Stop in the Name of that Checkpoint: Sacrificing Our Fourth Amendment Right in Order to Prevent Criminal Activity - State v. Mack

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Stop in the Name of that Checkpoint:  
Sacrificing Our Fourth Amendment Right in Order to Prevent Criminal Activity  

*State v. Mack*\(^1\)

I. INTRODUCTION

With the recent escalation of terrorist attacks against the United States, the prevention of crime in general has become a top priority for most Americans. A question arises, however, as to what sacrifices to our personal liberties we have to make to effectively prevent criminal activity? As indicated by the Missouri Supreme Court's holding in *State v. Mack*,\(^2\) the answer may very well be sacrificing our coveted Fourth Amendment right to be free from unreasonable searches and seizures.

The United States Supreme Court declared drug checkpoints illegal because they were pursuing general crime control purposes,\(^3\) but *Mack* seems to find a way to circumvent that holding. The holding in *Mack* allows police to create deceptive checkpoints to pursue general crime control purposes, something which the United States Supreme Court has specifically prohibited. This Note examines the Missouri Supreme Court's decision in *Mack*, considers how the majority came to its conclusion, and considers the policy implications of this questionable decision.

II. FACTS AND HOLDING

At approximately 11:00 p.m. on June 24, 1999, Todd Mack was driving northbound on Highway 61 in Lincoln County, Missouri, when he spotted signs advertising a drug checkpoint one mile ahead.\(^4\) Mack pulled off at the nearest exit, at Old Cap Au Gris road, which was only a quarter of a mile down the road, admittedly to avoid the checkpoint.\(^5\) Mack subsequently encountered uniformed

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1. 66 S.W.3d 706 (Mo. 2002).
2. Id. at 710.
5. Id. at 707-08.
police officers at a different, "ruse" drug checkpoint set up by the City of Troy Police Department.\textsuperscript{6}

In setting up the location of the checkpoint, the City of Troy Police Department selected the exit at Old Cap Au Gris along Highway 61 because there were few reasons to take the exit, except to avoid the advertised checkpoint.\textsuperscript{7} Signs were posted along the highway that led drivers to believe a checkpoint was one exit further down the highway than it was actually located.\textsuperscript{8} The police administered the checkpoint according to a written plan of action, which called for uniformed officers stationed at the top of the ramp to stop all exiting vehicles, record the driver's license and registration numbers, and ascertain the occupants' reason for exiting.\textsuperscript{9} In addition, officers were to look for any signs of possible drug trafficking and were given discretion to interview any drivers and passengers they stopped.\textsuperscript{10} If, while administering the checkpoint, circumstances raised reasonable suspicion, the officers then asked the driver for permission to search the vehicle.\textsuperscript{11} If the driver of the vehicle refused to grant permission, "officers used a drug dog to sniff the exterior of the vehicle."\textsuperscript{12} If the dog indicated the presence of a controlled substance, the police then searched the vehicle.\textsuperscript{13}

On the night in question, one of the officers at the scene stated that Mack almost missed the turn on the exit and "all of a suddenly [sic] veered off onto the off ramp."\textsuperscript{14} At the stop, officers observed that Mack "was very nervous, had glazed and bloodshot eyes, and smelled of alcohol."\textsuperscript{15} The officers questioned Mack's passenger and discovered the passenger was wanted for an outstanding warrant.\textsuperscript{16} Consequently, the police placed the passenger under arrest.\textsuperscript{17} Thereafter, Mack gave the officers permission to search his vehicle.\textsuperscript{18} Officers

\textsuperscript{6} Id. at 707.
\textsuperscript{7} Id. The Old Cap Au Gris exit did not provide gas or food services to motorists. Id. The only reason a motorist would take the exit would be to go to a local high school, a Catholic church, or one of several residences. Id. Neither the high school nor the church was holding any events on the night in question. Id.
\textsuperscript{8} Id. The signs stated "DRUG ENFORCEMENT CHECKPOINT ONE MILE AHEAD" and "POLICE DRUG DOGS WORKING." Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id. "If the driver granted permission, he or she was asked to sign a permission to search form." Id. "[T]he officers then searched the vehicle." Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id. at 708.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
subsequently found various narcotics and drug paraphernalia located under the 
driver’s seat of Mack’s car. Mack was later charged with three counts of 
possession of a controlled substance, including methamphetamine, cocaine, and 
methylphenidate, in violation of Section 195.202 of the Missouri Revised 
Statutes.

On June 20, 2000, Mack filed a motion to suppress the evidence that was 
obtained from the search of his vehicle at the ruse checkpoint. Mack argued 
that the search and seizure were made without a warrant or other lawful authority 
and without probable cause. Mack further argued that exigent circumstances 
did not exist so as to justify the search and seizure.

