

TITLE: SEARCH AND SEIZURE

CODIFIED: 55.1
EFFECTIVE: 12/21/16
RESCINDS/AMENDS: P 17
PAGES: 10

PURPOSE

This policy is established to provide guidelines for enforcement personnel so that searches and seizures comply with Constitutional requirements.

DISCUSSION

The area of constitutional search and seizure law is vital to the day-to-day functioning of law enforcement officers. This directive shall briefly highlight the major topics in order to provide a ready reference for officers.

Because of the changing nature of this topic, officers must stay abreast of recent court decisions and case law that may affect them.

POLICY

It is the policy of the Santa Fe Police Department that all searches and seizures of private property will be conducted within well-defined, lawful, and constitutional guidelines. As such, this policy will serve as a standard for all matters concerning search and/or seizure.

In all cases, measures shall be taken to assure that all constitutional safeguards are provided to non-English speaking and/or hearing impaired persons in a manner that is clearly understood.

PROCEDURE

EXCEPTIONS TO THE REQUIREMENTS OF A SEARCH WARRANT

55.1.01 CONSENT SEARCHES

- A. An officer may conduct a search without a warrant and without probable cause if the person to be searched gives consent to search.
- B. Consent searches are limited in scope by request of the officer and the permission given by the person granting the consent to search.
 - 1. The officer may not legally search beyond the extent of the permission, which has been given. In addition, the consent to search lasts only as long as the person granting the consent does not change his/her mind.
 - 2. The person granting the consent to search may also limit the area covered by the consent; i.e., giving consent to search only one room or one area or may tell the officers to stop at any time.
- C. Because there is a legal presumption against a waiver of a constitutional right, the State (the officers) have the burden of proving to the Court that the consent to search, a waiver of 4th Amendment rights was made voluntarily.
 - 1. In determining whether the consent is valid, the Courts look at the age, education, mental condition, whether the person granting the consent was intoxicated, previous contacts of the person giving consent, as well as any other factors which may relate to the question of the voluntary nature of the consent.
 - 2. The courts will also look at the circumstances surrounding the giving of consent much the same as they look at a waiver of Miranda rights. If it appears that the person has been coerced into the consent, the consent will be deemed involuntary and, as a consequence, anything found as a result of the search and seizure will be suppressed.
- D. It is always best to record the request for consent and consent to search. This can be done either by tape recording or in writing on a Consent-to-Search form.
 - 1. Either method provides the Court with a clearer picture of the person's waiver of **his/her Amendment Rights.**

2. Unlike cases involving in-custody questioning where a person must be warned of the rights he/she has in order to have a voluntary waiver of those rights, a person need not be informed of his/her right to refuse the request of the officer for consent to search. However, the much better practice is to advise them of such a right and note such advise in the officer's report. Again, this advice helps establish that the person has given voluntary consent to search.
- E.** In addition, the courts look to the following environmental factors to determine the voluntarism of the consent to search.
1. Was the person detained for a long time or a short time before the consent was given;
 2. Was the person threatened, physically intimidated or punished;
 3. Did the person rely on promises or misrepresentations by the police or others;
 4. Was the person in custody or under arrest;
 5. Was the consent given in public or secluded place;
 6. Did the person object to the search or stand silently by while it occurred?
- F.** Officers must be cautious when seeking to obtain consent to search from a third party, one that is not the owner.
1. The courts have ruled that any person who possesses authority over or otherwise has a sufficient relationship to the premises or effects sought to be searched may grant authority to enter and/or search.
 2. "Actual Authority" is required for consent; there is not a "good faith" exception in New Mexico.
 3. Care in these circumstances must be exercised.
 - For instance, a landlord may not consent to the search of a rented house. Parents may not consent to a search of child's room if the child maintains a reasonable expectation of privacy in the room. (The child must be 18 years of age or older in order to maintain a reasonable expectation of privacy. However, the circumstances may change depending on the living arrangements made with the parents. For instance, the child may be 16 or 17 years of age and be paying rent.) The same is true for third parties who stay overnight.
- G.** In searching residences based on consent, remember that the 4th Amendment protects the privacy interests of people.
1. A roommate may be able to give consent to search the areas of common use in the house but probably not the private room of his/her co-tenant.
 2. Likewise, consent to search an area does not automatically carry with it a right to search locked or closed containers of another even if found in the common area.
- H.** If there is a question as to the validity of the consent or scope of the search, do not hesitate to contact the on duty commander/supervisor; and if the matter cannot be resolved or is still in doubt, contact the on-duty Assistant District Attorney.
- I.** Consent to search is also typically used to draw blood for blood alcohol and/or drug tests, however, if the person refuses to submit to the test, a search warrant must be obtained.
1. If there is probable cause to believe the driver was under the influence of alcohol and/or drugs and the driver caused great bodily harm or death to another as a result of his operation of a motor vehicle while under the influence of alcohol and/or drugs, or this is the driver's fourth or subsequent DUI arrest, and the driver refuses to submit to a blood alcohol test, the officer shall seek and obtain a search warrant for the drawing of the blood sample.
 2. Once the search warrant is obtained, the blood may be taken even over the objection of the driver. It is important to note that even if the officer eventually gets the blood

