

The State of South Carolina



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The Honorable Gene Taylor
Sheriff, Anderson County
Post Office Box 5497
Anderson, South Carolina 29625

Dear Sheriff Taylor:

In a letter to this Office you questioned the legality of a planned narcotics operation which would be similar to sobriety check-points or roadblocks presently being used by some law enforcement agencies.

Pursuant to such an operation, a driver would approach an area, slow to a stop, an officer would observe what is in plain view, a narcotics dog would quickly sniff the outside trunk area of the vehicle, and the driver would then proceed. If probable cause was established, the officers would conduct a search of the vehicle. You referenced that in such a roadblock there would be allowances for the passage of drivers not wanting to pass through the roadblock, lights, and supervising officials at the scene.

Clearly the Fourth Amendment is applicable to the situation addressed by you. As referenced by one leading authority, quoting from Terry v. Ohio, 329 U.S. 1(1968).

"(i)t is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime -- "arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

It quite logically follows that whenever an officer directs a vehicle to stop, he has thereby "seized" the occupant, for the stop inevitably restrains that person's freedom of movement. As the Supreme Court said of the practice in Delaware v. Prouse, "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief."

LaFave, Search and Seizure, vol. 4, § 10.8(a), pp. 54-55.

Two decisions of the United States Supreme Court are of particular importance to the question raised by you. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976) the Court authorized the stopping of motor vehicles on a highway near Mexico to question motorists and passengers as to whether illegal aliens were being transported. The Court stated

... stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by a warrant... (T)he regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest.

428 U.S. at 566, 559.

In Delaware v. Prouse, 440 U.S. 648 (1979) the Court disapproved a law enforcement practice of random stops of motor vehicles to review documents of drivers. An officer had stopped a vehicle to check the driver's license and registration although he had not observed any traffic or equipment violation or any other suspicious activity. As the officer walked toward the vehicle he smelled marijuana and upon seeing the marijuana in plain view, the officer seized it. The Supreme Court affirmed the suppression of the evidence finding that the actions of the officer in this instance violated the standard of reasonableness imposed by the Fourth Amendment. While recognizing a state's interest in assuring that qualified individuals are operating vehicles and that the vehicles are safe, the Court in Prouse concluded that there was only a marginal benefit to highway safety in random spot checks. The Court particularly noted that the

unbridled discretion of law enforcement officers ... would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.

440 U.S. at 661. The Court stated, however, that "... questioning of all oncoming traffic at roadblock type stops is (a) possible alternative." Id. at 663. 1/

Several lower courts have also reviewed the constitutionality of roadblocks of motor vehicles. In United States v. Corral, 823 F.2d 1389 (10th Cir. 1987) the Court approved a roadblock set up by two law enforcement officers to check driver's licenses, vehicle registrations and proof of insurance. The Court noted that the roadblock was established with the approval of the officers' supervisor and did not result in random or selective stops of vehicles at these officers' discretion. Instead, all vehicles, with the exception of certain delivery trucks, were stopped. As stated by the court,

... this roadblock was established in a systematic manner to stop vehicles in a pattern which protected the public from the officers' unbridled discretion.

823 F.2d at 1932. In United States v. Hernandez, 739 F.2d 484 (9th Cir. 1984) the Court concluded that a roadblock designed to check all vehicles for illegal aliens was also not an unreasonable search under the Fourth Amendment.

However, in State v. Crom, 383 N.W.2d 461 (Neb. 1988) the Nebraska Supreme Court disapproved of a roadblock which was established by field officers not acting under standards or guidelines

1/ Stops of all traffic at a designated roadblock avoids problems associated with a stop of a single vehicle. As stated in United States v. Smith, 799 F.2d 704 at 707 (11th Cir. 1986).

(a)lthough an officer may conduct a brief investigative stop of a vehicle, ... such a stop must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct, Terry v. Ohio,.... Investigative stops of vehicles are analogous to Terry stops, ... and are invalid if based upon only "unparticularized suspicion or 'hunch'"..... See also: U.S. v. Guzman, 864 F.2d 1512 (10th Cir. 1988) (test for concluding, whether an investigatory stop is "unconstitutionally pretextual" is whether a reasonable officer under the same circumstances would have made a stop in the absence of the invalid purpose).

promulgated by a law enforcement agency. The Court noted that the officers were free to transfer the roadblock from place to place at various times. The Court stated that in this situation

... a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field.

383 N.W.2d at 463.

As stated by a leading authority in criminal law

as a general rule, the constitutionality of traffic checkpoints has been upheld where: (1) the discretion of the officers in the field is carefully circumscribed by clear objective regulations established by high level administrative officials; (2) approaching drivers are given adequate warning that there is a roadblock ahead; (3) the likelihood of apprehension, fear, or surprise is reduced by a display of legitimate police authority at the roadblock; and (4) vehicles are stopped on a systematic, nonrandom basis that shows drivers that they are not being singled out for arbitrary reasons.

