1-1-1994

State v. McHugh: The Louisiana Supreme Court Upholds Gaming Checks, 69 Tul. L. Rev. 611 (1994)

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RECENT DEVELOPMENTS

STATE v. MCHUGH: THE LOUISIANA SUPREME COURT UPHOLDS GAMING CHECKS

In November 1990, Louisiana wildlife law enforcement officers were stopping and checking hunting boats in an attempt to keep hunters from taking too many ducks from Bayou Boeuf.[1] The officers stopped the boats and checked the tags that are required to be placed on every bag of hunted ducks.[2] They recorded the signatures on the tags so they could determine whether the hunters had taken too many ducks for that day.[3] When they began checking Bayou Boeuf landing on November 17, they realized that some hunters were using other hunters' signatures to bring in more ducks than legally allowed.[4] The officers generally checked every boat that passed the checkpoint unless traffic became too heavy.[5]

On November 18, the officers stopped the defendants' boat as it headed toward the landing.[6] In response to the officers' queries, the defendants showed their hunting licenses and told the officers that they had no ducks, but did have a deer on board.[7] After checking the deer, the officers issued the defendants a summons for not appropriately tagging the deer.[8]

During trial, the court denied the defendants' motion to exclude the evidence obtained by the officers because the search and seizure did not violate the defendants' state and federal constitutional rights.[9] The court of appeal reversed, finding that the officers did not have reasonable grounds for a license check and game inquiry under Article I, Section 5 of the Louisiana Constitution.[10] The Louisiana Supreme

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1. State v. McHugh, 630 So. 2d 1259, 1261 (La. 1994).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 1261-62.
6. *Id.* at 1262.
7. *Id.*
8. *Id.* Louisiana law requires hunters to tag each part of a slaughtered deer portioned while hunting. LA. REV. STAT. ANN. § 56:125 (West 1987).
9. *McHugh*, 630 So. 2d at 1262.
10. State v. McHugh, 598 So. 2d 1171, 1175-76 (La. Ct. App. 1st Cir. 1992), *rev'd*, 630 So. 2d 1259 (La. 1994). Article I, Section 5 of the Louisiana Constitution states:

Court reversed, *holding* that gaming checks made during hunting season in a wildlife habitat do not violate the state or federal constitutions. *State v. McHugh*, 630 So. 2d 1259 (La. 1994).

The Fourth Amendment to the United States Constitution protects a person from unreasonable searches and seizures.[11] A seizure occurs when a government agent restrains the liberty of a citizen.[12] The Louisiana Constitution has expanded this protection to include the right to privacy.[13] The Louisiana Constitution thus gives more protection to individuals than the United States Constitution has "afforded by the pre-existing United States Supreme Court interpretations."[14]

In general, whenever a search and seizure takes place, the police officer is required to have probable cause to justify the search.[15] Police officers have probable cause if they can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."[16] *Terry v. Ohio* was the first federal case to create an exception to the general rule that probable cause is required whenever a search and seizure takes place.[17] In *Terry*, the Supreme Court developed the "investigatory stop" exception, which allows an officer to stop an individual when the officer observes unusual conduct and has reasonable grounds to

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> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

LA. CONST. art. I, § 5.

11. U.S. CONST. amend. IV. The Fourth Amendment states:

> 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.

Id.

12. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1967).
13. LA. CONST. art. I, § 5. For the specific provisions of this section, see *supra* note 10.
14. State v. Perry, 610 So. 2d 746, 755 (La. 1992).
15. *Terry*, 392 U.S. at 20.
16. *Id.* at 21.
17. *See id.* at 20-27.

believe that an individual has engaged in or is engaging in criminal conduct.[18] The officer may then investigate and make reasonable inquiries of the individual.[19]

