




# Ohio Attorney General's Law Enforcement Bulletin



**June 2014**

## **Legal Review: Consensual Encounters to Terry Stops**

Stops are one of the most dangerous parts of your job as a law enforcement officer. Whether you're on foot or in your cruiser, stopping a stranger is an encounter with the unknown. It is the conflict point between law enforcement and the individual, and it's also where everything can go right or everything can go wrong.

You know the proper police procedure for officer safety when making a stop — you don't even have to think about it. Reviewing the legal basics of stops will help you become more familiar with those requirements, and they'll eventually become second nature to you as well. Getting these encounters right from the outset is the best way to ensure that any evidence you uncover doesn't get thrown out on a legal technicality.

### **The Right to Walk Away**

Consider a consensual encounter. You have this kind of encounter every day when you buy a cup of coffee, say hello to a stranger, talk to your child's teacher, or approach a co-worker for help. A consensual encounter happens when you approach someone in public to engage them in conversation.

The most important aspect of this encounter is the person has the right to end the conversation at any point and walk away from you. This encounter can even stay consensual if you ask for identification or ask to search the individual. Remember, you can ask but you cannot demand. Any person in a consensual encounter has the right not to give you his identification or have you search her belongings.

But be careful, a consensual encounter can quickly change to a seizure based on your actions and whether the individual believes he can leave. If you detain an individual through force or authority, he has been "seized" and all of his constitutional protections kick in.

One way to keep your consensual encounters consensual is to think, "How would this play out if I weren't wearing a badge and uniform?" So imagine you see a couple of kids hanging out at a park. You walk up to them and ask, "What are you guys doing today?" There's nothing wrong with that. You haven't detained them; you've only engaged them in the same kind of consensual encounter that any other citizen could.

But what if one of them looks at you and says, "None of your business," and walks away? Well, he's absolutely allowed to do that. And if you weren't wearing a badge and uniform, no one would think their behavior was criminal (maybe rude, but not criminal). In fact, if you have kids and one of them

told you, “Some stranger came up to me at the park and asked me what I was doing, but I just walked away and didn’t answer,” you might think, “Good job!”

The minute you say anything like, “Hey, I’m talking to you, get back here,” you’re getting into stop-and-detain territory. The power to stop someone is what sets you apart from a random stranger, but it’s the same power that escalates a consensual encounter to a stop.

You can stop a person explicitly by telling him to stop, ordering him to answer a question, blocking his path, or grabbing him. You can stop him implicitly by displaying your weapon, surrounding him, or suggesting there might be consequences if he doesn’t obey you. The courts will look at all the factors surrounding the interaction to determine whether a reasonable person would have felt he was being stopped.

### **Asking for ID**

Asking for identification during a stop may be routine, but what you do with the ID after receiving it could change a stop from consensual to a seizure. For example, you walk up to a group of individuals on a public sidewalk to ask what they are doing and ask to see their identification. Up to this point, this is a consensual encounter. They have the right to walk away or refuse to give you identification.

But what if the individuals hand you their IDs? If you take the identifications and go to your cruiser to run warrant checks, you might convert a consensual encounter to a stop. This is because while you’re sitting in your cruiser with their IDs, they can’t really go anywhere, and so a reasonable person in the same situation would believe they were no longer free to leave.

So how can you ask for identification and keep it a consensual encounter? Well, you can take the identification, step back to your cruiser, write down the information, and give back the ID. As law enforcement, you may jot down information presented to you verbally or in writing without triggering the Fourth Amendment.

### **Moving into *Terry* Territory**

In particular situations, Ohio law allows you to demand an individual give you his personal information during a stop. A refusal to answer you is a misdemeanor. Under Ohio Revised Code Section [2921.29](#), a law enforcement officer may demand a person’s name, address, or date of birth when the officer reasonably suspects the person is committing, has committed, or will commit a criminal offence. It also allows personal information to be demanded from witnesses to criminal offenses. Once you have enough reasonable suspicion to demand information under R.C. 2921.29, you have enough to make a *Terry* stop.

Between a consensual encounter and an arrest is the *Terry* stop — a brief detention to investigate an individual. It must be done with “reasonable articulable suspicion” that the individual is or was doing something criminal.

So what does that mean? Reasonableness is judged on an “objective law enforcement officer” standard. In other words, would the “average” law enforcement officer seeing what you see and knowing what you know have the same actions or reactions as you? “Articulable suspicion” means suspicion you can articulate, in other words: the specific and objective facts or reasons why you had the suspicion and made the stop. In other words, “articulable” is the opposite of saying, “I just had a hunch he was up to no good.”

