

SPECIAL LEGAL BULLETIN

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Can a Person Consent to Search without Saying Anything?

If so, what does it mean?

A person's consent to search can be a tricky situation during a routine traffic stop. Typically a person will answer a simple question with a simple response, "Yes" or "No." However, what happens when the person refuses to answer the question verbally, but gives a non-verbal response left to be interpreted by the trooper on the side of the road? The trooper is left to try and decode what the driver is implying by his or her actions.

We received a phone call from a trooper who stopped a vehicle for speeding and, after writing the citation, asked the driver for consent to search the vehicle. For whatever reason, the driver was extremely nervous, gave evasive answers to standard questions and would not make eye contact with the trooper. When the trooper asked for consent to search, the driver would not give a verbal response. Upon the first request the driver shrugged. Not knowing what this meant the trooper

asked the driver again for consent to search. This time the driver looked straight down, slumped his shoulders and appeared as if he was about to cry. The trooper asked the driver for consent to search again saying, "Please answer out loud." This time he put his hands and arms out the window as if to imply, "Go ahead and search me." The trooper wanted to search the vehicle so the driver's response was not helpful at all.

The threshold issue is whether the driver of the vehicle was free to leave after the trooper wrote the traffic citation. Usually this is done by simply stating, "You're free to leave, but before you do, can I search the vehicle, its compartments and any containers in the vehicle?" The courts are clear that this language turns the traffic stop into a consensual encounter. The courts have addressed this issue repeatedly and have stated that a consensual encounter between a police officer and a defendant occurs when an officer asks for permission to search a defendant's vehicle following a valid traffic stop, as long as the defendant had been advised he was free to leave. Pierre v. State, 732 So.2d 376 (Fla. 2d DCA) 1999.

Assuming the stop has become a consensual encounter, we only have to show the court that the consent to search was freely and voluntarily given, Denehy v. State, 400 So.2d 1216, 1217 (Fla.1980). A search conducted pursuant to a valid consent is constitutionally permissible. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). When the state seeks to rely upon consent

to justify the lawfulness of a search, the state has the burden of proving that it was freely and voluntarily given. The context of the voluntariness is a question of fact to be determined from all the circumstances. Id. The state must demonstrate by clear and convincing evidence that a defendant freely and voluntarily agreed to a search and that his or her agreement was not the product of a mere acquiescence to the apparent authority of the police to conduct a search. Id.

Typically, we see non-verbal consent to search when a person simply raises his hands above his head or shrugs. A shrug can be interpreted as valid consent to a search based on the trooper's interpretation of the person's body language. The federal courts have repeatedly found that a shrug and similar nonverbal gestures were sufficient to show various forms of consent. United States v. Stewart, 93 F.3d 189, 192 (5th Cir.1996); United States v. Wilson, 895 F.2d 168, 172 (4th Cir.1990); United States v. Griffin, 530 F.2d 739, 742 (7th Cir.1976).

If a person can give consent without saying anything, can he/she withdraw consent in the same manner? The answer is yes. Just as when verbal consent is given, once a voluntary non-verbal consent is given, he or she has the right to withdraw that consent at any time. The withdrawal of the consent may be verbal or non-verbal as well. Smith v. State, 753 So.2d 713, 715 (Fla. 2d DCA 2000). When an individual revokes his or her previously given consent, the search must stop and anything discovered after its withdrawal will be considered the fruits of an illegal search and, therefore suppressed. The Court held in E.B. v. State, 866 So.2d 200, 203 (Fla. 2d DCA 2004), that, E.B. (a minor) withdrew his consent when he ran from the officer.

However, once consent is given, the scope of the consent is left to the reasonable interpretation of the officer. In the case of the United States v. Freeman, 482 F.3d 829 (5th Cir.2007), the federal court said that the scope and authority are not determined based on a totality-of-the-circumstances standard, but by a reasonable-officer standard. The burden of proof remains on the government. In the case of the United States v. Patten, 183 F.3d 1190 (10th Cir.1999), the court said that the scope of a defendant's consent is what a reasonable person would have understood by the exchange between the defendant and police officer. A defendant's silence and acquiescence may support a finding of voluntary consent. Moreover, a defendant's failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent. This means that a failure to object to the search, either verbally or non-verbally means the search is within the scope of the consent. Id.

So how can we define the scope of the consent? For instance, consent to a pat-down search does not give rise to a **full-blown** search of the person. In Jimenez v. State, 643 So.2d 70 (Fla. 2d DCA 1994), the defendant was subjected to a pat-down search as a condition of admission to a dance being held in a National Guard Armory. Many of the attendees did not speak English and as Jimenez approached the checkpoint, he raised his arms indicating to the officer that he was consenting to the pat-down. When the officer found two cigarette packs in a shirt pocket, he attempted to remove them and Jimenez grabbed the officer's hand. The officer removed Jimenez's hand, opened one of the packs and found white powder that later tested positive for cocaine. The court held that it was improper for the officer to continue the search over

Jimenez's objections, which were communicated through his non-verbal gesture of grabbing the officer's hand.

If a citizen gives a valid consent to search, without limitation, the search may continue up until and including the discovery of contraband. For instance, in State v. Petion, 992 So.2d 889 (2nd DCA) 2008, the defendant, Mr. Petion provided consent to search his car without limitation. Subsequently, when law enforcement found a secret compartment, they had probable cause that allowed them to continue to search the secret compartment even if Mr. Petion withdrew his consent. Once the secret compartment was found, even if Mr. Petion withdrew his consent to search, they could have continued to detain him by means of a Terry stop. United States v. Jurado-Vallejo, 380 F.3d 1235 (10th Cir.2004). A Terry stop is where a person is legally detained, but not arrested, when the law enforcement officer has a reasonable, well-founded suspicion that there is criminal activity afoot.

So how do we handle the trooper's dilemma in the initial scenario above? The shrug, if interpreted by the trooper as a "Yes" or "Go right ahead", he or she is free to search the vehicle. I asked the trooper why he asked for consent to search the vehicle a second time and he said that he was not sure what the shrug meant. If he could not articulate what it meant, then there is no way we could have met our burden of establishing that the shrug was a valid consent to search by clear and convincing evidence.

The second response, slumping and appearing as if he is about to cry, indicates that he may be guilty of transporting contraband, or that a family member recently died and he is on the way to the funeral.

The third response is not a response to the question, but it is a non-verbal consent to search his person. A search of the vehicle would clearly be beyond the scope of the consent given by the driver. However, I suggested that the trooper go ahead and search the driver because it could lead to reasonable suspicion to detain him (Terry Stop) and later, probable cause to search the vehicle.

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