In Michigan Department of State Police v. Sitz, the Supreme Court held that the use of sobriety checkpoints is consistent with the Fourth Amendment.[20] The Michigan State Police set up surprise checkpoints where every driver was examined for signs of intoxication.[21] If a driver appeared to be intoxicated, that person would be directed to another location for further examination.[22] If the examination and breath tests showed that the person was intoxicated, the driver was arrested.[23] The average delay for the drivers was only twenty-five seconds.[24] The Court balanced the state's interest in preventing accidents, the effectiveness of the program in achieving that goal, and the level of the intrusion on the individual's privacy rights.[25] The Court stated that a seizure occurs when a "vehicle is stopped at a checkpoint."[26] In support of its holding, the Court reasoned that (1) the invasion was only slight; (2) the state had a great interest in preventing drunken driving; and (3) the arrest of over one percent of the stopped motorists proved that the program was effective.[27] The Court stated that the police are not required to have any particularized suspicion to stop a driver at a checkpoint and ask simple questions in order to determine if there should be further inspection.[28] The Court did not address the issue of whether the further detention of suspicious individuals is constitutional.[29] Rather, the Court held that the principles discussed in United States v. Martinez-

18. *Id.*
19. *Id.* at 30.
20. 496 U.S. 444, 447 (1990).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 448.
25. *Id.* The Court used a balancing test developed in Brown v. Texas, 443 U.S. 47, 50-51 (1979). The Court in *Brown* held that in considering the constitutionality of a seizure that is less intrusive than a full arrest, a court 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." *Id.*
26. *Sitz*, 496 U.S. at 450.
27. *Id.* at 450-55.
28. *Id.* at 450-51.
29. *Id.*

Fuerte[30] must be applied to determine whether more extensive sobriety testing is valid.[31]

In *Martinez-Fuerte*, the Supreme Court upheld the practice of stopping every car at fixed checkpoints to detect illegal immigrants.[32] The Court also established the requirements for referring a stopped car for further investigation.[33] The Court held that a referral to a secondary area could be based solely on the fact that the individual appears to be of Mexican ancestry.[34] Because of the importance of controlling the border and the effectiveness of these checkpoints in controlling the immigration of illegal aliens, the border patrol officers must have "wide discretion in selecting the motorists to be diverted for" further questioning.[35]

The Court has not been as willing to allow random stops of cars without the use of fixed checkpoints. In *Delaware v. Prouse*, the Supreme Court held that officers may not randomly stop cars in order to inspect a driver's license and registration.[36] In *Prouse*, the officers stopped vehicles without probable cause or reasonable suspicion.[37] The Court applied a balancing test, which involves weighing the governmental interest against the level of intrusion, and examining any alternative means of achieving the interest that may be less intrusive.[38] The Court believed that the intrusion was excessive relative to the "promotion of [the] legitimate governmental interests."[39] The Court focused on the existence of more effective alternatives to random spot checks to show that "the incremental contribution to highway safety of the random spot check" does not justify intrusion.[40] The Court stated that the police may stop a vehicle only if they have reasonable suspicion, because there is a "'grave danger' of abuse of discretion"

30. 428 U.S. 543 (1976).
31. *Sitz*, 496 U.S. at 451-52.
32. *Martinez-Fuerte*, 428 U.S. at 545.
33. *Id.* at 562. The requirements mandate a finding by the court that: (1) the intrusion is minimal; (2) the purpose of the stop is legitimate; and (3) the stops are in the public interest. *Id.*
34. *Id.* at 563.
35. *Id.* at 564.
36. 440 U.S. 648, 663 (1979).
37. *Id.* at 650.
38. *Id.* at 654-55.
39. *Id.* at 654.
40. *Id.* at 659.

given to the officers.[41] However, the Court left open the possibility of less intrusive and discretionary spot checks, suggesting roadblocks as one possible alternative.[42]

In general, the Supreme Court has held that fixed checkpoints are allowed, but has tended to be more skeptical of random, possibly arbitrary, spot checks. The Court has given a great deal of discretion to officers when stopping motorists at a fixed checkpoint. The Louisiana Supreme Court, by contrast, has given more protection to individuals, because the Louisiana Constitution has expanded the Fourth Amendment of the United States Constitution to include invasions of privacy.[43] The Louisiana Supreme Court first dealt with random investigatory stops in *State v. Parms*.[44] In *Parms*, the state police department set up a random checkpoint without any warning to the public.[45] The officers checked for license and registration; they also checked to see if motorists were intoxicated.[46] The officers were given no instructions or policy for conducting the checkpoint.[47] The court found that the roadblock violated the United States Constitution because (1) there was "no advance publicity"; (2) there was "no evidence that a roadblock operation is more effective than stops made when there is individualized suspicion"; and (3) the field officers had unbridled discretion.[48] The court did not decide whether the roadblocks violated the Louisiana Constitution, but stated that it was doubtful that the roadblocks could pass constitutional muster.[49]

