

## **Ingham County Prosecutor's Office Policy regarding Heightened Scrutiny of Traffic Stops and Automobile Searches**

The Ingham County Prosecutor's Office (ICPO) reviews warrant requests from police agencies and decides whether to issue criminal charges. It is within the ICPO's authority to review any warrant request that a police agency submits to the ICPO and to decide whether to issue criminal charges. Part of this discretion includes the sole authority to deny a warrant request when it is not in the interests of justice for a person to face criminal charges. This policy provides direction for ICPO Assistant Prosecuting Attorneys (APAs) who review warrant requests that arise from traffic stops. This policy is intended to promote equity, justice, and fairness in the ICPO's charging decisions.

### **A. Background regarding traffic stops and automobile searches**

#### **1. Making a traffic stop**

The United States and Michigan Constitutions both guarantee the right of citizens to be free from unreasonable searches and seizures. See US Const, Am IV; Const 1963, art 1, § 11. "In general, a search or seizure conducted without a warrant is presumptively unreasonable, and thus, unconstitutional." *People v Barbarich*, 291 Mich App 468, 472 (2011). However, investigatory traffic stops are an exception to the warrant requirement. See *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). A traffic stop is valid when a police officer has "an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law," *People v Williams*, 236 Mich App 610, 612 (1999), or when the officer has probable cause to believe that the driver of a vehicle has committed a traffic violation. *People v Davis*, 250 Mich App 357, 363 (2002).<sup>1</sup>

The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. [I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. [*People v LoCicero* (After Remand), 453 Mich 496, 500-501 (1996) (Cleaned up).]

However, under the law, the reasonableness of a traffic stop does not depend on the police officer's subjective intentions.<sup>2</sup>

The circumstances of a traffic stop often evolve and change, and there is no "one size fits all" rule for police investigations. *People v Williams*, 472 Mich 308, 316 (2005).

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<sup>1</sup> But note that investigatory traffic stops can occur for certain traffic violations as well.

<sup>2</sup> The term "pretext stop" is often used to describe a stop where the stated reason for the traffic stop is facially valid, but the true, subjective motivation is a hope to find contraband or another motivation. We find the typical use of this phrase to be misleading because the phrase is often used with the connotation that pretext stops are not permissible and lawful. Because of this, our policy will not use the term "pretext stop."

“[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s “mission”—to address the traffic violation that warranted the stop, and attend to related safety concerns[.]” *Rodriguez v US*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015).

## **2. Searching an automobile without a search warrant**

“In order to show that a search was legal, the police must show either that they had a warrant or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement.” *People v Eaton*, 241 Mich App 459, 461 (2000). There are several exceptions to the warrant requirement that may be applicable in the context of an automobile search.

The automobile exception to the warrant requirement allows the police to lawfully search an automobile without a warrant if the officer has probable cause to believe the vehicle contains contraband. *People v Garvin*, 235 Mich App 90, 102 (1999).

The consent exception to the warrant requirement is not particular to automobiles; it applies in the same manner whether the place to be searched is a pocket, backpack, automobile, or home. See *People v Mead*, 503 Mich 205, 215-216 (2019). “There are three ways a court may find that a consent search was unreasonable: consent wasn’t voluntary, the consent-giver lacked authority, or the scope of the search exceeded the consent.” *Id.* at 216.

The plain view exception to the warrant requirement allows officers to seize “items in plain view if the officers are lawfully in a position from which they view the item, and if the item’s incriminating character is immediately apparent.” *People v Champion*, 452 Mich 92, 101 (1996). People do not have a reasonable expectation of privacy in things that they willingly expose to the public. *Katz v US*, 389 US 347, 351; 88 S Ct 507, 511; 19 L Ed 2d 576 (1967).

The inventory search exception to the warrant requirement applies when the police impound a vehicle and secure and inventory its contents. *People v Toohey*, 438 Mich 265, 275 (1991). “An inventory search that is conducted pursuant to standardized police procedure is considered reasonable because the resulting intrusion will be limited to the extent it is necessary to fulfill the caretaking function.” *Id.* at 275-276.

## **3. Disparate impact of traffic stops, searches, and the resulting criminal charges**

Nationwide, Black people are significantly more likely than white people to be stopped for a traffic violation.<sup>3</sup> After a traffic stop, Black and Hispanic people “are significantly more likely to be searched for contraband.”<sup>4</sup> Preliminary data from the Ingham County Prosecutor’s Office’s (ICPO) collaborative partnership with the Vera Institute for Justice shows that there is a significant racial disparity in charged cases in Ingham County. Black and Hispanic people represent 12 percent of the population in Ingham County, yet they represent 41 percent of the misdemeanor caseload and 54 percent of the felony caseload in the ICPO. Black people in Ingham County are 4.6

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<sup>3</sup> Stanford Open Policing Project, Findings, available at <https://openpolicing.stanford.edu/findings/>.

<sup>4</sup> Washtenaw County Policy Regarding Pretext Stops citing *Id.*

times more likely to be charged with a misdemeanor and 7.6 times more likely to be charged with a felony than white people. There is more work to do in order to fully understand and change these racial disparities. This policy is one step toward change.

## **B. Definitions**

### **1. Public safety related infractions**

Public safety related infractions are infractions that present an actual danger to a person, property, or the general public.