The trial court denied Mack’s motion to suppress the evidence, basing its 
opinion on State v. Damask, in which the Missouri Supreme Court approved 
a drug checkpoint similar to the one at issue. A short time after the trial court 
made its ruling, however, the United States Supreme Court decided Indianapolis 
v. Edmond, in which it declared drug checkpoints illegal. Specifically, the 
Court in Edmond stated that evidence obtained through the use of drug 
checkpoints, absent “individualized suspicion of wrongdoing,” must be 
suppressed because such checkpoints amount to pursuing general crime control 
purposes in violation of the Fourth Amendment.

After the decision in Edmond, Mack filed a motion for reconsideration, and 
the trial court granted the motion. On reconsideration, the trial court found in 
favor of Mack and ruled to suppress the evidence seized from Mack’s vehicle at
the ruse checkpoint. The State then filed an interlocutory appeal. Because of the general interest and importance of the issue presented, the court of appeals transferred the case directly to the Missouri Supreme Court.

On appeal, the state contended that there was reasonable suspicion of wrongdoing when the officers stopped Mack at the checkpoint, and, thus, the required "quantum of individualized suspicion," as required by Edmond, was present. Mack, on the other hand, argued that his actions did not provide the police officers with the requisite amount of individualized suspicion and that the purpose of the ruse drug checkpoint was to pursue general crime control, which was prohibited by Edmond. As a result, he argued, by stopping him at the checkpoint, the police violated his Fourth Amendment right to be free from unreasonable searches and seizures.

The Missouri Supreme Court, in a 4-3 decision, reversed the trial court's decision and remanded the case for further proceedings. In an opinion by Chief Justice Limbaugh, the Missouri Supreme Court found that the state had met its burden of proof to show that the checkpoint stop did not violate the Fourth Amendment because the requisite amount of individualized suspicion was created in the use of the deceptive drug checkpoint.

III. LEGAL BACKGROUND

A. The Fourth Amendment

The Fourth Amendment to the United States Constitution guarantees the right to be free from unreasonable searches and seizures. The underlying purpose of the Fourth Amendment has been described as "safeguard[ing] the privacy and security of individuals against arbitrary invasions by government officials." Furthermore, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession

29. Id.
30. Id.
31. Id.
32. Id. at 709 (citing Edmond, 531 U.S. at 47).
33. Id. at 708 (citing Edmond, 531 U.S. at 48).
34. Id.
35. Id. at 710.
36. Id.
37. "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." U.S. CONST. amend. IV.
and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."39 In 1967, the United States Supreme Court declared that the protection promised by the Fourth Amendment applies to any governmental search or seizure that interferes with a person's reasonable expectation of privacy.40 To establish a constitutional violation, therefore, a defendant must establish (1) an actual, subjective expectation of privacy, (2) that society recognizes as being reasonable.41

The Fourth Amendment's protection from unreasonable searches and seizures by the government extends not only to traditional arrests but also to brief investigatory stops of persons or vehicles that fall short of a traditional arrest.42 Whenever a police officer approaches an individual and restrains his freedom to walk away, he has "seized" that person for purposes of the Fourth Amendment.43

Because the "balance between the public interest and the individual's right to personal security," tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot."44

Consequently, a search or seizure that falls short of a traditional arrest is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.45

"Individualized suspicion" justifying the minimally intrusive Terry46 stop is present "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be

42. Terry, 392 U.S. at 16 (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.").
43. Id.
The United States Supreme Court stated in 2001 that the "degree of individualized suspicion required is a determination that a sufficiently high probability of criminal conduct makes the intrusion on the individual's privacy interest reasonable." The Court further stated that, although the Fourth Amendment ordinarily requires probable cause, a lesser degree of suspicion satisfies the Constitution when the balance of governmental and privacy interests makes such a standard reasonable. Moreover, if the courts allowed stops for the primary purpose of general crime-fighting without requiring individualized suspicion, they would "in effect obliterate the rule requiring individualized suspicion for anti-crime stops."

Furthermore, the Supreme Court has declared that persons stopped for any purpose at motorist checkpoints set up by government officials have been "seized" under the Fourth Amendment. Nevertheless, in limited circumstances involving checkpoints, courts have held that individualized or reasonable suspicion may not be necessary to search and seize an automobile. A person's expectation of privacy with respect to his automobile is significantly less than the expectation of privacy a person may have at his home or office. This lesser expectation derives not only from the fact that the area to be searched is frequently in plain view, but also from the fact that automobiles, unlike homes, are subjected to much broader governmental regulation and inspection requirements. Thus, in limited circumstances, courts may allow checkpoint stops without individualized suspicion as long as the stops are conducted for narrow regulatory and safety purposes related to driving.