Nine months later, in *State v. Church*, the Louisiana Supreme Court held that sobriety checkpoints violate Article I, Section 5 of the Louisiana Constitution if the officers lack "reasonable suspicion or probable cause to believe that [the] defendant ... had violated some

41. *Id.* at 662 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976)).

42. *Id.* at 663. Roadblocks were later held constitutional in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990). For a discussion of *Sitz*, see *supra* notes 20-31 and accompanying text.

43. LA. CONST. art. I, § 5. For a discussion about how the Louisiana courts have expanded the right of privacy, see State v. Perry, 610 So. 2d 746, 755-57 (La. 1992); Hondroulis v. Schuhmacher, 553 So. 2d 398, 410 (La. 1989); and Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 20-25 (1974).

44. 523 So. 2d 1293 (La. 1988).

45. *Id.* at 1294.

46. *Id.*

47. *Id.* at 1294-95.

48. *Id.* at 1303.

49. *Id.*

law."[50] Unlike in *Parms*, the officers in *Church* had been given detailed procedures for setting up sobriety checkpoints that met the federal constitutional standards.[51] However, the Louisiana Supreme Court later stated that "reasonable jurists may disagree as to whether the *Church-Parms* holding involving motor vehicle sobriety checkpoints is directly and fully controlling with respect to game agents' stops of sportsmen in the marsh for questioning with respect to possible game or boating violations."[52]

In the noted case, the Louisiana Supreme Court began its analysis by determining whether the agent's conduct fell within the investigatory exception to the warrant requirement during a search or seizure.[53] The court, applying the *Terry v. Ohio* rule,[54] held that the state failed to prove that the action fell within the investigatory exception.[55] The court reasoned that because the agents were stopping every boat without observing any suspicious conduct, the agents did not have sufficient grounds to suspect that the defendants were engaged in criminal activity.[56] Moreover, the main purpose of the stop was to check every person's hunting license and to inquire about any game within the hunters' possession; the agents did not suspect that each boater was engaging in criminal activity.[57] Therefore, the state failed to prove that it had sufficient grounds to make an investigatory stop as required by *Terry*.[58]

The court next focused on the requirements that the government must satisfy in order to show that its action falls within the allowable interference with privacy rights permitted by Article I, Section 5 of the Louisiana Constitution. The court stated that when a privacy right interference is less intrusive than a full arrest, the intrusion must be justified by a compelling state interest that cannot be achieved through less restrictive means.[59] The court gave four reasons for holding that the wildlife gaming stops do not violate the Louisiana Constitution.

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50. 538 So. 2d 993, 997-98 (La. 1989).
51. *See id.* at 995.
52. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1094 (La. 1990).
53. State v. McHugh, 630 So. 2d 1259, 1262-63 (La. 1994).
54. 392 U.S. 1, 30 (1968); *see supra* notes 17-19 and accompanying text.
55. *McHugh*, 630 So. 2d at 1263.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1264. The court pointed to several state and federal cases that discuss when the government can interfere with a person's constitutional rights. *See, e.g.*, State v. Perry, 610

First, the program furthers the state's compelling interests in preserving wildlife and regulating the abuse of it.[60] Second, the court concluded that the program serves a governmental need that is outside the usual law enforcement area.[61] Third, the gaming stops are much less intrusive than actual arrests.[62] Fourth, the state does not have a less restrictive means to accomplish its goals.[63] The court pointed to statutes and provisions in the constitution to show the "paramount importance of [the] invaluable natural resources" in Louisiana.[64] The court specifically pointed to the Public Trust Doctrine in the state constitution that is designed to protect, conserve, and replenish all of the state's natural resources.[65] In addition, "the defendants concede[d] that the state has a compelling interest in preserving the wildlife and in regulating its exploitation."[66]

