Approved 2-26-90
Date

MINUTES OF THE Senate COMMITTEE ON Federal and State Affairs.

The meeting was called to order by Edward F. Reilly, Jr. a
Chairperson

11:05 a.m./p~~m~~ on February 21, 1990 in room 254-E of the Capitol.

All members were present ~~except~~:

Committee staff present:

Mary Torrence, Revisor of Statutes Office
Mary Galligan, Legislative Research
Deanna Willard, Committee Secretary

Conferees appearing before the committee:

Senator Winter
Jim Flory, District Attorney, Douglas Co.
Rev. Richard Taylor, Kansans for Life at its Best
Jack West, Department of Revenue
Don Strole, Lawrence
Sally Gingerich, Lawrence
Sheriff Loren Anderson

Lori Callahan, KaMMCO, made a request for a bill introduction to allow the Health Care Stabilization Fund to clarify certain coverage provisions in its insurance contracts. (Attachment 1)

A motion was made by Senator Morris and seconded by Senator Bond that the bill be introduced. The motion carried.

John Peterson, National Car and Budget Car Rental, requested introduction of a bill regarding property tax on fleet vehicles.

A motion was made by Senator Strick and seconded by Senator Ehrlich that the bill be introduced. The motion carried.

Hearing on: SB 630 - concerning alcoholic beverages; relating to display of identification documents

Staff briefed the committee that the bill would require every person upon premises and attempting to purchase cereal malt beverage to have a valid ID and display the same on demand by a law enforcement officer.

Senator Winter said the bill was needed as minors have unrestricted access to bars. He distributed a letter from Donald Strole, defending attorney in the case which is addressed by SB 630, State v. Berstein. Included were cases which had implications in this case. (Attachment 2)

Jim Flory, District Attorney, Douglas County, said they had requested this legislation because of increased incidence of underage drinking. He said the US Constitution defers to the states on alcohol beverage regulation. He said there is no constitutional problem with this bill, that the legislature must provide enforcement tools. In his opinion this bill would not relieve the licensee of any liability for selling to an underage person. The ID must be presented on demand, or a ticket is given, which will be dismissed when a valid ID is brought in. The penalty set is the same as present for a fake ID. His letter to the Chairman supporting this bill was distributed. (Attachment 3)

Don Strole, Lawrence, expressed concern that this bill treads upon the constitution. He said people drive without licenses, yet cars can't be randomly stopped without reasonable suspicion. This bill allows random checks for underage drinking. Persons have the right not to cooperate, yet there is a fine for not complying.

MINUTES OF THE Senate COMMITTEE ON Federal and State Affairs,

room 254-E, Statehouse, at 11:05 a.m./p.m. on February 21, 1990

Rev. Richard Taylor, Kansans for Life at its Best, spoke in support of the bill on the basis of K.S.A. 65-4102. The equal protection clause does not apply when the person involved is under 21 because it is an illegal drug for one at that age.

Sally Gingerich, Lawrence, spoke against the bill. She cited possible scenarios, such as an officer requesting an ID at a grocery store from a young-appearing person buying a six-pack and the person being arrested if he could not produce a valid ID. She said this violates the 4th and 5th Amendments pertaining to rights against unreasonable search and giving incriminating evidence. She said it would invite officers to hassle whomever they wish; if a person couldn't produce an ID, they could be subject to frisking and taken to jail. She suggested a law that would require pub owners to demand ID's from persons as they enter. A District Court Memorandum Decision regarding the State v. Berstein case was distributed. (Attachment 4)

Jack West, Department of Revenue, said the department supports the bill.

Sheriff Loren Anderson, Douglas County, said their powers have been eliminated. They are not doing bar checks in Douglas County and need a law to allow enforcement.

The meeting was adjourned at 11:50 a.m.

GUEST LIST

COMMITTEE: Senate Federal & State Affairs DATE: 2-21-90

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATIO!
Jack West	A.B.C. Topeka, KS.	Dept. of Rev. A.B.C.
Jim Conant	Topeka	ABC
Don Strole	Lawrence	
Sally Gingerich	Lawrence KS	
Jackie Snyder	Overland Park	Johnson Co. C. College
Dean Reynoldson	Dept. of Revenue	Topeka
Neal Whitaker	Topeka	KBWA
Rod Griffin	Lawrence	University Daily Kansan
Lori Callahan	Topeka	Ka MMCO
Jim Flory	LAWRENCE	District Attorney
Loren Anderson	Lawrence	Dg Co. Sheriff
Lissie Flory	Lawrence	Dept of Revenue
Dick Taylor	Topeka	Life & Best
M. Hauver	"	Coa-Journal
John Peterson	"	Budget Retailers
Jim Clark	Topeka	KCDFA

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY
AND
KANSAS MEDICAL INSURANCE SERVICES CORPORATION

February 21, 1990

MEMORANDUM OF BILL REQUEST

TO: Senate Federal and State Affairs Committee

FROM: Lori M. Callahan
Legislative Counsel

The Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas, physician-owned, non-profit professional liability insurance company formed by the Kansas Medical Society. KaMMCO currently insures 400 Kansas doctors and has capitalized and anticipates insuring in the next few months 400 more. KaMMCO feels it is in a unique position to provide insight to the Kansas legislature with regard to professional liability insurance for doctors and, therefore, appreciates the opportunity to testify today.

KaMMCO requests introduction of legislation which would allow the Health Care Stabilization Fund and thereby medical malpractice carriers in Kansas to clarify certain coverage provisions in its contracts of insurance.

KaMMCO respectfully requests your consideration of this legislation.

Senate F&SA
2-21-90
Att. 1

P.O. BOX 2307 • TOPEKA, KANSAS 66601-2307
913-232-2224 / 800-232-2259

REVISIONS TO K.S.A. 40-3403 AND K.S.A. 40-3408

AN ACT relating to insurance; amending the health care provider insurance availability act; concerning liability coverage of the health care stabilization fund and liability of an insurer providing coverage pursuant to such act, amending K.S.A. 1989 Supp. 40-3403 and K.S.A. 40-3408 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1989 Supp. 40-3403 is hereby amended to read as follows:

40-3403. (a) For the purpose of paying damages for personal injury or death arising out of the rendering of or the failure to render professional services by a health care provider, self-insurer or inactive health care provider subsequent to the time that such health care provider or self-insurer has qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund or contract for the administration of the fund with an insurance company authorized to do business in this state.

(b) (1) There is hereby created a board of governors. The board of governors shall:

(A) Provide technical assistance with respect to administration of the fund;

(B) provide such expertise as the commissioner may reasonably request with respect to evaluation of claims or potential claims;

(C) provide advice, information and testimony to the appropriate licensing or disciplinary authority regarding the qualifications of a health care provider; and

(D) prepare and publish, on or before October 1 of each year, a summary of the fund's activity during the preceding fiscal year, including but not limited to the amount collected from surcharges, the highest and lowest surcharges assessed, the amount paid from the fund, the number of judgments paid from the fund, the number of settlements paid from the fund and the amount in the fund at the end of the fiscal year.

(2) The board shall consist of 14 persons appointed by the commissioner of insurance, as follows: (A) The commissioner of insurance or the designee of the commissioner, who shall act as chairperson; (B) two members appointed from the public at large who are not affiliated with any health care provider; (C) three members licensed to practice medicine and surgery in Kansas who are doctors of medicine; (D) three members who are representatives of Kansas hospital; (E) two members licensed to practice medicine and surgery in Kansas who are doctors of osteopathic medicine; (F) one member licensed to practice chiropractic in Kansas; (G) one member who is a licensed professional nurse authorized to practice as a registered nurse

anesthetist; and (H) one member of another category of health care providers. Meetings shall be called by the chairperson or by a written notice signed by three members of the board. The board, in addition to other duties imposed by this act, shall study and evaluate the operation of the fund and make such recommendations to the legislature as may be appropriate to ensure the viability of the fund.

(3) The board shall be attached to the insurance department and shall be within the insurance department as a part thereof. All budgeting, purchasing and related management functions of the board shall be administered under the direction and supervision of the commissioner of insurance. All vouchers for expenditures of the board shall be approved by the commissioner of insurance or a person designated by the commissioner.

(c) Subject to subsections (d), (e), (f), (i) (k), and (l), the fund shall be liable to pay: (1) Any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable resident health care providers or resident self-insurers for any personal injury or death arising out of the rendering of or the failure to render professional services within or without this state; (2) any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable nonresident health care providers or nonresident self-insurers for any such injury or death arising out of the rendering or the failure to render professional services within this state but in no event shall the fund be obligated for claims against nonresident health care providers or nonresident self-insurers who have not complied with this act or for claims against nonresident health care providers or nonresident self-insurers that arose outside of this state; (3) any amount due from a judgment or settlement against a resident inactive health care provider for any such injury or death arising out of the rendering of or failure to render professional services; (4) any amount due from a judgment or settlement against a nonresident inactive health care provider for any injury or death arising out of the rendering or failure to render professional services within this state, but in no event shall the fund be obligated for claims against: (A) Nonresident inactive health care providers who have not complied with this act; or (B) nonresident inactive health care providers for claims that arose outside of this state, unless such health care provider was a resident health care provider or resident self-insurer at the time such act occurred; (5) reasonable and necessary expenses for attorney fees incurred in defending the fund against claims; (6) any amounts expended for reinsurance obtained to protect the best interests of the fund purchased by the commissioner, which purchase shall be subject to the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto, but shall not be subject to the provisions of K.S.A. 75-4101 and amendments thereto; (7) reasonable and necessary actuarial expenses incurred in administering the act, which expenditures shall not be subject to the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto; (8) annually to the plan or plans, any amount due pursuant to

thereto; (9) reasonable and necessary expenses incurred by the insurance department and the board of governors in the administration of the fund; (10) return of any unearned surcharge; (11) reasonable and necessary expenses for attorney fees and other costs incurred in defending a person engaged or who was engaged in residency training from claims for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider; (12) any amount due from a judgment or settlement for an injury or death arising out of the rendering of our failure to render professional services by a person engaged in residency training; (13) amounts authorized by the court pursuant to K.S.A. 1986 Supp. 60-3411 and amendments thereto; and (14) reasonable and necessary expenses for the development and promotion of risk management education programs.

(d) All amounts for which the fund is liable pursuant to subsection (c) shall be paid promptly and in full except that, in any case arising out of a cause of action which accrued before July 1, 1986, if the amount for which the fund is liable is $300,000 or more, it shall be paid, by installment payments of $300,000 of 10% of the amount of the judgment including interest thereon, whichever is greater, per fiscal year, the first installment to be paid within 60 days after the fund becomes liable and each subsequent installment to be paid annually on the same date of the year the first installment was paid, until the claim has been paid in full. Any attorney fees payable from such installment shall be similarly prorated.

(e) In no event shall the fund be liable to pay in excess of $3,000,000 pursuant to any one judgment or settlement against any one health care provider relating to any injury or death arising out of the rendering of or the failure to render professional services on and after July 1, 1984, and before July 1, 1986, subject to an aggregate limitation for all judgments or settlements arising from all claims made in any one fiscal year in the amount of $6,000,000 for each provider.

(f) Except as provided by K.S.A. 1986 Supp. 60-3411 and amendments thereto, the fund shall not be liable to pay in excess of $1,000,000 pursuant to any one judgment or settlement for any party against any one health care provider relating to any injury or death arising out of the rendering of or the failure to render professional services on and after July 1, 1986, subject to an aggregate limitation for all judgments or settlements arising from all claims made in any one fiscal year in the amount of $3,000,000 for each provider.

(g) A health care provider shall be deemed to have qualified for coverage under the fund: (1) On and after the effective date of this act if basic coverage is then in effect; (2) subsequent to the effective date of this act, at such time as basic coverage becomes effective; or (3) upon qualifying as a self-insurer pursuant to K.S.A. 40-3414 and amendments thereto.

(h) A health care provider who is qualified for coverage under the fund shall have no vicarious liability or responsibility for any injury or death arising out of the rendering of or the failure to render professional services

inside or outside this state by any other health care provider who is also qualified for coverage under the fund. The provisions of this subsection shall apply to all claims filed on or after the effective date of this act.

