CONTINUING PROFESSIONAL TRAINING

TOPIC: SEARCH AND SEIZURE UPDATE

HOURS: 1

GOAL: THE STUDENT WILL GAIN UPDATED INFORMATION ON ISSUES OF SEARCH AND SEIZURE

TEACHING AIDS (CHOOSE ALL THAT APPLY):

_____ Whiteboard/markers

_____ Computer

__X__ Multi-media projector

_____ Easel notepad

_____ VCR/DVD player

_____ TV

_____ Lectern or table

INSTRUCTIONAL TECHNIQUES (CHOOSE ALL THAT APPLY):

__X__ Lecture

__X__ Discussion

_____ Individual exercise

_____ Group work

_____ Scenario-based training

_____ Hands-on techniques (i.e. driving, shooting, etc.)

STUDENT MATERIALS

Handout #1 – Case Law

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REFERENCES

Court decisions as cited in lesson plan.

Ohio Supreme and Appellate Court Decisions at www.sconet.state.ohio.

"Search Incident to Lawful Arrest," "Federal Bureau of Investigation Law Enforcement Bulletin" (FBILEB), July, 2009.

"Searching Cell Phones Seized Incident to Arrest," FBILEB, February, 2009.

"Abandoning Places," FBILEB, October 2008.

"Fourth Amendment Consent Searches," FBILEB, July 2008.

"Vehicle Pursuits and the Fourth Amendment," October, 2007.

"Search Incident to Arrest in the Age of Personal Electronics,' FBILEB, September, 2007.

"Abandonment of Items,' FBILEB, August, 2007.

"Tracking 'Bad Guys' Legal Considerations in Using GPS," FBILEB, July, 2007.

"Getting Schooled in the Fourth Amendment," FBILEB, March 2007.

"Inferring Probable Cause," FBILEB, February, 2007.

"Detaining Individuals at the Scene of a Search," FBILEB, December, 2006.

"Police Interventions Short of Arrest," November, 2006.

"Knock and Announce Violations," FBILEB, September, 2006.

"Law Enforcement Response at a Crime Scene," FBILEB, April 2006.

"When is Force Excessive," FBILEB, September, 2005.

"Consent Searches," FBILEB, February, 2004.

"When an Informant's Tip Gives Officers Probable Cause to Arrest Drug Traffickers," December, 2003.

"Obtaining Written Consent to Search," FBILEB, March, 2003.

"Consent Once Removed," FBILEB, February, 2003

"Warrantless Interception of Communication," FBILEB, January, 2003.

"Kyllo V. United States," FBILEB, October, 2001.

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NOTES TO INSTRUCTORS

1) Instructors are obligated to review each lesson plan they teach for accuracy, current information and applicability to community demands. If it is found that information in a particular lesson plan is out of date or for any reason requires changes or updates, please notify the Ohio Peace Officer Training Commission Curriculum Supervisor - at 1-800-346-7682. Comments may be mailed to OPOTC, PO Box 309, London, OH 43140; or faxed to (740) 845-2675.

2) Instructors are also expected to:

* Bear in mind the legal, moral, professional and ethical implications of instructing in a commission-approved program.

* Use any and all opportunities which may arise during instruction of the required material to point out to the students the legal, moral, professional and ethical responsibilities they will bear to their employers and communities while serving in an official capacity.

* Use scenarios and examples specific to each lesson plan to generate active discussions concerning the ethical implications of the topic/skill being taught. Emphasis should be placed on the benefits of ethical behavior and the consequences of unethical behavior.

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STUDENT PERFORMANCE OBJECTIVES

At the end of this topic, the student will be able to:

1. Better understand provisions of the Fourth Amendment to the US Constitution, Section 14, Article 1, of the Ohio Constitution that prohibit unreasonable searches and seizures.

2. Gain a better understanding of exceptions to searching by warrant.

3. Better understand Investigative Detention and Frisk.

4. Apply recent Ohio Supreme Court and US Supreme Court Search and Seizure decisions to a given set of facts in an incident.

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PRESENTATION

A. Fourth Amendment to the US Constitution and Section 14, Article I, Ohio Constitution, prohibit unreasonable searches and seizures. Fourth Amendment is applied to state action through the Fourteenth Amendment due process clause. Ohio Supreme Court can interpret the Ohio Constitution more restrictively than the US Supreme Court interprets the Fourth Amendment.

NEED REFER TO CASE LAW FOR APPLICATION

B. Search Defined – Government action which infringes on an objectively Reasonable Expectation of Privacy. Katz v. US, 389 US 347 (1967)

PRIOR CASES DEFINED SEARCH AS TRESPASS ON PROPERTY INTERESTS

1. No Reasonable Expectation of Privacy

a. Abandoned Property

SPO #1

Abel v. US, 362 US 217 (1960). Property abandoned when intentional and voluntary.

