

Vehicle Searches:  
Legal Question of the Week  
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**IMPORTANT NOTE! THIS UPDATE WAS WRITTEN BEFORE THE SUPREME COURT DECIDED ARIZONA V. GANT IN APRIL OF 2009, WHICH TOOK AWAY THE RIGHT TO SEARCH A VEHICLE INCIDENT TO ARREST IN MOST CIRCUMSTANCES. PLEASE READ THE LEGAL UPDATE ON THAT CASE FOR FURTHER INFORMATION. THE OTHER SEARCH JUSTIFICATIONS DISCUSSED HERE ARE STILL VALID.**

We start with a sad note this week. Reece Trimmer, who many of the veteran officers probably know from his time as a legal specialist at the Justice Academy, passed away at his home on Tuesday. In addition to his work with the Justice Academy, Reece was the first police attorney for the Durham Police Department back in 1971 and also served as legal advisor to the Cumberland County Sheriff's Office before retiring in 2004. He had a quick wit, brilliant mind, and a great heart. His funeral service will be Monday, August 25, at 1400 hours at the University Presbyterian Church on Franklin Street in Chapel Hill.

I've had a few questions about vehicle searches lately, so it seemed like a good topic to review. Automobiles are great – people carry around all kinds of illegal stuff in them and police have at least five ways to search them without a warrant. This is a bad combination for criminal drivers, but only if you – the faithful law enforcement officer – know your stuff.

**HYPOTHETICAL SITUATION**

Deputy Fife of the Mayberry Sheriff's Department stops a car for a partially obscured license tag. He asks the driver, Floyd Lawson, to step out of the vehicle. As Floyd steps out of the car, a pair of scissors and a baggie containing an off-white rock like substance falls to the ground. Based on his training and experience, Deputy Fife believes the substance to be crack cocaine.

Can Fife search the interior of the car for more cocaine? What about the glove compartment? Closed containers in the passenger area? What about searching the trunk? More importantly, what is Floyd the barber doing with crack cocaine in Mayberry? Does this explain the weird speech patterns and twitching?

To answer these questions (or at least the legal ones), you should be aware of the five major justifications for a warrantless vehicle search. You should also be aware of the scope of each type of these searches and the focus of each type of these searches. You should also be aware that this kind of thing lends itself nicely to an appendix.

The first justification you can have for a warrantless vehicle search is the voluntary **consent** of a person with actual or apparent authority. Neither probable cause nor reasonable suspicion is required for this search. The scope of a consent search is defined by the consent given. In other words, you may search any part of the vehicle for which consent is given, including containers. Can you search the trunk? If he consents, you can. It's that simple. Well, maybe not.

One case you need to be aware of is State v. Johnson, a North Carolina Court of Appeals decision from 2006. In Johnson, a consent search was done on a van whereupon one eagle-eyed (or owl-eyed, see below) officer spotted an extra piece of molding where the sliding door locked into place. He pulled the rubber molding off and found 10 kilograms of cocaine hidden between the van's inner wall and outer metal wall. The Court of Appeals ruled that the search went beyond the scope of the consent given because consent did not cover removing parts of the interior.

A very good friend of mine, Ralph Strickland, believes that the Court would rule differently if there were some facts that gave rise to a suspicion that the vehicle might contain drugs. There were no such facts in the Johnson case. Ralph and I were fellow Assistant District Attorneys in Durham. He has also worked for the Justice Academy, the Orange County Sheriff's Department, the Durham Police Department, presently the Cumberland County Sheriff's Department, and the list goes on. What does this tell us? Several things – Ralph is old, he cannot hold a job for very long, and he has been doing this for a long time and knows what he is talking about.<sup>1</sup> I believe him and you can, too.

The second justification for a warrantless vehicle search is a search based on probable cause. If you have probable cause that evidence is located in the vehicle, you do not need a warrant because of the “**vehicle exception**.” If probable cause justifies the search of a vehicle, it justifies the search of every part of the vehicle and its contents (to include locked and unlocked containers) that may conceal the object of the search. In other words, you may search any place the magistrate could have authorized with a search warrant based on your probable cause. This type of search may take place at the

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<sup>1</sup> Ralph also reads my legal updates, which is why I am giving him a hard time here. If you come and ask me a question and I get on the phone, I'm calling Ralph to get the answer. He knows what he's doing. I often plagiarize his work with his consent.

scene or after the vehicle has been impounded. This exception would usually also cover the contents of the “electronic data recorder” or “black box” of a vehicle.

A third warrantless automobile search is the **inventory search**. A vehicle that has been lawfully taken into the custody of law enforcement officers may be inventoried, if done pursuant to a reasonable, standardized policy. Here at the High Point Police Department, we have just such a policy contained in General Order 2.13(F). In fact, the first sentence says that all towed, impounded, or seized vehicles will be inventoried. Neither reasonable suspicion nor probable cause is required for an inventory search since it is done for the protection of the owner and the officers. The scope of this search is covered by our General Order, which allows you to search the vehicle and the trunk and open locked containers if you have a key. You should not break open locked containers for which you do not have a key and you should not break into the car if locked. Instead, do your inventory by looking through the windows as best you can.