47. Id. at 30.
50. Edmond, 531 U.S. at 46-47.
51. Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 450 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint."); Brower v. County of Inyo, 489 U.S. 593, 597 (1989) (A Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied."); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976) ("It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment.").
52. See Sitz, 496 U.S. at 455 (Court upheld a sobriety checkpoint aimed at removing drunk drivers from the road); Martinez-Fuerte, 428 U.S. at 561 (Court upheld brief, suspicionless seizures of motorists at a fixed border patrol checkpoint designed to intercept illegal aliens).
54. Id.
55. See Sitz, 496 U.S. at 454-55.
Whether a checkpoint stop is reasonable is determined by a balancing test established in Brown v. Texas. The test weighs 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 purpose in weighing these factors is to "assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Furthermore, in evaluating the legitimacy of a stop, courts consider the totality of the circumstances, and, in some cases, after doing so, factors that "by themselves are quite consistent with innocent travel may collectively amount to reasonable suspicion."

B. History of Checkpoints

The first major decision allowing checkpoints was United States v. Martinez-Fuerte. In that case, the United States Supreme Court found that immigration checkpoints around the United States-Mexico border were constitutional. The Court stated that all cars may be stopped at a fixed checkpoint and opined that the expectation of privacy in a vehicle was significantly less than what would be expected in one's residence. Furthermore, the intrusion on the interests of motorists was minimal due to the procedures used by the police in conducting the checkpoints. The Court also noted that the stops furthered the general public interest in preventing the influx of illegal aliens, and, therefore, the interference with Fourth Amendment freedoms was justified.

On the other hand, in Delaware v. Prouse, the Court struck down checkpoints as unconstitutional when individual patrolmen made discretionary stops to ensure that drivers were properly licensed and their cars were properly registered. The police making the stops in Prouse had neither probable cause nor reasonable suspicion to believe that any particular car they stopped was being driven in violation of the law. Furthermore, the police exercised unbridled discretion in conducting the checkpoint. Although the Court found these stops unconstitutional, the Court nevertheless suggested that it would probably be

57. Id. at 50-51.
58. Id. at 51.
60. 428 U.S. 543 (1976).
61. Id. at 561-62.
62. Id. at 567.
63. Id. at 562.
64. 440 U.S. 648 (1979).
65. Id. at 663.
66. Id. at 654.
constitutionally permissible for the police to set up a checkpoint at which every car is stopped to verify compliance with licensing and registration laws, because this would not entail any police discretion.\footnote{Id. at 663.}

Following Prouse, this dictum essentially became the law when the Supreme Court upheld the constitutionality of sobriety checkpoints in\textit{Michigan Department of State Police v. Sitz}.\footnote{496 U.S. 444 (1990).} In Sitz, the police had set up a fixed checkpoint on a highway and stopped all cars passing through the checkpoint.\footnote{Id. at 447-48.} The Court found that sobriety checkpoints were constitutionally permissible due to the significant problem of drunken driving in Michigan.\footnote{Id. at 455.} The Court determined that the slight burden the checkpoint imposed on law-abiding drivers justified the slight infringement on their personal liberty.\footnote{Id.} The Court opined that such stops may be made of all drivers even though the police have no particularized suspicion about any one driver.\footnote{Id. at 454-55.} The logic in Sitz only applies, however, when the police stop all cars passing through a checkpoint. There still cannot be any discretion on the part of individual officers unless they have particularized suspicion concerning an individual.\footnote{Id.}

In 2000, however, the United States Supreme Court’s decision in \textit{City of Indianapolis v. Edmond} declared drug intervention checkpoints illegal.\footnote{531 U.S. 32 (2000).} In \textit{Edmond}, the police set up a series of six checkpoint locations, at each of which they stopped a predetermined number of vehicles.\footnote{Id. at 34-35.} Although officers checked each driver’s registration and license, the primary purpose of the checkpoints was to check for illegal drugs.\footnote{Id. at 40-41.} To this end, the officers conducted a plain-view exam of each stopped vehicle from the outside, and a drug-detection dog walked around the outside of the vehicle.\footnote{Id. at 40.} The Court noted that it had, in the past, authorized suspicionless checkpoint stops under certain circumstances, but it had never approved a checkpoint program “whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”\footnote{Id. at 41.} The checkpoint program in this case, according to the Court, fell into this ordinary criminal wrongdoing class.
because its primary purpose was to detect illegal narcotics, and, thus, the Court found that the checkpoint program violated the Fourth Amendment. 79

