

Cars, Consent, and Columbo

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Consent Searches During Motor Vehicle Stops

By Brian Beasley, Fan of Detective Television Shows
and Legal Adviser, High Point PD

ROLL CALL TRAINING

*From North Carolina's 24/7 Police
Attorney Law Firm*

PO Box 4803

Greensboro, NC 27404-4803

Telephone (336) 691-7058

fax (336) 969-1879

www.policehelp.net

In that golden era of television referred to as “The 70’s,”¹ there was a certain crime fiction series that featured the character of Lieutenant Columbo, a scruffy looking, shabbily dressed homicide detective whose fumbling, absentminded, overly polite demeanor made him an unlikely candidate to solve ANY crime, much less a complex murder. However, his demeanor was a complex put-on, designed to lull suspects into a false sense of security. Columbo was in fact a brilliant detective with an eye² for minute details who would lull criminals into a false sense of security and then set up circumstances that would cause them to incriminate themselves.

Columbo, played by the great Peter Falk,³ was probably most famous for his signature interrogation technique known as “the false exit.” The detective would conduct a seemingly innocuous interview, politely conclude it and exit the scene only to stop in the doorway, turn around and say “One more thing...” The “one more thing” was always a question that caught the suspect off guard, usually resulting in the suspect accidentally revealing incriminating information. This method will feature prominently in our legal update today.⁴

Our legal topic concerns the ongoing controversy of gaining consent to search from a driver you have pulled over for a routine traffic stop. There seem to be two schools of thought emerging on this issue. In one corner are those who believe that you should ask for consent early on during the traffic stop, while in the other corner are those who believe that you should not ask for consent until the traffic stop is complete, you have returned the driver’s “credentials” to him or her, and indicated in some subtle way that they are free to go.⁵ Unfortunately, I have found that a clear, direct answer to this question is nowhere to be found.⁶ However, if we look at some general

¹ The 70’s also featured great shows like WKRP in Cincinnati, Mork and Mindy, Charlie’s Angels, and Buck Rodgers in the 25th Century.

² The actor who played Columbo had a glass eye, so when I say he had “an eye for minute details,” I mean literally that. AN eye. As in one, not two.

³ Those of you too young to remember Columbo may know Peter Falk from his equally impressive role of grandfather/narrator in “The Princess Bride.”

⁴ Alongside several more random references to Detective Columbo – stay tuned.

⁵ This has been dubbed “The Columbo Method” by attorney Kevin Smith of Smith, Rodgers, and Strickland, PLLC because the strategy involves returning the license and registration, taking three steps back, and then spinning around to say, “Ma’am, one more thing...” Kevin is a fine attorney and is also an outstanding drummer – but please don’t tell him I said so. I would hate for him to get the big head.

⁶ As I have pointed out before, lawyers don’t really like clear answers because if the law was simple and easy to apply, there would be no need for lawyers and I would have to go out and get a real job.

principles that we know to be true, we can shed some light on the best way to proceed in these cases.

First, let's look at the general legal rules regarding consent searches:

1. When the justification for a warrantless search is consent, the burden is on the State to prove that the consent was free and voluntary based on the totality of the circumstances.⁷

This is the foundational rule for deciding if a consent search is valid. As we shall see, this rule applies whether you ask for consent before or after you hand the driver his license back.

2. If the stop/seizure is unconstitutional, any consent to search given during that unconstitutional "detention" will be found to be involuntary and any evidence found will be suppressed.

3. The granting of consent may NOT be the product of duress or coercion.

Consent has been held to be involuntary and thus invalid when officers told the defendant if he did not consent, the officers "would get" a search warrant that "would allow" them to tear the paneling off his walls and ransack his house.⁸ On the other hand, consent was found to be voluntary when officers merely told the driver that they "would be applying for a warrant and the vehicle may be towed" prior to the driver giving consent. The difference between the two is that the first statement is more coercive because it states the officer can obtain the search warrant as if it were a foregone conclusion. This is a subtle distinction, but deadly to your case if not understood.

4. The granting of consent MAY SOMETIMES be valid even if gained by misrepresentation, deception, or trickery.

Generally, consensual entries of undercover officers or informants misrepresenting their identities and purpose have been upheld as valid. But there are times when police deception is deemed coercive and the consent is therefore found to be involuntary. Police may not falsely represent that they have a search warrant to gain consent, for instance.⁹

⁷ Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The Columbo series was also groundbreaking in that instead of the usual murder mystery story which only revealed the murder's identity at the end, Columbo episodes would show the murder itself at the beginning and the episode would then be based around how Columbo solved the crime. This was referred to as a "howcatchem" instead of a "whodunit."

⁸ United States v. Kampell, 574 F.2d 962 (8th Circuit 1978). Few people know that the trademark trenchcoat worn by Columbo was provided by Peter Falk himself.