(i) Notwithstanding the provisions of K.S.A. 40-3402 and amendments thereto, if the board of governors determines due to the number of claims filed against a health care provider or the outcome of those claims that an individual health care provider presents a material risk of significant future liability to the fund, the board of governors is authorized by a vote of a majority of the members thereof, after notice and an opportunity for hearing, to terminate the liability of the fund for all claims against the health care provider for damages for death or personal injury arising out of the rendering of or the failure to render professional services after the date of termination. The date of termination shall be 30 days after the date of the determination by the board of governors. The board of governors, upon termination of the liability of the fund under this subsection, shall notify the licensing or other disciplinary board having jurisdiction over the health care provider involved of the name of the health care provider and the reasons for the termination.

(j) (1) Upon the payment of moneys from the health care stabilization fund pursuant to subsection (c)(11), the commissioner shall certify to the director of accounts and reports the amount of such payment which is equal to the basic coverage liability of self-insurers, and the director of accounts and reports shall transfer an amount equal to the amount certified from the state general fund to the health care stabilization fund.

(k) Notwithstanding any other provision of the health care provider insurance availability act, no psychiatric hospital licensed under K.S.A. 75-3307(b) and amendments thereto shall be assessed a premium surcharge or be entitled to coverage under the fund if such hospital has not paid any premium surcharge pursuant to K.S.A. 40-3404 and amendments thereto prior to January 1, 1988.

(l) Notwithstanding anything in Article 34 of Chapter 40 of the Kansas Statutes Annotated to the contrary, the Fund shall in no event be liable for any claims against any health care provider based upon or relating to his or her sexual acts or activity.

Sec. 2. K.S.A. 40-3408 is hereby amended to read as follows:

40-3408. The insurer of a health care provider covered by the fund or self-insurer shall be liable only for the first $200,000 of a claim for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider, subject to an annual aggregate of $600,000 for all such claims against the health care provider. However, if any liability insurance in excess of such amounts is applicable to any claim or would be applicable in the absence of this act, any payments from the fund shall be excess over such amounts paid, payable or that would have been payable in the

absence of this act. The liability of an insurer for claims made prior to July 1, 1984, shall not exceed those limits of insurance provided by such policy prior to July 1, 1984.

If any inactive health care provider has liability insurance in effect which is applicable to any claim or would be applicable in the absence of this act, any payments from the fund shall be excess over such amounts paid, payable or that would have been payable in the absence of this act.

Notwithstanding anything ~~herein~~ in Article 34 of chapter 40 of the Kansas Statutes Annotated to the contrary, an insurer that provides coverage to a health care provider may exclude from coverage any liability incurred by such provider (i) from the rendering of or the failure to render professional services by any other health care provider who is required by K.S.A. 40-3402 and amendments thereto to maintain professional liability insurance in effect as a condition to rendering professional services as a health care provider in this state or (ii) based upon or relating to his or her sexual acts or activity.

Sec. 3. K.S.A. 1989 Supp. 40-3403 and K.S.A. 40-3408 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

Session of 1990

SENATE BILL No. 630

By Senator Winter

2-7

AN ACT concerning alcoholic beverages; relating to display of identification documents upon licensed premises for the sale or consumption thereof.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) No person shall be in or upon a premises for the sale of alcoholic liquor or cereal malt beverage and purchase or consume or attempt to purchase or consume alcoholic liquor or cereal malt beverage unless such person has in such person's possession a valid identification document displaying such person's date of birth and establishing that such person is at least 21 years of age.

(b) Every person who purchases or consumes or attempts to purchase or consume alcoholic liquor or cereal malt beverage while on a licensed premises, upon demand of any properly identified law enforcement officer, shall display to the officer the person's valid identification document.

(c) Failure to display an identification document is a class B misdemeanor.

(d) No person charged with violating this act shall be convicted if such person produces in court or the office of the arresting officer a valid identification document issued to such person and establishing that such person was at least 21 years of age at the time of the charge.

(e) As used in this section:

(1) "Licensed premises" means any premises which is licensed by the state of Kansas or any political subdivision for the sale or consumption of alcoholic liquor or cereal malt beverage;

(2) "Valid identification document" means a birth certificate, driver's license or non-driver identification card issued by the United States or any state; and

(3) "law enforcement officer" has the same meaning as provided in subsection (10) of K.S.A. 21-3110 and amendments thereto.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.

Senate F&SA
2-21-90
Att. 2

Donald G. Strole
Attorney at Law
16 East 13th Street
Lawrence, Kansas 66044
(913) 842-1133

February 14, 1990

Wint Winter, Jr.
State Capitol Building
120-S
Topeka, Kansas 66612-1594

Re: SB 630

Dear Wint:

As you know I am counsel for Abbey Bernstein, the defendant in the case to which SB630 is in response. I have several serious concerns about the constitutionality of this bill. At the outset, however, I should note that State v. Bernstein, the case upon which this bill is based, will be argued before the Court of Appeals on March 6 at 10:00. I would think, therefore, that any consideration of this bill is premature until the Court indicates what constitutional limits it believes exist with respect to the stopping of individuals in a bar and the checking of I.D.'s.

Section 1(b) of the bill allows law enforcement officers to demand that persons in a bar produce identification showing that the person is 21 or over. Section 1(c) makes it a misdemeanor to refuse to produce such identification. It is my belief based upon numerous United States and Kansas Supreme Court cases that these provisions violate both the Fourth and Fifth Amendments of the U.S. Constitution.

In State v. Deskins, 234 KAN 529, 673 P.2d 1174 (1983), the Kansas Supreme Court quoting the United States Supreme Court stated:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

2-2

Mr. Flory has attempted to justify this bill by comparing and analagizing the issue to motor vehicles and driver's license regulations. He has argued that since a law enforcement officer can require a driver of an automobile to produce his or her driver's licence upon demand, a law enforcement officer can demand a person to produce identification in a bar, especially given that both driving motor vehicles and consuming alcohol are heavily regulated activities.

I am in general agreement that the two situations are analogous and would be quite pleased if a similar constitutional analysis were applied to this case; because Mr. Flory has not given you a clear and complete picture of the law with respect to automobile stops and driver's license checks. Both the United States Supreme Court and the Kansas Supreme Court have clearly held that a law enforcement officer can only stop a particular automobile and check the driver's license if the officer has reasonable suspicion that the driver has committed, is committing or is about to commit a crime. (See Delaware v. Prouse, 440 U.S. 648,59 L.Ed.2d 660, 99 S.Ct. 1391 (1979), a copy of which I have attached.) In State v. Deskins, the Kansas Court reaffirmed this, but did rule that driver's license checks which were not random, at which all automobiles were stopped and which were in accordance with established criteria and procedures may be constitutional. But in that case they unequivocally stated that random stops and checks were unconstitutional. (See Deskins at 532-536, a copy of which I have also attached.)

A cursory reading of these cases clearly shows that a law enforcement officer cannot randomly stop automobiles and check whether, for example, the driver has a valid driver's license; but rather can only stop a particular individual if he has reasonable suspicion that the person has committed, is committing or is about to commit a crime. Applying this same constitutional analysis to law enforcement officers demanding I.D. of individuals in drinking establishments, it is clear that officers must also have reasonable suspicion in order to confront and demand an I.D. from these individuals.

In the past couple of years I have handled probably over a hundred cases in which persons have been charged with driving with a suspended license. These suspensions occurred as a result of DUI's, too many speeding tickets, no proof of insurance, and other violations which endanger the safety of the public. Obviously, it would seem that driving while suspended is a far more serious crime than underage drinking. However, the Courts have clearly held that the police cannot stop drivers randomly and check for valid driver's licenses. I am confident that the Courts would make the same finding with respect to SB630 and would declare it to be unconstitutional.

I should also note that in my opinion this bill is also a violation of the Fifth Amendment because it require a person to turn over to officer potentially incriminating evidence. Under the Fifth Amendment a person has an absolute right to remain silent and not provide incriminating evidence to the police. Producing identification or even disclosing one's name could be incriminating in the fact situations which this bill is designed to cover. Thus, making it a crime not to produce identification is clearly a violation of this constitutional provision.

For all of these reasons I strongly urge this committee to report this bill unfavorably. I would be happy to testify or answer questions of the committee when it comes up for hearing. If you could provide me with as much notice as possible of the hearing date, I would greatly appreciate it.

Very truly yours,

Donald G. Strole

P.S. It is my understanding that you will provide a copy of this letter and the attached cases to the rest of the committee.

DGS:crr

Attachments

2-4

substantially similar to the Fourth Amendment, since the Delaware Supreme Court had not rested its decision independently on the state constitution but had based its decision on the Fourth and Fourteenth Amendments, having followed the approach, consistent with previous opinions of the Delaware Supreme Court, of interpreting the state constitutional provision in terms of the breadth and scope of the Fourth and Fourteenth Amendments, and (2) a policeman's stopping an automobile and detaining the driver in order to check the driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth and Fourteenth Amendments, except in those situations in which there is at least an articulable and reasonable suspicion that a motorist is unlicensed, or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, such rule against random stops and detentions, however, not precluding a state from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion, such as, for example, the questioning of all oncoming traffic at roadblock-type stops.

BLACKMUN, J., joined by POWELL, J., concurred, with the understanding that (1) the court's allowing spot checks that do not involve the unconstrained exercise of discretion would include, in addition to a roadblock stop for all traffic, other stops that were not purely random and that equate with, but are less intrusive than, a 100% roadblock stop, and (2) the court's decision was distinguishable, for purposes of constitutionality, from individualized random examinations by game wardens in the performance of their duties.

REHNQUIST, J., dissenting, expressed the view that the state's system of random spot checks of vehicles was not violative of the Fourth Amendment, and that there was no basis for distinguishing, for Fourth Amendment purposes, between a roadblock stop of all cars and the random stop of a car in order to check the driver's license and the vehicle's registration.

2-5

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 8 — random auto stop and detention — license and registration check

1a, 1b, 1c. A police officer's stopping an automobile and detaining the driver in order to check the driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth and Fourteenth Amendments, where the police officer has no articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, there being no justification for subjecting every occupant of every vehicle on the roads to a seizure at the unbridled discretion of law-enforcement officials on the basis of a state interest in promoting roadway safety. (Rehnquist, J., dissented from this holding.)

Appeal and Error § 500 — Supreme Court jurisdiction — review of state court decision — independent and adequate state ground — police stop of vehicle

2. The United States Supreme Court has jurisdiction to review, on certiorari, the decision of a state's highest court holding that a policeman's random stop of a vehicle violated Fourth and Fourteenth Amendments to the United States Constitution and a provision of the state constitution substantially similar to the Fourth Amendment, and the Supreme Court's jurisdiction is not barred on the ground of the state court's judgment having been based on an independent and adequate state ground, where even if the state constitution would have provided an adequate basis for the judgment, the holding of the state's highest court depended upon its view of the reach of the Fourth and

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

68 Am Jur 2d, Searches and Seizures § 16

7 Federal Procedural Forms L Ed, Criminal Procedure §§ 20:571 et seq.

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure Forms 171 et seq.

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence

USCS, Constitution, 4th Amendment

US L Ed Digest, Search and Seizure § 8

L Ed Index to Annos, Motor Vehicles and Carriers

ALR Quick Index, Automobiles and Highway Traffic

Federal Quick Index, Automobiles and Highway Traffic

ANNOTATION REFERENCES

What constitutes adequate and independent state substantive ground precluding Supreme Court review of state court decision on federal question. 59 L Ed 2d 924.