sample as a result of a search warrant, the driver has still refused the test and the refusal may still be reported to the New Mexico Department of Motor Vehicles.

3. Officers may no longer obtain the results of hospital blood tests for the purpose of determining probable cause. These tests are protected under the physician patient confidentiality.

J. Consent to search is required to draw bodily fluids or tissues, however, if the person refuses to submit, a search warrant must be obtained.

K. With vehicle traffic stops, officers cannot ask to search the vehicle, unless the search is related to the traffic stop.

55.1.02 SEARCH INCIDENT TO A LAWFUL ARREST

A. Once a person has been lawfully arrested, a search without a warrant may be conducted of the arrested person and the area immediately surrounding the arrested person in which he could hide weapons or from which he may be able to obtain and destroy evidence.

1. The scope of this search is limited to the area immediately surrounding the arrested person.
2. Officers cannot lead an arrested person throughout his residence and justify a search of the entire residence as incident to arrest.

B. There are several factors, which the courts use to evaluate the validity of this exception to the search warrant requirement.

1. The search must be contemporaneous in time and place to the arrest of the person.
2. Police may search only the person and immediate area from which evidence or weapons could be obtained.
3. The search is invalid if the arrest is merely a pretext to allow the search of the person or the surrounding area.
4. Locked areas and items which may contain a weapon or evidence may not be searched if it is unreasonable to believe that the person could obtain such items and destroy them or pose a threat to officers making the arrest.

55.1.03 PROTECTIVE SWEEPS (WHERE ARREST HAS BEEN MADE)

A. A home or other premises where a lawful arrest has been made may be subjected to a limited "sweep," for the purpose of finding other persons, if the circumstances give the arresting officers a basis for reasonably believing that there are other persons on the premises who pose a danger to those at the arrest scene.

55.1.04 HOT PURSUIT

A. To apply this exception, police must have probable cause to believe that a serious crime has been committed, that the person they are pursuing committed it and that the person is in the dwelling or structure they are entering.

1. The time between the finding of probable cause to believe that a person is in a given building and the warrantless entry should be short and there should be some semblance of continued pursuit throughout the period.
2. The key question to be answered in this matter is whether police would risk losing a suspect if time were taken to obtain a warrant.
3. The scope of the search must be limited to areas where the suspect could reasonably be found.
4. Once the suspect is located, further search beyond his reach, incident to arrest, cannot be justified unless there is more than one suspect or a protective sweep can be justified

B. If it is believed that evidence may have been placed or hidden in the residence by the suspect and it is not found on a search incident to his arrest, a search warrant must be obtained before there is a further search of the residence.

NOTE: THIS EXCEPTION CANNOT BE USED TO JUSTIFY THE POLICE IN PROCESSING A CRIME SCENE.

BEFORE A CRIME SCENE CAN BE PROCESSED IN A RESIDENCE OR VEHICLE OR OTHER BUILDING IN WHICH PERSONS HAVE A

POSSESSORY INTEREST, A SEARCH WARRANT MUST BE OBTAINED.