The court will look at the totality of the circumstances — such as the location of the stop, your knowledge about the suspect and the alleged criminal activity, and the suspect’s behavior — to determine if you had articulable suspicion. No one factor outweighs the others.

Consider the following factors and how the court will scrutinize them:

- **Confidential informants:** You can rely on informants if you know them and they previously provided you with reliable information. It also helps to corroborate the information the informant provides.
- **High crime areas:** While not enough on its own, the fact that you know an area has a characteristic for a certain kind of crime can be a factor to make the stop if the stop is for the kind of crime known in the area. For example, an area of town is known for heroin and you stop an individual because you suspect he is a heroin dealer.
- **Suspect’s behavior:** In general, you are able to consider the behavior of a suspect as a factor to make the stop. This is especially true when the suspect’s behavior changes upon noticing you. If a suspect is nervous and evasive, that can be one factor to justify reasonable suspicion. An attempt to flee has to be more than briskly walking away from law enforcement; it must be an attempt to run.

Solidifying your understanding of the subtle lines between consensual encounters, *Terry* stops, and seizures is important during those conflict points to protect yourself and your evidence. The good news is that your behavior and actions control those lines.

But remember, the lines are constantly being reviewed by courts. It is important to keep up-to-date on the latest Fourth Amendment court decisions. The Ohio Police Officer Training Academy offers courses on Fourth Amendment topics. Its upcoming [Legal Training](#) (Nov. 12) and [Arrest, Search, and Seizure](#) (Aug. 4 and Oct. 9) classes cover search, seizure, arrest, and *Miranda*. You can also reach out to your local legal counsel for updates.

## **Warrantless Search (Consent from Co-Occupants): *Fernandez v. California***

The U.S. Supreme Court recently issued an important ruling in favor of law enforcement that expands the authority of officers to get consent to search premises after a lawful arrest. *Fernandez* changes the landscape of consensual searches in situations in which one co-tenant, who is present on the property, agrees and the other, who is not present, objects to the search.

[Fernandez v. California](#), U.S. Supreme Court, Feb. 25, 2014

**Facts:** Police officers watched a suspect in a violent robbery run into an apartment building. They then heard screams coming from inside. The officers knocked on the door, which Roxanne Rojas answered. She appeared to be battered and bleeding. The officers asked her to step out so they could do a protective sweep when Walter Fernandez appeared and objected to their entry. Suspecting Fernandez had assaulted the woman, the officers arrested him for domestic violence, unrelated to the suspected robbery. At the station, Fernandez was identified as the individual from the robbery. The officers returned to the apartment a few hours later and received Rojas’ consent to search it.

Inside they found several items linking Fernandez to the robbery. Fernandez filed a motion to suppress because he, as a co-occupant, objected to the search prior to his arrest.

**Importance:** When two or more people share a premises, it only takes one of them to deny you entry. But what happens when the one who denied you entry is no longer physically present? In this case, Fernandez argued the search was improper because he had already denied entry. But the court found that once Fernandez was no longer on the property, the remaining tenant could give consent to search. Under *Fernandez*, the important factor is whether the person is physically present when you make the request. If the person is not present as a result of a lawful detention or arrest, that person is absent just like any other absent co-occupant and the exception does not apply.

**Keep in Mind:** The cops in this case had a legitimate reason to arrest Fernandez. They saw obvious signs of domestic violence, and they arrested him for it. In the wake of this case, you can expect that courts may look at these kinds of arrests with a skeptical eye if it looks like you're just arresting someone to get them out of the house.

**One Last Thought:** This case does not change the rule that the co-occupant must have common authority over the area to be searched in order for the consent to be valid. In *U.S. v. Peyton*, a great-great-grandmother and her adult grandson shared a one-bedroom apartment, and the lease was under both names. The grandson used the living area as his "room" and stored personal items under his bed. The grandmother was able to give permission for the police to search the common areas of the apartment, but was not able to give consent for the officers to look under the bed and search the contents of shoeboxes, where they found marijuana. [\*U.S. v. Peyton\*](#), D.C. Appellate Court, March 21, 2014

### ***More on Warrantless Search***

**I know you have marijuana, so I'm coming in!** You arrive at the home of an alleged marijuana grow operation and meth lab to conduct a "knock and talk." As you head to the door, four officers take positions around the perimeter of the home, on its property. After you knock and tell the two occupants why you are there, one of the occupants immediately closes the door. You are informed by your backup that marijuana plants are sitting on the rear deck of the home (which is not in plain view). You knock again and ask, through the door, for the occupants to come out. You hear someone inside say, "Hang on." At this point, you open the door and go in based on the exigent circumstance of the marijuana. Was entry into the home proper without a warrant? The court in *Morgan* says no. Although the "exigent circumstances" rule is an exception to the warrant requirement, in this case the exception did not apply because knowledge of the plants came from an unconstitutional entry onto the property. Performing a knock and talk does not allow law enforcement to enter private property without a warrant. [\*State of Ohio v. Morgan\*](#), Fifth District, Fairfield County, May 1, 2014