One of the most underused ways to justify a warrantless search of a vehicle is doing a “**Terry**” frisk of the car. We all know very well that Terry v. Ohio gives officers the right to perform a frisk of a subject with reasonable suspicion that the suspect might be presently armed and dangerous. That extends to vehicles as well. If during a traffic stop, an officer develops reasonable suspicion, based on specific and articulable facts, that the driver or passenger is dangerous and may gain immediate control of a weapon, they may frisk not only that person, but the entire passenger area of the vehicle where a weapon might be hidden, including any unlocked container. You may not open the trunk or any locked container based on this justification.

**SEE NOTE ABOVE.** Finally, you may search a car **incident to the lawful arrest** of an occupant of the vehicle. This justification allows you to search the entire passenger area, the console, the glove compartment and any containers, open or closed, locked or unlocked in the vehicle. You may not search the trunk under this justification.

In addition, a U.S. Supreme Court case from 2004 gives you the ability in some circumstances to search a parked car incident to arrest. In Thornton v. United States, Officer Nichols of the Norfolk (VA) Police Department observed a vehicle whose tag belonged to another car. Before he could stop the vehicle however, the driver parked and got out. Officer Nichols stopped the defendant, asked for his license and registration, and after some conversation, the defendant admitted to being in possession of illegal drugs. Officer Nichols arrested the defendant, searched the car and found a gun under the front seat. The Supreme Court ruled that this was a proper search incident to arrest. There is still some question about how close to the vehicle the person has to be, but a general rule is that if you actually see the suspect exit his vehicle and he is still where he might “lunge” to the car when you arrest him, you may search the vehicle incident to arrest.

So in the above hypothetical, Deputy Fife may search Floyd’s car on a variety of theories. First, he may conduct a frisk of the vehicle for officer-safety purposes (assuming he has reasonable suspicion to believe a weapon may be in the car which could be used to harm him; courts generally recognize that drugs and weapons are frequently

found together.) Second, a search incident to Floyd's arrest for possession can be conducted although this search would not include the trunk. However, to the extent the crack cocaine gives probable cause as to the entire vehicle, a search of the trunk may be conducted on that theory. If there is any legal doubt about the foregoing, Deputy Fife can always request consent from Floyd to search the entire car and trunk (if only as a "fall-back" position.) Finally, assuming the car will be towed and impounded, Fife can inventory the car in accordance with his department's policy.

**Another Practice Tip:** If two or more justifications overlap, it may be helpful to "stack" them when possible. For example, even though you clearly have a right to do a search incident to arrest, go ahead and ask for consent and "stack" this as a fall-back position.

Finally, one additional theory authorizing a warrantless vehicle search should be mentioned: a search to determine ownership. Generally, officers may make a limited warrantless search of a vehicle when they need to determine its ownership. For example, if officers believe that a vehicle has been stolen or vandalized, they may need to determine its ownership so they can inform the owner about what has happened to his or her vehicle.

I realize that this week's legal update has been light on the humor (except for that Floyd twitching line – that's comic genius) so let me pause to let you in on something I learned today that I never knew. In a quote taken from today's Durham Herald-Sun, Dr. Deborah Radisch, a pathologist with the Medical Examiner's office, said this: "You would probably find microscopic feathers everywhere," she said. "It would be part of the dust makeup of any home." I did not know this.

This becomes important because of a case you may remember that was tried several years ago in Durham where a local novelist killed his wife by beating her about the head with a fireplace poker in the staircase of his luxurious Durham home. I was a prosecutor in Durham at the time and Court TV covered the case live. The trial lasted several months and ended with the conviction of said novelist, Michael Peterson. After his conviction, supporters of Peterson came up with a theory (I am not making this up) that an owl had flown into the house and murdered his wife. That theory has now been bolstered by the fact that there was apparently a microscopic feather found in the victim's hand. But, according to the learned Dr. Radisch, these feathers are everywhere. This is nothing to sneeze at. (groan) The article can be found at <http://heraldsun.southernheadlines.com/durham/4-982318.cfm>

You might say the case was a real "hoo"-dunnit. (groan again)

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APPENDIX  
VEHICLE SEARCHES

<u>Type of Search</u>	<u>Requires</u>	<u>Scope</u>	<u>Trunk Search?</u>
Car Frisk	Reasonable Suspicion that occupant is dangerous and may gain immediate control of weapon	Anywhere in pass. area that weapon might be found incl. open or closed unlocked containers.	No
<b>INCIDENT TO ARREST NO LONGER VALID UNDER ARIZONA V. GANT</b>			
<del>Incident To Arrest</del>	<del>Lawful arrest of vehicle occupant</del>	<del>Entire pass. Area, console, glovebox, all containers locked or unlocked</del>	<del>No</del>
Probable Cause	Probable Cause that evidence is contained in vehicle	Any part of vehicle where the evidence being sought might be located, incl. the trunk	Yes
Consent	Um...consent	Any part of vehicle for which consent is given, including containers	Yes, if consent
Inventory	Reasonable Dept. Policy and lawfully towed, seized, or impounded vehicle	See HPPD General Order 2.13(F)	Yes, under our General Order