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

What indication that state court's decision turned on federal question will move the Supreme Court to review it. 84 L Ed 925, 100 L Ed 1200.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

2-6

ion
§ 500 — Supreme
on — review of
ision — indepen-
ate state ground
vehicle
es Supreme Court
iew, on certiorari,
te's highest court
nan's random stop
Fourth and Four-
to the United
nd a provision of
substantially simi-
endment, and the
diction is not bar-
the state court's
based on an inde-
te state ground,
state constitution
an adequate basis
e holding of the
depended upon its
the Fourth and

ENCES

rocedure

re Forms

idence

fic

nd precluding
L Ed 2d 924.
of privacy. 43

ion will move

ant, prior to

Fourteenth Amendments, the state court having followed the approach, consistent with its previous decisions, that the state constitution would automatically be interpreted at least as broadly as the Fourth Amendment so that every police practice authoritatively determined to be contrary to the Fourth and Fourteenth Amendments would, without further analysis, be held contrary to the state constitutional provision.

[See annotation p 924, infra]

Appeal and Error § 487 — independent and adequate state ground — Supreme Court jurisdiction

3. If the decision of a state's highest court is based solely on the United States Constitution, without mention of state law, the United States Supreme Court will have jurisdiction to review the decision on certiorari, even though the state constitution might have provided an independent and adequate state ground upon which the state court could have based its decision.

Search and Seizure § 2 — stopping automobile

4. A state police officer's stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention quite brief.

Search and Seizure § 5 — Fourth Amendment — reasonableness

5. Since the essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law-enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions, the permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Search and Seizure § 6 — Fourth Amendment — persons protected — persons in autos

6. An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation, and just as people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks, nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Search and Seizure § 8 — auto stops — registration and license checks — roadblock-type stops

7. The rule that a police officer's stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth Amendment when there is no articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, does not preclude the state from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion, the questioning of all oncoming traffic at roadblock-type stops being one possible alternative.

Search and Seizure § 8 — auto stops — license and registration checks — weigh-stations and inspection points for trucks

8a, 8b. The rule that a police officer's stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth Amendment when there is no articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, does not cast doubt on the permissibility of roadside truck weigh-stations and inspection points, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.

2-7

SYLLABUS BY REPORTER OF DECISIONS

A patrolman in a police cruiser stopped an automobile occupied by respondent and seized marihuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marihuana, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and the car's registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. The trial court granted the motion to suppress, finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment. The Delaware Supreme Court affirmed. *Held:*

1. This Court has jurisdiction in this case even though the Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but was also impermissible under the Delaware Constitution. That court's opinion shows that even if the state Constitution would have provided an adequate basis for the judgment below, the court did not intend to rest its decision independently on the state Constitution, its holding instead depending upon its view of the reach of the Fourth and Fourteenth Amendments.

2. Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

(a) Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

(b) The State's interest in discretionary spot checks as a means of ensuring the safety of its roadways does not outweigh the resulting intrusion on the privacy and security of the persons detained. Given the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents, cf. United States v Brignoni-Ponce, 422 US 873, 45 L Ed 2d 607, 95 S Ct 2574, United States v Martinez-Fuerte, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074, the marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure at the unbridled discretion of law enforcement officials.

(c) An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalk; nor are they shorn of those interests when they step from the sidewalks into their automobiles.

(d) The holding in this case does not preclude Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.

382 A2d 1359, affirmed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, Marshall, Blackmun, Powell, and Stevens, JJ., joined. Blackmun, J., filed a concurring opinion, in which Powell, J., joined. Rehnquist, J., filed a dissenting opinion.

2-8

DELAWARE v PROUSE
440 US 648, 59 L Ed 2d 660, 99 S Ct 1391

APPEARANCES OF COUNSEL

Charles M. Oberly, III, argued the cause for petitioner.
David M. Lukoff argued the cause for respondent.

Briefs of Counsel, p 921, infra.

OPINION OF THE COURT

[440 US 650]

Mr. Justice **White** delivered the opinion of the Court.

[1a] The question is whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.

I

At 7:20 p.m. on November 30, 1976, a New Castle County, Del., patrolman in a police cruiser stopped the automobile occupied by respondent.[1] The patrolman smelled marihuana smoke as he was walking toward the stopped vehicle, and he seized marihuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marihuana seized as a result of the stop, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. Characterizing the stop as "routine," the patrolman explained, "I saw the car

[440 US 651]

in the area and wasn't answering any complaints, so I decided to pull them off." App A9. The trial court granted the motion to suppress, finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment.

The Delaware Supreme Court affirmed, noting first that "[t]he issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is *not* now before the Court," 382 A2d 1359, 1362 (1978) (emphasis in original). The court held that "a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the

1. In its opinion, the Delaware Supreme Court referred to respondent as the operator of the vehicle, see 382 A2d 1359, 1361 (1978). However, the arresting officer testified: "I don't believe [respondent] was the driver. . . . As I recall, he was in the back seat . . .," App A12; and the trial court in its ruling on the motion to suppress referred to respondent as one of the four "occupants" of the vehicle, id., at A17. The vehicle was registered to respondent. Id., at A10.

2-9

United States Constitution." Id., at 1364. We granted certiorari to resolve the conflict between this decision, which is in accord with decisions in five other jurisdictions,[2] and the contrary determination in six jurisdictions[3] that the Fourth Amendment does not prohibit the kind of automobile stop that occurred here. 439 US 816, 58 L Ed 2d 107, 99 S Ct 76 (1978).

II

[2] Because the Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but was

[440 US 652]

also impermissible under Art I, § 6, of the Delaware Constitution, it is urged that the judgment below was based on an independent and adequate state ground and that we therefore have no jurisdiction in this case. Fox Film Corp. v Muller, 296 US 207, 210, 80 L Ed 158, 56 S Ct 183 (1935). At least, it is suggested, the matter is sufficiently uncertain that we should remand for clarification as to the ground upon which the judgment rested. California v Krivda, 409 US 33, 35, 34 L Ed 2d 45, 93 S Ct 32 (1972). Based on our reading of the opinion, however, we are satisfied that even if the state Constitution would have provided an adequate basis for the judgment, the Delaware Supreme Court did not intend to rest its decision independently on the state Constitution and that we have jurisdiction of this case.

[3] As we understand the opinion below, Art I, § 6, of the Delaware Constitution will automatically be interpreted at least as broadly as the Fourth Amendment;[4] that is, every police practice authoritatively determined to be contrary to the Fourth and Fourteenth Amendments will, without further analysis, be held to be contrary to Art I, § 6. This approach, which is consistent with previous opinions of the Delaware Supreme Court,[5] was followed in this

2. United States v Montgomery, 182 US App DC 426, 561 F2d 875 (1977); People v Ingle, 36 NY2d 413, 330 NE2d 39 (1975); State v Ochoa, 23 Ariz App 510, 534 P2d 441 (1975), revd on other grounds, 112 Ariz 582, 544 P2d 1097 (1976); Commonwealth v Swanger, 453 Pa 107, 307 A2d 875 (1973); United States v Nicholas, 448 F2d 622 (CA8 1971). See also United States v Cupps, 503 F2d 277 (CA6 1974).

3. State v Holmberg, 194 Neb 337, 231 NW2d 672 (1975); State v Allen, 282 NC 503, 194 SE2d 9 (1973); Palmore v United States, 290 A2d 573 (DC App 1972), affd on jurisdictional grounds only, 411 US 389, 36 L Ed 2d 342, 93 S Ct 1670 (1973); Leonard v State, 496 SW2d 576 (Tex Crim App 1973); United States v Jenkins, 528 F2d 713 (CA10 1975); Myricks v United States, 370 F2d 901 (CA5), cert dismissed, 386 US 1015, 18 L Ed 2d 474, 87 S Ct 1366 (1967).

4. The court stated:
"The Delaware Constitution Article I, § 6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former." 382 A2d, at 1362, citing State v Moore, 55 Del 356, 187 A2d 807 (1963).

Moore was decided less than two years after Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 16 Ohio Ops 2d 384, 86 Ohio L Abs 513, 84 ALR2d 933 (1961), applied to the States the limitations previously imposed only on the Federal Government. In setting forth the approach reiterated in the opinion below, Moore noted not only the common purposes and wording of the Fourth Amendment and the state constitutional provision, but also the overriding effect of the former. See 55 Del, at 362–363, 187 A2d, at 810–811.

5. We have found only one case decided after State v Moore, supra, in which the court relied solely on state law in upholding the validity of a search or seizure, and that case involved not only Del Const Art I, § 6, but also state statutory requirements for issuance of a search warrant. Rossitto v State, 234 A2d 438 (1967). Moreover, every case holding a search or seizure to be contrary to the state constitutional provision relies on cases interpreting the Fourth Amendment and simulta-

2-10

hould remand for the ground upon it rested. Califor- S 33, 35, 34 L Ed (1972). Based on opinion, however, hat even if the would have pro- basis for the judg- e Supreme Court rest its decision ie state Constitu- ve jurisdiction of

tand the opinion of the Delaware utomatically be as broadly as the [4] that is, every ritatively deter- y to the Fourth nendments will, lysis, be held to I, § 6. This ap- sistent with pre- ie Delaware Su- followed in this

re, 55 Del 356, 187

than two years after . 6 L Ed 2d 1081, 81 384, 86 Ohio L Abs 31), applied to the iously imposed only nt. In setting forth the opinion below, e common purposes h Amendment and ovision, but also the mer. See 55 Del, at 311.

one case decided in which the court in upholding the zure, and that case nst Art I, § 6, but ements for issuance to v State, 234 A2d ry case holding a ntrary to the state lies on cases inter- ment and simulta-

case. The court analyzed
[440 US 653]
the various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment foreclosed spot checks of automobiles, and summarily held that the state Constitution was therefore also infringed. This is one of those cases where "at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." Zacchini v Scripps-Howard Broadcasting Co., 433 US 562, 568, 53 L Ed 2d 965, 97 S Ct 2849, 5 Ohio Ops 3d 215 (1977). Had state law not been mentioned at all, there would be no question about our jurisdiction, even though the state Constitution might have provided an independent and adequate state ground. Ibid. The same result should follow here where the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments. If the state court misapprehended federal law, "[i]t should be freed to decide . . . these suits according to its own local law." Missouri ex rel. Southern R. Co. v Mayfield, 340 US 1, 5, 95 L Ed 3, 71 S Ct 1 (1950).

III

[4, 5] The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. United States v Martinez-Fuerte, 428 US 543, 556–558, 49 L Ed 2d 1116, 96 S Ct 3074 (1976); United States v Brignoni-Ponce, 422 US 873, 878, 45 L Ed 2d 607, 95 S Ct 2574 (1975); cf. Terry v Ohio, 392 US 1, 16, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968). The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard
[440 US 654]
of "reasonableness"[6] upon the exercise of discretion by government officials, including law enforcement agents, in order "'to safeguard the privacy and security of individuals against arbitrary invasions. . . .'" Marshall v Barlow's, Inc., 436 US 307, 312, 56 L Ed 2d 305, 98 S Ct 1816 (1978), quoting Camara v Municipal Court, 387 US 523, 528, 18 L Ed 2d 930, 87 S Ct 1727 (1967).[7] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmen-

neously concludes that the search or seizure is contrary to that provision. See, e. g., Young v State, 339 A2d 723 (1975); Freeman v State, 317 A2d 540 (1974); cf. Bertomeu v State, 310 A2d 865 (1973).

6. See Marshall v Barlow's, Inc., 436 US 307, 315, 56 L Ed 2d 305, 98 S Ct 1816 (1978); United States v Brignoni-Ponce, 422 US 873, 878, 45 L Ed 2d 607, 95 S Ct 2574 (1975); Cady v Dombrowski, 413 US 433, 439, 37 L Ed 2d 706, 93 S Ct 2523 (1973); Terry v Ohio, 392 US 1, 20–21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968); Camara v Municipal Court, 387 US 523, 539, 18 L Ed 2d 930, 87 S Ct 1727 (1967).

7. See also United States v Martinez-Fuerte, 428 US 543, 554, 49 L Ed 2d 1116, 96 S Ct 3074 (1976); United States v Ortiz, 422 US 891, 895, 45 L Ed 2d 623, 95 S Ct 2585 (1975); Almeida-Sanchez v United States, 413 US 266, 270, 37 L Ed 2d 596, 93 S Ct 2535 (1973); Beck v Ohio, 379 US 89, 97, 13 L Ed 2d 142, 85 S Ct 223, 3 Ohio Misc 71, 31 Ohio Ops 2d 80 (1964); McDonald v United States, 335 US 451, 455–456, 93 L Ed 153, 69 S Ct 191 (1948).