## **Searches and Seizures of Vehicles (Abandoned Property): *State of Ohio v. Warner***

**Question:** Can you search a trunk of an "abandoned" vehicle without a warrant?

**Quick Answer:** Yes, if an individual intended to abandon the vehicle, through words or actions, he loses his right to privacy, and search without a warrant is proper.

[State of Ohio v. Warner](#), Eleventh Appellate District, Portage County, May 5, 2014

**Facts:** Officer Dominic Poe of the Kent Police Department activated his lights to pull over Raymond Warner for a turn-signal violation. Warner turned into a driveway, parked, and ran. Due to the presence of a passenger, Poe did not chase Warner. Instead, he ran the registration and found the car did not belong to Warner. Poe called in a tow truck because the vehicle was abandoned. He performed an inventory search, finding meth and the purse of the owner inside the car as well as a digital scale with powder residue, a bag of lithium batteries, Warner's Social Security card, aluminum foil, a pipe cutter, and a bottle of suspected muriatic acid in the trunk. Warner filed a motion to suppress the evidence found in the trunk.

**Importance:** In general, an inventory of a vehicle does not allow the search of a closed trunk. However, if the vehicle is determined to be abandoned, searching the trunk is proper. To determine if a vehicle is abandoned, you look to the intent (words or actions) of the person. In this case, Warner ran from the vehicle. The act of running shows abandonment through action. When a person abandons his property, he loses any expectation of privacy, and a search is proper without a warrant.

**Keep in Mind:** The individual must carry out the act of abandonment voluntarily. The determination of whether the person acted voluntarily is also based on your stop. If a person abandons a vehicle after an illegal stop, that vehicle will not be classified as abandoned for search purposes — even if the person runs away. In this case, Poe witnessed Warner fail to signal, a violation of traffic law, making the stop legal. As a result, Warner voluntarily abandoned the vehicle, and the search of the trunk was proper.

**Another Look:** Check out the case of Nicholas Newton, in which the court determined that a rifle used to murder an individual was abandoned property. As a result, Newton had no right of protection under the Fourth Amendment to the rifle, including the DNA traces found on it. [State of Ohio v. Newton](#), Tenth Appellate District, Franklin County, May 8, 2014

### ***More on Search and Seizure: Vehicles***

- **Do you have to ticket for every reasonable suspicion?** While on patrol, you pass a car with a loud sound system going the opposite direction at a high rate of speed. You turn your cruiser around and follow the driver, activating your overhead lights after watching the car go left of center. You think this may be a possible OVI due to the surrounding bar scene. When you approach, the driver rolls down his window and you smell burnt marijuana. You have the two men exit the vehicle and you search the car, finding a loaded pistol magazine and marijuana. You give a citation for a marked lane violation and loud sound system, but not OVI or speed. Based on your charges, was the search proper? The court in *Holland* says yes. An officer's reasonable articulable suspicion is based on a collection of factors to make a traffic stop. It doesn't mean a citation has to be issued for each suspicion. In this case, the video showed the vehicle cross the center line, a clear violation of law. The court determined the stop was proper, and the search was permitted after the officer smelled the marijuana. [State of Ohio v. Holland](#), Tenth Appellate District, Franklin County, May 8, 2014
- **Are those balloons in your car?** You respond to a call for shoplifting. Both suspects are very suspicious, tell you different stories about their whereabouts, and admit to shoplifting. You then take one of the suspects outside to talk. He points out the vehicle he drove to the store, which you believe may have been involved in an earlier drug deal. He says the vehicle is not his, but you run the tags and find he had purchased it a few days earlier. You shine your flashlight through the window onto the seat and see a duffle bag with an unzipped pocket containing multicolored

balloons and white pills. You decide to search the vehicle and find a variety of drug paraphernalia, drugs, material to make methamphetamine, and a handgun. Was this search proper? The court in *Chaffins* said yes. Under the automobile exception, you are allowed to search portions of a vehicle if you have probable cause to believe there is evidence of a crime. In this case, the officer knew the vehicle was likely associated with a drug case, observed that the suspects were lying and acting suspicious, and saw pills and balloons (known to him as a way to transport drugs) in plain view in the car. The court determined he had probable cause under the automobile exception for the search. [\*State of Ohio v. Chaffins\*](#), Fourth Appellate District, Scioto County, May 7, 2014

## **Miranda (Custodial Interrogation): *Ohio v. Jones***

**Question:** Do you need to give *Miranda* if a person voluntarily speaks to you and you inform him he is free to leave and not under arrest?

