

Cobb County Police Department

Policy 5.24

SEARCH AND SEIZURE

Effective Date: January 12, 2013
Rescinds: Policy 5.24 (September 30, 2007)
Related Orders: None
Issued By: Chief J.R. Houser Page 1 of 15
The words "he, his, him," which may appear in this policy, are used generically for clarity and ease of reading. These terms are not meant to imply gender and relate to all employees of the Department.

The purpose of this policy is to outline the basic legal principles of search and seizure. A thorough understanding of both statutory law and case law in the area of search and seizure is critical to the operations of the Department and the success of officers in many of their duties. Officers assigned to functions within the Department which are more involved with arrest and search and seizure issues may be required to further their knowledge of this field.

I. POLICY

- A.** It shall be the policy of this Department to conduct searches of persons, places, and things, pursuant to state and federal laws governing search warrants and/or warrantless searches. Officers of this Department shall have due regard for the protection guaranteed under the provisions of the Fourth Amendment of the United States Constitution.
- B.** Officers of this Department shall not engage in racial profiling, that is, the race or ethnicity of an individual shall not be the sole factor in determining the existence of probable cause to take into custody or search the premises or vehicle of that individual.
- C.** The following procedures shall address search and seizure policy and will cite major case law and/or state statutes where applicable.

II. SEARCH WARRANT

- A.** A search warrant is an order in writing issued by a justice or other magistrate, in the name of the state, and directed to a sheriff or peace officer, authorizing him to search for and seize any property that constitutes evidence of the commission of a crime, contraband, the fruits of crime, or things otherwise criminally possessed; or property designed or intended for use or which is, or has been, used as the means of committing a crime.

B. A search is an invasion of a citizen's expectation of privacy in a particular area. An officer should always keep in mind that, absent a warrant, a search is unconstitutional unless it falls within an exception to the rule requiring search warrants.

C. Searches with a Search Warrant

OCGA 17-5-20 authorizes the issuance of search warrants. The following is required of all search warrants and search warrant affidavits:

1. Issuance

The warrant must be issued by a judicial officer authorized to hold a court of inquiry (OCGA Section 17-5-21). For search warrants within Cobb County, officers shall use the Cobb County Magistrate Court. For searches outside of Cobb County, officers shall use the appropriate judicial officer.

2. Probable Cause

The judicial officer must find probable cause that the place to be searched contains items connected with criminal activity. (*Berger v. New York* 388 U.S. 41). The officer must swear or affirm under oath that the facts presented for establishing probable cause are true.

Probable cause is defined as “what facts and circumstances within an officer's knowledge would lead a reasonable and prudent man to believe that an offense has been committed or is being committed and/or that a particular individual has committed or is committing the offense.”

3. Description

The warrant must describe with sufficient particularity, the person or the place to be searched and the items to be seized (OCGA 17-5-23). If a place can be easily identified by a street number or address, then no further information shall be necessary; however, an officer may elect to further describe the place to be searched.

4. Hearsay

A warrant may be issued based upon an affidavit containing only hearsay, where the reliability of the informant is established and the underlying factual circumstances are described.

III. SEARCH WARRANT EXCEPTIONS

Pursuant to the following doctrines pertaining to officer/citizen contacts, contraband or evidence of a crime may be seized, and charges initiated for the associated criminal act.

A. Stop and Frisk

1. Grounds for Stop

- a. To lawfully stop an individual, the law enforcement officer must have a reasonable suspicion that the person stopped is involved in criminal activity.
- b. Officers shall not use racial or ethnic profiling to justify any stops. In appropriate situations, an incident report should be filled out on all such stops of suspicious persons and forwarded to the appropriate investigative unit. A detailed description of the activity and of the person should be included.

2. Grounds for Frisk

In *Terry v. Ohio*, 392 U.S. 1, the Supreme Court decided that an officer is authorized to stop and frisk an individual whenever the law enforcement officer has a reasonable suspicion that the subject is committing, has committed, or is about to commit a crime and the officer has real, articulable reasons to fear for his safety.

- a. Since the scope of the search in *Terry* is limited to weapons, such search may not be intrusive and beyond the scope of looking for weapons. However, contraband discovered in such searches is subject to seizure and may be admissible into evidence.
- b. When the officer no longer is in fear of his safety, the exception to warrantless search and seizure under *Terry* no longer applies.

3. Nature of Frisk

The frisk for weapons must be only a limited intrusion of a person (pat-down). If the pat-down of the suspect's clothing fails to disclose evidence of a weapon, no further search may be made.