California v. Greenwood, 486 US 347 (1988). Trash moved to curb for pick-up was abandoned.

DISCUSS HOTEL ROOMS, APARTMENTS

State v. Freeman, 640 Ohio St. 2d 291 (1988). Intent to abandon can be inferred from words, acts and objective fact. Dropping luggage and running when approached was abandonment of luggage.

b. Fly Over

California v. Ciralao, 476 US 207 (1986), flight over curtilage in navigable airspace was not search.

DEFINE "CURTILAGE"

State v. Mims, 2006 Ohio 862 (6th Dist. Ct of App. 2006). Helicopter at 500 feet over back yard not search. Subsequent entry into back yard was search.

c. Nature of Property

Oliver v. US, 480 US 294 (1987). Open fields need not be open or field. Determined by distance from house, use of area, fence type, and possessions placed there.

Hudson v. Palmer, 468 US 517 (1984). No reasonable expectation of privacy in prison cell.

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State v. Buzzard, 112 Ohio St. 3d 451 (2006). Peering through crack in locked but warped doors of business is not a search.

2. Reasonable Expectation of Privacy. Kyllo v. US, 533 US 27 (2001). Targeting home with thermal scanner is a search.

C. Reasonableness of Searches

SPO #1

1. Search Warrant is generally required to make reasonable, unless the situation is a generally recognized exception to the warrant requirement. Katz, supra.

2. Exceptions to the Warrant Requirement

TO FIT EXCEPTION MUST BE WITHIN DEFINED JUSTIFICATIONS AND SCOPE OF SEARCH

   a. Emergency

   b. Consent

   c. Incident to Arrest

   d. Vehicle Exception

   e. Inventories

   f. Frisk

   g. Special Needs

D. Seizure Defined

Brower v. County of Inyo, 486 US 593 (1989). Intentional government action which interferes with freedom of movement or possession of property. See also Arizona v. Hicks, 480 US 321 (1987)

E. Reasonableness of Seizures of Persons

SPO #1

Graham v. Connor, 490 US 386 (1989). Determined by "…the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests."

1. Arrest requires probable cause of criminal activity – Beck v. Ohio, 379 US 89 (1964)

2. Investigation Detention requires reasonable suspicion of criminal activity – Terry v. Ohio, 392 US 1 (1968)

DISCUSS WHAT OFFICER MCFADDEN OBSERVED AND DID IN TERRY

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F. Search Warrants

1. Acquisition

a. Probable Cause

Illinois v. Gates, 462 US 410 (1983). Determined by totality of the circumstances.

b. Particularly describing place to be searched and persons/things to be seized.

Groh v. Ramirez, 540 US 551 (2004). Failure to describe items to be seized in warrant caused to be unreasonable.

2. Execution

a. Knock and Announce

Hudson v. Michigan, 547 US 586 (2006), State v. Oliver, 112 Ohio St. 3d 447 (2007). Violation of K & A does not necessarily require suppression. Could however lead to civil liability.

ORC Sec. 2933.231 allows application for judicial approval of nonconsensual entry during execution of warrant.

b. Detention of Occupants

Michigan v. Sommers, 452 US 692 (1981). Can detain occupants of residence during execution of search warrant for contraband. Prevents flight if found, minimizes risk to officers, and facilitates orderly execution of search.

Muehler v. Mena, 544 US 93 (2005). Handcuffing of four detainees for 2-3 hours by two officers during search of gang house for weapons reasonable.

c. Scope – Where described items can be found.

3. Extensions of Warrant Requirement to Entry into Premises to Arrest

a. Subject's Residence

DISCUSS PROBABLE CAUSE V. REASONABLE SUSPICION

JUDICIAL PREFERENCE FOR SEARCH BY WARRANT

NOT ENTITLED TO QUALIFIED IMMUNITY IN CIVIL LIABILITY WHEN WARRANT IS PLAINLY INVALID

DISCUSS REASONS FOR K & A – PROTECTION OF RESIDENT AND LAW ENFORCEMENT OFFICER

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Payton v. NY, 445 US 573 (1980). In absence of consent or emergency, arrest warrant and reasonable belief present is necessary.

b. Third Party Residence

Steagald v. US, 451 US 204 (1981). In absence of consent or emergency, search warrant is necessary.

c. Protective Sweep and Plain View

Maryland v. Buie, 494 US 325 (1990). Plain view requires lawful presence and immediately apparent item is evidence. Protective sweep includes space immediately adjoining place of arrest. Sweep of other areas requires reasonable suspicion areas may harbor individual posing danger.