2-11

tal interests.[8] Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard,"[9] whether this be probable cause[10] or a less stringent test.[11] In those situations in which the balance of interests precludes insistence upon "some quantum

[440 US 655]

of individualized suspicion."[12] other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." Camara v Municipal Court, 387 US. at 532, 18 L Ed 2d 930, 87 S Ct 1727. See id., at 534–535, 18 L Ed 2d 930, 97 S Ct 1727; Marshall v Barlow's, Inc., supra, at 320–321, 56 L Ed 2d 305, 98 S Ct 1816; United States v United States District Court, 407 US 297, 322–323, 32 L Ed 2d 752, 92 S Ct 2125 (1972) (requiring warrants).

In this case, however, the State of Delaware urges that patrol officers be subject to no constraints in deciding which automobiles shall be stopped for a license and registration check because the State's interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the persons detained.

IV

We have only recently considered the legality of investigative stops of automobiles where the officers making the stop have neither probable cause to believe nor reasonable suspicion that either the automobile or its occupants are subject to seizure under the applicable criminal laws. In United States v Brignoni-Ponce, supra, Border Patrol agents conducting roving patrols in areas near the international border asserted statutory authority to stop at random any vehicle in order to determine whether it contained illegal aliens or was involved in smuggling operations. The practice was held to violate the Fourth Amendment, but the Court did not invalidate all warrantless automobile stops upon less than probable cause. Given "the importance of the governmental interest at stake, the minimal intrusion of a

8. See, e. g., United States v Ramsey, 431 US 606, 616–619, 52 L Ed 2d 617, 97 S Ct 1972 (1977); United States v Martinez-Fuerte, supra, at 555, 49 L Ed 2d 1116, 96 S Ct 3074; cases cited in n 6, supra.

9. Terry v Ohio, supra, at 21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383. See also Scott v United States, 436 US 128, 137, 56 L Ed 2d 168, 98 S Ct 1717 (1978); Beck v Ohio, supra, at 96–97, 13 L Ed 2d 142, 85 S Ct 223, 3 Ohio Misc 71, 31 Ohio Ops 2d 80.

10. See, e. g., United States v Santana, 427 US 38, 49 L Ed 2d 300, 96 S Ct 2406 (1976); United States v Watson, 423 US 411, 46 L Ed 2d 598, 96 S Ct 820 (1976); Ker v California, 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623, 24 Ohio Ops 2d 201 (1963) (warrantless arrests requiring probable cause); United States v Ortiz, supra; Warden v Hayden, 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642 (1967); Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925) (warrantless searches requiring probable cause). See also Gerstein v Pugh, 420 US 103, 43 L Ed 2d 54, 95 S Ct 854 (1975).

11. See Terry v Ohio, supra; United States v Brignoni-Ponce, supra.

In addition, the Warrant Clause of the Fourth Amendment generally requires that prior to a search a neutral and detached magistrate ascertain that the requisite standard is met, see, e. g., Mincey v Arizona, 437 US 385, 57 L Ed 2d 290, 98 S Ct 2408 (1978).

12. United States v Martinez-Fuerte, supra, at 560, 49 L Ed 2d 1116, 96 S Ct 3074.

2-12

e and registration
State's interest in
checks as a means
safety of its road-
he resulting intru-
cy and security of
ed.

V

ecently considered
estigative stops of
the officers mak-
neither probable
or reasonable sus-
the automobile or
subject to seizure
le criminal laws.
Brignoni-Ponce,
l agents conduct-
n areas near the
r asserted statu-
p at random any
to determine
illegal aliens or
muggling opera-
was held to vio-
ndment, but the
iate all warrant-
s upon less than
en "the impor-
mental interest
l intrusion of a

ayden, 387 US 294,
42 (1967); Carroll v
69 L Ed 543, 45 S
1925) (warrantless
le cause). See also
103, 43 L Ed 2d 54,

ra; United States v

nt Clause of the
ally requires that
ral and detached
he requisite stan-
ey v Arizona, 437
S Ct 2408 (1978).

nez-Fuerte, supra,
S Ct 3074.

brief stop, and the absence of practical alternatives for policing the border," 422 US, at 881, 45 L Ed 2d 607, 95 S Ct 2574, the Court analogized the roving-patrol stop to the on-the-street encounter addressed in Terry v Ohio, supra, and held:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are
>
> [440 US 656]
>
> aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." 422 US, at 884, 45 L Ed 2d 607, 95 S Ct 2574 (footnote omitted).

Because "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators," id., at 883, 45 L Ed 2d 607, 95 S Ct 2574, "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." Ibid.

The constitutionality of stops by Border Patrol agents was again before the Court in United States v Martinez-Fuerte, supra, in which we addressed the permissibility of checkpoint operations. This practice involved slowing all oncoming traffic "to a virtual, if not a complete, halt," 428 US, at 546, 49 L Ed 2d 1116, 96 S Ct 3074, at a highway roadblock, and referring vehicles chosen at the discretion of Border Patrol agents to an area for secondary inspection. See id., at 546, 558, 49 L Ed 2d 1116, 96 S Ct 3074. Recognizing that the governmental interest involved was the same as that furthered by roving-patrol stops, the Court nonetheless sustained the constitutionality of the Border Patrol's checkpoint operations. The crucial distinction was the lesser intrusion upon the motorist's Fourth Amendment interests:

> "[The] objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." Id., at 558, 49 L Ed 2d 1116, 96 S Ct 3074.

Although not dispositive,[13] these decisions undoubtedly provide

[440 US 657]

guidance in balancing the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case. We cannot agree that stopping or detaining a vehicle on an ordinary city street is less intrusive than a roving-patrol stop on a major highway and that it bears greater resemblance to a permissible stop and secondary detention at a checkpoint near the border. In this regard, we note that Brignoni-Ponce was not limited to roving-patrol stops on limited access roads,

13. In addressing the constitutionality of Border Patrol practices, we reserved the question of the permissibility of state and local officials stopping motorists for document questioning in a manner similar to checkpoint detention, see 428 US, at 560 n 14, 49 L Ed 2d 1116, 96 S Ct 3074, or roving-patrol operations, see United States v Brignoni-Ponce, 422 US, at 883 n 8, 45 L Ed 2d 607, 95 S Ct 2574.

2-13

but applied to any roving-patrol stop by Border Patrol agents on any type of roadway on less than reasonable suspicion. See 422 US, at 882–883, 45 L Ed 2d 607, 95 S Ct 2574; United States v Ortiz, 422 US 891, 894, 45 L Ed 2d 623, 95 S Ct 2585 (1975). We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." Id., at 894–895, 45 L Ed 2d 623, 95 S Ct 2585, quoted in United States v Martinez-Fuerte, 428 US, at 558, 49 L Ed 2d 1116, 96 S Ct 3074.

[440 US 658]

V

But the State of Delaware urges that even if discretionary spot checks such as occurred in this case intrude upon motorists as much as or more than do the roving patrols held impermissible in Brignoni-Ponce, these stops are reasonable under the Fourth Amendment because the State's interest in the practice as a means of promoting public safety upon its roads more than outweighs the intrusion entailed. Although the record discloses no statistics concerning the extent of the problem of lack of highway safety, in Delaware or in the Nation as a whole, we are aware of the danger to life[14] and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter. We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle.[15] The registration requirement and, more pointedly, the related annual inspection requirement in Delaware[16] are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are es-

14. In 1977, 47,671 persons died in motor vehicle accidents in this country. U. S. Dept. of Transportation, Highway Safety A-9 (1977).

15. See, e. g., Del Code Ann, Tit 21, §§ 2701, 2707 (1974 and Supp 1977), § 2713 (1974) (Department of Public Safety "shall examine the applicant as to his physical and mental qualifications to operate a motor vehicle in such manner as not to jeopardize the safety of persons or property . . .").

16. § 2143(a) (1974).

2-14

sential elements in a highway safety program. Furthermore, we note that the State of Delaware requires a minimum amount of insurance

[440 US 659]

coverage as a condition to automobile registration,[17] implementing its legitimate interest in seeing to it that its citizens have protection when involved in a motor vehicle accident.[18]

The question remains, however, whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. On the record before us, that question must be answered in the negative. Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental countribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.

The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained. Furthermore, drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves.[19] Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers. If this were not so, licensing of drivers would hardly be an effective means of promoting roadway safety. It seems common sense that the

[440 US 660]

percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed. The contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best. Furthermore, and again absent something more than mere assertion to the contrary, we find it difficult to believe that the unlicensed driver would not be deterred by the possibility of being involved in a traffic violation or having some other experience calling for proof of his entitlement to drive but that he would be deterred by the possibility that he would be one of those chosen for a spot check. In terms of actually discovering unlicensed drivers or deterring them from driving, the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment.

Much the same can be said about the safety aspects of automobiles as

17. § 2118 (Supp 1977): State of Delaware, Department of Public Safety, Division of Motor Vehicles, Driver's Manual 60 (1976).

18. It has been urged that additional state interests are the apprehension of stolen motor vehicles and of drivers under the influence of alcohol or narcotics. The latter interest is subsumed by the interest in roadway safety, as may be the former interest to some extent. The remaining governmental interest in controlling automobile thefts is not distinguishable from the general interest in crime control.

19. Cf. United States v Brignoni-Ponce, supra, at 883, 45 L Ed 2d 607, 95 S Ct 2574.

2-15

distinguished from drivers. Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately. Furthermore, in Delaware, as elsewhere, vehicles must carry and display current license plates,[20] which themselves evidence that the vehicle is properly registered;[21] and, under Delaware law, to qualify for annual registration a vehicle must pass the annual safety inspection[22] and be properly insured.[23] It does not appear, therefore, that a stop of a Delaware-registered vehicle is necessary in order to ascertain compliance with the State's registration requirements; and because there is nothing to

[440 US 661]

show that a significant percentage of automobiles from other States do not also require license plates indicating current registration, there is no basis for concluding that stopping even out-of-state cars for document checks substantially promotes the State's interest.

[1b] The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." Terry v Ohio, 392 US, at 22, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383. By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations[24]—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. Almeida-Sanchez v United States, 413 US 266, 270, 37 L Ed 2d 596, 93 S Ct 2535 (1973); Camara v Municipal Court, 387 US, at 532–533, 18 L Ed 2d 930, 87 S Ct 1727.

[440 US 662]

VI

The "grave danger" of abuse of discretion, United States v Martinez-Fuerte, 428 US, at 559, 49 L Ed 2d 1116, 96 S Ct 3074, does not disappear simply because the automobile is subject to state regulation result-

20. Del Code Ann, Tit 21, § 2126 (1974).

21. §§ 2121(b), (d) (1974).

22. See n 16, supra; § 2109 (1974).

23. See n 17, supra; § 2109 (1974).

24. See, e. g., §§ 4101–4199B (1974 and Supp 1977).

2-16

ing in numerous instances of police-citizen contact. Cady v Dombrowski, 413 US 433, 441, 37 L Ed 2d 706, 93 S Ct 2523 (1973). Only last Term we pointed out that "if the government intrudes . . . the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." Marshall v Barlow's, Inc., 436 US, at 312–313, 56 L Ed 2d 305, 98 S Ct 1816. There are certain "relatively unique circumstances," id., at 313, 56 L Ed 2d 305, 98 S Ct 1816, in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise. See United States v Biswell, 406 US 311, 32 L Ed 2d 87, 92 S Ct 1593 (1972) (federal regulation of firearms); Colonnade Catering Corp. v United States, 397 US 72, 25 L Ed 2d 60, 90 S Ct 774 (1970) (federal regulation of liquor). Otherwise, regulatory inspections unaccompanied by any quantum of individualized, articulable suspicion must be undertaken pursuant to previously specified "neutral criteria." Marshall v Barlow's, Inc., supra, at 323, 56 L Ed 2d 305, 98 S Ct 1816.