- a. If, during the pat-down, an officer feels an object that he reasonably believes could be a weapon, he may seize it.
- b. If, during the pat-down for weapons, the officer feels an object that he immediately recognizes to be contraband, he may seize that item under the "plain feel" doctrine.
- c. If possession of that item is a crime, the officer may arrest the suspect and complete a full-custody search incident to arrest of the suspect.

4. Carried Articles

Carried articles and belongings may be frisked the same as a lawful body frisk, if they are, or were, in the immediate control of the detainee. It does not matter if the officer has separated the article and suspect, he may still conduct a frisk.

5. Search after Frisk

Feeling an object which might be a weapon or contraband will justify a more extensive intrusion to obtain the suspected weapon or contraband. An officer may search the suspect's pockets to dispel the alarm that a weapon or contraband is present.

B. Plain View Doctrine

In order for the plain view doctrine to apply all of the following conditions must be met:

1. The law enforcement officer must be at a location where he has a legal right to be.
2. The seized items must appear on their face to be incriminating.
3. The items seized must be plainly visible to the law enforcement officer.

C. Abandonment

1. Act

Abandonment is a voluntary relinquishment of control of property, i.e., disposing of or denying ownership.

2. Implications

Abandoned property is not protected by the Fourth Amendment. Officers may seize abandoned property without probable cause and without a warrant.

Whether or not property has been abandoned is a question of intent, which must be shown by clear, unequivocal, and decisive evidence.

D. Curtilage

1. The Curtilage Doctrine

Curtilage is afforded the same Fourth Amendment protection as is the home. Generally speaking, curtilage has been held to include all buildings in close proximity to a dwelling, which are continually used for carrying on domestic purposes; or such places as are necessary and convenient to a dwelling, and are habitually used for family purposes (including a patio).

2. The Open Field Doctrine

The Fourth Amendment protection does not extend to the "open fields" surrounding the curtilage and the home. The "plain view" exception can apply to an open field situation.

3. Legitimate Expectation of Privacy

The determination of whether Fourth Amendment protection will be extended to items seized from the curtilage or open fields focuses on whether the person challenging the search has a legitimate expectation of privacy in the place which was searched.

E. Consent Search

1. A consent search is permitted when a person, who has a reasonable expectation of privacy in an area, voluntarily gives permission for police to conduct a search of the area.

a. This search does not require probable cause, or even reasonable suspicion, merely consent. The search will be limited to those areas "reasonably" within the search area.

b. Consent may be withdrawn at any time. If consent is withdrawn, all searching will immediately stop, unless by that time other lawful search justifications are present.

2. The courts, in deciding on the validity of a consent search, generally use the following criteria in order to make that determination:

a. Voluntariness: The law enforcement officer obtaining consent has the burden of proving that the defendant's consent to a warrantless search was given freely and voluntarily.

b. Test: The voluntariness of a person's consent is measured by the totality of the circumstances.

3. Consent after Arrest

If the consenting party is in custody, the voluntariness of the consent is still measured by the totality of the circumstances, although courts will analyze the relevant factors more critically.

4. Third Party Consent

Consent for a warrantless search may be given by a third party who shares control of, or has common authority over, the premises or items to be searched. Areas belonging exclusively to parties not present or not giving consent shall not be searched.

- a. Law enforcement officers will make every reasonable attempt to get a signed consent to search.
- b. Officers are reminded that an oral consent will be subject to the same scrutiny as a written consent.

5. Oral and Written Consent

- a. The courts do not require that consent be in writing. An oral or written consent will be judged by the criteria listed above.
- b. However, whenever feasible, officers should have the individual sign a consent form. A written consent is sometimes more successful in court.

F. Search incident to Arrest

OCGA 17-5-1, authorizes the search of an individual incident to a lawful arrest.

1. The purpose for this exception is for:
 - a. Protecting the officer from attack.
 - b. Preventing the person from escaping.
 - c. Discovering or seizing the fruits of the crime for which the person has been arrested.
 - d. Discovering or seizing any instruments, articles, or things which are being used in the commission of the crime for which the person is being arrested.
2. A search incident to a lawful arrest must be limited in scope to the arrestee's person and the area "within his immediate control".

3. A search incident to a lawful arrest must be concurrent in time and place with the arrest.
4. When an officer is in the process of conducting a lawful search, the officer shall not be precluded from discovering or seizing any stolen or embezzled property, any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of this state. (OCGA 17-5-1(4)(b).)
5. A jail house search of an arrested individual is justified as an administrative search. A custodial search of the arrestee's person may be justified as either an administrative search or as an inventory procedure. Once an officer has taken any property discovered during the search into his control, a further non-contemporaneous search is no longer an incident of the arrest.

