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ONE MINUTE BRIEF

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NUMBER: 2019-06 **DATE:** 02-28-19 **BY:** Devallis Rutledge **TOPIC:** "Afterthought Consent"

ISSUE: Can a police officer obtain valid consent for a vehicle search, even after the driver's documents have been returned and the driver is free to depart?

Ideally, an officer seeking consent to search from a driver stopped for a traffic violation would make that request **early** in the encounter, so as to avoid raising an issue of whether consent was invalid because obtained during an **unlawfully-prolonged detention**. *People v. Russell* (2000) 81 Cal.App.4th 96, 101-02. (Officers are likewise well-advised to determine **probation/parole/supervision** searchability **early** in an encounter, rather than making that inquiry as an afterthought. *Myers v. Superior Court* (2004) 124 Cal.App.4th 1247, 1254.)

But what if the officer fails to seek early consent and only does so as an afterthought, after returning the driver's documents and as the driver prepares to leave? Is a consent given at that point valid to justify a search?

- Robert D. Robinette was stopped for speeding. He handed over his license and was asked to step out of his vehicle. After running a records check, the deputy returned Robinette's license and **then** asked for consent to search the vehicle. Robinette consented, and drugs were found. The Ohio Supreme Court suppressed the narcotics, on the ground that consent was the product of an unlawfully prolonged detention, because Robinette had not expressly been told he was free to go. The US Supreme Court, ruling that no such advisement is necessary, reversed. *Ohio v. Robinette* (1996) 519 US 33, 39-40.

The Supreme Court has also said that "*An officer's inquiries into matters unrelated to the justification for the traffic stop ... do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.*"

Arizona v. Johnson (2009) 555 US 323, 333. Simply asking for consent to search before the person departs would not “measurably extend” the duration of the stop, as the California Court of Appeal recently held.

- Jorge Arebalos-Cabrera was stopped for speeding. He handed over his license and was asked to step out of his vehicle. After running a records check, the CHP officer returned Arebalos-Cabrera’s license and **then** asked for consent to search the vehicle. Arebalos-Cabrera consented, and drugs were found. The trial court denied suppression, and the appellate court affirmed, saying, “... *Arebalos was no longer detained at the time he gave his consent*” as he was about to re-enter his vehicle. *People v. Arebalos-Cabrera* (2018) 27 Cal.App.5th 179, 189, review denied December 19, 2018.

(Curiously, the Court of Appeal thought that no controlling decision “*has considered this precise fact pattern,*” and then resorted to decisions of other states and other federal circuits for guidance. In the 16-page *Arebalos-Cabrera* opinion, there is no mention of *Ohio v. Robinette*.)

BOTTOM LINE: Although law enforcement officers are well-advised to seek desired consent to search early during a traffic stop, a voluntary consent obtained as an afterthought—where merely asking for consent does not measurably extend the duration of a lawful stop—can be used to justify a search.

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