DISCUSS POTENTIAL APPLICATION OF EXCLUSIONARY RULE AND CIVIL LIABILITY

G. Recognized Exceptions to the Search Warrant Requirement

SPO #2

1. Emergency

a. Justification

1. Probable cause risk of escape or destruction/removal of evidence – Cupp v. Murphy, 412 US 291 (1973)

2. Reasonable suspicion of danger to life – Maryland v. Buie, 494 US 325 (1990)

USE CUPP FACTS TO ILLUSTRATE PROBABLE CAUSE AND EMERGENCY

b. Scope

1. Limited to the action necessary to resolve the emergency.

2. Arizona v. Mincey, 437 US 385 (1978) – Once emergency is resolved, SW or other recognized exception is required. Reasonable to enter residence to rescue undercover officer. Subsequent "crime scene" search required warrant.

DISCUSS LEAST INTRUSIVE MANNER OF SECURING RESIDENCE WHILE SEEKING WARRANT

2. Consent

a. Justification

1. Voluntary Waiver

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Schneckloth v. Bustamonte, 412 US 218 (1973) Voluntariness is determined by totality of circumstances. Factors include characteristics of consentor, environment and techniques used.

DISCUSS DESIRABILITY OF WRITTEN CONSENT

2. By One Having Lawful Control

   a. US v. Matlock, 415 US 164 (1974). One of two individuals with common control can consent.

   b. Illinois v. Rodriguez, 497 US 177 (1990) – At time of search reasonable for officers to believe girlfriend had authority to search when had key, clothes were there, and she claimed she lived there; even when later proven she had moved out month earlier and did not pay rent.

   c. Georgia v. Randolph, 547 US 103 (2006) – Unreasonable search when one with control refuses in presence of other with control. Cannot remove tenant from entrance to avoid possible objection.

   d. US v. Hudspeth, 518 F3d 954 (8th Cir. 2008) – Reasonable search when husband, while at work, refused outside presence of wife, who later consented to search of house.

   e. US v. Murphy, 516 F 3d 1117 (9th Cir. 2008) – Unreasonable search when co-tenant refused outside presence of consentor.

b. Scope – Limited by consentor's control and consent.

3. Incident to Arrest

   a. Justification

      1. Custodial Arrest – US v. Robinson, 414 US 218 (1973)

         a. State v. Murrell, 94 Ohio St. 3d 489 (2002) – Overruled Brown to bring into harmony with Belton. US Supreme Court in Belton allowed search of passenger compartment of vehicle incident to arrest of occupant of vehicle. Ohio Supreme Court in Brown disallowed search incident to arrest of passenger compartment when arrest was for traffic warrant. Murrell allowed when contemporaneous with arrest for traffic offense.

OVERRULED BY GANT

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b. Arizona v. Gant, 556 US ___, 129 S. Ct. 1710(2009) – Police may search passenger compartment of vehicle incident to arrest only if reasonable to believe arrestee might access vehicle at time of search, or vehicle contains evidence of offense for which arrested. Rare case when unable to remove danger by moving to police vehicle. If justified could search pursuant to Carroll motor vehicle search, consent, inventory or frisk.

b. Scope

1. Arrestee and items in their possession

a. US v. Finley, 477 F 2d (5th Cir. 2007) – Scope includes container or cell phone on person at time of arrest.

b. State v. Smith, 2008 Ohio 3717 (2d District Ct. of Appeals 2008) – Search incident to arrest justified search of cell phone for call record.

APPEALED TO OHIO SUPREME COURT. ALSO ARGUED EMERGENCY DUE TO IMMINENT DESTRUCTION OF CALL RECORDS

2. Within immediate control to prevent destruction of evidence and accessing weapons – Chimel v. California, 395 US 752 (1969).

a. NY v. Belton, 453 US 454 (1981) – Includes passenger compartment of vehicle, but see limitations of Gant.

b. State v. Mercier, 2007 Ohio 2017 (1st Dist. Ct. of App. 2007) – Passenger's purse left within vehicle susceptible to search incident to arrest of driver for drug sale which occurred in vehicle.

c. Maryland v. Buie, supra – Protective sweep of adjacent rooms and areas.

DISCUSS PROTECTIVE SWEEP

4. Vehicle Exception

a. Justification

1. Probable Cause evidence is in vehicle, Carroll v US, 267 US 132 (1925)

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2. California v. Carney, 471 US 386 (1985). Extended to motor home when in parking lot and not connected to utilities.

b. Scope

1. Same as if had search warrant, US v. Ross, 456 US 798 (1982).

2. State v. Moore, 90 Ohio St. 3d 47 (2000) – Smell of marijuana sustains probable cause to search vehicle, but does not standing alone establish search of trunk

OHIO DISTINCTION

5. Inventory

a. Justification

1. Lawful custody of property – South Dakota v. Opperman, 428 US 364 (1976).

2. Not pretext or ruse – Florida v. Wells, 495 US 1 (1990).

3. Standardized Procedure – Colorado v. Bertine, 479 US 367 (1987).

State v. Huddleston, 123 Ohio App. 3d 17 (10th Dist. Ct. of App. 2007) – Neither ordinance nor police department directive authorized impounding of vehicle in parking lot when arrestee not in or near vehicle when arrested.

b. Scope

Dictated by standardized procedure, which must be limited to areas where personal property can be found (purpose of inventory – protect property and avoid false claims).

