 106, 98 S.Ct. 330 (1977)
- ²³ *Com. v. Leone*, 386 Mass. 329, 435 N.E.2d 1036 (1982)