The court discussed the special governmental need, outside the law enforcement field, to have the agents check game and licenses. The agents help promote the state's interest of "protecting, conserving and promoting replenishment of the wildlife of the state" through checking hunter licenses and the game they have within their possession.[67] By checking the game, the agents are able to examine the factors that relate to the protection of wildlife.[68] For example, the court stated that the agents are able to better understand and gather "information pertaining to the appearance, quality, quantity, health and habits of animals taken or sighted."[69] Therefore, there is a great need to have the agents question each hunter.

So. 2d 746, 757-58 (La. 1992); Hondroulis v. Schuhmacher, 553 So. 2d 398, 401-02 (La. 1989); *see also* Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Cantwell v. Connecticut, 310 U.S. 296, 303-07 (1940).

60. *McHugh*, 630 So. 2d at 1264-65.

61. *Id.* at 1265.

62. *Id.* at 1266.

63. *Id.* at 1265-66.

64. *Id.* at 1265 (citing LA. CONST. art. IX, §§ 1, 7; LA. REV. STAT. ANN. §§ 56:3 (West 1987), 56:103 (West 1987 & Supp. 1994), 56:109 (West 1987 & Supp. 1994), 56:116-:121.1 (West 1987 & Supp. 1994), 56:301.1 (West 1987), 56:304 (West 1987), 56:701-:803 (West 1987 & Supp. 1994)).

65. *Id.* The Public Trust Doctrine appears in Article 9, Sections 1 and 7 of the Louisiana Constitution. LA. CONST. art. IX, §§ 1, 7. The court found that these sections "establish[ed] a standard of protection which the legislature and all public trustees are required to vigorously enforce." *McHugh*, 630 So. 2d at 1265.

66. *McHugh*, 630 So. 2d at 1265.

67. *Id.*

68. *Id.*

69. *Id.* at 1265-66.

The court reasoned that since the encounter only lasts for a couple of minutes and only involves a few questions, the stop falls far short of being similar to an arrest.[70] The court further reasoned that the impact of the checks on non-hunters is almost nonexistent, so only a small segment of the population is affected.[71] Also, hunters should know that they probably will be stopped for license and game checks.[72] Most hunters generally expect such checks because gaming stops are made often and are visible to most hunters during hunting season.[73] The fact that agents cannot detain a hunter beyond the brief check unless they have probable cause or reasonable suspicion also illustrates that the intrusion is only slight.[74] All of these factors led the court to believe that the intrusion caused by the gaming checks is quite small.

The court rejected an alternative that the defendant proposed, which allows an agent to stop a hunter only if he has reasonable suspicion that a violation has occurred, because agents would not be able to tell if a hunter had a license with him without stopping the hunter and checking.[75] Most importantly, the court reasoned that surveillance of hunting activities is almost impossible because of the large and constantly changing area of wetlands in Louisiana.[76]

Finally, the court distinguished *Church* and *Parms* on the basis that the stops at the sobriety checkpoints were made in a "traditional criminal law enforcement context,"[77] while the stops in *McHugh* served a "special government need outside the traditional law enforcement context."[78] Therefore, the balancing test articulated in the noted case would not be applied to traditional law enforcement areas.[79] The court further stated that the sobriety checkpoints could not pass constitutional muster under the balancing test because there are less

70. *Id.* at 1266.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1267.
75. *Id.*
76. *Id.* at 1267-68. The court pointed to the fact that the state had 5.3 million acres of wetlands and too few officers to protect it. *Id.* at 1267. Also, "[t]he demarcation between land and water in Louisiana's coastal wetlands is constantly fluctuating and often indistinct." *Id.* For a discussion on the changing wetlands in Louisiana, see generally Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3 (1983).
77. *McHugh*, 630 So. 2d at 1268.
78. *Id.*
79. *Id.*

restrictive means of achieving the state's goal of preventing drunk driving.[80] Hence, the court held that the wildlife stops did not violate the Louisiana Constitution.

