



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 2, 1994

Honorable Sandy S. Gately
52nd Judicial District Attorney
P.O. Box 919
Gatesville, Texas 76528

Letter Opinion No. 94-026

Re: Whether it is constitutionally permissible for game wardens to stop motorists at roadblocks to investigate their compliance with game laws (RQ-564)

Dear Ms. Gately:

Your request for an opinion involves a proposed program of temporary roadblock checkpoints to enforce hunting laws. The proposed roadblocks you describe would be conducted according to guidelines established by the Texas Department of Parks and Wildlife. Game wardens would stop every vehicle at a roadblock and would ask the occupants if any of them had been hunting or were en route to a hunting site. Upon an affirmative response, the wardens would check to verify that the hunters possessed the required hunting licenses. The wardens also might ask whether the occupants had any game in their possession. Finally, the wardens might conduct a "modest" visual inspection, limited to what can be seen from standing alongside the vehicle, for the purpose of detecting the possession of unauthorized game.

You ask whether the above-described scheme would be constitutional. We cannot answer this question because the answer would require the determination of issues of fact, which determination is beyond the scope of the opinion process.

The contemplated scheme would require first a detention of a motorist. "[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990). Determination of the reasonableness *vel non* of a roadblock seizure of the occupants of a motor vehicle that is not based on individualized suspicion of criminal activity "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50-51 (1979); *accord Sitz*, 496 U.S. at 450 (adopting balancing analysis of *Brown* for roadblock sobriety checkpoint scheme).

As the Supreme Court's opinion in *Sitz* shows, this balancing test requires the taking of evidence and findings of fact regarding the three prongs of the *Brown* test. *See Sitz*, 496 U.S. at 448-55; *cf. State v. Van Natta*, 805 S.W.2d 40, 41, 42 (Tex. App.--Fort

Worth) (state failed to elicit evidence in support of second prong of *Brown* balancing test; therefore, sobriety roadblock violated motorist's fourth amendment rights), *pet. ref'd per curiam*, 811 S.W.2d 608 (Tex. Crim. App. 1991). The court held in *Sitz* that a state's use of highway sobriety roadblocks does not violate the fourth and fourteenth amendments to the Constitution. 496 U.S. at 447. To date, however, there is no Texas or binding federal precedent on the constitutionality of game roadblocks. This office is unable to test the constitutionality of such roadblocks because we are not authorized to make fact determinations.

You also ask whether it would be necessary for the Texas Parks and Wildlife Department to have a statewide plan in place to implement the game roadblock program. In *State v. Sanchez*, 856 S.W.2d 166 (Tex Crim. App. 1993), the Texas Court of Criminal Appeals held that a roadblock for questioning concerning driver's licenses and insurance was an unreasonable search and seizure where the roadblock was established by four individual Department of Public Safety officers who acted without the authorization or guidance of a superior officer and without standardized guidelines or procedures regarding the location of the roadblock or its operation and where the state had offered no evidence of the roadblock's effectiveness in identifying violators. 856 S.W.2d at 169-70. The Texas Court of Criminal Appeals noted

that while the checkpoint at issue in *Sitz* was established by a state-wide law enforcement agency pursuant to a directive from the governor, and the checkpoints at issue in [*United States v. Martinez-Fuerte*], 428 U.S. 543 (1976),] were established by a national authority, the Supreme Court has not specifically addressed the issue of whether checkpoints implemented by county or local law enforcement agencies would be acceptable.

Id. at 169 n.6.

There currently is a conflict in the case law regarding whether the absence of a *legislatively* developed administrative scheme for certain checkpoint roadblocks is a threshold finding that would make such roadblocks unconstitutional or is merely a factor to be considered in the third prong of the *Brown* test. Compare *State v. Wagner*, 810 S.W.2d 207, 208 (Tex. Crim. App. 1991) (Miller, J., concurring) (development of administrative scheme for sobriety checkpoints is task best left to legislature), *on remand*, 821 S.W.2d 288, 291 (Tex. App.--Dallas 1991, *pet. ref'd*) (sobriety roadblock violated fourth amendment as well as article I, section 19, of the Texas Constitution where there was no evidence of legislatively developed administrative scheme for such roadblocks) and *King v. State*, 816 S.W.2d 447, 451 (Tex. App.--Dallas 1991, *pet. ref'd*) (same holding) with *State v. Sanchez*, 856 S.W.2d at 174 n.2 (Campbell, J., concurring) ("There is plainly no requirement under the Fourth Amendment for any kind of *legislatively-authorized, statewide administrative scheme* governing the use of highway checkpoints" [emphasis in original]), *State v. Holt*, 852 S.W.2d 47, 49 (Tex. App.--Fort Worth 1993, *pet. granted*) (existence of legislatively developed program for sobriety checkpoints is