55.1.05 STOP AND FRISK

- A. Terry v. Ohio, 392 U.S. 1 (1968)**, gave officers the right to conduct a limited pat down of a person they lawfully stopped when they have reason to believe that the person is armed and/or presently dangerous.
- B.** Factors the Courts consider in this regard to determine the reasonableness of a pat down include:
1. You have to have knowledge of facts that reasonably lead you to believe that the suspect is involved in criminal activity.
 2. You identify yourself as a Police Officer and make reasonable inquiries as to the suspect's conduct.
 3. His response to your stopping him and questioning him does not relieve your suspicions.
 4. Suggestive movements by the suspect, and there are visual clues as to the presence of weapons.
- C.** You may frisk the suspect if you have knowledge of facts that reasonably lead you to believe that the suspect is armed or otherwise dangerous to yourself or others. A frisk must be a carefully limited search of the suspect's outer clothing, aiming at discovering weapons .
1. Items that feel as if they may be weapons may also be removed to determine what they are.
 2. It must be remembered that a pat down is a search for weapons and is not an authorization for a complete search of the person or the pockets or clothing of the person unless intrusion is justified in retrieving something which the pat down found which reasonably could be believed to be a weapon and inspection of the item is reasonable to determine its nature.

55.1.06 PLAIN VIEW

- A.** If officers are legally in the area or at a location, they may seize any item in plain view, which is

evidence of a crime, contraband, or items that are otherwise seizable by the police.

- B.** The key to this exception to the search warrant requirement is that the officer be legally in the position he is at when the observation of the crime occurs. Such authority may be in the form of:
1. By some other exception to the search warrant requirement.
 2. Objects noticed by the officer, which are open to public view.
 3. During execution of a search warrant.
- C.** There are two (2) tests which must be met in order to seize the property which is observed in plain view:
1. The police officer must be lawfully present at the location of the seizure.
 2. The items seized must be immediately recognizable as evidence or contraband.
 - a. The items seized, must by its own nature, the way it looks, the way it smells or the way it sounds, give police probable cause to believe that it is evidence of criminal activity.
 - b. If, during the course of executing a search warrant, officers come upon property which they believe to be stolen, the officers must be able to articulate a sufficient basis for the probable cause to believe that the items are stolen when they observed them and before they "seized" the items to check serial numbers or other identifying marks which may be contained on the items.

55.1.07 INVENTORY SEARCHES

- A.** Inventory searches of vehicles are valid if:
1. The vehicle is lawfully in police custody, and
 2. The inventory is conducted pursuant to established police regulations.

- B.** The purpose of an inventory search is not to search for contraband or for evidence of a crime but to justify and note property, which has come into the possession of police officers. The purposes of inventory searches as outlined by the Courts are;
1. To protect the owner's property while the vehicle is in police custody by creating a record of the property.
 2. To protect police from unfounded claims of lost property.
 3. To protect the police from potential danger.
- C.** While officers have a duty to follow department guidelines in conducting inventory searches of vehicles, officers are not allowed to arrest persons for the purpose of seizing their vehicles and then using an inventory search as a pretext to search the vehicle.
- D.** If an inventory is to comply with the reasons outlined by the Courts for allowing them in the first place, then it stands to reason that containers within the vehicle may also be searched to determine their contents in accordance with the department's policy.

55.1.08 PROBABLE CAUSE & EXIGENT CIRCUMSTANCES

- A.** Exigent circumstances are circumstances which arise which call for emergency and/or immediate action by law enforcement officers to prevent the imminent destruction of evidence or to save persons from death or injury.
1. The exigent circumstance exception is generally used to justify entry into a building or residence without a search warrant, and when probable cause exists to search.
 2. It is important to remember that once the emergency ends so too does the exigent circumstance. Officers, depending upon the circumstances at the time, may be justified in making a protective sweep of the premises or conducting a search incident to an arrest.
- B.** This exception to the search warrant requirement is not a blanket authorization to search everywhere and everything.

1. Once the person is out of danger or once the evidence that was going to be destroyed is saved, the search must end.
 2. If there is need to search further, and probable cause can be found to support the further search, a search warrant for the remainder of the premises must be obtained.
 3. As with other exceptions, this is not an authorization to process a crime scene. Even if exigent circumstances justify the entry, officers must obtain a search warrant before any processing of a crime scene is begun.
- C.** It is important to note that officers cannot "create" the exigent circumstance to gain entry or access and then to justify the entry or access based upon an exigent circumstance they have created. Any evidence so received would be suppressed.

