

# JOURNAL of LAW REFORM ONLINE

COMMENT

## ONE MORE GOOD REASON FOR IN-CAR VIDEOTAPING OF TRAFFIC STOPS: AN ACCURATE ASSESSMENT OF “CONSENT”

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There are a number of reasons why legislative reform mandating the use of in-car cameras in police cruisers would benefit the criminal justice system in Illinois. In-car cameras provide evidence for cases involving traffic violations or intoxicated motorists.<sup>1</sup> They produce instantly available training materials.<sup>2</sup> They also assist victims of police misconduct,<sup>3</sup> as well as officers defending themselves against misconduct claims.<sup>4</sup> This Comment looks to add to this list of benefits the role in-car cameras can play in assessing the validity of consents to search that officers obtain during traffic stops.

### I. THE VALIDITY OF CONSENT OFTEN HINGES ON POLICE-CITIZEN INTERCHANGES IN QUICKLY DEVELOPING CIRCUMSTANCES

In the Supreme Court’s guiding case on consent searches, *Schneekloth v. Bustamonte*,<sup>5</sup> the Court stated that consent searches “normally occur ... under informal and unstructured conditions” and highlighted that requests for consent to search may be the product of quickly developing

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1. See Thomas A. Kantas, *Missing: Video Evidence in DUI Cases After People v. Kladis*, 100 ILL. B.J. 250, 250 (2012).

2. See Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras As Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 810 (2005).

3. See Sarah Schulte, *Beating: Video Played in Streamwood Police Trial*, (ABC 7 News television broadcast Mar. 9, 2011), available at <http://abclocal.go.com/kfsn/story?section=news/local&id=8004053>.

4. See Thurlow, *supra* note 2, at 809; see generally, *Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (relying on in-car camera footage in concluding officer did not violate Fourth Amendment during high-speed pursuit).

5. 412 U.S. 218 (1973).

circumstances.<sup>6</sup> My eleven years of experience as a police officer in Illinois convince me of the accuracy of the *Schneekloth* majority's aforementioned generalizations. However, I believe that the language of Justice Marshall's dissent best characterizes how the validity of consent should be judged. Justice Marshall stated that the validity of consent should turn "on a realistic assessment of the nature of the interchange between citizens and the police."<sup>7</sup> Marshall went on to criticize the majority's "perception of these interchanges and their accordance with reality."<sup>8</sup> A requirement of in-car cameras in police cruisers would produce evidence that most accurately depicts the "nature of the interchange between citizens and police"—evidence that would be used by courts when analyzing the validity of consent searches obtained during traffic stops.

## II. WHY THE IN-CAR CAMERA CAN ADDRESS THE VALIDITY OF CONSENT

Traffic stops are certainly "informal and unstructured conditions" with "quickly developing circumstances." Since 2007, Illinois has collected data on consent searches conducted subsequent to a traffic stop, including whether a consent search was requested and whether the motorist granted or denied the request.<sup>9</sup> Using my former employer's entries as an example, the collected data shows that from 2007–2011 officers from the municipality I patrolled requested consent to search vehicles 596 times.<sup>10</sup> Consent was granted for 593 of these requests.<sup>11</sup>

I observed many consent searches conducted along the boundary lines of the Fourth Amendment, where a decision on the validity of the search depended on an individual judge's interpretation of police or citizen conduct as verbally communicated through testimony or as documented in a police report. Many of the grants of "consent" to search that I witnessed were simply citizen acquiescence to officers' persuasive techniques

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6. *Id.* at 232.

7. *Schneekloth*, 412 U.S. at 289 (Marshall, J., dissenting).

8. *Id.*

9. See 625 ILL. COMP. STAT. 5/11–212 (2012).

10. ILL. DEPT. OF TRANSP. <http://www.dot.state.il.us/trafficstop/meeting.html> (click on "Study Links" for 2007–2011 on far right of page, then click on "Illinois Traffic Stop Report" and scroll down to "Carol Stream Police").

11. *Id.*

and/or subtle leveraging. However, a number of tactics that were either coercive (or nearly so) rarely found their way into written police reports.

Tone, body language, and the use of forceful words on the part of the investigating officer are all factors that may be absent from an officer's report or testimony but would be captured by in-car video.<sup>12</sup> Accurate portrayal of these factors in court is even more important in light of court decisions that do not require police officers to advise suspects of their right to refuse consent<sup>13</sup> and allow police officers to infer consent from nonverbal conduct.<sup>14</sup>

### III. THE IN-CAR CAMERA SHOULD BE A PREFERRED SOLUTION

One way to address the problem of coercive consent searches is to require officers to obtain written documentation of consent.<sup>15</sup> Such a mandate could be placed on officers by statute, judicial decision, or even a police department policy. However, this may do little more than memorialize the outcome of the police-motorist interchange without addressing the potentially coercive means by which it is reached.<sup>16</sup> This solution also does little to protect against post-hoc documentation of probable cause or reasonable suspicion that the officer may or may not have otherwise noted before requesting consent to search.

