

Body Worn Camera & The Fourth Amendment

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Body Worn Camera (BWC)

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Law Enforcement Body-Worn Camera Privacy Act

MCL 780.311, *et seq*

MCL 780.316 (1) – Except as provided in subsections (2) and (3), a law enforcement agency shall retain an evidentiary audio video recording recorded by a body-worn camera for not less than 30 days from the date the recording is made.

MCL 780.316 (2) – A law enforcement agency *shall* retain audio and video recordings that are the subject of an ongoing criminal investigation or internal investigation, or an ongoing criminal prosecution or civil action, until the completion of the ongoing investigation or legal proceeding.

Effective 10/19/2017 – Directive Number 304.6

304.6-2 - Policy

It is the policy of the Detroit Police Department to increase member safety, protect the department from unwarranted citizen complaints, and ensure exceptional police service by members of the Detroit Police Department by using BWC systems to securely record policing activities on video/audio media. The use of body-worn cameras does not replace the requirement to provide thorough written documentation of an incident. All data, images, video and metadata captured, recorded or otherwise produced is the property of the Detroit Police Department and is subject to State and Local law and City policies regarding retention of records.

DPD Body-Worn Camera Policy

304.6-3.1 When to Activate Body-Worn Cameras

The BWC shall be activated prior to initiating, or as soon as practical after initiating the following police actions:

- 1) Except as otherwise provided in this policy, members shall activate their body-worn cameras to record all contacts with citizens in the performance of his/her official duties (Le. calls for service, vehicle stops, execution of search and/or arrest warrants, observed events, and casual encounters).
- 2) Once a body-worn camera is activated, the device shall remain on until the event is completed in order to ensure the integrity of the recording.
- 3) If a member fails to activate his/her body-worn camera, fails to record the entire event, or interrupts the recording, the member shall document on his/her Activity Log why the recording was not made, interrupted, or terminated.
- 4) If a member purposely de-activates his/her body-worn camera without justified cause, he/she may be subject to disciplinary action.
- 5) Members shall inform citizens immediately upon contact that they are being recorded.

DPD Body-Worn Camera Policy

304.6-3.8 – Records Retention

- 1) All files from body-worn cameras shall be securely stored on the DPD's local storage server for a period of ninety (90) days. Files flagged by administrative or legal department personnel shall be maintained after ninety (90) days and saved to a separate storage medium.
- 2) Any files retained longer than ninety (90) days shall be saved and maintained on a separate storage medium.
- 3) Files flagged for extended retention under subpart 1 shall be retained on a separate storage medium until the investigation is concluded, or allegations of misconduct are fully investigated and resolved, or litigation is completed, or the statute of limitation for a claim has expired as dictated by the State of Michigan, Department of Technology, Management and Budget, General Schedule #11 Retention and Disposal.
- 4) All BWC files involving a formal complaint against a law enforcement officer and/or the Detroit Police Department shall be maintained for not less than three (3) years.

DPD Body-Worn Camera Policy

Official Order No. 39

When assigned a BWC system, enforcement members who are on-duty and in uniform shall activate the BWC audio and video recording functions to record the following:

- (1) Dispatched or self initiated police action.
- (2) All contact with citizens in performance of official duties, except as provided in Section 39.1.3.D

Michigan State Police BWC Policy

Statistics Show Police Fail to Follow BWC Policies Nationwide

- ⌘ Officers recording and preserving at their own discretion against departmental policy reveal interesting trends:
 - ⌘ Use of force increases among noncompliant officers
 - ⌘ Use of force decreases among compliant officers
 - ⌘ Responses to DV calls get recorded the most
 - ⌘ Traffic stops are recorded rarely in some departments
 - ⌘ Most use of force incidents and citizen complaints do not get recorded

Richard E. Myers II, *Police-Generated Digital Video: Five Key Questions, Multiple Audiences, and A Range of Answers*, 96 N.C. L. Rev. 1237 (2018);

Daniel Bernard Trimble, *Body-Worn Cameras: The Implementation of Both the Police Department's Rollout of Cameras and the State's Attorney's Office's Processing of Data for Discovery*, 47 U. Balt. L. Rev. 379 (2018)

