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April 10, 2014

ATTORNEY GENERAL OPINION NO. 2014- 09

The Honorable Jim Howell
State Representative, 81st District
State Capitol, Room 459-W
300 S.W. 10th Avenue
Topeka, Kansas 66612

The Honorable Brett Hildabrand
State Representative, 17th District
State Capitol, Room 274-W
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Constitution of the United States—Amendment 4; Searches and Seizures—Plain View Exception

Constitution of the State of Kansas—Bill of Rights—Search and Seizure; Plain View Exception

Wildlife, Parks and Recreation—Enforcement—Unlawful Acts—Seizure of Wildlife, Devices, Equipment, and Firearms; Wildlife Checkpoint

Synopsis: The use of a flashlight or spotlight by a law enforcement officer at an intersection from a public vantage point to see if the occupants of a motor vehicle are wearing seatbelts is not a search and does not violate the Fourth Amendment.

Roadway checkpoints may be constitutional if they serve a purpose other than detecting evidence of ordinary criminal wrongdoing. If a checkpoint serves an acceptable purpose, its constitutionality depends on how it is conducted. Cited herein: K.S.A. 8-2501; Kan. Const., Bill of Rights, § 15; U.S. Const., Amend. 4.

* * *

Dear Representatives Howell and Hildabrand:

As Representatives for the 81st and 17th Districts, respectively, you ask for our opinion on whether the Nighttime Seatbelt Enforcement Program is an unreasonable search in violation of the Fourth Amendment of the United States Constitution or § 15 of the Bill of Rights of the Constitution of the State of Kansas. You state in your request letter that during the nighttime, law enforcement officers position themselves at intersections, and when a motor vehicle stops at a traffic light, the law enforcement officer uses a flashlight or spotlight to see if the occupants of the motor vehicle are wearing seatbelts. If the officer witnesses a violation of the primary seatbelt law by the front seat occupants, he or she informs another officer, who then stops the motor vehicle to issue a citation for a violation of the Safety Belt Use Act.¹ Specifically, you ask whether the use of a flashlight or a spotlight makes this viewing an unconstitutional search.

Additionally, you ask generally whether “saturation patrol checkpoints” are an unreasonable search and seizure in violation of the same constitutional provisions. In your specific question, you ask whether a checkpoint by the Kansas Department of Wildlife, Parks and Tourism (KDWPT) to check and verify hunters’ compliance with hunting regulations, similar to a saturation patrol checkpoint, is constitutional. Before addressing your questions, we review the constitutional provisions you cited.

Constitutional Provisions

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²

Section 15 of the Kansas Constitution Bill of Rights provides:

The right of the people to be secure in their persons and property against *unreasonable* searches and seizures shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.³

¹ K.S.A. 8-2501 *et seq.*

² Emphasis added.

³ Emphasis added.

While the language is clearly not identical, the Kansas Supreme Court has held that the *protections* provided by the Fourth Amendment of the United States Constitution and § 15 of the Kansas Constitution Bill of Rights are identical.⁴ Both of the provisions prohibit unreasonable searches and seizures.⁵ Although the Kansas Supreme Court has recognized that it could extend state constitutional protections of § 15 beyond the federal guarantees provided by the Fourth Amendment, it has declined to do so.⁶ Therefore, if a search or seizure does not violate the Fourth Amendment, it also will not violate § 15 of the Kansas Constitution Bill of Rights.

The threshold question in search and seizure analysis is whether a search or seizure has occurred. A search occurs for the purposes of the Fourth Amendment when the government violates a person's subjective expectation of privacy, which society recognizes as an objectively reasonable expectation of privacy.⁷ A Fourth Amendment seizure of a person occurs when, in view of all of the circumstances surrounding the incident, a reasonable person would believe that person is not free to leave.⁸ If a search or seizure occurs, the question that remains is whether the search or seizure was reasonable under the Fourth Amendment.

Having laid the foundation for an understanding of search and seizure jurisprudence, we now address your specific questions.

Nighttime Seatbelt Enforcement Program

According to the information that you provided, the Nighttime Seatbelt Enforcement Program is a grant program developed by the Kansas Department of Transportation (KDOT). The program is designed to enforce nighttime seatbelt use throughout the State. Its purpose is to reduce unrestrained passenger motor vehicle deaths occurring during the evening and nighttime hours, especially on Friday and Saturday evenings. The law enforcement officers of a participating law enforcement agency are deployed to carry out the program objectives pursuant to the enforcement protocol recommended by KDOT.