[6] An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.[25] Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the

[440 US 663]

individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As Terry v Ohio, supra, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. See Adams v Williams, 407 US 143, 146, 32 L Ed 2d 612, 92 S Ct 1921 (1972).

VII

[1c, 7, 8a] Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discre-

25. Cf. Marshall v Barlow's, Inc. 436 US 307, 56 L Ed 2d 305, 98 S Ct 1816 (1978) (warrant required for federal inspection under interstate commerce power of health and safety of workplace); See v Seattle, 387 US 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967) (warrant required for inspection of warehouse for municipal fire code violations); Camara v Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967) (warrant required for inspection of residence for municipal fire code violations).

2-17

tion.[26] Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. The judgment below is affirmed.

So ordered.

SEPARATE OPINIONS

Mr. Justice **Blackmun**, with whom Mr. Justice **Powell** joins, concurring.

The Court, ante, at this page, 59 L Ed 2d, at 673, carefully protects from the reach of its decision other less intrusive spot checks "that do not involve

[440 US 664]

the unconstrained exercise of discretion." The roadblock stop for all traffic is given as an example. I necessarily assume that the Court's reservation also includes other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop. And I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties. In a situation of that type, it seems to me, the Court's balancing process, and the value factors under consideration, would be quite different.

With this understanding, I join the Court's opinion and its judgment.

Mr. Justice **Rehnquist**, dissenting.

The Court holds, in successive sentences, that absent an articulable, reasonable suspicion of unlawful conduct, a motorist may not be subjected to a random license check, but that the States are free to develop "methods for spot checks that . . . do not involve the unconstrained exercise of discretion," such as "[q]uestioning . . . all oncoming traffic at roadblock-type stops . . . ." Ante, at 663, 59 L Ed 2d, at 673–674. Because motorists, apparently like sheep, are much less likely to be "frightened" or "annoyed" when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop *all* motorists on a particular thoroughfare, but he cannot without articulable suspicion stop *less* than all motorists. The Court thus elevates the adage "misery loves company" to a novel role in Fourth Amendment jurisprudence. The rule becomes "curiouser and curiouser" as one attempts to follow the Court's explanation for it.

As the Court correctly points out, people are not shorn of their Fourth Amendment protection when they step from their homes onto the public sidewalks or from the sidewalks into

[440 US 665]

their automobiles. But a random license check on a motorist operating a vehicle on highways owned and maintained by the State is quite different from a random stop designed to uncover violations of laws that have nothing

26. [8b] Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.

2-18

to do with motor vehicles.* No one questions that the State may require the licensing of those who drive on its highways and the registration of vehicles which are driven on those highways. If it may insist on these requirements, it obviously may take steps necessary to enforce compliance. The reasonableness of the enforcement measure chosen by the State is tested by weighing its intrusion on the motorists' Fourth Amendment interests against its promotion of the State's legitimate interests. E. g., United States v Brignoni-Ponce, 422 US 873, 878, 45 L Ed 2d 607, 95 S Ct 2574 (1975).

In executing this balancing process, the Court concludes that given the alternative mechanisms available, discretionary spot checks are not a "sufficiently productive mechanism" to safeguard the State's admittedly "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Ante, at 659, 658, 59 L Ed 2d, at 671, 670. Foremost among the alternative methods of enforcing traffic and vehicle

[440 US 666]

safety regulations, according to the Court, is acting upon observed violations, for "drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves." Ante, at 659, 59 L Ed 2d, at 671. Noting that "finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers," ibid., the Court concludes that the contribution to highway safety made by random stops would be marginal at best. The State's primary interest, however, is in traffic safety, not in apprehending unlicensed motorists for the sake of apprehending unlicensed motorists. The whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed. The Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away.

Nor is the Court impressed with the deterrence rationale, finding it inconceivable that an unlicensed driver who is not deterred by the prospect of being involved in a traffic violation or other incident requiring him to produce a license would be deterred by the possibility of being subjected to a spot check. The Court arrives at its conclusion without the benefit of a shred of empirical data in this record suggesting that a system of random spot checks would

* Indeed, this distinction was expressly recognized in United States v Brignoni-Ponce, 422 US 873, 883 n 8, 45 L Ed 2d 607, 95 S Ct 2574 (1975):

"Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters."

2-19

No. 55,845

STATE OF KANSAS, *Appellant*, v. RICK L. DESKINS, *Appellee*.

(673 P.2d 1174)

SYLLABUS BY THE COURT

1. KANSAS CONSTITUTION—*Bill of Rights—Search and Seizure—Scope of Constitutional Provision.* In considering the application of Kansas Constitution Bill of Rights § 15 to any particular factual situation, its scope is identical to that of the Fourth Amendment to the United States Constitution.
2. POLICE AND SHERIFFS—*"Seizure" of Person Construed.* Whenever a police officer accosts an individual and restrains his freedom to depart the scene, he has seized that person.
3. CRIMINAL LAW—*Automobile Stop and Detention of Occupants—Stop Constitutes Seizure within Fourth Amendment.* 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.
4. SEARCH AND SEIZURE—*Automobile Stop by Police Officer—Constitutional Violation When Stop Randomly Made Based on Unbridled Discretion of Officer.* The random stopping of a motorist based upon the unbridled discretion of the police officer without at least articulable and reasonable suspicion that the motorist is unlicensed or that the vehicle is unregistered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, constitutes an unreasonable restraint under the Fourth Amendment.
5. SAME—*Fourth Amendment Protections.* The essence of the Fourth Amendment prohibition against unreasonable search and seizure is to safeguard the privacy and security of individuals against arbitrary invasions by government officials by imposing a standard of reasonableness upon the exercise of those officials' discretion.
6. SAME—*Warrantless Search of Private Property without Proper Consent—Unreasonable Search.* Except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.
7. SAME—*Warrantless Search and Seizure—Constitutionality.* Whether a warrantless search and seizure is constitutional is determined by balancing the degree of legitimate governmental interests against the resulting intrusion on the individual's Fourth Amendment rights.
8. SAME—*Warrantless Search and Seizure—Constitutionality—Balancing Test.* In applying the balancing test of the degree of governmental or public interest against the degree of intrusion upon the individual's constitutionally protected rights, the courts must weigh 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.
9. AUTOMOBILES—*Driver's License Check—Constitutionality of Roadblock "Seizure" of Automobiles in Order to Conduct Police Check—Application of Balancing of Interests Test.* In determining whether a driver's license check or DUI roadblock meets the balancing test in favor of the State, factors

2-20

to be considered include: (1) the degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.

10. SEARCH AND SEIZURE—*Automobile Stop and Lawful Arrest of Occupant—Contemporaneous Search of Automobile.* When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. (Following *State v. White*, 230 Kan. 679, Syl., 640 P.2d 1231 [1982].)

Interlocutory appeal from Shawnee district court, FRANKLIN R. THEIS, judge. Opinion filed December 2, 1983. Reversed and remanded.

Frank A. Caro, Jr., assistant district attorney, argued the cause, and *Robert T. Stephan*, attorney general, *Gene M. Olander*, district attorney, and *Arthur R. Weiss*, assistant district attorney, were with him on the brief for appellant.

Hal E. Des Jardins, of Topeka, argued the cause for appellee.

The opinion of the court was delivered by

HOLMES, J.: This is an interlocutory appeal, pursuant to K.S.A. 22-3603, by the State of Kansas from an order of the district court suppressing certain evidence in a prosecution for driving while under the influence of alcohol (DUI) and possession of marijuana.

Defendant, Rick L. Deskins, was arrested after his automobile was stopped by police officers at a roadblock ostensibly set up for the purpose of checking drivers' licenses. Prior to trial defendant filed a motion to suppress all evidence of DUI and the small bag of marijuana found in the automobile glove-box after defendant's arrest. The court found the roadblock to be an unconstitutional violation of the Kansas Constitution Bill of Rights § 15, the Kansas equivalent to the Fourth Amendment to the United States Constitution. The trial court found as a matter of fact, and counsel for the State candidly conceded in argument before this court, that the roadblock was set up to catch drunk drivers and that the checking of drivers' licenses was a facade for such purposes. Therefore, the narrow question before this court is whether the use of a DUI roadblock under the factual situation

existing in this case is an
person's right to be free fr
under the Kansas Bill of F
considering the applicatio
any particular factual situa
Fourth Amendment. *State*
536 (1963).

At 10:00 p.m. on Novem
officers from the Kansas
County Sheriff's Office, a
up a roadblock at the int
Avenue in Topeka, oster
vehicles proceeding both
were stopped and their
were carrying valid licens
Topeka Avenue around
stopped in the check lane.
requested Deskins' licens
that point he had satisfie
check.

The officer had not ob
tomobile, as it was standi
when the officer approach
being stopped, had no fa
tute probable cause or ev
ant had committed, was
violation of Kansas crimin
outside Deskins' car, the
alcohol, some type of alcol
and his eyes were kind o
asked Deskins to step o
coordination test. His per
the officer and, as the offi
under the influence of alc
him the *Miranda* rights. T
car and another officer, wi
car out of the check lan
police car, one of the offic
bile and found in the glo
juana.

2-21

existing in this case is an unconstitutional infringement upon a person's right to be free from unreasonable searches and seizures under the Kansas Bill of Rights and the Fourth Amendment. In considering the application of § 15 of the Kansas Bill of Rights to any particular factual situation, its scope is identical to that of the Fourth Amendment. *State v. Wood*, 190 Kan. 778, 788, 378 P.2d 536 (1963).

At 10:00 p.m. on November 20, 1982, thirty-five to forty police officers from the Kansas State Highway Patrol, the Shawnee County Sheriff's Office, and the Topeka Police Department, set up a roadblock at the intersection of 45th Street and Topeka Avenue in Topeka, ostensibly to check drivers' licenses. All vehicles proceeding both north and south on Topeka Avenue were stopped and their drivers checked to determine if they were carrying valid licenses. Mr. Deskins was driving south on Topeka Avenue around 1:20 a.m. the next morning, and was stopped in the check lane. A state trooper approached the car and requested Deskins' license which was found to be in order and at that point he had satisfied all the requirements for the license check.

The officer had not observed the defendant operate the automobile, as it was standing still in a line of stopped vehicles when the officer approached, and the officer, prior to the vehicle being stopped, had no facts or knowledge which would constitute probable cause or even a reasonable suspicion that defendant had committed, was committing, or was about to commit a violation of Kansas criminal statutes. However, from his position outside Deskins' car, the trooper "could smell a strong odor of alcohol, some type of alcoholic beverage on [defendant's] breath and his eyes were kind of bloodshot and watery." The officer asked Deskins to step out of the car to take a sobriety and coordination test. His performance was less than satisfactory to the officer and, as the officer was of the opinion defendant was under the influence of alcohol, he arrested defendant and read him the *Miranda* rights. The trooper moved defendant to a squad car and another officer, with defendant's permission, moved his car out of the check lane. While defendant remained in the police car, one of the officers searched the defendant's automobile and found in the glove-box a plastic bag containing marijuana.

2-22

Defense counsel filed a motion to suppress all evidence gathered after defendant's vehicle was stopped, on grounds the roadblock was designed not to check drivers' licenses but solely to "stop all vehicles for the purpose of arresting individuals that the police suspected of driving while intoxicated." Defendant claimed the roadblock stop violated his constitutional rights under the Fourth Amendment. At the hearing on the motion, the arresting officer testified that during a briefing before establishing the roadblock it was made clear to the officers that if, after stopping someone in the lane, they smelled alcohol or had any "suspicion" of drinking, they could question the driver further. The State, as previously indicated, has conceded the primary purpose of the roadblock was to catch drunk drivers, and this appeal will be considered in that light, although incidental to that purpose arrests were also made for a number of other reasons, including some involving license violations.

