Roll Call Training Bulletin

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Vehicle Searches
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In RCTB #76 (Search of vehicles for identification) we discussed changes in your ability to search a motor vehicle for identification when the operator does not produce one. Here we will discuss alternative methods that may be used to examine the contents of a lawfully stopped vehicle without a warrant.

This RCTB will cover the various legal methods for conducting a vehicle search. Additionally, two case law summaries involving vehicle stops and vehicle searches will be covered.

Search Methods

1. **Consent Searches:** It is recommended to ask for consent to search, if circumstances permit, even if there are other lawful alternatives to search a vehicle. When seeking consent, officers have to consider four different elements:
   a. The right to seek consent: officers can ask for consent during consensual contacts or during lawful detentions. Merely asking for consent, even when it is unrelated to the original purpose of the stop, is <u>permissible as long as the request for consent and the search occur in the time it would normally take to handle the original violation</u>.
   b. Voluntariness: Obtaining consent during an unlawful arrest or detention will render any grant of permission invalid. The California Peace Officer's Legal Sourcebook discusses potential problems with "voluntariness" when officers obtain consent AFTER they have issued a citation or warning. The CPOLSB recommends seeking consent during the traffic stop or obtaining a written consent waiver if consent is obtained after the stop has been completed.
   c. Authority: Simply put, the person granting permission to search must have the authority to do so.
   d. Scope: Scope deals with limitations over the area being searched. For instance, consent to search for drugs reasonably suggests the scope of the search would include any compartment or object that reasonably could contain narcotics (e.g. consent granted to search for stolen bicycles obviously keeps us out of glove compartments, center consoles and from peeking under seats).
2. **Incident to Arrest:** Officers may search a vehicle incident to the lawful arrest of the vehicle's operator or any of its passengers. This is only allowable when an actual arrest occurs, and the search is limited and must be contemporaneous to the arrest. In instances where drivers/occupants are released via citation (even if an arrest would have been permitted) will not justify a search under this authority. In *Arizona v. Gant (2009)*: Law enforcement officers lost search incident to arrest in most situations. Also, in *Arizona v. Gant* it was held that police may search the passenger compartment of a vehicle incident to an occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest.
3. **Probable Cause:** Courts have long recognized that vehicles have a lower expectation of privacy than residences and are obviously far more mobile. As such, it is permissible to search a vehicle when you have developed probable cause to believe evidence of a crime may be inside the vehicle.

4. **Vehicles as an Instrumentality of a Crime:** Officers may seize and search vehicles when the vehicle itself is evidence of the crime for which an arrest is made. This means the car is itself evidence of a crime and not just used to transport evidence or was used during the commission of a crime. While vehicles seized as an instrumentality of a crime can be searched without a warrant, obtaining a warrant can protect evidence seized from suppression in later court challenges.
5. **Plain View/Plain Smell (Marijuana):**
    a. The plain view doctrine allows a police officer to seize objects not described in a warrant when executing a lawful search or seizure if the officer observes the object in plain view, provided the officer has a lawful right to be there and has probable cause to believe that it is connected with criminal activities.
    b. As in plain view, "plain smell" can serve as probable cause for lawful searches of a vehicle provided the officer has other criminal activity. Proposition 215 and Proposition 64 impacted an officer's ability to search vehicles based upon plain smell of marijuana. Previously plain smell, as it pertained to a marijuana investigation, provided a basis for a search but that is no longer allowed.

Case law summary *(People v. Shumake (Dec. 16, 2019) 45 Cal.App.5th Supp. 1):*

In *Shumake*, a Berkeley PD officer working a DUI detail stopped a motorist for an equipment violation and thereafter noticed the smell of fresh and burnt marijuana coming from the car. Shumake told the officer he had a small amount of marijuana in the car's center console. The officer commenced searching the vehicle based on her interpretation of CVC 23222 (any marijuana transported in a vehicle must be in a closed, sealed container), believing this section required such containers be closed and heat-sealed.

Checking the center console first, the officer found a plastic tube containing what proved to be a legal-to-possess quantity of marijuana. The officer noted the plastic tube was not in a sealed condition and could be opened by pinching the sides of the tube, causing the tube's top to flex open. The officer believed her discovery revealed marijuana that was being illegally transported (the container was not closed and sealed), so a further search was justified. Ultimately, she discovered a loaded handgun under the driver's seat.

