

Consent is recognized as an exception to the Fourth Amendment's warrant requirement for searches. A driver may therefore voluntarily consent to the search of the driver's car. With that in mind, when can a Kansas officer request consent to search a car during a car stop?

Car stops are seizures under the Constitution. Courts view them as temporary detentions and analyze them under *Terry v. Ohio* (Terry Stop) requirements. All temporary detentions require an officer to have developed reasonable and articulable suspicion of a crime having been, being, or about to be, committed. Most car stops begin with a minor traffic infraction. They are brief in duration and the inquiries tend to be checking a driver for a license, insurance, registration and warrants. When those tasks and a verbal warning or ticket are completed, the car stop ends, the driver is released, and everyone goes on with their day.

However, sometimes during a car stop an officer hears, sees or smells something that raises the officer's suspicions of other criminal activity. When the particular facts and inferences, taken together, rise to "reasonable suspicion" then the officer gains new constitutional authority to continue to detain the car for further investigation. The additional detention continues until the officer's "second crime" suspicions have been dispelled. Remember that an officer's "gut hunch" that something criminal may be happening is not reasonable suspicion, and a hunch provides officers with no additional authority to do anything.

Some Kansas officers are under the impression that they can ask for consent to search a car at any time during a car stop. That is wrong. Other Kansas officers have been trained that they can never ask for consent to search a car while the driver remains in temporary detention. That too is wrong.

Kansas courts do not like fishing expeditions. Fishing expeditions occur when at a car stop for a minor traffic offense an officer without reasonable suspicion of other criminal activity inquires about criminal topics which were not the basis for the original stop. To stem those unjustified expeditions, Kansas courts have narrowed when officers may request consent to search a car. During a temporary detention like a car stop, Kansas officers are required to have reasonable suspicion of other criminal activity before requesting consent to search. Said another way, should an officer have developed reasonable suspicion of other criminal activity then the officer may request consent to search the car. There is no requirement for the officer to have first ended the detention before asking for consent.

In summary, a driver may voluntarily consent to a search of their car. However, Kansas courts prohibit officers from seeking consent to search during a car stop detention unless and until an officer develops reasonable suspicion of other possible criminal activity afoot. Should the officer have such reasonable suspicion of other crime, then the officer has authority to hold the car for a dog sniff,

additional questioning and/or to request consent to search. There is no requirement for the officer to first seek to transform the stop from a detention into a consensual encounter. In fact, as we will see in the next article, some attempts at transformation may actually taint any future voluntary consent.

For further research and understanding: *State v. Smith*, 286 Kan. 402 (2008); *State v. Cleverly*, 305 Kan. 598 (2016); *State v. Clardy*, 406 P.3d 922 (Kan.App., 2017)(unpublished); *State v. Hanke*, 307 Kan. 823 (2018); *United States v. Knapp*, 917 F.3d 1161 (2019); *Rodriguez v. U.S.*, 135 S.Ct. 1609 (2015).