There can be no doubt that the stopping of a motorist for the sole purpose of checking for a valid driver's license, let alone to seek evidence of the commission of a crime such as DUI, constitutes a "seizure" under the Fourth Amendment. In *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250, 35 L.Ed. 734, 11 S.Ct. 1000 (1891), the court stated:

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 141 U.S. at 251.

The Supreme Court in *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), was faced with a Fourth Amendment challenge to the admission of evidence recovered in a "stop and frisk" encounter between police and defendant Terry. The defendant, while walking on the street, had been stopped by a veteran police officer merely on the officer's suspicion that Terry and his companions might be considering a robbery. For his own protection the officer patted down the outer clothing of the men and found Terry to be carrying a pistol. Terry was later convicted of carrying a concealed weapon and the case eventually made its way to the Supreme Court on the question of whether his rights under the Fourth Amendment had been violated and whether the evidence recovered in the "stop and frisk" should have been suppressed. In its opinion the Court stated:

"It 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." 392 U.S. at 16.

In *Delaware v. Prouse,* 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979), the Court stated:

"The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." 440 U.S. at 653.

In *Prouse,* upon which the State relies heavily, the court stated the facts in the following manner:

"At 7:20 p.m. on November 30, 1976, a New Castle County, Del., patrolman in a police cruiser stopped the automobile occupied by respondent. The patrolman smelled marihuana smoke as he was walking toward the stopped vehicle, and he seized marihuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marihuana seized as a result of the stop, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. Characterizing the stop as 'routine,' the patrolman explained, 'I saw the car in the area and wasn't answering any complaints, so I decided to pull them off.' . . . The trial court granted the motion to suppress, finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment." pp. 650-651.

The Delaware Supreme Court affirmed the trial court and the United States Supreme Court affirmed with only Justice Rehnquist dissenting. The majority opinion, in its conclusion, stated:

"Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. *This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers."* p. 663. (Emphasis added.)

In reaching its ultimate conclusion that the random stopping of a motorist without at least some reasonable suspicion that a violation may be occurring violates the Fourth Amendment, the court relied heavily on its earlier opinions in what are referred to as the border patrol cases. The Court stated:

"The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order ' "to safeguard the privacy and security of individuals against arbitrary invasions. . . ." ' (Citations omitted.) Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " pp. 653-55.

"We have only recently considered the legality of investigative stops of automobiles where the officers making the stop have neither probable cause to believe nor reasonable suspicion that either the automobile or its occupants are subject to seizure under the applicable criminal laws. In *United States v. Brignoni-Ponce*, [422 U.S. 873 (1975),] Border Patrol agents conducting roving patrols in areas near the international border asserted statutory authority to stop at random any vehicle in order to determine whether it contained illegal aliens or was involved in smuggling operations. The practice was held to violate the Fourth Amendment, but the Court did not invalidate all warrantless automobile stops upon less than probable cause. Given 'the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border,' 422 U.S., at 881, the Court analogized the roving-patrol stop to the on-the-street encounter addressed in *Terry v. Ohio*, [392 U.S. 1 (1968),] and held:

> 'Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.' 422 U.S., at 884 (footnote omitted).

Because 'the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators,' *id.*, at 883, 'a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference.' *Ibid.*

"The constitutionality of stops by Border Patrol agents was again before the Court in *United States v. Martinez-Fuerte*, [428 U.S. 543 (1976),] in which we addressed the permissibility of checkpoint operations. This practice involved slowing all oncoming traffic 'to a virtual, if not a complete, halt,' 428 U.S., at 546, at a highway roadblock, and referring vehicles chosen at the discretion of Border Patrol agents to an area for secondary inspection. See *id.*, at 546, 558. Recognizing that the governmental interest involved was the same as that furthered by roving-patrol stops, the Court nonetheless sustained the constitutionality of the Border Patrol's checkpoint operations. The crucial distinction was the lesser intrusion upon the motorist's Fourth Amendment interests:

> '[The] objective intrusion — the stop itself, the questioning, and the visual inspection — also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of checkpoint stop.' [428 U.S.] at 558.

Although not dispositive, these decisions undoubtedly provide guidance in balancing the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case. We cannot agree that stopping or detaining a vehicle on an ordinary city street is less intrusive than a roving-patrol stop on a major highway and that it bears greater resemblance to a permissible stop and secondary detention at a checkpoint near the border. In this regard, we note that *Brignoni-Ponce* was not limited to roving-patrol stops on limited-access roads, but applied to any roving-patrol stop by Border Patrol agents on any type of roadway on less than reasonable suspicion. See 422 U.S., at 882-883; *United States v. Ortiz*, 422 U.S. 891, 894 (1975). We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment that that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. 'At traffic checkpoints the motorist can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.' [422 U.S.] at 894-895, quoted in *United States v. Martinez-Fuerte*, 428 U.S. at 558." pp. 655-657.

"When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations — or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered — we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Camara v. Municipal Court*, 387 U.S., at 532-533." p. 661

Thus it is clear that the random stop to check a motorist's driver's license without probable cause or at the very least some reasonable suspicion, which a majority of this court approved in *City of Overland Park v. Sandy*, 225 Kan. 102, 587 P.2d 883 (1978), is a violation of the Fourth Amendment rights of the driver and that holding in *Sandy* to the contrary has clearly been overruled by *Prouse*. Since its decision in *Prouse*, the Supreme Court has not had an opportunity to explore the issue further in the context of vehicle roadblocks.

However, in *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979), the court relied upon part of its Fourth Amendment analysis and approach taken in *Prouse*. *Brown* held a Texas statute unconstitutional under the Fourth Amendment where it allowed police to detain a person, and require that person to identify himself, even where the officers lacked probable cause or any reasonable suspicion to believe that defendant was engaged or had engaged in criminal conduct. 443 U.S. at 53. In the course of its opinion, the Court said:

"A central concern in balancing [the competing considerations of public need and individual liberty] has been to assure than an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. (Citations omitted.) To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51.

Several states have considered the issue in connection with driver's license check roadblocks or in some cases more candidly described as DUI roadblocks. It is obvious, without resort to the record or otherwise, that the problem of the drunk driver is one of enormous magnitude affecting every citizen who ventures forth upon the streets and highways. There can be no doubt that there is an overwhelming public and governmental interest in pursuing methods to curtail the drunk driver. Most states, however, which have considered the validity of roadblocks to "check drivers' licenses and auto registration" or to check for drunk drivers have found the methods used to be violative of Fourth Amendment rights and as failing to meet the implied tests set forth in the extensive dicta in *Prouse*. The use of a DUI roadblock has primarily two purposes: (1) to apprehend and remove

the drunk driver from the streets before injury or property damage results, and (2) in serving as a deterrent to convince the potential drunk driver to refrain from driving in the first place. As a fringe benefit the DUI roadblock also serves to disclose other violations pertaining to licenses, vehicle defects, open containers, etc.

In *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976), the South Dakota Supreme Court held "that unless authorized by prior judicial warrant, the establishment of a roadblock for the purpose of investigating all motorists for possible liquor law violations constitutes an unconstitutional seizure within the meaning of the Fourth Amendment." 248 N.W.2d at 395. In contrast to *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976), the court found that the roadblock in *Olgaard* was not at a permanent location; there was no notice of the roadblock, "for by its very nature the roadblock was set up to stop without prior warning, and perforce by surprise, all motorists . . ."; and, absent evidence that the decision to establish the roadblock was made by anyone other than officers in the field, "the roadblock in question had certain characteristics of a roving patrol, a type of intrusion into a motorist's privacy interest that was held unconstitutional in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 . . . ." 248 N.W.2d at 394-95. Although *Olgaard* was decided before *Prouse*, the South Dakota court relied heavily on the border patrol cases and recognized some of the same factors later considered in *Prouse*. The court was concerned with the lack of any permanent location for the roadblock resulting in what it termed "certain characteristics of a roving patrol," lack of notice and possible abuse of discretion by officers in the field.

Arizona reached the same result in *State ex rel. Ekstrom v. Justice Ct. of State*, 136 Ariz. 1, 663 P.2d 992 (1983). The Arizona Supreme Court said:

"[W]e cannot agree that the intrusion generated by the Kingman roadblocks was minimal. The record establishes that the Kingman checkpoints involved a not insubstantial amount of discretionary law enforcement activity and that the manner in which the roadblocks were operated was somewhat irregular. The roadblocks were set up at the discretion of a local highway patrolman and were operated without specific directions or guidelines. Officers were uncertain whether they should simply question the occupants of motor vehicles or whether they should seize the opportunity to cursorily search the vehicles for evidence of

a violation. Motorists were taken by surprise, not having had prior notice of the location and purpose of the checkpoints. We find present in the Kingman operation the grave danger that such discretion might be abused by the officer in the field, a factor which caused the Court in *[Delaware] v. Prouse, supra*, much concern." p. 5.

A scholarly and well-reasoned concurring opinion in *Ekstrom* explored the conditions under which a roadblock checkpoint might pass constitutional scrutiny, and noted that advance warning of a roadblock by notice on the highway and publicity in the media would not only increase the efficacy of a deterrent roadblock but would also limit the resulting intrusion on individual interests, because those being stopped would anticipate and understand what was occurring.

In *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983), the facts were quite similar to those in the instant case:

"McGeoghegan was in a motor vehicle that had been stopped at a roadblock, that the police asked him for his 'papers,' that he showed signs of having been drinking and was taken from his vehicle to a nearby van, where he took and failed a breathalyzer test, and that he was arrested and his vehicle was towed away. It was also agreed that the police had no cause initially to stop McGeoghegan 'except that he was one . . . of two hundred or more motorists that were stopped as they passed the roadblock stoppoint.'

"There are additional undisputed facts. The roadblock was conducted by the Revere police department on North Shore Road and Mills Avenue in that city on the evening of January 15, 1982. This was the result of a plan formulated earlier that day by the police chief and four subordinates. The area of the roadblock was a heavily travelled highway. The main purpose of the roadblock was to detect drunk drivers." pp. 138-39.

The court, in reaching its conclusion, relied upon findings of the trial court that "the roadblock area was poorly illuminated and unsafe for motorists, that the mechanics of the roadblock were left to the discretion of the officers carrying it out, that the officers used their own discretion in deciding which cars to stop, and that motorists were backed up on the highway for at least two-thirds of a mile." 389 Mass. at 144.

The Court of Appeals of Texas in *Koonce v. State*, 651 S.W.2d 46 (Tex. Crim. App. 1983), found evidence recovered in the search of a car at a driver's license roadblock inadmissible as the State failed to show the initial stop was reasonable under the guidelines of *Prouse*. The court stated:

"Without evidence that an objective, non-discretionary procedure was being used, we find that the initial stop of appellant's automobile was unreasonable, and thus, the fruit of that stop and subsequent search was tainted." 651 S.W.2d at 48.

New Jersey, on the other hand, has taken an opposite position from that of a majority of the states that have confronted the issue. In *State v. Coccomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980), the court was again faced with a motion to suppress evidence recovered at a driver's license check roadblock. The roadblock was evidently conducted by township police under a written policy of the Roxbury township police department. The facts were similar to those in the other cases we have discussed except that the procedure was to stop every fifth vehicle while the roadblock was in operation. In distinguishing *Prouse* the court stated:

"In prohibiting random, discretionary vehicular stops the Supreme Court did not 'preclude the [states] from developing methods for spot checks that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock type stops is one possible alternative.' 440 U.S. at 663, 99 S.Ct. at 1041." 177 N.J. Super. at 581.

The court went on to state:

"No one can deny the State's vital interest in promoting public safety upon our roads by detecting and prosecuting drunk drivers. These drivers are a threat to other motorists, to pedestrians and to themselves. Unfit drivers should be identified and removed from the highways. However, there is obviously a competing interest to be considered. Whether the practice adopted in Roxbury Township is reasonable depends upon a balancing of the State's interest in promoting highway safety against the individual motorist's interest in his expectation of privacy." 177 N.J. Super. at 582.