In support of its decision, the Court stated that it feared that if the checkpoints at issue were found constitutional, "there would be little check on the ability of the authorities to construct [checkpoints] for almost any conceivable law enforcement purpose." 80 Moreover, "[w]ithout drawing the line at [checkpoints] designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." 81 Thus, the Court held that the stops in Edmond, to the extent they were not accompanied by individualized suspicion of wrongdoing, were unreasonable and, thus, violated the Fourth Amendment. 82 Consequently, after Edmond, all drug checkpoints are prohibited, at least as traditionally structured, unless "individualized suspicion" exists as to each vehicle that is stopped and searched.

C. Ruse Drug Checkpoints

Recently, law enforcement officers in various states have begun to utilize "ruse" drug checkpoints. 83 Invariably, these checkpoints involve signs along a highway informing travelers that there is a drug checkpoint ahead. If the driver attempts to avoid the checkpoint by exiting, police pull the driver over at the ruse checkpoint. Referring to a ruse checkpoint in Texas, one officer stated, "[W]e're just using the signs [of a checkpoint ahead] to see who panics trying to avoid the checkpoint. The key to this deal is they have to commit a traffic violation." 84

While few cases have addressed the constitutionality of ruse drug checkpoints, the Missouri Supreme Court addressed this very issue in State v. Damask. 85 Damask involved two consolidated cases addressing similar drug

79. Id. at 41-42.
80. Id. at 42.
81. Id.
82. Id. at 47.
85. 936 S.W.2d 565 (Mo. 1996). Note that State v. Damask was decided before the United States Supreme Court's decision to ban drug checkpoints. See supra notes 74-82 and accompanying text.
checkpoint operations. Both of these checkpoint operations involved signs placed along a highway advertising a drug checkpoint ahead. Drivers who wished to avoid the advertised checkpoint could take an earlier exit, but the drivers then encountered the drug checkpoint that they had anticipated would be at the next exit on the highway. In both cases, the exits that the police selected for the real checkpoint were in remote areas that offered no services to travelers. Further, the police stopped all vehicles who passed through the exits.

The defendants in Damask challenged the constitutionality of the initial stop of their vehicles at the ruse checkpoint, arguing it violated their Fourth Amendment right to be free from unreasonable searches and seizures. Responding to this argument, the court in Damask noted that the deceptive drug checkpoints at issue were modeled after successful checkpoint operations and that the checkpoints were planned to increase the likelihood of such success. The court held that ruse drug checkpoints were constitutionally permissible because they resulted in minimal intrusion on the motorists and they effectively advanced a sufficiently important state interest.

On the other hand, the Sixth Circuit Court of Appeals reached a contrary conclusion in United States v. Huguenin, in which it decided that a drug/DUI checkpoint ruse similar to the one in Damask violated the Fourth Amendment. The Sixth Circuit found that the primary purpose of the checkpoint was to detect narcotics and the fact that the checkpoint also had a secondary purpose of catching drunk drivers did not make it valid. The court further found that the motorists in that case were taken by "surprise" because they were not stopped at the designated location for the checkpoint, but rather they were stopped elsewhere. Consequently, the court in Huguenin held that the checkpoint at

86. Id. at 567.
87. Id. at 568-69.
88. Id.
89. Id.
90. Id.
91. Id. at 570.
92. Id. at 573. These checkpoints were modeled after previous drug checkpoints in Phelps County. Id. "Evidence showed that the checkpoint program in Phelps County had resulted in the seizure of more than thirty 'loads' of contraband." Id.
93. Id. at 575.
94. 154 F.3d 547 (6th Cir. 1998).
95. Id. at 563.
96. Id. at 555-56.
97. Id. at 556. "[W]hile checkpoints must stop motorists on a non-random and neutral basis, in the present case the checkpoint was intentionally set up as a trap, targeting motorists who left the Interstate and who thought they would avoid the highway checkpoint for whatever reason." Id. at 561 (emphasis added).
issue failed to create the kind of individualized suspicion required under the Fourth Amendment. The court further noted that the checkpoint actually caused greater Fourth Amendment concerns than the typical checkpoint because its surreptitious nature resulted in unreasonable and unnecessary surprise to the law-abiding motorist.  

On the other hand, in United States v. Brugal, the Fourth Circuit held that a driver's evasive behavior in exiting a highway to avoid an advertised drug checkpoint did support a finding of reasonable suspicion. In this case, the Court noted that reasonableness was established by significant efforts to reduce the legitimate reasons for taking the exit, including setting it up in an isolated area where no services were offered.