55.1.09 ARRESTED PERSONS

- A.** Persons who are arrested and taken into custody and booked are subject to search of their entire person along with any and all clothing and items in their possession at the time of the arrest.
- B.** Once the person has been arrested, the person has in effect been seized for 4th Amendment purposes and the items the arrested person has with him or her, including clothing, may be seized and retained by the arresting officer.
1. As a consequence, all clothing and personal items of the persons arrested for felony offenses where identity or description or the presence of trace evidence may be an issue should be seized by the officer booking the person when clothing is removed and retained in accordance with the Santa Fe Police Department policies for collection of trace evidence and items which may contain trace evidence.
 2. Each item of clothing should be bagged separately.

55.1.10 ABANDONED PROPERTY

- A.** Property, which has been abandoned by its owner, even though the owner may retain legal property interest in the property, may be searched without a warrant.

1. The Courts have held that the person who abandons property loses any reasonable expectation of privacy in the object.
- B.** If officers are called to a location in regard to property being found, the officers may inspect the property and even open containers for the purpose of determining the owner and nature of the materials inside, and for the purpose of accounting for the contents and assuring the safety of the officers.
- C.** In the event that an officer opens a container with items which are obviously criminal in nature such as drugs or evidence of a crime, the better policy is to stop at that point and obtain a search warrant before proceeding to dig through the found container.
1. The reason for getting a search warrant at this point is that the officer's mindset and intent are now different; the officer is now searching for information, which connects a person to criminal activity.
 2. Since the history of the container is not known to the officer, the container may in fact not have been abandoned by its owner and while the officer had legal justification to begin inspection of the contents, continuing a search after the criminal nature of the contents is apparent may violate the owner's 4th Amendment rights.

55.1.11 STRIP/BODY CAVITY SEARCH

- A.** Strip searches shall not be conducted unless the officer has reasonable suspicion to believe that the suspect is concealing a weapon or contraband on their person and then only with the approval of a police lieutenant or higher command staff member. *Strip searches shall be completed in the presence of two (2) employees who are of the same sex as the person who is being searched. The strip search will be conducted in a private and secure area.* If a weapon or contraband is observed, i.e., taped to the body, the employee shall remove the item in a tactful manner maintaining the dignity of the suspect. If a possible weapon or contraband is observed inside a body cavity, the employee shall appropriately restrain the suspect and obtain a body cavity search warrant. Under no circumstances will the employee remove the

item. The suspect shall be kept under constant and watchful supervision and shall be taken to a medical facility where the search warrant shall be executed.

- B.** Under no circumstances shall any employee conduct a body cavity search on any person. A body cavity search requires a search warrant and must be conducted at a medical facility by a licensed and practicing medical physician.

55.1.12 SEARCHES OF CRIME SCENES

- A.** The 4th amendment protects people, not places. It protects the expectation of privacy which people have in locations and in objects. The expectation of privacy must be what the Courts have phrased as "reasonable expectation" of privacy.
- B.** Various items or locations have been held to have various levels of 4th Amendment protection depending upon the nature of the item or location and the purpose for which it is used.
1. The highest level of expectation of privacy has generally been held to be the home or residence of an individual and the person of an individual.
 2. Vehicles and businesses have been held to have a lesser degree of protection because of the reputations to which they are subject and the fact that they are subject to inspection for any number of reasons.
 3. Open fields or vacant land probably have the lowest degree of protection.
- C.** The fact that an expectation of privacy is less in a vehicle or business does not mean that it can be searched without a warrant absent one of the above exceptions.
- D.** The U.S. Supreme Court in Thompson v. Louisiana 469 U.S. 17 (1984), made it very clear that there is no exception to the requirement for a search warrant because a place is a crime scene; in that case a residence was the scene of a homicide.
1. The fact that a crime was committed in a certain location does not take away a person's property rights or lessen the 4th Amendment protection in the location.