The court found that the roadblocks were operated during early morning hours when traffic was light, that the manner of stopping vehicles was done safely and was designed to reduce anxiety on the part of the motorists, that the Roxbury police were following specific, defined standards and that the system was completely objective in its operation. The court held:

"After balancing the State's strong interest in protecting the public from the substantial risk posed by drunk drivers with the minor inconvenience which may be caused to every fifth motorist and the fleeting, minimal intrusion upon his privacy, the State's action must be considered as a reasonable infringement upon the motorist's expectation of privacy. Nor did the stop become overly intrusive when defendant was asked to produce his license and registration. When the initial detention is lawful as it was here, the police may require the driver to produce his driving credentials." 177 N.J. Super. at 583-84.

In *United States v. Prichard*, 645 F.2d 854 (1981), the Tenth Circuit Court considered a roadblock operated by two New Mexico state police officers for the avowed purpose of checking drivers' licenses and vehicle registration. The roadblock was set up with the permission of the officers' supervisor. All westbound vehicles, except semi-trucks, were to be stopped although when the vehicles began to pile up, the officers waved them on through and did not resume their checking until traffic had cleared. This was evidently a discretionary decision made by the two officers in the field for the purpose of preventing the development of a potentially dangerous and time-consuming accumulation of traffic. The court stated:

"In our view, the roadblock stop of the Ford Bronco does not run afoul of the rule of *Prouse*. While this may not have been a '100% roadblock' of the type referred to in *Prouse*, it is nonetheless a long way from the selective, single car stop denounced in *Prouse*. In the instant case, the New Mexico state police were attempting to stop all westbound traffic on an interstate highway, insofar as was humanly possible. The decision not to stop trucks was reasonable under the circumstances, because, presumably, they had all been stopped at a port of entry. The purpose of the roadblock, *i.e.*, to check drivers' licenses and car registrations, was a legitimate one. If, in the process of so doing, the officers saw evidence of other crimes, they had the right to take reasonable investigative steps and were not required to close their eyes. See *United States v. Merryman*, 630 F.2d 780, 782-85 (10th Cir. 1980). Furthermore, allowing all the stopped cars through when traffic became congested was also reasonable and, in our view, nonviolative of the rule of *Prouse*. In sum, the roadblock stop of the Ford Bronco was, under the described circumstances, constitutional." pp. 856-57.

The border patrol cases, *Prouse* and decisions from other state and federal appellate courts make it clear that not every driver's license check or DUI roadblock is constitutionally impermissible. Certain principles, standards and guidelines may be gleaned from the various decisions. Stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments, which prohibit searches and seizures of an unreasonable nature. *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979). The essence of the Fourth Amendment prohibition is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials" by imposing a standard of reasonableness upon the exercise of those officials' discretion. *Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967); *Prouse*, 440 U.S.at 653-54. The governing principle

of the amendment is that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. *Camara*, 387 U.S. at 528-29. Whether a warrantless search and seizure falls within these limited exceptions is determined by balancing the degree of legitimate governmental interests against the resulting intrusion of the particular law enforcement practice on individuals' Fourth Amendment rights. *Prouse*, 440 U.S. at 654. However, as *exceptions* to the overriding mandate requiring warrants based on probable cause, these "carefully defined classes of cases" permitting warrantless searches and seizures should be construed narrowly to preserve the integrity of the Fourth Amendment.

In applying the balancing test of the degree of governmental or public interest against the degree of intrusion upon the individual's constitutionally protected rights, the courts have developed a three-factor test or analysis which was stated in *Brown* as:

"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. at 50-51.

Numerous conditions and factors must be considered in determining whether a DUI roadblock meets the balancing test in favor of the state. Among the factors which should be considered are: (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test. Not all of the factors need to be favorable to the State but all which are applicable to a given roadblock should be considered. Some, of course, such as unbridled discretion of the officer in the field, would run afoul of *Prouse* regardless of other favorable factors.

When the test enunciated in the cases and the foregoing factors

are taken into consideration and applied to the DUI roadblock in question does it pass constitutional muster? We think it does. The roadblock in question was a joint effort of the highway patrol, Shawnee County sheriff's office and Topeka police department. Thirty-five to forty officers were briefed ahead of time by supervisory personnel of the Topeka police department. The officers were specifically advised to check for driver's license violations and signs of drunk driving. The roadblock was established in a well-lighted area of a four-lane highway. Several police cars were utilized, with a car with its red lights flashing located at each of the four corners of the roadblock. The time of detention was minimal, unless violations were noted, and sufficient officers were present to assure minimum intrusion, timewise. All vehicles going in either direction were stopped and subjected to the license check. The officers in the field had no discretion to pick and choose who would or would not be stopped. The officers were in uniform and readily recognizable as being police officers. The location was selected by supervisory personnel and not the officers in the field.

The Topeka DUI roadblock did not involve the unbridled discretion of the officer in the field which was held oppressive and subject to abuse in *Prouse*. When we consider the enormity of the injury and damage caused by the drinking driver and the vital interest of every citizen in being protected so far as possible upon the streets and roadways, we find that the public interest in a properly conducted DUI roadblock containing appropriate safeguards outweighs the individual's right to be free from unfettered intrusion upon his Fourth Amendment rights. The initial stop of the defendant in this case was under conditions which at least met the minimum requirements for a constitutional momentary seizure and, based upon obvious evidence of DUI, the resultant search and seizure in this case was not unreasonable under the Fourth Amendment or the Kansas Bill of Rights.

Due to the seriousness of any warrantless intrusion into an individual's right to privacy under the Fourth Amendment, we wish to make it clear that the decision herein applies solely to the facts surrounding this particular roadblock. We do not condone blanket, arbitrary exercises of power by governmental authorities which violate Fourth Amendment rights, and any roadblock lacking sufficient standards, guidelines and protections of the individual's right to privacy would run afoul of constitutional protections guaranteed by the Fourth Amendment and the Kansas Bill of Rights. It might well be advisable that minimum uniform standards for the operation of vehicular roadblocks be adopted and established by the legislature or attorney general, rather than leave the determination thereof to local officials.

Having determined that the initial stop or seizure was not constitutionally invalid, the officer had sufficient reason and probable cause to place defendant under arrest when it appeared he was under the influence of alcohol. The arrest of the defendant being lawful, the search of the passenger compartment of his automobile was also lawful. *State v. White*, 230 Kan. 679, 640 P.2d 1231 (1982).

The trial court erred in its suppression of the evidence and the case is reversed and remanded for further proceedings.

PRAGER, J., dissenting: I respectfully dissent. Today's decision will result in the erosion of one of the basic freedoms contained in the Bill of Rights of both the United States and Kansas Constitutions—the right of every individual to be free from unfettered intrusions on his or her right of privacy by government officials, the right to be left alone. The controversy presented in this case is an extremely difficult one. It cannot be denied there there is a wide difference of opinion on this issue held by reasonable persons of good faith. I have no disagreement with the excellent review of the legal precedents on this issue as contained in the majority opinion by Justice Holmes. However, I disagree with the majority's application of the law to the factual circumstances in the case which is now before us.

The majority opinion declares, without equivocation, that when a police officer accosts an individual and restricts his freedom to depart the scene, he has seized that person. Stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment to the United States Constitution, even though the purpose of the stop is limited and the resulting detention is quite brief. The essence of the Fourth Amendment prohibition against unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials

by imposing a standard of reasonableness upon the exercise of those officials' discretion. The majority opinion states that whether a warrantless search and seizure is constitutional is determined by balancing the degree of legitimate governmental interests against the resulting intrusion on the individual's Fourth Amendment rights. In applying the balancing test, the courts must weigh 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.

The majority opinion suggests 13 specific factors to be considered in applying the balancing test. The district court considered the evidence in the light of the various factors and concluded that the warrantless search and seizure presented in this case could not be upheld. I agree with the trial court. It is important to emphasize that this is *not* a case involving a driver's license checkpoint. The police officer who testified at the hearing in district court and counsel for the State on this appeal at oral argument conceded that the primary purpose of the roadblock was to catch drunk drivers, although incidental to that purpose arrests were also made for a number of other reasons, including some involving license violations. The trial court found that the roadblock in this case was there to catch drivers under the influence of alcohol (DUI). That same conclusion is accepted by the court on this appeal.

As I see it, the basic issue is this: Does the public interest in a DUI roadblock of the type established in this case outweigh the individual's right to be free from intrusion on his or her right of privacy? The majority opinion correctly states that the burden of proof rests upon the State to prove the validity of the roadblock.

As to the public interest involved, no one can seriously contest the grave concern over the public peril created by drunk drivers. It is safe to say that official efforts to discover and deter drunk drivers are, and should remain, a high priority. Certainly, the need to identify and apprehend drunken drivers is just as clear and pervasive as the need to discover illegal aliens, which was determined to be a sufficient public concern to justify the checkpoint stops in *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976).

The most pressing question before us is the degree to which

this roadblock checkpoint actually promoted the public interest in deterring drunk drivers. In this regard, we must recognize the fundamental distinction between the offenses of drunk driving, transporting illegal aliens, and failure to carry a valid driver's license. This distinction turns on the way each of these violations is discovered by law enforcement officers. Violations of motor vehicle license laws and the transportation of illegal aliens are in no way physically apparent through mere observation of traffic. The same is not true for DUI violations. It is here that the distinction between the cases arise.

Generally drunk drivers, through their behavior behind the wheel, manifest their presence to even lay observers. They can easily be discerned by law enforcement officers skilled in identifying the signals indicating a driver is operating the vehicle under the influence of alcohol or drugs. In this case, the trial court specifically found that there are alternative less intrusive means available to officers to identify drunk drivers, and police officials need not go to the degree of stopping all traffic at a roadblock. The record in this case shows that the roadblock was in effect for a period of four hours from 10:00 p.m. to 2:00 a.m. The officer testified that during that period, between 2,000 and 3,000 motor vehicles were stopped at the roadblock. A total of 74 violations were discovered at the checkpoint, only 15 of which were for driving while intoxicated. During this period of time 35 police officers were on duty, which for the four-hour period involved a total of 140 man hours. Although it does not specifically appear in the record before us, it was not unreasonable for the trial court to assume that the same or greater productivity in arresting drunk drivers could have been achieved by distributing the 35 officers at various places throughout the city for the sole purpose of observing erratic driving and stopping and checking drunk drivers. In my judgment, the trial court correctly concluded that the State failed in its burden of proof in establishing that the roadblock checkpoint promoted the public interest in light of available less drastic alternative measures which could have been used by the officers to combat the problem, without setting up a roadblock and stopping between 2,000 and 3,000 motorists.

We should not consider the factors suggested in the majority opinion. Factor No. 1 is concerned with the degree of discretion,

if any, left to the officer in the field. It should be considered along with factor No. 4 pertaining to standards set by superior officers for setting up the roadblock or to structure the procedure to be followed by the officers present at the scene. Would a team of three officers, consisting of two patrolmen and a sergeant acting as *supervisor*, have the authority to set up a roadblock anywhere in the city at any time at their discretion? In the present case, the State has not shown the existence of standards or limitations on the discretion of police officers at the roadblock.

Factor Nos. 2 and 3 have to do with the location designated for the roadblock and the time and duration of the roadblock. These factors have in mind the permanency of the location of the checkpoint which is considered as essential in a number of the cases discussed in the majority opinion. In the case before us, the trial court noted that the checkpoint in question had no permanency whatsoever and could have been moved to other locations. Thus it clearly appears that the checkpoint under consideration would not have the essential characteristics of permanency of location required by many of the cases.

Factor No. 6 is concerned with advance warning to the individual approaching motorist. The trial court found, and the record is clear, that advance warning to a motorist approaching the roadblock was practically nonexistent. In his testimony, the police officer admitted that no advance warning, like signs indicating "Danger, roadblock ahead" was present. He testified that no such warning was given because, under the law, a driver's license checkpoint is not required to have an advance warning of any kind. At one point in his testimony, he stated that the only warning to approaching drivers at the scene was the police vehicles with their red lights operating. Four police cars with red lights were parked alongside the road near the curb. This factor of advance warning to approaching motorists is emphasized again and again in the cases. Here there was practically none.