More recently, in 2002, the United States Court of Appeals for the Eighth Circuit addressed the constitutionality of ruse drug checkpoints in United States v. Yousif. The court in Yousif held that a ruse drug checkpoint violated the Fourth Amendment when its primary purpose was the interdiction of drug trafficking. In Yousif, the Missouri Highway Patrol had set up a ruse drug checkpoint and placed signs along the highway that warned travelers that they were approaching a drug checkpoint further down the highway. The actual checkpoint, however, was located on an exit ramp a short distance past the signs. In holding that this checkpoint violated the Fourth Amendment, the court stated that the mere fact that some vehicles took the exit after passing the drug checkpoint signs did not create individualized suspicion as to every driver who took the exit. Indeed, the court stated that "while some drivers may have wanted to avoid being caught for drug trafficking, many more took the exit for wholly innocent reasons—such as wanting to avoid the inconvenience and delay of being stopped or because it was part of their intended route." The court in Yousif also noted that "[g]eneral profiles that fit large numbers of innocent people do not [alone] establish reasonable suspicion" and that the defendant in the case never would have been stopped by the police but

98. Id. at 557.
99. Id. at 556.
100. 209 F.3d 353 (4th Cir. 2000).
101. Id. at 361.
102. Id.
103. 308 F.3d 820 (8th Cir. 2002).
104. Id. at 823.
105. Id.
106. Id.
107. Id. at 827.
108. Id. at 827-28.
109. Id. at 828; see, e.g., United States v. Eustaquio, 198 F.3d 1068, 1071 (8th Cir. 1999).
for the existence of the illegal checkpoint.\textsuperscript{110} Moreover, according to the court, because “there is nothing inherently unlawful or suspicious about a vehicle . . . exiting the highway, it should not be the case that the placement of signs by the police in front of the exit ramp transforms that facially innocent behavior into grounds for suspecting criminal activity.”\textsuperscript{111} Extending this logic further, the court stated that reasonable suspicion cannot be manufactured by the police themselves.\textsuperscript{112} Because of this and the other reasons expressed by the court, the court in \textit{Yousif} held that the initial stop and detention of the defendant’s car at the ruse drug checkpoint constituted an unlawful seizure under the Fourth Amendment.\textsuperscript{113}

Notwithstanding these decisions, there have been very few cases to address the constitutionality of ruse drug checkpoints, especially after \textit{Edmond}. It is clear, however, that there is a decided split of opinions among the courts that have addressed this controversial issue.

\section*{IV. Instant Decision}

\subsection*{A. Majority Opinion}

In \textit{State v. Mack}, the Missouri Supreme Court addressed whether a ruse drug enforcement checkpoint violated the Fourth Amendment of the United States Constitution.\textsuperscript{114} The court began its analysis by recounting the facts and holding of the United States Supreme Court in \textit{City of Indianapolis v. Edmond}.\textsuperscript{115} In \textit{Edmond}, the Court found the drug checkpoints at issue unconstitutional because they were used to pursue “primarily general crime control purposes” and that “stops can only be justified by some quantum of individualized suspicion.”\textsuperscript{116} The Missouri Supreme Court then framed the issue as whether the deceptive drug checkpoint scheme before it generated the necessary quantum of individualized suspicion as required under \textit{Edmond}.\textsuperscript{117} In considering this issue, the court noted that it is reasonable to conclude that

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\textsuperscript{110} \textit{Yousif}, 308 F.3d at 829.
\textsuperscript{111} \textit{Id}.
\textsuperscript{112} \textit{Id}; cf. \textit{Wong Sun v. United States}, 371 U.S. 471, 485 (1963) ("A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked.").
\textsuperscript{113} \textit{Yousif}, 308 F.3d at 829.
\textsuperscript{114} \textit{State v. Mack}, 66 S.W.3d 706, 709 (Mo. 2002).
\textsuperscript{115} \textit{Id} at 708-09.
\textsuperscript{116} \textit{Id} at 708 (quoting \textit{City of Indianapolis v. Edmond}, 531 U.S. 32, 47 (2000)) (internal quotation marks omitted).
\textsuperscript{117} \textit{Id} at 709.
\end{flushleft}
drivers with drugs would “take the bait” of the deceptive drug checkpoint and exit the highway to avoid being questioned at the next exit where the checkpoint was advertised to be taking place.\(^\text{118}\) The *Mack* majority also stated that it was reasonable to conclude that the drivers taking the exit at issue had drugs because there were no services offered at the exit and the checkpoint was conducted on an evening during which there would otherwise have been little traffic on the exit road.\(^\text{119}\) Thus, the court concluded that the deceptive drug checkpoint at issue was generally effective.\(^\text{120}\) In addition, the court stated that, even if the deceptive drug checkpoint scheme alone did not constitute individualized suspicion, Mack’s particular conduct when exiting the highway was sufficient to create individualized suspicion.\(^\text{121}\) In support of this, the court noted that Mack “suddenly veered off onto the off ramp” and “almost missed the turn,” as if he made the decision to exit only upon learning that a checkpoint was allegedly ahead.\(^\text{122}\) Because of this, and because the checkpoint itself was set up in such a way as to create individualized suspicion, the court held that the stop of Mack’s vehicle did not violate the Fourth Amendment.\(^\text{123}\)