G. Exigent Circumstances

1. Justification

A warrantless search is permitted when there is both probable cause and exigent circumstances. The ultimate test is whether there is such a compelling necessity for immediate action that proceeding without a warrant is justified.

2. Exigent Circumstances Defined

Hot pursuit, a fleeing suspect, imminent destruction of evidence, circumstances where an officer hears screams, observes an immediately dangerous situation to anyone, or other situations in which speed is essential to the accomplishment of lawful police action are examples of exigent circumstances.

3. "Hot Pursuit" Forcible Entries Into Offender's Home

In *United States v. Santana*, the Supreme Court ruled that hot pursuit justifies forcible entry into the offender's home without the need for a warrant. The court said "We thus conclude that a suspect may not defeat an arrest that has been set in motion in a public place...by the expedient of escaping into a private place."

- a. In order to justify this arrest, the three elements of hot pursuit must be satisfied:
 - 1) The arrest process has begun.
 - 2) The offender knows he is being placed under arrest.

- 3) The offender takes action to avoid the arrest.
 - b. However, under the restrictions imposed by the Supreme Court case of *Payton v. New York*, officers must not enter an individual's home or dwelling without a warrant.
 - c. Warrantless probable cause arrests, permissible in a public place, do not justify access to the sanctity of an offender's home.
4. Searches where public safety is endangered

Under special circumstances where an officer hears screams, observes an immediately dangerous situation to anyone, or other exigent circumstances exist, an officer may make an emergency search of persons or premises. In *Michigan v. Tyler*, the court specified the "compelling need for official action and no time to secure a warrant". Various other courts suggested factors establishing this compelling need to include the gravity of the offense, the presence of weapons, and the likelihood of escape. The "totality of the circumstances" will be the deciding factor in each case.

IV. VEHICLE STOPS

- A. A "seizure" occurs whenever a vehicle is stopped, even though the purpose is generally limited and the detention quite brief. Therefore the Fourth Amendment is applicable.
- B. The same justification needed to stop and detain a pedestrian is necessary to stop and detain a vehicle or occupant. Mere suspicion of criminal activity is sufficient to stop. [*Delaware v. Provse*. 440 U.S. 648 (1979)].
- C. A vehicle may also be stopped at general roadblocks or safety checkpoints which serve legitimate law enforcement purposes.
 1. If the purpose of the roadblock is legitimate, (e.g. to check driver's licenses) and not to randomly stop vehicles, and if evidence of other crimes is observed, the officer has the right to take investigative steps.
 2. A supervisor shall be at the location of a roadblock.
- D. Officers may take reasonable action to protect themselves after a lawful stop of a motor vehicle. An officer may prefer to ask the driver or passenger(s) of a vehicle to step out of the vehicle. Officers may consider external factors such as weather, crowds, etc., prior to instructing anyone to get out of a vehicle.

- E. Officers shall not use racial or ethnic profiling in making the decision to stop a vehicle or a violator.

V. VEHICLE SEARCHES

Pursuant to the following doctrines pertaining to vehicles, contraband or evidence of a crime may be seized, and charges initiated for the associated criminal act.

A. Exigent Circumstances

1. The mobility of a vehicle in a public place has been construed by the courts to constitute an exigent circumstance.
2. Exigent circumstances (vehicle in public place) combined with probable cause to search, constitutes the "automobile exception" to the search warrant requirement. This is true even if there is ample time to obtain a warrant. (Gondor v. State, 129 Ga. App 665; Carroll v. United States, 267 U.S. 132; California v. Carney, 471 U.S. 386).
3. The mobility of a vehicle does not preclude other aspects of the exigent circumstance doctrine from being applicable (i.e. vehicle hot pursuit from public place to private residence, etc.)

B. Probable Cause or "Carroll Search"

To search a vehicle without a warrant, the officer must have exigent circumstances and probable cause to believe that the vehicle contains contraband. Once this criteria has been met, the officer may search anywhere in the vehicle (e.g. under hood, in trunk, other compartments, etc.) where the contraband may be concealed.

1. Time and Place of Search

If probable cause and exigent circumstances existed originally, the police may search the vehicle after towing it to a secure area (impound lot) without securing a search warrant. When probable cause exists without exigent circumstances, a warrant is required (Caito et al v. State, 130 Ga. App. 83).