**Quick Answer:** No, unless the circumstances change and the conversation becomes a custodial interrogation.

[\*State v. Jones\*](#), Fifth Appellate District, Ashland County, April 21, 2014

**Facts:** Officer Kim Mager was investigating the alleged sexual molestation of a child by Elmer Joseph Jones. In an unrelated matter, Mager went to Jones' home to retrieve evidence. Jones was told he was not under arrest and that he could tell her to leave at any time. While Mager was in the home, Jones asked her questions about the potential punishment for molestation. Mager also mentioned the current investigation and told Jones the sexual things with the child should not have happened. Jones responded that he knew and that it wasn't happening any longer because he was staying away from kids. Mager was in the home for about 20 minutes when Jones told her he had to leave. Mager told Jones if he wanted to speak more, she was available. About a month later, Jones requested a meeting with Mager, and the two spoke in her car. Jones was in the passenger seat and was advised the doors were unlocked, he was not under arrest, and he could walk away any time. Jones talked to Mager for about an hour and 15 minutes. She repeatedly asked Jones to be honest with her after he denied the allegations a few times. Eventually, Jones admitted to sexual activity with the child. At the end of the interview, Mager did not arrest Jones. He was later picked up, arrested, and taken to the county jail. At the county jail, Mager gave Jones *Miranda* and interviewed him a second time. He recanted his prior admissions, but ultimately confessed to the sexual activity and was charged. He later filed a motion to suppress his statements.

**Importance:** As you know, *Miranda* warnings only have to be given when someone is in custodial interrogation. A conversation is not custodial if a reasonable person believes he is free to leave your presence. To make this determination, factors to consider include the location of questioning, the individual's status as a suspect, any restriction on freedom of movement (handcuffs, locked doors, etc.), if neutral parties were present during questions, and the tone, language, and behavior of the officer. The court looked to the situation of the questioning and Officer Mager's behavior to find she did not create a custodial interrogation, therefore *Miranda* was not necessary.

**Keep in Mind:** This case also features a two-stage interrogation. In [\*Missouri v. Seibert\*](#), the U.S. Supreme Court determined that the practice of using a two-stage interrogation, in which *Miranda* was intentionally withheld until a confession was made and then given so the confession could be repeated, was not proper. In cases in which courts find police use this practice as an intentional

interrogation strategy, the second confession can be suppressed because the first was illegally obtained due to the intentional withholding of *Miranda*. The timing of the second confession to the first is a key to this determination: The closer in time the second is to the first, the more it seems like an improper strategy was used.

### ***More on Miranda***

- **Maybe I have an attorney, maybe I don't.** While investigating the death of a child, you speak to the father. He tells you that an attorney advised him not to speak to the police. But he later clarifies that the attorney actually does not represent him, but worked on a neglect case involving his child. He continues talking and at one point he states, "I did it." The father is convicted of murder based on this statement. Did the suspect invoke his *Miranda* rights by mentioning the attorney? The court in *Smith* says no. A mere reference to an attorney does not trigger *Miranda* unless a reasonable officer would believe the suspect "might" be invoking right to counsel. Based on the totality of the circumstances in this case, the suspect did not clearly and unambiguously request counsel. He simply relayed advice an attorney gave him. [\*State of Ohio v. Smith\*](#), First Appellate District, Hamilton County, May 9, 2014
- **I don't think you said that correctly.** You are dispatched to an apartment complex where an apartment manager is holding a man down on the ground. The manager tells the man was involved in a shooting. You handcuff the man and put him in the patrol car. You review the surveillance tapes with the manager and watch the man shoot out a lighting fixture. You go back to the patrol car, let the man know he is under arrest, and give *Miranda* from memory. In reciting *Miranda*, you forget to include the phrase "anything you say can and will be used against you in a court of law." The man tells you he understands and asks why he was arrested. You tell him, and he states he shot out the light because the "drug boys" gave him the gun to do so because they were being filmed. Does the statement come in? The court in *Hall* says yes. Although the officer did not give *Miranda* correctly, Robin Hall's statement was made as a result of the custodial interrogation, but was a voluntary statement made without questioning by the officer. Remember that you must give full *Miranda* warnings for a waiver to be effective. The court may have come to a different conclusion if it found Hall was under custodial interrogation. [\*State v. Hall\*](#), Eighth Appellate District, Cuyahoga County, April 24, 2014