**B. The Dissent**

In a dissenting opinion, Judge Stith, joined by two other judges, vehemently opposed the majority’s opinion and stated that the instant case fell within the parameters of *City of Indianapolis v. Edmond*.\(^\text{124}\) The dissent first noted that the main issue before the court was whether the procedures used to set up the checkpoint created the kind of individualized suspicion required by *Edmond*, when considered from an objective standpoint.\(^\text{125}\) The dissent then noted that while *Edmond* requires individualized suspicion, the police in the instant case were operating on group suspicion as evidenced by the fact that they pulled over every driver that exited.\(^\text{126}\) Next, the dissent stated that a court cannot approve an unconstitutional seizure on the basis that it is an effective law enforcement procedure.\(^\text{127}\) Furthermore, even if it could, the dissent argued that ruse

\(^{118}\) *Id.*

\(^{119}\) *Id.*

\(^{120}\) *Id.*

\(^{121}\) *Id.*

\(^{122}\) *Id.* at 710.

\(^{123}\) *Id.*

\(^{124}\) *Id.* at 710-11 (Stith, J., dissenting).

\(^{125}\) *Id.* at 714 (Stith, J., dissenting).

\(^{126}\) *Id.* at 714-15 (Stith, J., dissenting).

\(^{127}\) *Id.* at 715 (Stith, J., dissenting).
checkpoints are not effective enough to distinguish them from other drug checkpoints and that there are numerous valid reasons why law-abiding citizens might exit before the advertised checkpoint. Finally, the dissent stated that the police did not, in fact, stop Mack because he swerved, but rather because he exited. Judge Stith, therefore, concluded that the stop violated the Fourth Amendment because the primary purpose of the stop was to pursue generalized criminal activity, which had been declared unconstitutional in Edmond.

V. COMMENT

In State v. Mack, the Missouri Supreme Court set a dangerous precedent that, in effect, allows law enforcement authorities to sidestep the United States Supreme Court’s decision in Edmond banning all drug checkpoints that stop vehicles without individualized suspicion. The holding in Mack encourages law enforcement authorities to develop situations that circumvent established law and to take deceptive steps to attempt to create individualized suspicion of criminal wrongdoing.

In Mack, the majority opinion listed several objective factors about the stop of Mack’s vehicle at the checkpoint at issue that satisfied the “quantum of individualized suspicion” required under Edmond. Included in the majority’s analysis was the fact that Mack swerved onto the exit after passing the signs posted along the highway warning of a drug checkpoint ahead. In addition, the majority stated that it was reasonable to assume that criminals would “take the bait” and that there were very few reasons why any motorist who was not engaged in criminal activity would take that particular exit. The court argued that all of this showed that the checkpoint was likely to be effective in catching criminals, and, therefore, the court found the tactic acceptable. This sort of argument, however, was directly rejected by the United States Supreme Court in Sitz when it stated that the effectiveness of a checkpoint should not be taken into

128. Id. at 715-16 (Stith, J., dissenting). The record does not support the assumption that only those engaged in criminal activity would “take the bait” and exit the highway in response to drug checkpoint signs posted along the highway. Id. at 715 (Stith, J., dissenting). “[O]f the 60 to 150 cars that left the highway, 46 drivers were talked to by police and 25 ‘or more’ were detained so that a search could be made.” Id. at 715 n.3. Although the officer’s numbers were inexact, “he recalled some five drug-related arrests, including defendant’s and four arrests for misdemeanor drug offenses.” Id.

129. Id. at 716-20 (Stith, J., dissenting); see infra text accompanying notes 143-47.
130. Mack, 66 S.W.3d at 720 (Stith, J., dissenting).
131. Id. (Stith, J., dissenting).
132. Id. at 709-10.
133. Id. at 710.
134. Id. at 709.
account when determining the constitutionality of the procedure as a whole. Consequently, even though the state attempted to list several objective factors to justify the stop, its case necessarily boils down to one single argument: that the act of avoiding a checkpoint, by itself, necessarily creates a reasonable suspicion of criminal activity.