Howard M. Wasserman, *Recording of and by Police: The Good, the Bad, and the Ugly*, 20 J. Gender Race & Just. 543 (2017)

Michael D. White & Henry F. Fradella, *The Intersection of Law, Policy, and Police Body-Worn Cameras: An Exploration of Critical Issues*, 96 N.C. L. Rev. 1579 (2018)

Mary D. Fan, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 Ga. L. Rev. 57 (2017)

Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. Rev. 1313 (2018)

Missing BWC Footage

- ⌘ There is no individual right attached to the BWC statutes or departmental policies, so there is no clear statutory or constitutional remedy to an officer's failure to record or preserve bodycam footage.
- ⌘ Be creative:
 - ⌘ Jury instructions
 - ⌘ Brady Motion
 - ⌘ Exclusion of partial footage
 - ⌘ Patterns within department or unit
 - ⌘ No tape, no testimony

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The 4th Amendment

- ⌘ Warrantless searches and seizures by the government
 - ⌘ Your home
 - ⌘ Your person
 - ⌘ Your papers
 - ⌘ Your effects

The Fourth Amendment protects
against...

⌘ A person is seized under the Fourth Amendment “only if, in view of all all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v Mendenhall*, 446 US 544, 545 (1980).

⌘ A suspect isn't seized by an officer unless he is physically touched by the officer or the suspect submitted to the officer's show of authority. *California v Hodari D.*, 499 US 621 (1991).

Is it a seizure under the 4th Amendment?



Street Encounters – *Terry* Stops

- ⌘ An officer may make an *investigatory stop* of an individual if the officer has *reasonable suspicion* that the individual is involved in criminal activity.
- ⌘ The stop is proper *only so long as necessary* to confirm or dispel the investigating officer's suspicions *unless* new information creates *new suspicion*.
- ⌘ An officer's reasonableness in making or continuing or continuing an investigatory stop is reviewed under the totality of the circumstances.

- ⌘ A brief stop and search may be constitutional, even done without a warrant and without probable cause, where the "officer observes 'unusual conduct' which leads him reasonably to conclude in light of his experience, that criminal activity may be afoot and that the person with whom he is dealing may be armed and presently dangerous . . ."
Terry v Ohio, 392 US 1, 22-22, 30 (1968).

What is a *Terry* stop?

⌘ “ . . . more than an inchoate or unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause.” *Terry*, 392 at 27.

Reasonable Suspicion

Police Buzzwords

- & Bulges
- & Blading
- & Furtive movements/gestures
- & High crime area
- & Client looked in officer's direction
- & Client walked away when he saw police

“There is no bright line rule to test whether the suspicion giving rise to an investigatory stop was reasonable, articulable, and particular. Common sense and everyday life experiences predominate over uncompromising standards.”

People v Nelson, 443 Mich 626, 635-636 (1993)



Terry Frisk/Pat Down





⌘ “We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.” *Terry v Ohio*, 392 US 1, 30 (1968)

Terry Frisk/Pat Down

Plain Feel

- ⌘ An officer may *frisk* a detainee for weapons during a *Terry* stop if the officer reasonably believes the detainee is armed.
- ⌘ A frisk for contraband is not allowed, but if an officer feels an object that the officer immediately has probable cause to believe is contraband, the officer may seize the contraband.
- ⌘ “An object felt during an authorized pat down search may be seized without a warrant if the item’s *incriminating character is immediately apparent*. . .” *People v Champion*, 452 Mich 92, 105-106 (1996).
- ⌘ The police *cannot* manipulate an object to determine whether it is contraband; it must be immediately apparent from plain view or plain feel. *People v Custer*, 465 Mich 319 (2001).

Civil Infractions

A traffic stop does not violate the Fourth Amendment if the officer had probable cause to believe that a traffic violation has occurred or was occurring. *People v Marcus Davis*, 250 Mich App 357 (2002).

Reasonable suspicion is insufficient to justify a traffic stop initiated to investigate a non-criminal traffic violation. *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000).

The Fourth Amendment demands that the officer, regardless of his subjective intent when stopping a vehicle, have “probable cause to believe that a civil traffic violation had occurred or was occurring[.]” *Id*; see also *Whren v. United States*, 517 U.S. 806, 810 (1996).

