



County of Fairfax, Virginia

MEMORANDUM

DATE: 06/09/2021

TO: Colonel Kevin Davis
Chief of Police

Major Dean Lay
Commander - Internal Affairs Bureau

FROM: Richard G. Schott
Independent Police Auditor

SUBJECT: Policy Change Recommendation

On May 26, 2020, I addressed a Policy Change Recommendation Memorandum¹ to Chief Edwin C. Roessler Jr. which recommended adding the following highlighted language to G.O. 601 VI. SEARCH OF PERSONS:

Search incident to arrest includes a thorough search of the suspect's clothing and pockets, and removal of coats, jackets, or other outer garments. It also includes a search of the area within the arrestee's immediate control at the time of his arrest, to include any unlocked bags, purses, or containers within that area. This authority does not extend to locked items, as they are not accessible to the arrestee. Search incident to arrest does not extend to digital information on a cell phone or other personal electronic device seized from an arrestee.

If the arrestee was the driver, passenger, or recent occupant of a vehicle, the interior passenger compartment of the vehicle may be searched incident to the arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense for which the person was arrested. This limitation on the search incident to arrest of the driver, passenger, or recent occupant of a vehicle does not prevent a more complete search of the passenger compartment based on another exception to the warrant requirement, such as a consent search or a search based on the motor vehicle exception.

¹ Memo available from <https://www.fairfaxcounty.gov/policeauditor/sites/policeauditor/files/assets/reports/oipa%20memo%205-26-20%20go601.pdf>

My reason provided for the recommended language was to “recognize the full extent of and limitations on the lawful search incident to arrest. The United States Supreme Court first put parameters on the scope of the search incident to arrest in Chimel v. California, 395 U.S. 752 (1969); and prohibited the search of an arrestee’s personal electronic device (including a cell phone), **pursuant to the search incident to arrest exception**, in Riley v. California, 134 S. Ct. 2473 (2014). The Arizona v. Gant, 556 U.S. 332 (2009) decision prescribes the limits of the search of the passenger compartment of a vehicle based on a recent occupant’s arrest.”

The FCPD incorporated the recommended language into revised G.O. 601, which became effective on January 1, 2021. However, on May 7, 2021, the Fourth Circuit Court of Appeals held, in United States of America v. Davis, that the limits of the search of the passenger compartment of a vehicle based on a recent occupant’s arrest prescribed by the United States Supreme Court, in its Arizona v. Gant decision, apply beyond the automobile context. Specifically, the Fourth Circuit in the Davis case held that “the first Gant holding applies to searches of non-vehicular containers incident to a lawful arrest ‘only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search.’”

Consequently, I recommend that G.O. 601 be revised immediately to reflect the Fourth Circuit’s ruling in United States v. Davis.

The necessary policy revision can be accomplished by changing G.O. 601 VI. SEARCH OF PERSONS, ¶ A. to read (with changes **highlighted**):

VI. SEARCH OF PERSONS

In order to ensure the safety of the arresting officer and prevent possible harm to the arrestee or other persons, officers shall search persons in their custody for evidence, contraband, and weapons or other objects which could be used to inflict harm or effect an escape.

A. Search incident to arrest - in effecting the arrest of a suspect, officers should perform a systematic search of the person at the earliest possible time and, unless conditions dictate otherwise, prior to transporting prisoners in police vehicles. The search is made by sliding the hand over the suspect’s body, feeling for weapons, other objects, evidence, and contraband with special attention to the waistband, armpit, collar, and groin areas. If an unusual object is detected, the officer will reach into or under the clothing to remove it. **Search incident to arrest includes a thorough search of the suspect’s clothing and pockets, and the removal of coats, jackets, or other outer garments.**

The search incident to arrest includes a search of the area within the arrestee’s immediate control at the time of their arrest. That search may include any unlocked bags, purses, or containers within that area, but only if the arrestee is unsecured and within reaching distance of the container at the time of the search. (United States v. Davis, F.3d (4th Cir. 2021)). This authority does not extend to locked items, as they are not accessible to the arrestee. If the

arrestee was the driver, passenger, or recent occupant of a vehicle, the interior passenger compartment of the vehicle may be searched incident to the arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or, it is reasonable to believe the vehicle contains evidence of the offense for which the person was arrested (Arizona v. Gant, 556 U.S. 332 (2009)).

Search incident to arrest does not extend to digital information on a cell phone or other personal electronic device seized from an arrestee.

The limitations on the search incident to arrest of bags, purses, containers, digital information on a cell phone or other personal electronic device, or the passenger compartment of a vehicle, does not prevent a more complete search if the search is based on another exception to the warrant requirement—such as consent, inventory, or the motor vehicle exception.