You ask whether a Fourth Amendment violation occurs when a law enforcement officer uses a sense-enhancing device such as a flashlight or a spotlight to illuminate the interior of a motor vehicle at an intersection from a public vantage point. That question was answered by the United States Supreme Court in *United States v. Lee*.⁹ In *Lee*, a crewmember of a Coast Guard patrol boat used a search light to look at the deck of the

⁴ See *State v. Johnson*, 253 Kan. 356, 362 (1993).

⁵ *Id.*

⁶ *State v. Hoeck*, 284 Kan. 441, 463 (2007).

⁷ *Katz v. United States*, 389 U.S. 347, 353 (1967); *Id.* at 360-61 (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735 (1979). *But see United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 950-52 (2012) (“[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”).

⁸ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

⁹ 274 U.S. 559 (1927).

motorboat and found numerous cases of liquor. The Court found, “Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution.”¹⁰ The Court has consistently found that use of a flashlight or a spotlight does not constitute a search because it does not intrude upon a legitimate expectation of privacy recognized by the public as reasonable.¹¹

The Kansas Supreme Court also has held that the use of a flashlight to look into a vehicle’s windows is not a search with the meaning of the Fourth Amendment:

A search implies prying into hidden places for that which is concealed and it is not a search to observe that which is in open view. Looking into a parked car through the windows does not constitute a search, even though it is nighttime and the items can be seen only with the aid of a flashlight.¹²

The fact that the motor vehicle has occupants and is stationary at an intersection rather than parked in a parking lot does not transform the viewing into a search in violation of the Fourth Amendment. Even if the occupants held a subjective expectation of privacy in not being viewed while in a motor vehicle, this expectation is not objectively reasonable under governing Supreme Court precedents. The motor vehicle’s windows are made of glass and are meant to be seen through. Thus, the determination of whether the occupants are wearing a seatbelt is made by observing what is in open view and does not require prying into hidden places or opening doors of the motor vehicle. We conclude, therefore, that the use of a flashlight or spotlight by a law enforcement officer at an intersection from a public vantage point to see if the occupants of a motor vehicle are wearing a seatbelt is not a search and does not trigger a Fourth Amendment violation.

Wildlife Checkpoints

Turning to your question about KDWPT wildlife checkpoints, “[i]t is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.”¹³ While “[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing,” the United States Supreme Court has recognized several limited exceptions to this general rule, one of which involves certain roadway checkpoints.¹⁴

¹⁰ *United States v. Lee*, 274 U.S. at 563.

¹¹ See also *United States v. Dunn*, 480 U.S. 294, 305 (1987); *Texas v. Brown*, 460 U.S. 730, 739 (1983).

¹² *State v. McMillin*, 206 Kan. 3, 7-8 (1970). See also *State v. Doile*, 244 Kan. 493, 497(1989), *disapproved on other grounds by State v. Hoeck*, 284 Kan. 441 (2007) (officer's use of flashlight to illuminate interior of car in parking lot to which officer had been summoned on official business was not “search,” within meaning of Fourth Amendment).

¹³ *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

¹⁴ *Id.* at 37-39.

A suspicionless roadway checkpoint such as a drug interdiction checkpoint violates the Fourth Amendment when designed to “detect evidence of ordinary criminal wrongdoing.”¹⁵ However, the United States Supreme Court has approved the constitutionality of Border Patrol and field sobriety checkpoints because they “serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety” rather than a “general interest in crime control.”¹⁶ If a checkpoint serves an acceptable purpose, courts “will judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.”¹⁷

Wildlife checkpoints arguably serve a special purpose other than detecting evidence of ordinary criminal wrongdoing, namely protecting the wildlife of the state from being illegally taken. Even if the purpose of a wildlife checkpoint is acceptable, however, whether a checkpoint is constitutional will depend on how it is conducted. Because this will depend on the facts of each case, we decline to provide an opinion on this question.

Sincerely,

Derek Schmidt
Attorney General

Athena Andaya
Deputy Attorney General

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¹⁵ *Id.* at 41-42.

¹⁶ *Id.* at 41; *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (field sobriety checkpoints); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-67 (1976) (Border Patrol checkpoints). The Supreme Court has also suggested that checkpoints to check for driver’s licenses and vehicle registrations may be constitutional based on roadway safety concerns. See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

¹⁷ *Illinois v. Lidster*, 540 U.S. 419, 426 (2004). See also *State v. Deskins*, 234 Kan. 529 (1983).