6. Special Searches

a. Probation

US v. Knights, 543 US 112 (2001) - Parole search for evidence of crime is reasonable when supported by reasonable suspicion and is condition of probation.

b. Vehicle Checkpoints

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Indianapolis v. Edwards, 531 US 32 (2000) – Narcotics vehicle checkpoint was for general criminal purpose and unreasonable when not supported by reasonable suspicion. Unlike sobriety checkpoint or if purpose is to thwart terrorism or apprehend dangerous criminal.

SOBRIETY CHECKPOINT SHOULD BE TRULY RANDOM, OF SHORT DETENTION, AND WELL LIGHTED TO LIMIT INTRUSION

c. School Search

1. New Jersey v. TLO, 469 US 325 (1985) – Reasonable suspicion standard applies to school administrator's search of student. Scope must be reasonably related to objectives of search and not excessively intrusive in light of age and sex of student and nature of infraction.

APPLIES TO SEARCH BY SCHOOL ADMINISTRATOR, WHO HAS COMPELLING INTEREST IN MAINTAINING SAFE LEARNING ENVIRONMENT

2. Safford Unified School District v. Redding, 557 US ___, 129 S. Ct. 2633(2009) – Absence of sufficient suspicion to warrant extending search by making student pull out underwear. Nondangerous contraband does not "raise specter of intimate stash sites" in absence of reasonable suspicion in underwear.

H. Investigative Detention

SPO #3

1. The Stop

a. Factual Justification - Reasonable suspicion involved in criminal activity. Terry v. Ohio, 392 US 1 (1968)

1. US v. Cohen, 481 F 3d 896 (6th Circuit 2007) – Detention of vehicle leaving street from where 911 hang-up call made four minutes earlier was not sufficiently corroborated to support reasonable suspicion.

2. US v. Campbell, 486 F3d 949 (6th Circuit 2007) – Stop occurs when reasonable person feels not free to walk away. Stop did not occur until officer advised "could be on way when IDed." Up to that point was voluntary encounter. Reasonable suspicion existed at time of stop.

3. State v. Langston, 2007 Ohio 4383 (6th District Court of Appeals 2007) – Anonymous CB tip of erratic driving corroborated by description of reported vehicle and license number alone did not establish reasonable suspicion.

b. Reasonableness Factors

1. Duration of stop

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a. US v. Sharpe, 470 US 675 (1985) – Reasonableness of Duration is determined by time and officer's diligence.

b. Blue Ash v. Kavanagh, 113 Ohio St. 3d (2007) – Deployment of canine while waiting for impound tow did not unreasonably prolong detention, distinguishing from Robinette, Ohio St. 3d 234 (1997), where following speed warning officer moved violator to rear of car and asked for consent.

c. State v. Batchilli, 113 Ohio St. 3d 403 (2007) – Deployment of canine while awaiting CCH and DL inquiries was diligent and justified. Took 8 minutes from time of stop. Testimony would have taken 10 minutes for warning, 20 for citation.

2. Level of Force – Reasonable under the circumstances

DISCUSS WHETHER THERE MIGHT BE CIRCUMSTANCES WHERE RESTRAINT WOULD BE REASONABLE

2. The Frisk (Search)

a. Factual Justification – Reasonable suspicion armed. Terry, supra

State v. Lozada, 92 Ohio St. 3d 74 (2001) - Placing driver in patrol car if for convenience of driver is alone not enough to justify frisk. Absence reasonable suspicion is armed, frisk is only justified if there is a need to protect officer or driver from a dangerous condition, and placing the suspect driver in the patrol car is least intrusive means to avoid the dangerous condition.

b. Scope

1. Pat down of outer clothing. If feel what can reasonably be weapon, reach into clothing to retrieve. Terry, supra

2. Michigan v. Long, 463 US 1032 (1981) – Frisk includes areas of immediate control. This includes the areas in the passenger compartment of a vehicle where a weapon could be found, as suspect could return to vehicle if not arrested.

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3. Minnesota v. Dickerson, 508 US 366 (1993) – During course of frisk, plain feel applies when immediately apparent item felt is weapon or contraband. It is not immediately apparent when have to manipulate, squeeze and slide.

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HANDOUT #1 – CASE LAW

Case Law can be found as a pdf document at:
www.ohioattorneygeneral.gov/OPOTA

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