- ⌘ An officer possesses the probable cause necessary to conduct a traffic stop when he observes a violation of a traffic law. *Whren*, 517 U.S. at 810 (1996); *United States v. Kelley*, 459 F. Appx 527, 532 (6th Cir. 2012).
- ⌘ Michigan law requires that an officer personally observe a traffic violation before effecting a traffic stop. MCL 257.742.

Probable Cause

If the basis for the stop was a traffic violation, was that used as a pretext?

- ⌘ “When police lack the reasonable suspicion necessary to support a stop and use a minor violation to stop and search a person or place for evidence of an unrelated serious crime, the stop is a mere pretext.” *People v Haney*, 192 Mich App 207 (1991).
- ⌘ “An arrest may not be used as a pretext to search for evidence.” *United States v Lefkowitz*, 285 US 452, 467 (1932).

BE CAREFUL when using the term “pretext stop” – The subjective intent of an officer *is not relevant* to the legal inquiry, provided that the officer has an objective basis or legitimate ground(s) for the action. *Whren, et al v United States*, 517 US 806 (1996); *People v Oliver*, 464 Mich 184 (2001).

*A pretext stop is not, in-and-of-itself, a basis for suppression of evidence.



- ⌘ Investigative stops must last no longer than necessary to effectuate the purpose of the stop and dispel the officer's suspicions. *Florida v Royer*, 460 US 491, 500 (1983).
- ⌘ A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. *Rodriguez v United States*, 135 S Ct 1609 (2015).

Consider if and when your client was ordered out of the vehicle – did anything occur to escalate or justify the police action?



Length of the Stop

⌘ Michigan law requires that when a police officer seizes a person for a possible violation of a civil infraction, the officer must issue the citation “as soon as possible.” MCL 257.742(1). The statute states, in relevant part, the following:

A police officer who witnesses a person violating this act or a local ordinance substantially corresponding to this act, which violation is a civil infraction, may stop the person, detain the person temporarily for purposes of making a record of vehicle check, and prepare and subscribe, as soon as possible and as completely as possible, an original and 3 copies of a written citation, which shall be a notice to appear in court for 1 or more civil infractions. [*Id.*]

⌘ Fits of rudeness or lack of gratitude may violate the Golden Rule. But that doesn't make them illegal or for that matter punishable or for that matter grounds for a seizure. *Cruise-Gulyas v Minard*, 918 F3d 494, 495 (6th Cir), cert denied, 140 S. Ct. 116 (2019) (additional traffic stop not justified after officer issued ticket and released driver, who “repaid [officer’s] kindness by raising her middle finger at him.”)

Prolonged Stops

⌘ Passengers have standing to challenge an unlawful stop:

⌘ “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

⌘ When a police officer conducts a traffic stop, that officer has “seized” the driver of the vehicle and all of the vehicle’s occupants for purposes of the Fourth Amendment. *Brendlin v. California*, 551 U.S. 249, 263 (2007).

⌘ Passengers have standing to challenge unlawful searches of any area where they have a reasonable expectation of privacy:

⌘ “a person—whether she is a passenger in a vehicle, or a pedestrian, or a homeowner, or a hotel guest—may challenge an alleged Fourth Amendment violation if she can show under the totality of the circumstances that she had a legitimate expectation of privacy in the area searched and that her expectation of privacy was one that society is prepared to recognize as reasonable.” *People v. Mead*, 503 Mich. 205, 214, 931 N.W.2d 557, 562, reh’g denied, 503 Mich. 1041, 927 N.W.2d 255 (2019)

Passenger Standing

Search Incident to Arrest

- ⌘ Exception to the warrant requirement

- ⌘ When an individual is lawfully arrested, the officers may search the person of the arrestee and the area within the arrestee's immediate control for weapons and destructible evidence.

 - ⌘ The probable cause for the search, is the probable cause for the arrest

 - ⌘ An area within “immediate control” is the area from within which the arrestee might gain possession of a weapon or destructible evidence. *Arizona v Gant*, 555 US 332 (2009)

The permissible scope of a vehicle search incident to arrest is limited to circumstances when

- (1) the arrestee is *unsecured* and within reaching distance of the vehicle's passenger compartment and;
- (2) the police reasonably believe evidence related to the crime of arrest may be found in the vehicle.