During appeal the courts suppressed the evidence based on improper search: the court concluded that, given the legality of personal use of marijuana in the State of California, there was not a fair probability that Officer Jones would find evidence of a crime in the Hyundai. Anyone 21 years and older can now lawfully smoke marijuana under California law, and as Officer Jones testified, the smell can linger for more than a week. The law permits possession and transportation of up to 28.5 grams of cannabis in a car. The court held that upon Shumake telling the officer that he had some "bud" in the center console, Officer Jones could have conducted a further inquiry, including asking Shumake about the amount of marijuana, whether it was in a container, where it was located, when he last smoked, etc. This is consistent with the type of reasonable inquiry officers must use when they smell alcohol in a car. Marijuana and alcohol now receive similar treatment under the law. Officer Jones may have had justification at that point to administer field sobriety tests to ascertain Shumake's sobriety, but that justification is not tantamount to probable cause to search the remainder of Shumake's car.

Conclusion: "The odor of marijuana alone no longer provides an inference that a car contains contraband because individuals over the age of 21 can now lawfully possess and transport up to 28.5 grams of marijuana."

It is, of course, possible that an officer who detects an unusually strong odor of marijuana in a vehicle might reasonably believe, based on training and experience, that the amount must have exceeded one ounce. Furthermore, the odor of ***burnt*** marijuana from a vehicle might constitute probable cause to believe that the driver or other occupant had been smoking marijuana while the car was moving. And this, too, is illegal.

The possession of even a small amount of marijuana in the passenger compartment of a vehicle is unlawful if it was inside an "open" container. In *People v. Johnson* (2020), the court ruled that a container of marijuana is not "open" unless it lacked "a lid or some other type of cover or material separating the content from the outside such that there is no barrier to accessing the content." It then ruled that a plastic bag that is "knotted" does not fall within this definition of "open" because "it presents a barrier to accessing the content."

The court also pointed out that the existence of an open container of marijuana in a vehicle is unlawful only if officers had probable cause to believe the vehicle was being "driven."

Case summary *(People v. Lee (Oct. 3, 2019)* 40 Cal.App.5th 853):

San Diego officers conducted a traffic stop on Brandon Lee and his passenger. During the traffic stop officers had Lee and his passenger exit the vehicle. A pat down search of Lee revealed a small amount of marijuana (personal use) and a wad of cash. When asked about his driver license, Lee advised he did not have his driver license with him. When asked if he was a delivery driver of marijuana, Lee advised that he was. Lee and his passenger were handcuffed and asked if anything illegal was in the vehicle to which Lee replied there was not. Officers advised Lee and his passenger that if nothing illegal was found in the vehicle, they would be free to go. The officer also advised Lee that his vehicle would be impounded. The case noted that the officers asked on three separate occasions if there was anything illegal in the car to which Lee stated there was not, and that Lee advised the officers that he could have someone pick up his vehicle.

Officers proceeded to conduct a search of the vehicle without a warrant. The search revealed 56 grams of cocaine, a firearm, and other items associated with selling narcotics. The vehicle was subsequently impounded, and Lee was arrested and charged with various drug and weapons offenses. The asserted basis of the search had been an impound search, although the proper paperwork wasn't completed until after the vehicle had been impounded and searched a second time.

Motion to suppress the evidence based on improper search: Lee filed a motion to suppress the evidence obtained from the warrantless vehicle search. The trial court granted Lee's motion, rejecting the State's contentions that the search was proper under the automobile exception as supported by probable cause or, alternatively, an inventory search of a vehicle following an impound.

Conclusion: The Court concluded that even considering the totality of the circumstances known to the officer, there did not exist "a fair probability that contraband or evidence of a crime will be found" in the vehicle. The Court likewise found no error in the trial court's conclusion that the search was not valid as an inventory search. The Court therefore affirmed the trial court's order granting Lee's motion to suppress the evidence obtained from the unlawful search of his car.

It should also be noted that the court's ruling that Lee's possession of a small and legal amount of marijuana provided scant support for an inference that his car contained contraband. Further, the Court held that there must be something else in addition to the simple possession of a legal amount of marijuana to justify a search of the vehicle. (See *People v. Strasburg* (2007) 148 Cal.App.4th 1052.)

Thus, per the Court, "(i)n their totality, these facts provide substantial evidence to support the trial court's finding that the focus of (the officer's) search was finding incriminating evidence (as opposed to conducting a mere inventory of the car's contents). This motivation is inconsistent with an inventory search." The search of defendant's car, therefore, cannot be justified under the theory that it was a lawful inventory search.

A warrantless search of a motor vehicle requires probable cause to believe it contains contraband or other evidence of a crime. A motor vehicle driver's possession of a lawful amount of marijuana, absent some other evidence that the vehicle contains more marijuana or that the driver is under the influence, is not sufficient to establish the necessary probable cause to search the vehicle.