



Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 16 2015

The Honorable Lee Beyer, Chair
Senate Committee on Business and Transportation, Members

RE: Senate Bill 13

Dear Chair Beyer and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to Senate Bill 13.

1. Senate Bill 13 is legislation which seeks to implement sobriety roadblocks by law enforcement, something which the Oregon Supreme Court has ruled violates the search and seizure protections of Article I Section 9 of the Oregon Constitution. *State v. Boyanovsky, 304 Or 131 (1987)*. Hence, Senate Bill 13 would be effective only if the people were to first amend the Oregon Constitution by referral of Senate Joint Resolution 3.

2. While the constitutionality of sobriety roadblocks is a separate issue from their implementation, OCDLA urges this committee to be mindful of why roadblocks are unconstitutional under Oregon's current search and seizure provisions:

a.) Article I Section 9 of the Oregon Constitution reads differently than does the Fourth Amendment to the United States Constitution. In *State v. Caraher, 293 Or 741 (1982)*, the Oregon Supreme Court ruled that the search and seizure provisions in Section 9 are deserving of their own interpretation and vibrancy, independent of what the nine justices of the United States Supreme Court may determine is necessary under the federal constitution.

b.) This independent determination has resulted in significantly greater liberty and freedoms for Oregon citizens than are enjoyed under the US constitution. The US constitution protects a citizen's "reasonable expectation of privacy" whereas the Oregon constitution protects an individual's "personal right" of privacy, regardless of one's expectation or the "reasonableness" of one's expectation. The distinction can be profound.

c.) Six states have determined that roadblocks violate their state constitutional protections against search and seizure: Michigan, Minnesota, Oregon, Rhode Island, Texas and Washington. Notably, after the United States Supreme Court ruled in *Michigan Department State Police v. Sitz, 296 US 444 (1990)* that sobriety roadblocks do not violate the federal constitution, the Michigan Supreme Court on remand ruled that they do violate the Michigan Constitution. *Sitz v. Department of State Police, 444 Mich 744 (1993)*.

d.) It is a tenant of Article I Section 9 that an individual has the right to be free from a police stop . . . a "seizure" under constitutional parlance . . . unless an officer has individualized suspicion that criminal conduct is afoot. A search of a person or the vehicle cannot be conducted absent the presence of probable cause. A roadblock violates both of these principles: i.e., it subjects all motorists, regardless of individual conduct, to police intrusion without individualized suspicion of wrongdoing.

e.) Law enforcement already has authority to stop, detain and investigate a motorist whom they reasonably suspect is impaired:

- They may stop a vehicle for a traffic infraction, or if they have reasonable suspicion the motorist may be impaired.
- They may detain the motorist for a reasonable length of time to investigate their suspicion.
- If they suspect the motorist is impaired, they may require the motorist to perform field sobriety tests.
- During the stop, they may visually inspect the inner contours of a vehicle for the presence of alcohol containers, drug paraphernalia, weapons or firearms.
- If they develop probable cause to suspect other criminal activity, they may search in inner contours of the vehicle and the truck for evidence.
- If they arrest the motorist, they may impound the vehicle, remove all the contents, and inventory the contents.

f.) While the debate regarding the efficacy of roadblocks versus saturation patrols goes on, an FBI study showed that "Overall, measured in arrests per hour, a dedicated saturation patrol is the most effective method of apprehending offenders." [Green, Jeffrey, 2003. *Battling DUI: A Comparative Analysis of Checkpoints and Saturation Patrols. FBI Law Enforcement Bulletin, 72: 1-6*]

3. Senate Joint Resolution 3 suffers from vagueness in its provision and intent, among them:

a.) SJR 3 would insert the term “sobriety checkpoints” into our constitution, and yet that term is undefined.

b.) It is unclear whether the existing limitations in Article I Section 9 would apply to general law enforcement conduct occurring *during* a roadblock, or whether Article I Section 9 would have no effect whatsoever. In other words, what law would apply for general crime interdiction practices occurring during a roadblock: the law under Article I Section 9? The law under the Fourth Amendment? None at all?

4. As to Senate Bill 13, a host of issues arise from incorporating by reference the *National Highway Traffic Safety Administration bulletin (DOT HS 807 656, November 1990 (hereinafter “DOT bulletin”))*.

a.) The guidelines referenced in the bulletin are aspirational rather than prescriptive. The guidelines presuppose that each law enforcement agency will enact “specifically established procedures outlining how the checkpoints are to be conducted” but do not mandate what those specific procedures should be. *DOT bulletin, page 2*.

b.) Hence, there will be no assurance of statewide consistency or uniformity in the implementation of roadblocks. This poses the following questions:

- May agencies search for evidence of other possible criminal violations, such as the presence of firearms in the vehicle?
- May agencies employ the use of drug-detecting dogs to circle the perimeter of the vehicle seeking the detection of drugs?
- May agencies use the detention to determine the immigration status of the motorist or occupants within the vehicle?

c.) The answer to these important questions appears to be yes. The bulletin itself suggests that roadblocks can be the basis to engage in general criminal law enforcement interdiction beyond that of detecting impaired driving:

- “Be observant of the interior of the vehicle for alcoholic beverage containers, drug paraphernalia or other contraband, such as weapons, that are in plain view.” *DOT Bulletin, Appendix A-2*.
- “Searches of a motor vehicle, the driver, or passenger, shall be conducted only when consistent with departmental policies or when legally permissible.” *DOT Bulletin, Appendix A-3*.

d.) Hence, nothing in the DOT Bulletin would limit the amount of generalized criminal investigation that might be employed during the course of a checkpoint stop. Article I Section 9 would be converted from the civil liberty it is today that protects all Oregonians from suspicionless stops, to one which promotes inconsistencies and non-uniformity throughout the state.

5. Without question, a sobriety roadblock is a "seizure" of a car and its occupants without individualized suspicion of wrongdoing in the hope that, at some point during the ensuing detention, evidence of a crime will be discovered. The constitutional limitation on the police powers of government is a precious right which, once lost, cannot be reclaimed. OCDLA urges the Committee to vote no on Senate Bill 13.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

Gail L. Meyer, JD
Legislative Representative
Oregon Criminal Defense Lawyers Association
glmlobby@nwlinc.com