⁹ Bumper v. North Carolina, 391 U.S. 543 (1968). In a classic episode of The Simpsons, Chief Wiggum attempts to defend his position as a police officer by saying that he was "able to solve an episode of Columbo." On being told that they show who committed the crime at the start of the episode, Wiggum replies, "Yeah, but you have to remember."

5. Factors considered to determine whether consent was voluntarily given include the following:
 - a. Whether the subject is in custody or not;¹⁰
 - b. The subject's knowledge of his right to refuse to give consent;
 - c. Whether there was any display of force;
 - d. The degree of the subject's cooperation;¹¹
 - e. The subject's intelligence/education;
 - f. The clearness/explicitness of the consent given;
 - g. Other physical/mental/emotional factors.¹²

Again – none of the above factors are dispositive by themselves but are considered in a “totality of circumstances” analysis.

Now let's apply these general principles to a traffic stop situation. Suppose you have stopped a car for a minor violation such as a taillight not operating properly. You are feeling particularly lucky and you determine that you would like to search the car.¹³ How should you proceed?

SITUATION ONE: Develop Reasonable Suspicion to Extend Traffic Stop

A traffic stop is a brief investigative detention. Although “the scope of the detention must be carefully tailored to its underlying justification,” you may certainly question the driver and any passengers for a reasonable time to confirm or dispel any suspicions and you may even have the driver come back and sit in your patrol car while you are conducting your traffic investigation.¹⁴ If during that brief detention you develop reasonable suspicion, you may extend the length and expand the scope of the stop to further investigate.

In State v. Hernandez,¹⁵ a police officer witnessed the defendant remove his seatbelt while driving and pulled the vehicle over. The officer asked the defendant to sit in his patrol car while he issued a citation for the violation. The officer noticed that the defendant was extremely nervous and during their conversation the defendant gave two different accounts of where he was going. Most telling, the officer testified that there were “several of these Christmas trees, air fresheners in the vehicle” and further testified that based on his training and experience, the use of several air fresheners was a tactic used by drug traffickers to mask the smell of controlled substances.¹⁶ The officer then asked the defendant if there was any contraband or weapons in the vehicle and asked for consent to search, which the defendant gave.

Because of the observations of the officer, the court held that there was reasonable suspicion to expand the seatbelt stop in scope and length to further investigate. Since the

¹⁰ Although this is NOT dispositive. Subjects may give voluntary consent even when under arrest so long as the totality of circumstances show that he or she was not giving consent under duress or coercion.

¹¹ For example, did the subject open the trunk himself to aid officers in their search?

¹² For example, the subject cannot be so intoxicated as to not be aware that he is giving consent.

¹³ Maybe your “Spidey Sense” is tingling but you can't articulate any reasons why your suspicion is aroused. You have a hunch, and as you all (should) know, a hunch does not equal even reasonable suspicion, much less probable cause.

¹⁴ State v. McClendon, 350 N.C. 630 (1999) is a good example of this.

¹⁵ 170 N.C. App. 299 (2004).

¹⁶ I don't know if this just applies to Christmas tree air fresheners or air fresheners in other shapes as well. But apparently you can avoid this sort of suspicion if you limit yourself to one air freshener at a time.

detention was still constitutional, the consent gained from the defendant was also deemed voluntary under the totality of the circumstances.

SITUATION TWO: Asking for Consent during the Stop without Extending It

This is where things start to get a little dicey. Suppose you have stopped the same car, but this time during your brief traffic stop you have not observed anything that gives rise to reasonably suspect some other crime is being committed. Can you ask for consent anyway?

I believe you can, with one note of caution. In the U.S. Supreme Court case of Schneckloth v. Bustamonte,¹⁷ an officer stopped a vehicle when he observed that one headlight and the license plate light were burned out. Early on in the stop, the officer asked for and received consent to search the vehicle. The Court made note of the fact that the defendant actually helped in the search of the car by opening the trunk and glove compartment. Three stolen checks were found under the left rear seat. The Court upheld this by finding based on the totality of circumstances that the consent was voluntarily given.

HOWEVER – there is a potential trap here. If you have finished the investigation connected to the traffic stop and then ask for consent to search, courts will likely find that your reason for detaining the motorist is complete and any further detention is unconstitutional. Therefore, any consent you obtain will be invalid. (See Rule #2 above)

In the recent North Carolina Court of Appeals case of State v. Jackson,¹⁸ a deputy stopped a vehicle because after running the tag and the name of the registered owner, she discovered that the registered owner's license was inactive and the description matched her observations of the driver. Upon approaching the car, she confirmed that the driver and the registered owner were one and the same and she informed the driver that his license was inactive. The driver did have a valid Kentucky driver's license and in discussing that and checking the driver's information, the stop lasted about 20 minutes.