merely element to be considered under third prong of *Brown* test), *State v. Hubacek*, 840 S.W.2d 751, 753 (Tex. App.--Fort Worth 1992, pet. ref'd) (expressly holding that existence of legislatively developed administrative scheme is not threshold finding before application of the *Brown* test but is merely "an element to be considered in the third prong of the [*Brown*] analysis") and *State v. Sanchez*, 800 S.W.2d 292, 297 (Tex. App.--Corpus Christi 1990) ("the U.S. Supreme Court never said that the State had to establish guidelines concerning the checkpoint's time, frequency, or location"), *reversed on ground of complete absence of authoritatively standardized procedures*, 856 S.W.2d 166, 170 (Tex. Crim. App. 1993). We therefore believe that the prudent course would be to refrain from setting up a game roadblock in the absence of a statewide roadblock program at least until this conflict is resolved.

It is possible that the courts will conclude that the fourth amendment constitutional analysis of sobriety roadblocks adopted in *Sitz* does not apply to game roadblocks but rather that such detentions should be analyzed under a stricter standard of probable cause requiring individualized grounds for suspicion, for a game roadblock arguably differs from a roadblock set up to check sobriety or driver's licenses and vehicular equipment in at least one respect that may be constitutionally significant. The types of game law violations about which you inquire are unrelated to the safe operation of motor vehicles on the public roadways, whereas driving while intoxicated, without a license (because the driver either has not been trained and tested or has lost his or her license because of past violations), or with unsafe equipment on the vehicle may constitute a continuing threat to the safety of others. Therefore, unlike a game roadblock, which predominantly serves the purpose of apprehending persons who have violated the law, *Oregon v. Tourtillott*, 618 P.2d 423, 438-40 (Or. 1980) (Linde, J., dissenting, in 4-3 decision upholding game roadblock stop as not unreasonable under fourth amendment or search-and-seizure clause of Oregon Constitution), *cert. denied*, 451 U.S. 972 (1981), sobriety checks and license and equipment checks arguably are intended, at least in part, to protect others from dangerous drivers by removing them from the roads. In other words, the latter types of roadblocks serve regulatory (preventive) as well as penal objectives.

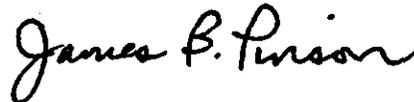
Finally, even if game roadblocks are not found to be distinguishable for fourth amendment purposes from the other types of roadblocks mentioned above, there still may be independent state constitutional grounds for distinction under article I, section 9, of the Texas Constitution. *Cf. Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (holding that article I, section 9, requires analysis distinct from federal constitutional analysis of same search-and-seizure issue); *State v. Holt*, 852 S.W.2d at 49 n.1 (court's discussion of constitutionality of sobriety roadblock applies to both Texas and federal constitutions "in the absence of direction to the contrary"); *State v. Hubacek*, 840 S.W.2d at 753 n.2 ("Whether a highway sobriety checkpoint violates the Texas Constitution is to be determined by a reasonableness standard under the circumstances").

S U M M A R Y

Whether it is constitutionally permissible for game wardens to stop motorists at roadblocks to investigate their compliance with game laws is a matter that involves taking evidence and finding facts under the balancing test of *Brown v. Texas*, 443 U.S. 47, 50-51 (1979), as applied in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 450 (1990), to roadblock checkpoint stops that are not based on individualized suspicion of criminal activity. This office is not authorized to make fact determinations and therefore cannot answer this question.

The Texas courts have reached conflicting conclusions regarding whether the absence of a legislatively developed administrative scheme for certain checkpoint roadblocks is a threshold finding that would make such roadblocks unconstitutional or is merely a factor to be considered in the third prong of the *Brown* test. The prudent course would be to refrain from setting up a game roadblock in the absence of a statewide roadblock program at least until this conflict is resolved.

Yours very truly,



James B. Pinson
Assistant Attorney General
Opinion Committee