- E.** This situation arises most often in the context of crimes and crime scenes that are discovered within a residence. The officer must examine the facts and circumstances carefully.
1. It is always safer to obtain a search warrant than it is to proceed on the assumption that an unknown suspect has no reasonable expectation of privacy in the residence, which contains the crime scene.
 2. As mentioned in the beginning of this section, officers may have sufficient grounds to seize evidence at a crime scene but not be legally allowed to search the scene without a warrant.
 3. Officers called to a given location who discover a crime, such as a homicide, may do the following:
 - a. Secure and thereby seize the residence and establish a crime scene log.
 - b. Make a protective sweep of the residence as explained above. (Only if the circumstances give the officers a basis for reasonably believing that there are other persons on the premises who may pose a danger to those on the scene.)
 - c. Refuse access to the residence and secure the contents of the residence.
 - d. Note and seize any obvious items of evidence, which are in plain view. Of course most officers understand the importance of documenting a crime scene and will leave items that are in plain view in place until after the scene as been thoroughly processed.
 - e. Conduct a search incident to arrest after an arrest has been made.
 - f. Allow any and all emergency medical treatment to be given to any victim.
 - g. Conduct a pat down of persons at the location if there is a sufficient basis for the officers to do so.
 - h. Interview witnesses or take statements as may be necessary.
- F.** Other than these acts which could be done immediately or soon after the entry, the officers may **NOT** search for trace evidence, take blood samples, or otherwise process the crime scene without a search warrant.
1. Of course this does not apply to crime scenes which are in public places.
 - a. As there is no reasonable expectation of privacy in public places, the scene may be searched and processed as necessary.
- G.** If the crime scene is in a vehicle, while ownership from the registration may be easily obtained, that may not show if the vehicle was recently sold to another.
1. If there is any possible doubt as to the ownership of a vehicle, a search warrant should be obtained before a search of the vehicle, other than an inventory search, is conducted.
 2. The vehicle may of course be seized and secured and held until a search warrant is obtained.

55.1.13 ARRESTS IN THE HOME/THIRD PARTY HOMES

- A.** The Courts have held that a warrant for the arrest of a defendant implies that the officers may search the defendant's residence for the defendant.
- B.** This search requires, first, a warrant for the arrest of the defendant and two, a search of his/her residence, not some other person's residence where the suspect may be hiding.
1. As a result, officers who are not in hot pursuit of a suspect may not enter his/her residence without a warrant to search for the suspect.
 2. Even if the officers have a warrant for the arrest of the defendant, the search of the residence is only for the suspect, not for evidence of the crime.
 3. Evidence of the crime, which is found in a location where the defendant could not have been located, will be suppressed.

4. Once the defendant has been located in the residence and officers wish to search for additional evidence of the crime, a search warrant must be obtained for the residence.
5. Of course evidence which is of an immediately apparent nature to the officer which is discovered in plain view during the course of the search for the suspect may be seized on the basis of the plain view exception.
6. In addition, evidence discovered during a search incident to the suspect's arrest may also be seized.

55.1.14 SEARCH WARRANTS

- A. Officers of the Santa Fe Police Department shall obtain search warrants for any search to be conducted other than the exceptions listed in this Directive.
- B. The following procedures will apply in obtaining a valid search warrant:
 1. The officer or detective shall prepare a typewritten affidavit for a search warrant, which specifically and clearly describes:
 - a. The officer's name, occupation, and training and experience that leads him/her to believe probable cause exists for the search;
 - b. The items to be searched for/seized;
 - c. The name of the owner/person in legal control of the place to be searched;
 - d. The exact location and detailed description of the place or person to be searched, and if known, the location of the items within the place to be searched.
 - e. All information and facts to support a finding of probable cause to believe that a crime has been committed and that evidence or fruits of the crime are located in the place to be searched.
 - f. A notarized statement that the officer/detective has accurately and truthfully stated known facts in the affidavit.

2. The officer/detective must have the affidavit approved by a Criminal investigations commander/supervisor, and the on-duty Assistant District Attorney.
3. Upon obtaining approval, the officer/detective must submit the affidavit to either a Magistrate or District Judge, who must sign the order. Remember Magistrates only have authority in their specific county. District Judges have statewide jurisdiction.
4. If the search is to be conducted between the hours of 10:00 p.m. and 6:00 a.m., additional probable cause must be outlined and specific authorization must be granted in writing by the issuing Judge.

