

SEARCH AND SEIZURE SEARCHES INCIDENT TO ARREST (LAW ENFORCEMENT PERSONNEL)

OBJECTIVES

- Staff will learn current search and seizure principles for searches incident to arrest
- Staff will review the department's search and seizure policies pertaining to searches incident to arrest

The 4th Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution both protect New Mexicans from unreasonable searches and seizures by law enforcement. When law enforcement officers violate these constitutional provisions the evidence they obtain is subject to suppression and may not be used for criminal prosecution. The law enforcement officers and the agency are also subject to civil liability for damages resulting from constitutional deprivation.

Week twenty-five described investigative or "Terry Stops" which can be performed even if the officer does not have probable cause for an arrest. When an officer is making an arrest the scope and purpose for the search is expanded. This lesson describes the parameters of that expanded search authority.

BASIS FOR SEARCH INCIDENT TO ARREST

Officers are authorized to conduct searches incident to *lawful custodial* arrests. In order to trigger authority to search, the arrest must be legal (based upon probable cause) and custodial. When officers issue a citation they are not performing a custodial arrest. Further, probable cause that a citable offense has been committed does not automatically make custodial arrest reasonable. The officer must be able to articulate a legitimate reason for the decision to escalate the seizure into a full custodial arrest.

SCOPE OF SEARCH

(Discuss your state's position on searches)

The scope of a search incident to an arrest is broader than the frisk for weapons an officer may perform as part of a Terry Stop. Depending upon the nature and circumstances of the arrest, the officer may be authorized to search the arrestee in order to remove any weapons they might attempt to use in order to resist arrest or

escape and to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

The U.S. Supreme Court has held that the arresting authority has the unqualified authority to search an arrestee for weapons and evidence. However, New Mexico law expresses a strong preference for warrants and New Mexico courts have held that the state constitution provides arrestees with more privacy protection than the federal constitution. It is important for officers to know and comply with the stricter search standards imposed by the New Mexico Constitution.

WEAPONS

While Terry Stop frisks require officers to have reason to conclude that the person they are dealing with may be armed and presently dangerous, under federal law an officer can search an arrestee for any weapons the arrestee might seek to use and any evidence on the arrestee's person. Under federal law the area that can be searched is the area "into which the arrestee might reach." *Chimel v. California*, 395 U.S. 752 (1969).

EVIDENCE

The evidence concealment/destruction rationale for a search incident to an arrest is based on the need to act quickly or else lose critical evidence of a crime which the police have probable cause to believe the suspect committed. The officer can only search for evidence if the individual might have evidence related to the crime from which they are being arrested on their person. Thus someone who is arrested for speeding or violating curfew cannot be searched for evidence because there will not be evidence on their person about their alleged crime. Conversely, someone arrested for possession of controlled substances may be searched for evidence because they may well have evidence on their person probative of their alleged criminal activity that they may try to destroy.

VEHICLES

(Discuss your state's position on vehicle searches)

New Mexico courts have especially departed from federal search and seizure precedent where automobiles are involved. While federal courts have frequently held that a search of a car incident to arrest is valid even if the arrestee is safely placed in the police car, New Mexico courts will invalidate such searches unless the officer can articulate a reason why the search was necessary for officer safety (such as the officer is informed that there is a weapon in the car that the passenger has access to). Under New Mexico constitutional law an officer should not search an arrestee's vehicle unless 1) the search is necessary for officer safety, or 2) the search and seizure is necessary to preserve evidence from destruction. If neither rationale is present the officer must obtain a warrant before commencing the search. However, if the vehicle will be towed after arrest, officers may conduct a vehicle inventory to locate, log, and safeguard property in the vehicle.

SEARCH AND SEIZURE INCIDENT TO ARREST CONSIDERATIONS

- The arrest must be based upon probable cause.

- The arrest must be custodial
- Legitimate purposes for a search incident to the arrest: include:
 - officer safety
 - preservation of evidence
 - safekeeping of the arrestee's valuables.
- The scope of the search MAY include the person being arrested, places within their reach, adjacent areas necessary to secure the scene, and open and obvious items
- The search performed must be reasonable under the circumstances

RECENT NEW MEXICO DECISIONS

(Discuss your state's recent court decisions)

The "ultimate question" in cases invoking the state constitution is whether the search was reasonable. *State v. Rodarte*, 2005 NMCA 141, ¶13. Recently New Mexico appellate courts have held that:

- Where the criminal statute provides for citation and release the officer is not authorized to make a custodial arrest. *State v. Bricker*, 2006-NMCA-052 cert. granted May 1, 2006.
- Syringe loaded with methamphetamine that was found in defendant's wallet during jail booking search suppressed because officer was not authorized to arrest him and take him in for booking for driving on a suspended license. *Id.*
- Officer was authorized to search vehicle under officer safety rational when defendant (who was outside vehicle) reported that there was a weapon in the vehicle and the passenger had access to it. *State v. Gutierrez*, 2004-NMCA-081, ¶ 11,
- Officer was NOT authorized to search vehicle under officer safety rational when the defendant was handcuffed and secured in the patrol car and posed no danger to the officer. *State v. Pittman*, 2006-NMCA-006

POLICY

Discuss the department's search and seizure policies pertaining to searches incident to arrest.

CLOSING

Encourage discussion about searches incident to arrest and the need to protect against unlawful searches and seizures.