Arizona v Gant, 556 US 332 (2009)

The arrestee was arrested for driving with a suspended license, so police could not have reasonably believed that evidence related to the crime of arrest would be found in the vehicle. Once the arrestee was handcuffed and secured in the back of the patrol car, officers could not reasonably believe that the arrestee had access to the vehicle or that there was a concern for officer safety.

- ⌘ Because inventory searches are administrative in nature—done for purposes of community caretaking rather than investigation—they are proper only if conducted pursuant to a standardized police inventory policy. *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976); *United States v. Hockenberry*, 730 F.3d 645, 659 (6th Cir. 2013) (explaining inventory search “must be conducted according to standard police procedures”).
- ⌘ This requirement is important because “an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.” *Florida v. Wells*, 495 U.S. 1, 4 (1990).
- ⌘ Although officers have some discretion in regard to impounding a vehicle, the Court must ensure that police did not act “‘for the sole purpose of investigation in conducting’ an inventory search.” *Hockenberry*, 730 F.3d at 659 (quoting *United States v. Vite-Espinoza*, 342 F.3d 462, 470 (6th Cir. 2003)).

Inventory Searches

- ⌘ Police can inventory a vehicle for the following reasons:
 - ⌘ Abandonment 204.4-4
 - ⌘ Safekeeping 204.4-4.8
 - ⌘ Forfeiture 204.4-5
 - ⌘ Evidence 204.4-3.4
- ⌘ Police must actually *inventory* the vehicle. 204.4-3
- ⌘ Vehicles may be left legally parked on the roadside at the owner's request where:
 - ⌘ Ownership of vehicle not in question;
 - ⌘ Vehicle can be locked; and
 - ⌘ No traffic hazard is created. 202.4-3.5

DPD Impound Policy – Directive 204.4

⌘ Despite the well-recognized expectation of privacy citizens enjoy in their vehicles, warrantless searches are permitted, so long as the officers have probable cause to believe that the vehicle contains contraband. *United States v. Ross*, 456 U.S. 798, 823 (1982) (citing *Carroll v. United States*, 267 U.S. 132 (1924)).

Automobile Exception (Probable Cause)



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⌘ Make your requests early. Be thorough.

- ⌘ 911 recordings
- ⌘ Dispatch recordings
- ⌘ Dash cam
- ⌘ Body cam
- ⌘ Officers' rough notes
- ⌘ Event dispatch reports
- ⌘ Activity logs

Discovery

Court Rules and Procedure

- ⌘ Your motion must be accompanied by a separate brief. MCR 2.119.
- ⌘ Together, the motion and brief may not exceed 20 pages. MCR 2.119.
- ⌘ You are entitled to an evidentiary hearing unless you stipulate to proceeding on the exam transcript record. *People v Kinnebrew*, 75 Mich App 81, 83 (1977); *People v Kaufman*, 457 Mich 266, 276 (1998); MCR 6.110(D)(2).
- ⌘ Your client's testimony cannot be used against him to prove guilt at trial. *People v Walker (Lee)*, 374 Mich 331, 338 (1965).

Practice Pointers

- ⌘ Usually less is more for a motion to suppress, especially if you will be holding an evidentiary hearing.
- ⌘ Try to make a clear record at the preliminary examination....you may want to stipulate to those facts for your motion to suppress.
- ⌘ Consider calling your own witnesses or presenting your own video evidence if possible, especially where BWC footage is missing.
- ⌘ Know the departmental policies better than the officers do.

Useful Websites

↳ Detroit Crime Viewer:

↳ <https://cityofdetroit.github.io/crime-viewer/>

↳ Detroit Ordinances:

↳ https://library.municode.com/mi/detroit/codes/code_of_ordinances

↳ Bodycam Toolkit:

↳ <https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/Resources.html>

- & Always request the bodycam videos
- & Watch each video in its entirety
- & File motions to suppress
- & Make the videos work for you

Takeaways