The court next discussed whether the stops violated the federal constitution. The court relied on *Sitz*, in which the United States Supreme Court held that unannounced, nighttime sobriety checkpoints were constitutional.[81] The court in the noted case believed that the wildlife stops are even less intrusive than the stops in *Sitz*.[82] Therefore, the court used the balancing test articulated in *Prouse*.[83] First, the court believed that the wildlife stop is less intrusive because the hunters are on alert to the fact that they may stopped.[84] In contrast, motorists have no advanced notice of or opportunity to prepare for stops at unannounced sobriety checkpoints.[85] Second, the court rearticulated its belief that the state has a great interest in protecting its wildlife, that the wildlife stop advances a legitimate state interest, and that there are no less restrictive means with which to advance the state's interest.[86] Therefore, the court held that the state had proved that the wildlife stops were valid under the Fourth Amendment, but limited its holding only to wildlife stops described in the noted case.[87]

On its face, the court's opinion appears to be inconsistent with the law that has been developed in the state since the late 1980s. In the sobriety checkpoint cases, the court seemed to find it necessary to protect individuals against even the most minor privacy invasions. However, when the court is faced with the issue of protecting the environment, it quickly distinguishes the two situations. The *McHugh* opinion appears to have added a new exception to what was the established law in *Parms* and *Church*. When police officers are engaged in stops, the court will not allow warrantless searches without probable cause or reasonable suspicion. However, the balancing of interests test from *Prouse* is used when the search involves a

80. *Id.*

81. *Id.* at 1269; see *supra* notes 20-31 for a discussion of Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990).

82. *McHugh*, 630 So. 2d at 1269.

83. *Id.*; *see* Delaware v. Prouse, 440 U.S. 648, 654-55 (1979); *supra* text accompanying note 38.

84. *McHugh*, 630 So. 2d at 1266.

85. *Id.* at 1269.

86. *Id.* at 1270.

87. *Id.*

governmental agent outside the "traditional law enforcement context."[88] The fact that this exception has not been clearly articulated in any previous case shows the court's willingness and desire to protect the environment.[89] The court was also concerned with the lack of alternatives to protecting wildlife from overly aggressive hunters.

The distinction made by the court may also show its distrust of traditional law enforcement officers. The majority opinion in *Parms* discussed the evils of roadblocks as police-state measures.[90] By allowing agents outside the traditional law enforcement area to make stops, the court may believe that wildlife stops carry less of a danger of being a police-state measure.

The court may wish to reexamine how it would analyze sobriety checkpoints under the balancing test used in *McHugh*. The court could have avoided the distinction it made between *McHugh* and *Church* by applying the balancing test and still holding that sobriety checkpoints are unconstitutional. The court may be heading in this direction because the *McHugh* opinion stated that sobriety checkpoints would not pass constitutional muster even if the balancing test were used.[91] The concurrence also left open the possibility that the sobriety checkpoints could be reexamined under the balancing test.[92] The court may wish to make the law more consistent by applying the balancing test to any situation in which an invasion is sufficiently less than a full arrest. A few other states have found sobriety checkpoints unconstitutional and wildlife checkpoints valid without distinguishing between non-traditional and traditional law enforcement functions.[93] But until the law changes, the court will apply two different standards to police and non-police action.

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88. *Id.* at 1268.

89. *See* Donald C. Douglas Jr., Comment, *A Comment on Louisiana Wildlife Agents and Probable Cause: Are Random Game Checks Constitutional?*, 53 LA. L. REV. 525, 552-53 (1992).

90. State v. Parms, 523 So. 2d 1293, 1303 (La. 1988).

91. *McHugh*, 630 So. 2d at 1268.

92. *Id.* at 1270 (Marcus, J., concurring).

93. *See, e.g.*, Orr v. People, 803 P.2d 509, 512 (Colo. 1990); Drane v. State, 493 So. 2d 294, 296 (Miss. 1986), *cert. denied*, 482 U.S. 916 (1987); State v. Tourtillott, 618 P.2d 423, 434 (Or. 1980), *cert. denied*, 451 U.S. 972 (1981).