The majority of jurisdictions that have addressed the more general issue of flight from police confrontation have held that the mere act of avoiding confrontation does not create reasonable and articulable suspicion. For example, in State v. Talbot, the Utah Court of Appeals specifically addressed whether avoiding a roadblock amounted to reasonable suspicion that the occupants of the vehicle in question were involved in criminal activity. The state contended that when a person obviously avoids confrontation with the police, that fact alone is sufficient to create a reasonable suspicion that criminal activity is afoot. The court rejected this argument and stated that flight alone is insufficient to create a reasonable suspicion. The court further stated that its position was:

[I]n keeping with the United States Supreme Court’s position that a person need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective

135. Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 453-54 (1990) (The courts must not consider the relative effectiveness of a chosen path of law enforcement activity in determining its constitutional propriety. So long as the technique employed is reasonable, the decision whether to use it or some other approach, whether more or less effective, is left in the hands of law enforcement officials.).

136. See, e.g., Hinton v. United States, 424 F.2d 876, 879 (D.C. Cir. 1969) (flight is not a “reliable indicator of guilt without other circumstances to make its import less ambiguous”); People v. Thomas, 660 P.2d 1272, 1276 (Colo. 1983) (“[A]n effort to avoid police contact, by itself, is insufficient to support a stop.”); In re D.J., 532 A.2d 138, 141 (D.C. 1987) (Defendant “merely attempted to walk away, behavior indicative simply of a desire not to talk to police. No adverse inference may be drawn from such a desire.”); People v. Fox, 421 N.E.2d 1082, 1086 (Ill. App. Ct. 1981) (“[T]he mere fact that the vehicle drove away at the approach of a squad car does not serve as a justifiable basis for conducting a Terry stop.”); People v. Shabaz, 378 N.W.2d 451, 460 (Mich. 1985) (flight “does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity is afoot”). But see Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (unprovoked flight inside an area of known criminal activity provided police with reasonable suspicion); United States v. Pope, 561 F.2d 663, 669 (6th Cir. 1977) (flight “may furnish sufficient ground for a limited investigative stop”).


138. Id. at 492.

139. Id. at 493.
grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.\textsuperscript{140}

Consequently, the Talbot court stated that although their decision might be at odds with a few checkpoint cases, it was very much in keeping with the majority of cases addressing the more general issue of avoiding a confrontation with the police.\textsuperscript{141} If a person may choose to avoid or ignore an officer when approached on the street, there is no reason why he or she should not be able to avoid an equally, if not more, intrusive confrontation at a roadblock.\textsuperscript{142}

The Supreme Court of Pennsylvania has also addressed the issue. In Commonwealth v. Scavello,\textsuperscript{143} the defendant challenged a traffic stop on the basis that he was only stopped because he had made a legal u-turn to avoid a sobriety checkpoint. The court held that avoidance of the checkpoint was, by itself, an insufficient justification for the traffic stop and noted that "there is no requirement that a driver go through a [checkpoint]."\textsuperscript{144}

\textsuperscript{140} Id. at 494 (citing Florida v. Royer, 460 U.S. 491, 498 (1983) (citations omitted) (emphasis added)).

\textsuperscript{141} Id. at 495.

\textsuperscript{142} Id. at 494. Moreover, legal scholars have suggested that a person may lawfully choose to avoid or to not cooperate at a roadblock. See, e.g., Lance J. Rodgers, The Drunk-Driving Roadblock: Random Seizure or Minimal Intrusion?, 21 CRIM. L. BULL. 197, 207-08 (May-June 1985); William P. Weiner & Michael D. McCulloch, Sobriety Checkpoints in Michigan: Balancing Sobriety and Propriety Under the Fourth Amendment, 4 COOLEY L. REV. 247, 268 n.108 (1987).

\textsuperscript{143} 734 A.2d 386 (Pa. 1999).