Ringel, Searches and Seizures, Arrests and Confessions, Section 11.6(c)(1). Disapprovals of sobriety and DUI checkpoints have principally resulted from "... certain precautions the police failed to take or certain excesses the police engaged in...." LaFave, Search and Seizure, vol. 4, § 10.8(d).

It has been further stated

(e)ven assuming that a particular stop for a driver's license and vehicle registration check was lawful at the outset, it of course does not follow that everything the office does thereafter is likewise legal... As stated in Commonwealth v. Ferrara, ... (381 N.W. 2d 141 (Mass. 1978)) ... "once the defendant had produced a valid license and registration, there was no basis for further interrogation and no need for further protective cautions." If, however, other facts come to light during the check which create a reasonable suspicion under Terry that the driver is engaged in some criminal activity, then a stopping for that purpose ... is permissible....

LaFave, supra, § 10.8(a), p. 64.

As to the use of roadblocks in association with attempts to curb drug trafficking, certain operations have been approved. In United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989), the Court upheld a roadblock for traffic enforcement purposes established in association with a law enforcement program to hinder drug trafficking. The Court stated that the evidence presented supported the conclusion that the principal purpose of the roadblock was traffic related, i.e., checking drivers' licenses and vehicle registrations. The Court stated that

(t)he fact that there may have been a "halo" or "spin-off" effect of deterring drug sellers and buyers from trafficking in areas where a roadblock was posted did not make one otherwise legitimate checkpoint unlawful.

865 F.2d at 1312. In the case before the Court, the drugs were observed during an attempt by the driver to hide such from the office at the roadblock. The Court found that

(t)he roadblock at issue was conducted in a systematic and nondiscriminatory fashion ... The intrusion on personal liberty was minimal, and the roadblock was a means reasonably calculated to achieve its purpose.

865 F.2d at 1310. In its decision, the Court established various factors similar to those stated above which it concluded were necessary for a motor vehicle checkpoint to pass constitutional scrutiny. The Court stated that

... there must be a legitimate state interest at stake... The checkpoints must serve to promote the state interest in a "sufficiently productive" fashion ... The checkpoints must be minimally intrusive: (1) they must be clearly visible; (2) they must be part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) they must detain drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity....

865 F.2d at 1311-1312. Citing the case of United States v. Prichard, 645 F.2d 854 the Court concluded that as to the situation before it,

(t)he purpose of the roadblock, i.e., to check drivers' licenses and car registrations, is a legitimate one. If in the process of so doing, the officers see evidence of other crimes, they have the right to take reasonable investigative steps and are not required to close their eyes... In other words, "the law does not require the police to ignore evidence of other crimes in conducting legitimate road blocks....

865 F.2d at 1312.

As to canine searches themselves, in United States v. Place, 77 L. Ed.2d 110 (1985) the United States Supreme Court held

... (w)e have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment.... A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigation technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also insures that the owner of the property is not subject to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a "search" within the meaning of the Fourth Amendment.

77 L. Ed. 2d at 121.

One authority has stated

(i)t is extremely important to recognize that the Place holding does not validate the case of drug detection dogs in all circumstances. The Court said only 'that the particular course of investigation that the agents intended to pursue--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a 'search' within the meaning of the Fourth Amendment.' For one thing, this means that if an encounter between the dog and a person or object is achieved by bringing the dog into an area entitled to Fourth Amendment protection, that entry is itself a search subject to constitutional restrictions. For another, it means that if the place is public but the encounter can be accomplished only by temporary seizure of the person or object, then the encounter will again be constitutionally impermissible, unless there are Terry-Place grounds for such a seizure or it is otherwise permissible under a Delaware v. Prouse standardized procedure approach.

LaFave, Search and Seizure, vol. 1, § 2.2(f), p. 373.

In an opinion of this Office dated August 28, 1984 it was stated

(w)hile considered offensive to some the case of 'drug sniffing' dogs to locate drugs and other contraband has generally been

found by the courts to be less intrusive than other means of detection. Indeed, the use of dogs to locate drugs in baggage at airline terminals has recently been found by the United States Supreme Court ... (in U.S. v. Place) ... to not even constitute a search.