2. Closed or locked containers within a vehicle may be searched if the item being searched for could be enclosed within the container.

C. Consent to Search

1. An officer must have voluntary permission from the owner or person in control of the vehicle to conduct a consent search. If there is more than one occupant in the vehicle, prior to asking for consent, the officer shall

determine if the driver or other occupant is the owner or person in charge of the vehicle.

2. The owner/person in charge may limit the scope of the search.
3. Any place in the vehicle that may reasonably be believed to be within the consent may be searched.
4. Containers can be searched if it is reasonable to believe they are within the consent.
5. Consent may be withdrawn at anytime, and the search must be stopped at that time unless further probable cause is present.
6. Consent does not have to be in writing. However, when feasible, officers should have the individual sign a consent form. A written consent is sometimes more successful in court.

D. Frisk for Weapons

1. An officer must have made a lawful vehicle stop and have reasonable suspicion that dangerous weapon(s) are contained within *the* immediate access of the suspect.
2. Only the interior passenger compartment may be frisked.
3. A closed container may be opened and checked for weapons if it could, in fact, conceal a weapon and if it is immediately accessible to the suspect; that is, if the container could be opened quickly and without breakage.
4. Even if the suspect is removed from the vehicle, the right to frisk for weapons remains. [Michigan V. Long. 463 U.S. 1032 (1983)]

E. Frisk of Occupants

Frisk of occupants is covered by Terry V. Ohio, 392 U.S. (1968) (see above) and is authorized when there is:

1. A lawful basis for investigative detention
2. Reasonable suspicion the suspect is armed and dangerous.

F. Search Incident to Arrest

1. A search incident to a lawful arrest of an occupant of a vehicle must be limited in scope to the arrestee's person and the area "within his immediate control".
2. The courts have held that the passenger compartment is the area within immediate control. Therefore, the officer may search anywhere in the interior passenger compartment where a weapon could be found, fruits of the crime for which the person has been arrested, or to seize articles or things which are being used, or may have been used, in the commission of the crime for which he has been arrested.
3. Closed containers can be searched in the same manner as discussed in a consent search.
4. The right to search remains even if the arrestee has been removed from his vehicle [New York V. Belton, 453 U.S. 454 (1981)].
5. When an officer is in the process of conducting a lawful search, the officer shall not be precluded from discovering or seizing any stolen or embezzled property, any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of this state. (OCGA 17-5-1(4)(b).)
6. If, during the search of the interior passenger compartment incident to arrest, probable cause is developed, or contraband or fruits of the crime is discovered, the remainder of the vehicle (those areas in which the person did not have "immediate control") may be searched pursuant to the "automobile exception" to the search warrant requirement.

G. Plain View

1. During the course of a traffic stop, items of contraband or evidence of a crime in plain view within a motor vehicle may be seized.
2. The seized items must appear, on their face, to be incriminating, and the items must be plainly visible to the law enforcement officer.

H. Inventory of Vehicles

1. Seizure of Vehicle
 - a. For an inventory of a vehicle to be valid, the police custody of the vehicle must be lawful.
 - b. An inventory of a vehicle is not a search.

- c. An inventory is a departmental policy designed to insure that valuable possessions within a vehicle in police custody are accounted for.
- d. Any contraband which is inadvertently found during an inventory may be seized.

2. Justification

The inventory must be conducted only to fulfill the police care-taking function of securing the contents of the vehicle.

3. Nature of the Inventory

- a. The search must be a routine part of standard police procedures for impounding vehicles, rather than a pretext for an investigatory search, and may not extend to locked luggage or other similar repositories of personal effects.
- b. It shall be standard operating procedure for Cobb County Police officers to inventory all vehicles impounded by this Department.

I. Containers within Vehicles (General)

- 1. A law enforcement officer who has legitimately stopped an automobile, and who has probable cause to believe contraband is located somewhere within the car, may conduct a warrantless search of the vehicle, including compartments and containers within the vehicle whose contents are not in plain view. (U.S. v Ross, 456 U.S. 798; California v. Acevado, 111 S.Ct. 1982 (1991).)
- 2. The search incident to arrest and plain view doctrines will generally make unnecessary the need to secure a warrant to search containers. When a lawful arrest has been made, the officer may examine the contents of any container found within the passenger compartment within reach of the arrestee, or the area of immediate control.
- 3. Closed containers may be opened during a personal effects inventory. (Ill. v. Lafayette, 162 U.S. 640,)

VI. GREATER INTRUSION SEARCHES

The Department recognizes that the use of body surface and body cavity inspections may, under certain conditions, be necessary to protect the safety of officers, civilians and other prisoners; or to detect and secure evidence of criminal activity. Recognizing the intrusiveness of these inspections, it is the policy of the Cobb County Police Department that such inspections shall be conducted only with proper authority and justification, and with respect

for the privacy of those being inspected. This policy does not address inspections of subjects who have been relinquished to other agencies.