55.1.15 SERVICE OF SEARCH WARRANTS

- A. Search Warrants shall be served only after completing a warrant matrix risk assessment packet.
- B. When an officer or detective obtains a search warrant that is signed by a judge, he/she has ten (10) days in which to serve the warrant. The officer/detective shall notify a supervisor of the warrant and a supervisor shall be present when the search warrant is served.
- C. Upon executing the search warrant, the supervisor will:
 1. Make sure that the return is properly filled out;
 2. Verify that the subject named in the search warrant is served with the appropriate copies;
 3. Verify the list of items seized, if any.
- D. The responsible detective/officer will:
 1. Fill out the return and inventory pages.
 2. Have the subject sign and date the inventory to acknowledge seizure of any items taken.
 3. Provide the subject with a copy of the affidavit for search, a copy of the inventory, and a copy of the search warrant.
 4. The original search warrant must be returned to the court within three (3) days. This may be done in person or by routing the return through the District Attorney Liaison.

5. Complete a supplemental report that includes the following information:
 - a. Original case number;
 - b. Date of receipt of the search warrant;
 - c. Date of service;
 - d. Location of service;
 - e. Name of person on whom the warrant was served;
 - f. Name of the Judge and court who issued the warrant;
 - g. Name of those persons present when the warrant was served;
 - h. Items seized in the search; and
 - i. Any arrests and/or pending charges.

55.1.16 HIGH RISK WARRANTS

- A. When there are facts to suggest that a place to be searched, or persons at the location present a special danger to the officers/detectives, the following steps shall be taken:
 1. A Case Plan shall be prepared by the Incident Commander.
 2. Plainclothes commanders/supervisors shall request assistance from uniformed officers, with approval from the on-duty commander/supervisor.
 3. If it is determined that uniformed assistance is not sufficient to lessen the risk, the commander/supervisor shall request assistance from the S.W.A.T. Team Commander.
 4. All persons who respond to the scene shall wear Department issued ballistic resistant body armor.
 5. The District Captain will be notified, and shall advise the Office of the Chief of Police, prior to the search taking place.
- B. All search warrants that are served with the assistance of the S.W.A.T. Team will be in accordance with their standard operating procedures.
- C. Magistrates and Judges may NOT pre-approve a no-knock entry. Such entry is the decision of

officers executing the search warrant. The decision must be based on facts known to the officers relating to the danger posed by knocking and announcing their presence and intent. The fact that narcotics are involved and/or that the person(s) owns firearms is not sufficient. There must be a reasonable likelihood, based on articulable facts, that the weapons will be used against the officers.

55.1.17 CONCLUSION

- A. The expectations listed above are those most often encountered by officers in this jurisdiction. These are by no means exclusive and there have been omitted situations such as customs searches, border searches, searches in regard to business licenses, OSHA searches and drug testing of employees. As stated above, if a search or situation does not fall clearly into one of these exceptions to the search warrant requirement, then a search warrant must be obtained before the search is begun.
- B. While affidavits for search warrants are generally not difficult to write nor are search warrants difficult to serve, they do however require knowledge of the forms on which they are written as well as a familiarity with the Santa Fe Police Departments procedures for serving search warrants.
 1. If an officer encounters a situation where the officer feels a search warrant is needed or is not certain if a search warrant is needed, the officer should contact his supervisor for advise.
 2. If the supervisor determines that a search warrant is needed, the supervisor shall direct the manner in which the search warrant and supporting affidavit are applied.
- C. An Assistant District Attorney must approve all affidavits for search warrants before they are presented to the judge or magistrate to be issued.
 1. If the District Attorney's Office is closed, the on-duty Assistant District Attorney should be contacted by telephone for approval of the affidavit and search warrant.
- D. If an officer conducts a search without a search warrant, the officer shall state in his/her report the exception(s) to the search warrant

requirement that the officer relied upon in searching the person or place and seizing the item or items of evidence or contraband.

GLOSSARY

Refer to the definitions included in each section.

Drafted (awm) 01/03 (bpv)10/16

APPROVED: 
PATRICK GALLAGHER
Chief of Police

DATE: 12/21/16