

Should Officers Use Written Consent to Search Forms?

By
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Consent searches are a legitimate means of obtaining evidence, but officers must recognize that since a consent search is a warrantless search, it is presumed illegal until the state can prove it to be Constitutionally legal, primarily through testimony of the officer obtaining the consent. The state does this by showing that the person giving consent had *authority* to consent to the search and that the person also *voluntarily* consented to the search.¹ This article will concentrate on the voluntariness requirement and the desirability of obtaining the consent in writing.

TEST FOR VOLUNTARINESS

Schneckloth ruled that the test is whether or not, in obtaining the consent, the defendant's will was overborne. In other words, was this a free choice on the defendant's part? To make that determination, the court will consider the "totality of the circumstances." *Schneckloth* provided as examples the following circumstances, among others, which will be examined by the court to make the determination of whether the defendant's will is overborne:

- the age of the accused
- his education
- his intelligence
- the length of detention
- the repeated and prolonged nature of the questioning
- the use of physical punishment such as the deprivation of food or sleep

Later cases have required that the consent must be knowingly, intelligently, and freely given,² and that mere submission to police authority will not amount to consent.³ Therefore, the State must prove that there was no express or implied duress or coercion exerted upon the person allegedly consenting to a search.⁴ The standard is what the typical, reasonable person would have understood by the exchange between the officer and the suspect.⁵

There is no absolute requirement that the consent be obtained in writing; however, because having an executed, written consent form is one of the clearest evidences of voluntariness, most authorities strongly urge the use of the forms. One such authority states: "As the burden of proof is on the prosecution to show that the consent was given voluntarily, this consent should be obtained in writing when possible and should be witnessed by more than one person. If forms are used, they should be readily available at all times."⁶

Also note that an oral consent to search but a refusal to sign the form should not hurt the officer's case. In this instance the officer should execute the form by signing as a witness and writing on the form that "(subject's name) orally consented to the search of the above described property, but declined to sign the Consent to Search Form."

The form should then be admissible with the proper predication and should substantially support the officer's testimony that the consent was obtained voluntarily.

If forms are not used by your department, consider obtaining a tape recording of the consent. Many Alabama departments are beginning to use this technique and it is acceptable as long as the tape does not malfunction and the chain of custody for the tape is strictly followed. Of course, a video recording is, in most instances, the most acceptable evidence assuming that the officer carefully words his/her request for consent.

CONCLUSION

The use of the form is not a legal requirement, but is a matter of proof. We are living in times where the police officer's word, which once was accepted as truth merely because of the position, no longer enjoys that status. The fact that the witness is employed as a law enforcement officer does not necessarily cloak the officer with a mantle of believability. For this reason, officers need an edge. One way to obtain this edge in the courtroom is to produce written evidence of the subject's consent. This often can make the difference between winning and losing a case.

NOTE : If you would like copies of approved consent forms, please telephone Bob Thetford, ICJE, at 334-280-0020.

¹ *Schneckloth v. Bustamonte* 412 U.S. 218 (1973)

² *Ex parte Wilson* , 571 So. 2d 1251, 1255 (Ala. 1990).

³ *Martinez v. State* , 624 So. 2d 711, 716 (Ala. Crim. App. 1993)

⁴ *Duncan v. State* , 278 Ala. 145, 176 So. 2d 840 (1965)

⁵ *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)

⁶ Klotter and Kanovitz, *Constitutional Law*, Seventh Edition, Anderson Publishing Co., Cincinnati, Ohio, 1995.