The opinion concluded that the limited use of drug-sniffing dogs was proper in the institutional facilities, lockers and common areas at the Department of Youth Services. 2/

In reviewing your question I have located two cases which have examined the question of the legality of using sniff dogs at roadblock locations. In Cardwell v. State, 482 So. 2d 512 (1986) a Florida District Court of Appeals approved a roadblock at which vehicles were stopped so that drivers could display their licenses and registrations. When stopped, a dog handler with a sniff dog would proceed around the vehicle. If the dog detected nothing, the vehicle was allowed to leave. However, if the dog responded, the driver was asked to pull the vehicle over to the side of the roadway where he was questioned by an officer. The driver was given an opportunity to sign a consent form authorizing a search of the vehicle. A determination as to whether consent is voluntary is made by examining the totality of the circumstances surrounding the consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The Court stated

(t)he Supreme Court ... (in United States v. Place), ... has said that the use of sniff dogs is not a constitutionally prohibited search under the Fourth Amendment and that a sniff dog's "alert" can constitute probable cause to conduct a search... Once probable cause exists to search a motor vehicle, no warrant need be obtained prior to the search... Just as no police officer need close his eyes to contraband in plain view, no police officer armed with a sniff dog need ignore the olfactory essence of illegality. Under the particular circumstances of this case, we hold that Florida's interest in interdicting the flow of illegal drugs over its

2/ The opinion noted however that the in Horton v. Goose Creek Independent School District, 690 F.2d 470 (5th Cir. 1982) the Court determined that the use of widespread sniff-searches by dogs of students themselves was unconstitutional where the children were sniffed at close proximity or where the dog's nose was actually placed on the student. The Court did approve of sniffing of lockers and common areas.

highways outweighs the minor intrusion on the privacy of the motoring public caused by this roadblock.

482 So. 2d at 515.

However in United States v. Morales, 714 F.Supp. 1146 (1989) a federal district court determined that a roadblock established to check licenses and registrations in which a sniff dog walked around a vehicle which had been stopped was violative of the Fourth Amendment and suppressed evidence recovered as a result of the sniff. The Court acknowledged that at any such roadblock, officers are not required to disregard apparent suspicious circumstances. However, the Court noted

(i)t is undisputable that a canine sniff would be a reasonable investigative step if the officers had some suspicion, some evidence, that another crime was being committed. But grave constitutional questions arise when the canine sniff is routinely performed with no individualized suspicion of wrong doing at a roadblock established to check driver's license, registration and proof of insurance.

714 F. Supp. at 1146. The Court indicated that pursuant to its constitution by Place, "... a court must determine on the facts of the case before it whether or not a canine sniff intruded on an individual's reasonable expectation of privacy." 714 F.Supp. at 1146.

The Court noted that in Place the Supreme Court had determined that a canine sniff is "sui generis" or "of its own kind or class", and therefore not just an enhancement of an officer's own senses. Thus the Court distinguished the use of a sniff dog from situations where an officer himself "sniffs" drugs, such as marijuana, at a routine stop thereby authorizing probable cause for a search of a vehicle. See United States v. Merryman, 630 F.2d 780 (10th Cir. 1980).

In its decision, the Court referred to the decision of the Tenth Circuit in United States v. Stone, 866 F.2d 359 (1989) which authorized the use by law enforcement officers of a dog to sniff a vehicle reasonably suspected to be carrying narcotics declaring that such use is not a search which requires either a search warrant or probable cause. In Stone, reference was made to the decision by the United States Supreme Court in United States v. Sharpe, 470 U.S. 675 (1985) that law enforcement officers may stop and detain a vehicle and the occupants of that vehicle if the officers have an

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"articulable and reasonable suspicion" that the vehicle is carrying contraband. See also: United States v. Hardy, 855 F.2d 753 (11th Cir. 1988) (a canine sniff of a vehicle which has been stopped based upon a "reasonable suspicion" that it carries narcotics is not a search within the Fourth Amendment). However, in the situation before the Court the determination was made that because of the privacy interest at stake, at any roadblock set up to check driver's licenses and registrations, before a canine sniff is authorized, there must be a "reasonable, articulable suspicion that a crime is being committed."

As is evident, a variety of factors must be weighed in evaluating the propriety of any roadblock. Moreover, as to the use of sniff dogs at roadblocks, courts have split as to the legality of such searches.

This Office strongly supports the use of any recognized weapon which is effective in the war against drugs. We also support your efforts in this regard and we believe that the use of sniff dogs can be a very useful tool in discovering illegal drugs. Moreover, we believe based upon the Florida case cited, that a court could reasonably conclude that the use of sniff dogs in the manner which you have outlined is legally permitted. Caution is advised, however, because the use of sniff dogs at a roadblock is a relatively new technique in the drug war and there are as yet, few cases which have decided your precise question. Moreover, as we have noted, at least one court has already held that such a technique is legally impermissible. Accordingly, we suggest that you consult with and work closely with your solicitor should you decide to employ this technique. The Solicitor is best able to advise in any individual case. We also suggest that you carefully weigh the various factors outlined above in deciding as a matter of policy whether to institute this procedure.

With best wishes, I am

Very truly yours



Charles H. Richardson
Assistant Attorney General

CHR/nnw

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