The deputy testified that “[r]ight after the traffic stop was pretty much over,” and before returning the license and registration, she asked Roth if there was anything in the car and eventually asked for consent to search. Consent was given and a bag of cocaine and a gun were found in the vehicle. The Court ruled that since the purpose of this stop was to confirm or dispel her suspicion that the driver was operating his vehicle without a license and that issue had been addressed, the interrogation concerning whether there was any contraband in the car was an “extension of the detention beyond the scope of the original traffic stop.” Therefore, the further detention was unconstitutional and the consent was invalid.

This potential pitfall¹⁹ is the reason why drug interdiction schools routinely teach the following practice...

¹⁷ 412 U.S. 218 (1973). The show Sesame Street featured a sheep detective named “Colambo.” The 2009 Chick-fil-A calendar parodies the show by referring to it (in June) as “Cowlumbo.” You know you’ve hit the big time when you start getting portrayed in pop culture as livestock.

¹⁸ COA08-1517 (August 18, 2009). In another episode of The Simpsons, Homer Simpson attempts to do a Columbo impression by saying “one more thing” in a gruff accent repeatedly while one of his eyes wanders around.

¹⁹ Even more troubling is the following blanket statement from State v. Parker, 183 N.C. App. 1 (2007): “If the officer’s request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity” (emphasis added). Even though Parker was not a case that dealt with consent in this fashion, and even

SITUATION THREE: The Columbo Method

This method is generally accomplished by completing your traffic stop as usual, then returning the driver's license, registration, completed ticket, and any other paperwork to the driver, saying something like "you're all set," then turning back around and asking whether there is anything in the vehicle. The theory is that this is now a consensual encounter instead of a traffic stop meaning there is no justification or suspicion required.

The U.S. Supreme Court case of Ohio v. Robinette²⁰ supports this method. In Robinette, a deputy stopped a vehicle for speeding. After obtaining the driver's license and running a check which indicated that the driver had no previous violations, the deputy asked the driver to step out of the car, turned on a mounted video camera,²¹ issued a verbal warning to the driver, and returned the driver's license. The deputy then said to the driver, "One question before you get gone: are you carrying any illegal contraband in your car?" When the driver answered "no," the deputy asked if he could search the car. The driver consented, and the deputy found a small amount of marijuana and an Ecstasy²² pill. The Court, in an 8-1 opinion, found that the consent was validly given as part of a (now) consensual encounter.

Keep in mind, however, that the giving back of the license and registration is not by itself the magic bullet that changes a detention into a consensual encounter. As stated by the North Carolina Court of Appeals in State v. Kincaid,²³ "the return of documentation would render a subsequent encounter consensual only if a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." In other words, giving back the credentials is always a prerequisite for transformation into a consensual encounter, but there also needs to be an indication that the stop is in fact over. However, the Schneckloth and Robinette cases discussed above make it clear that the subject does not have to actually know or be told that he is free to go.²⁴

So now you have some idea of what you can do and what you need to avoid. But I am sure you will ask me, "Which way should I do it?" The answer is that you are probably safer at this point using the Columbo method unless you can articulate a reasonable suspicion to extend the duration and scope of the original stop.²⁵ However, if you seek consent during a traffic stop, do it early enough that it does not unreasonably extend the length of the stop. In either instance,

though the Court cites the McClendon case (see note 15) for this proposition when McClendon didn't go that far, this language indicates that the Court of Appeals is very skeptical of these types of consent searches.

²⁰ 519 U.S. 33 (1996).

²¹ The video taken by this camera was introduced into the record and helped the court determine that the consent was voluntary because they were able to see the actual conversation between the officer and driver.

²² A.K.A. MDMA or methylenedioxymethamphetamine. Say that three times fast.

²³ 147 N.C. App. 94 (2001).

²⁴ Although explaining this to them will go a long ways toward showing that this was indeed a consensual encounter. On the other hand, if they know that they are free to go, they are probably less likely to give consent, especially if they know there is something criminal in the car.

²⁵ This is different advice than I have given in the past. I have never liked the logic behind the Columbo method and am frankly surprised that the Courts have allowed it. But as pointed out, our N.C. Court of Appeals lately has been very critical of asking for consent during the traffic stop without some sort of increased suspicion. As a result, I have to change my advice to you.

remember that the key is going to be whether consent was given voluntarily under the totality of the circumstances. Happy hunting!²⁶ Oh, and one more thing, sir...

ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR&S Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith, Rodgers, & Strickland, PLLC but he thinks they're pretty cool guys.



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²⁶ I apologize for the lengthy nature of this update, but episodes of Columbo were all movie-length, between 70 and 100 minutes long excluding commercials, so I guess it’s only fitting.