Factor No. 12 is the degree of effectiveness of the checkpoint procedure. As noted above, during the period of four hours in which the roadblock was maintained, 2,000 to 3,000 cars were stopped and only 15 persons arrested for DUI. There was no evidence whatsoever presented by the State that the roadblock procedure had been more effective than the traditional, less intrusive method of detecting drunk drivers. The question again

2-30

arises whether or not roadblocks are worth the price of public inconvenience and interference with the individual's right of privacy.

I, likewise, believe that the majority of the court have failed to consider another important factor in this case. In substance, the majority opinion would seem to authorize any police agency in Kansas to set up a roadblock to discover DUI violations. If this is a proper procedure, why should not a police agency be able to maintain a roadblock to discover violators of *other* criminal statutes or city ordinances? Does the majority opinion contemplate that every individual police agency established in the state may, on its own, authorize DUI roadblocks of this type? In Kansas, we have 105 counties and 625 incorporated cities. If each of these political subdivisions decides to maintain a roadblock, we could have "Checkpoint Charley" at the boundary of every city and every county. Motorists could legally be stopped five times or even more often in driving from Wichita to Kansas City. My basic concern is that, without legislative standards and limitations, the rights of Kansas citizens to privacy and freedom from unreasonable intrusion by governmental officials would be destroyed. I cannot in good conscience accept that as a way of life in this land of freedom.

For the reasons set forth above, I would affirm the trial court, and I respectfully dissent.

OFFICE OF DISTRICT ATTORNEY
SEVENTH JUDICIAL DISTRICT
JUDICIAL & LAW ENFORCEMENT CENTER
111 E. 11th STREET • LAWRENCE, KS 66044

JAMES E. FLORY
DISTRICT ATTORNEY
DOUGLAS COUNTY, KANSAS

General Office 913-841-0211
Child Support 913-841-7420

February 20, 1990

The Honorable Edward F. Reilly
Chairman, Federal and State Affairs Committee
State Capitol
Topeka, Kansas 66612

Re: Senate Bill No. 630

Dear Senator Reilly:

Please accept this letter of support for the provisions of Senate Bill No. 630 which was introduced by Senator Wint Winter. In recent years in Douglas County we have experienced an alarming escalation in the number of violations of the laws relating to the possession, purchase and consumption of alcoholic beverages by individuals who are under the legal age for possession and consumption of such beverages. This problem has been compounded by recent court rulings (and the publicity regarding such rulings) that have severely restricted the authority of law enforcement officers in investigating and enforcing the laws relating to alcoholic beverages.

The provisions of Senate Bill No. 630 simply provide that persons who choose to possess and/or consume alcoholic beverages upon licensed premises be required to possess and display on demand an identification document evidencing that they are of legal age to possess or consume such beverages. Since introduction of this legislation, I have been informed that there are some concerns regarding the constitutionality of the bill.

The power of the Legislature with respect to alcoholic liquor is rather unique in light of the 21st Amendment to the Constitution of the United States. As was stated in the Kansas case of State v. Payne, 183 Kan. 396 (1958):

> "It has been repeatedly held that under the 21st Amendment a state may absolutely prohibit the manufacture, transportation, importation, sale or possession of alcoholic liquors irrespective of when or where produced or obtained, or the use to which they are to be put, and may adopt measures reasonably appropriate to effectuate those inhibitions and exercise full police authority in respect to them, unfettered by the due process clause, the equal protection clause or the commerce clause." Id. at p. 403
>
> "It has long been recognized in this state that alcoholic liquor occupies a special position with respect to exercise of the police power." Id. at 404

Senate F&SA
2-21-90
Att. 3

Clearly the Constitution of the State of Kansas in Article 15, Section 10 contemplates that the Kansas Legislature is empowered with the authority to regulate the possession of alcoholic beverages. [See also City of Baxter Springs v. Bryant, 226 Kan. 383 (1979)]

While opponents to Senate Bill No. 630 may draw constitutional comparisons to other exercises of state police power, the state's police power with respect to alcoholic beverages clearly stands in a different stead. Having enacted Legislation which establishes the legal age for possession and consumption of alcoholic beverages, I believe the Legislature has both the power and the responsibility to provide the executive branch of government with the authority to effectively enforce the law.

Based upon the factual and legal positions set forth above I encourage your support of Senate Bill No. 630. Absent your Legislative intervention I am concerned that the health, safety and welfare of the citizens of Kansas will be adversely affected.

Very truly yours,

James E. Flory
District Attorney

JEF:ca

Stille

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
JUDICIAL CENTER
LAWRENCE, KANSAS 66044
913-841-7700, ext. 230

JEAN F. SHEPHERD, Judge
Third Division

JUDY L. MOORE
Reporter

PATTY HOBBS
Secretary

89TR 763 State of Kansas vs Abby J. Bernstein

MEMORANDUM DECISION

ISSUE: In a police bar check for underage alcoholic beverage drinkers, does a person's young appearance, standing alone, amount to an articulable suspicion as defined in Terry v Ohio, 392 U.S. 1 (1968), for purposes of an officer's subsequent questioning?

FINDINGS OF FACT

1. On March 23, 1989, in Lawrence, Douglas County, Kansas, Officers Daniel Ward and Susan Auer of the Lawrence Police Department conducted undercover bar checks.

2. They entered the Free State Brewery, a local bar, at 10:00 p.m. Upon entering the bar they looked around for anyone who appeared to be under twenty-one.

3. The officers saw Defendant Abby J. Bernstein and her friend Mary Powers when the officers entered the bar. The officers noticed these women because they appeared to the officers to be very young and Ms. Bernstein was small.

4. Defendant stood in the bar talking to Ms. Powers and two white males. She did not behave any differently than anyone else in the bar.

5. Defendant did not appear to be nervous.

6. The officers approached Defendant based solely upon her young appearance.

7. Officer Auer had no training in sorting out people by age.

Senate F&SA
2-21-90
Att. 4

8. Officer Auer used dress and a young appearance as criteria for approaching people in the bars to determine if they were underage drinkers.

9. The officers saw Defendant holding a glass containing an amber liquid which Officer Auer thought was beer although she could not specifically identify it.

10. The officers approached Ms. Powers and Ms. Bernstein, presented their badges, and asked for the women's identification.

11. Ms. Bernstein said she had no identification with her.

12. The officers carded four people in Defendant's group; Ms. Powers immediately admitted to being underage, two were of age, and the fourth was Defendant.

13. At this point, the officers asked Defendant for her name and date of birth to check through the computer. She gave them her name and a date of birth.

14. In addition, at this point the officers took the glass of liquid Defendant was holding. The officers told Defendant she could have her drink back if they found that she was old enough to have it.

15. The officers then told Ms. Bernstein that she needed to come outside of the bar with them where it was quiet and they could talk on the radio, so that they could check her name and date of birth through the computer. They told her if they found her name and date of birth to be correct she could go and if not they would arrest her.

16. When this defendant said she had no identification, she was not free to leave. She was compelled to stay until the officers got an answer. If the officers could not get an answer their procedure called for their taking people to the police department to stay until proof of age and identification could be shown.

17. When the officers took Ms. Bernstein outside the bar she was not free to leave; if she had attempted to leave they would have told her to stay for awhile so they could determine whether or not she was underage. If she had refused to stay, she would have been arrested.

18. The officers did not need Defendant with them to run her name and date of birth through the computer.

19. When Defendant and Ms. Powers went outside, Ms. Powers was under arrest. The officers did not tell Defendant that she could not leave, but she was not free to leave.

20. Officer Auer stated that when she took Defendant outside Defendant probably thought she was not free to leave.

21. Officer Auer called in Defendant's name and birth date for a check against the motor vehicle files to see if a driver's license had been issued to a person named Abby J. Bernstein with the date of birth she gave; the dispatcher indicated there was no driver's license for that person.

22. Officer Auer informed Defendant then that it was obvious that Defendant had not been telling the officers the truth and that she needed to tell the truth this time or else they would have to take her to jail instead of writing a ticket.

23. At this point, Ms. Bernstein said "Okay, I'm nineteen," and gave her name and correct date of birth which did check through the drivers' license computer.

24. At this point she was officially arrested and was later issued a Notice to Appear for Minor in Possession of Alcohol.

25. The officers first made contact with Defendant between 10:05 p.m. and 10:10 p.m., and they issued her a Notice to Appear at 10:30 p.m.; the entire process took twenty-five minutes.

26. On this evening Officer Ward carried a concealed weapon; he never drew his weapon during this contact with Defendant nor did any of the other officers who had contact with Defendant.

27. Officer Zarnowiec was a uniformed officer who was assisting with the bar checks; he did not enter the bar until after the defendant had been taken outside; he went into the bar to get the bartender's name.

28. Officer Zarnowiec waited outside the bar door in case Officers Auer and Ward arrested any people.

29. None of the officers threatened Defendant in any way.

30. After arresting Defendant, Officer Auer searched her based upon the bartender's self-serving report that Defendant had presented identification when she entered the bar. The officers requested that Defendant turn over the identification and she refused; Officer Auer searched her for identification but the officer found no identification.

31. Ms. Bernstein was never placed in handcuffs or restraints.

32. Ms. Bernstein was never advised of her rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

33. The question as to Defendant's age and her response that she was nineteen occurred prior to her having been officially arrested for the charge of Minor in Possession.

34. Defendant was free to leave after she received the Notice to Appear.

35. The officers have no specific criteria or standards for conducting bar checks. They have had no special training sessions to help them identify underage people.

CONCLUSIONS OF LAW

1. Police officers may approach anyone in a bar, identify themselves, and ask for identification. However, bar patrons are not required to produce identification for police officers. Brown v Texas, 443 U.S. 47 (1979); State v Latimer, 9 K.S. 2nd 728 (1984).

2. Police officers may ask bar patrons their names. Bar patrons have the option of answering or not. Berkemer v McCarty, 468 U.S. 420 (1984). Defendant in this case provided the officers with her name and a date of birth.

3. An officer's view of "who looks young" is subjective and dependent on that officer's perspective; i.e. young adults who appear under twenty-one to a forty-five or a fifty-year-

old officer will probably not appear as young to a twenty-one year old officer. Youthful appearance standing alone does not rise to an articulable suspicion for a Terry stop. United States v Brignoni-Ponce, 422 U.S. 873 (1975). The officers in this case did not have a reasonable suspicion, based upon objective facts, that this defendant was involved in criminal activity. Brown v Texas, 443 U.S. 47 (1979); Delaware v Prose, 440 U.S. 648 (1979).

4. The officers seized the amber liquid Ms. Bernstein was drinking immediately after they approached and asked her for identification. The beverage was improperly seized and is suppressed.

5. When Defendant's name and date of birth as she gave it did not come back on the officers' computer, she was clearly the focus of the officers' investigation of what they believed to be the crime of underage drinking, and she was in custody. At this point, prior to questioning Defendant further, the officers should have advised her of her rights pursuant to Miranda v Arizona, 384 U.S. 436 (1966). The officers failed to do this and any statements made by Defendant at this point as to her age and date of birth are suppressed.

6. The officers did not have probable cause or an articulable suspicion to detain Defendant when they had her leave the bar with them.

7. The rule of independent source and inevitable discovery as stated in Costello v United States, 365 U.S. 265 (1961); Nix v Williams, 467 U.S. 431 (1984), and other cases following that line, is not applicable in this case because the state presented no testimony as to the police computer's capabilities to provide information about an individual's date of birth when police officers could only give it a name; rather, the testimony was that the original name and date of birth given by Defendant were not present on the computer. In addition, the officers stated they required both Defendant's name and date of birth to check through the computer.

8. This case will be set for trial on October 19, 1989, at 4:15 p.m..

IT IS SO ORDERED THIS 20 DAY OF SEPTEMBER, 1989.

JEAN F. SHEPHERD
DISTRICT JUDGE

cc: District Attorney
Donald Strole
Court Reporter

FILED
SEP 20 1989 10:30 pm

Sherlyn K. Sampson
CLERK OF DISTRICT COURT