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12. See *People v. Leach*, 959 N.E.2d 680, 685 (Ill. App. Ct. 2011), *appeal denied*, 962 N.E.2d 486 (Ill. 2011) (identifying several issues that could be resolved with video evidence); *People v. Ramsey*, 839 N.E.2d 1093, 1100 (Ill. App. Ct. 2005).

13. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973) (identifying suspect's knowledge of their right to refuse as a factor, but not dispositive, in determining the validity of consent).

14. See, e.g., *People v. Anthony*, 761 N.E.2d 1188, 1192–93 (Ill. 2001); *In re M.N.*, 645 N.E.2d 499, 502–03 (Ill. App. Ct. 1994).

15. See Joint Application for Entry of Consent Decree, *United States v. New Jersey*, No. 99–5970(MLC) (D.N.J. Dec. 30, 1999), available at <http://www.nj.gov/oag/jointapp.htm> (requiring written consent for consent searches on traffic stops); see also *Schneckloth*, 412 U.S. at 229–30 (“There might be rare cases where it could be proved from the record that a person in fact affirmatively knew of his right to refuse—such as a case where he announced to the police that if he didn't sign the consent form, 'you (police) are going to get a search warrant.'”).

16. See *People v. Cardenas*, 604 N.E.2d 953, 956 (Ill. App. Ct. 1992) (concluding voluntary consent absent when defendant signed consent form after being given misleading information by the police); *People v. Purchase*, 573 N.E.2d 831, 883 (Ill. App. Ct. 1991) (stating that a written waiver of consent is not dispositive when obtained by coercion).

In-car videotaping of traffic stops is one way to protect against illegally-administered consent searches without abolishing consent searches altogether. The use of videotaped evidence could potentially eliminate much of the “swearing contest” aspect of consent search suppression hearings.<sup>17</sup> This is not a novel approach, as Illinois already effectively mandates the use of video recording for certain custodial interrogations.<sup>18</sup> Applying a similar measure to consent searches during traffic stops would place the judge in the defendant-motorist’s position, assisting the judge in reaching a more objective decision regarding a reasonable person’s response to the officer’s tone, demeanor, and nonverbal communication.

In addition to helping the judge address issues of subtle coercion, the in-car video also places a concrete value on many of the variables involved in the totality of the circumstances calculus used to decide the validity of consent.<sup>19</sup> Video evidence would help settle many disputes over the number of officers present, the display of any weapons, and whether the suspect’s inquiries were answered directly and honestly. Video evidence also preserves the officer’s phrasing of the request to search and the defendant’s phrasing of any express waiver, thereby eliminating errors in recollection. In practice, in-car videos should also lead to a decreased necessity for actual suppression hearings following review by a prosecutor or criminal defense attorney.<sup>20</sup>

#### IV. CONCLUSION

As previously stated, in-car videotaping of traffic stops has many benefits for criminal defendants, innocent suspects, and

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17. See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 246–47 (2002); see also *Purchase*, 573 N.E.2d at 833 (“This case presents a simple issue of whether the defendant’s or the State’s witnesses were more credible.”).

18. See 725 ILL. COMP. STAT. 5/103–2.1(b) (2012) (establishing a presumption of inadmissibility for custodial interrogations that are not electronically recorded).

19. See *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996); *Schnecko*, 412 U.S. at 233.

20. See Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of A Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL’Y 400, 406 (2012) (arguing that police recordings aid in “systemic efficiency” by reducing the number of frivolous suppression motions); see also Thomas P. Sullivan, *Three Police Station Reforms to Prevent Convicting the Innocent*, CBA REC., Apr. 2003, at 30, 32 (stating that arguments about excessive equipment costs associated with videotaping custodial interrogations can be addressed by comparing such costs to the costs of time-consuming suppression hearings and false allegations of police misconduct).

police officers alike. A more comprehensive assessment of the validity of consent is one more reason why Illinois should mandate the installation of in-car cameras in police cruisers. Such a reform could afford police officers the benefits of continuing to use the consent search as an investigatory tool while still protecting criminal defendants through preservation of the unique nature of each police-citizen “interchange” for Justice Marshall’s “realistic assessment” of the validity of the consent granted.