A. Body Surface Inspection

Body Surface Inspection: Any search of an individual requiring the removal or rearrangement of clothing to permit the visual inspection of the genital area, buttocks, anus, female breasts.

1. Individuals arrested or detained for traffic violations and other minor offenses of a nonviolent nature should not be subject to a Body Surface Inspection unless the arresting officer has reasonable suspicion to believe that the individual is concealing contraband or weapons. Reasonable suspicion may be based upon, but is not limited to the following:
 - a. The nature of the offense charged.
 - b. The arrestee's appearance and demeanor.
 - c. The circumstances surrounding the arrest/detention.
 - d. The arrestee's criminal record, particularly past crimes of violence and narcotics offenses.
 - e. The discovery of evidence of a major offense in plain view or in the course of a search incident to the arrest.
 - f. Detection of suspicious objects beneath the suspect's clothing during a field search incident to arrest.
2. Body Surface Inspections should be conducted:
 - a. By the fewest number of personnel necessary.
 - b. Under conditions that provide privacy from all but those authorized to conduct the inspection.
 - c. If the circumstances permit, by an officer of the same sex.
3. Following a Body Surface Inspection, the officer performing the inspection will document, in writing, the following:
 - a. Date and place of the inspection.
 - b. Identity of the officer conducting the inspection.
 - c. Identity of the individual inspected.
 - d. Those present during the inspection.
 - e. A description of the nature and extent of the inspection.
 - f. The basis of reasonable suspicion to conduct the inspection.
 - g. Any weapons, evidence or contraband found during the inspection.

Body Surface Inspections that require the removal of all clothing shall be conducted only in the rarest of circumstances and with the explicit approval of a supervisor.

B. Body Cavity Inspections

Body Cavity Inspection: Any search involving not only visual inspection of skin surfaces but the internal physical examination of body cavities and, in some instances, organs such as the stomach cavity.

Should visual examination of a suspect during a Body Surface Inspection and/or other information lead an officer to believe that the suspect is concealing a weapon, evidence or contraband within a body cavity, the following procedures shall be followed:

1. The suspect shall be kept under constant visual surveillance until a Body Cavity Inspection is conducted or an alternative course of action taken.
2. The officer shall consult with his immediate supervisor to determine whether probable cause exists to seek a search warrant for a Body Cavity Inspection. The decision to seek a search warrant shall recognize that a Body Cavity Inspection is highly invasive of personal privacy and is reasonable only where the suspected offense is of a serious nature and/or poses a threat to the safety of officers, the suspect, or others.

Certain intrusions into the body (e.g. stomach pumping, surgery) have been held to be in violation of the Fourth Amendment (*Rochin v. California* 342 U.S. 165, *Winston v. Lee*, 470 U.S. 753). Hence, only under the most exigent circumstances and only pursuant to a search warrant, could such a procedure be allowed.

3. If probable cause exists for a Body Cavity Inspection, an affidavit for a search warrant shall be prepared that clearly defines the nature of the alleged offense and the basis for the officer's probable cause.
4. On the basis of a search warrant, a Body Cavity Inspection shall be performed only by an authorized physician or by other medically trained personnel at the physician's direction.
5. For safety and security reasons, the inspection shall be conducted at the jail or other authorized medical facility and in a room designated for this purpose.
6. Body Cavity Inspections shall be performed with due recognition of privacy and by medically trained personnel as previously addressed in this policy.
7. A supplemental report will be completed by the requesting officer stating the reason for the Body Cavity Inspection. A copy of the medical report shall be submitted with the original incident report.

C. Other Intrusive Searches

Intrusions on the body's surface (swabbing, hair samples, retrieval of evidence from the mouth, etc.) are governed by the Fourth Amendment. Such searches are permissible as long as they are conducted in a reasonable manner and are justified under the circumstances (e.g. probable cause to search).

However, other more common intrusions, such as blood tests, may be conducted without a warrant if the setting and procedures are reasonable, as when blood is drawn by a doctor in a hospital (*Schmerber v. California* 384, U.S. 757).