### **2. Non-public safety related infractions**

Non-public safety related infractions are infractions that do not pose an actual danger to a person, property, or the general public. Examples of common infractions that do not typically pose an actual danger to a person, property, or the general public include: window tint, expired registration, a single defective tail light, failing to stop leaving a private drive, driving in the left lane, some defective equipment infractions, and driving while license suspended. This is a non-exhaustive list. APAs will weigh whether an infraction presents an actual danger.

### **3. Investigatory stops**

Investigatory stops occur when a police officer has a reasonable and articulable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law.<sup>5</sup>

### **4. Possession of contraband charge**

Possession of contraband includes the following: possession of a controlled substance (MCL 333.7403); receiving or concealing stolen, embezzled, or converted property (MCL 750.535); minor in possession of alcohol (MCL 436.1703); carrying a concealed weapon (MCL 750.227), possession of a blackjack, slungshot, billy, metallic knuckles, sand club, sand bag, bludgeon, or portable device directing electrical current (MCL 750.124(1)(d)); possession or transportation of of a firearm or pneumatic gun in a vehicle (MCL 750.227c-d); and possession of a firearm in public by a minor (MCL 750.234f).<sup>6</sup>

## **C. Policy**

### **1. Heightened scrutiny of *all* traffic stops and automobile searches**

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<sup>5</sup> Some stops are investigatory in nature but publicly announcing the substance of an investigation will pose a danger to someone. In these instances, police agencies should contact the prosecutor's office and inform them of the nature of the stop so that the reviewing APA can make an appropriate decision under this policy and disclose the nature of the interaction if required under the rules of discovery.

<sup>6</sup> This list substantially mirrors the Washtenaw County Policy Regarding Pretext Stops definition of "Possession of Contraband Charge."

APAs will apply the law when reviewing warrant requests that arise out of a traffic stop. If there is no legal basis to initiate a traffic stop (reasonable articulable suspicion or probable cause as applicable), the APA will deny the warrant request unless there is an independent basis for the charge.

Likewise, APAs will carefully scrutinize the stated reason for any automobile search that is not authorized by a search warrant. APAs will carefully scrutinize whether the search is authorized by an exception to the warrant requirement. APAs will evaluate the credibility of facts giving rise to warrant exceptions. In cases involving consent, APAs will evaluate whether consent was voluntary. APAs will not consider evidence that was obtained in violation of the Fourth Amendment when making their charging decisions.

APAs will also examine whether the police officer impermissibly prolonged the duration of the traffic stop. Routine traffic stops should not become “fishing expeditions.”

## **2. Non-public safety related traffic stops**

- a. If an APA reviewing a warrant request determines: 1) that the traffic stop was a non-public safety related traffic stop, and 2) there was a consent search with no other exception to the warrant requirement, the APA will deny any warrant request for possession of contraband crimes arising out of the search.<sup>7</sup>
- b. If an APA reviewing a warrant request determined: 1) that the traffic stop was a non-public safety related traffic stop, and 2) the warrant request is for a non-public safety related infraction, the APA will deny any warrant request for the non-public safety related infraction.<sup>8</sup>

## **3. Public safety related infractions**

Consistent with policy section C, paragraph 1, APAs will evaluate whether the police report or other evidence establishes that the traffic stop was based on a public safety related infraction. APAs will consider reasons for why the stop is public safety related. Consistent with policy section C, paragraph 1, APAs will evaluate the reason for any automobile search. Conclusory statements that the stop was based on public safety will not be accepted. In order to be a public safety related stop, the APA must be convinced that the stated infraction presents an actual danger to a person, property, or the general public.

If there is a legal basis for the initial traffic stop and any resulting search, the APA may authorize or deny charges if they are supported by the evidence and applicable law, consistent with other office policies, and in the interests of justice.

## **4. Investigatory traffic stops**

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<sup>7</sup> This should not discourage asking for consent even when there is independent justification for the search through the automobile exception to the warrant requirement. The presence of consent along with other justification does not prohibit an APA from issuing possession of contraband charges.

<sup>8</sup> APAs will also dismiss tickets for non-public safety related infractions when the stop was for a non-public safety related infraction and the ticket only lists non-public safety related infractions.

Consistent with policy section C, paragraph 1, APAs will evaluate whether the police report or other evidence establishes that the traffic stop was a valid investigatory stop (as defined by this policy). APAs will consider reasons for why the stop is a valid investigatory stop and not a fishing expedition. Consistent with policy section C, paragraph 1, APAs will evaluate the reason for any automobile search. If there is a legal basis for the initial traffic stop and any resulting search, the APA may authorize or deny charges if they are supported by the evidence and applicable law, consistent with other office policies, and in the interests of justice.

#### **5. Seizing contraband and forensic testing**

This policy does not prohibit or discourage lawfully seizing, processing, forensically testing, or destroying contraband consistent with a police agency's standard policies and procedures.

#### **6. Prosecutorial discretion**

This policy is an exercise in prosecutorial discretion. The policy does not create new legal rights.

#### **7. Flow chart**

The appendix contains a flow chart to assist APAs with applying this policy.

#### **8. Exceptions**

If an APA believes that there should be an exception to this policy, the APA will consult with either Prosecutor Carol Siemon or Chief Assistant Prosecutor Michael Cheltenham.

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