\textsuperscript{144} Id. at 388; see also Howard v. Voshell, 621 A.2d 804, 807 (Del. 1992) (lawful u-turn 1000 feet from a sobriety checkpoint did not constitute reasonable and articulable suspicion for stop); United States v. Lester, 148 F. Supp. 2d 597, 605 (D. Md. 2001) (u-turn 1500 feet away from a temporary gate check did not give rise to reasonable, articulable suspicion to justify the stop); State v. D'Angelo, 605 A.2d 68, 71-72 (Me. 1992) (Glassman, J., dissenting) (The mere presence of a roadblock does not eliminate the requirement that there be an objectively reasonable suspicion of criminal activity to justify the stop of a vehicle not passing through a checkpoint. "Anything less would countenance roving stops, a practice declared unconstitutional by the Supreme Court in Delaware v. Prouse."). State v. Bryson, 755 N.E.2d 964, 969 (Ohio Ct. App. 2001) ("[L]egal turn within sight of a roadblock does not give a police officer a reasonable basis to suspect that the driver is involved in criminal wrongdoing."). But see United States v. Brugal, 209 F.3d 353, 360-61 (4th Cir.), cert. denied, 531 U.S. 961 (2000) (a driver's evasive behavior in exiting the highway to avoid a ruse drug checkpoint supports a finding of reasonable suspicion); Tims v. State, 760 S.W.2d 78, 79 (Ark. Ct. App. 1988) (act of defendant of running through a roadblock gave police a reasonable suspicion to detain him); Snyder v. State, 538 N.E.2d 961, 965 (Ind. Ct. App. 1989) (a driver's attempt to avoid a roadblock does raise reasonable suspicion that the driver may be committing a crime).
Furthermore, after *Mack* was decided, the Eighth Circuit Court of Appeals decided *United States v. Yousif*, in which it declared a ruse drug checkpoint unconstitutional "insofar as its primary purpose was the interdiction of drug trafficking." 145 The *Yousif* court, thus, came to a completely opposite conclusion as the court in *Mack*. 146 The court in *Yousif* directly undercut the *Mack* court's reasoning when it stated that the mere fact that some vehicles took the exit after passing the drug checkpoint signs did not create individualized suspicion of illegal activity as to every driver. 147

In *Yousif*, the court further noted that the defendant never would have been stopped by the police but for the existence of the illegal checkpoint. 148 Likewise, in *Mack*, the driver of the vehicle did not commit any traffic violations, so it seems likely he would not have been stopped but for the existence of the checkpoint. Moreover, the court in *Yousif* stated "there is nothing inherently unlawful or suspicious about a vehicle ... exiting the highway, [so] it should not be the case that the placement of signs by the police in front of the exit ramp transforms that facially innocent behavior into grounds for suspecting criminal activity." 149 In addition, *Yousif* stated that reasonable suspicion cannot be manufactured by the police themselves. Nevertheless, this is exactly what the police did in *Mack*. 150 Therefore, the Eighth Circuit Court of Appeals held that individualized suspicion is not created simply by avoiding a checkpoint, which is a decision in direct opposition to *Mack*.

Thus, whether it was in the context of a general roadblock, 151 a sobriety checkpoint, 152 or a ruse drug checkpoint, 153 these jurisdictions directly addressed the issue that confronted the Missouri Supreme Court in *Mack*: whether avoiding a checkpoint is, in itself, sufficient justification for a seizure under the Fourth Amendment. The court in *Mack* simply hedged the issue of whether avoiding the roadblock, by itself, was enough to constitute reasonable suspicion for the stop of Mack's vehicle. The majority stated that it was reasonable to conclude that drivers with drugs would exit to avoid the checkpoint. Even if it is reasonable to make this conclusion, however, this does not automatically amount to individualized suspicion to stop *every* vehicle that exits. This

146. *Id.* at 829 n.4.
147. *Id.* at 827.
148. *Id.* at 829.
149. *Id.*
150. *Id.*; cf. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) ("A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked.").
reasoning by the majority comes dangerously close to suggesting that law enforcement may stop all vehicles at a drug checkpoint because there may be a criminal among some of the vehicles. If this were the case, the purpose of the checkpoints involved would be for general crime control, and that was specifically prohibited under Edmond.

The majority opinion further stated that "even if the deceptive drug checkpoint scheme did not alone constitute 'individualized suspicion,' [the] defendant's particular conduct in exiting at the checkpoint must also be considered."\(^{154}\) This argument is also flawed, however, because every driver who exited at the checkpoint was stopped, not just those drivers who "swerved" or otherwise committed suspicious acts.\(^{155}\) Hence, according to the majority's approach, a suspicion arose as to all exiting vehicles, "based solely on the fact that they had exited the highway after, presumably, seeing the drug checkpoint sign."\(^{156}\) Because the Supreme Court has held that someone has the right to avoid talking to the police at all,\(^{157}\) it logically follows that a person should also have the right to avoid a checkpoint if one so chooses. The reasoning used by the Mack court, therefore, is incorrect.

Finally, the majority opinion in Mack suggests that few law-abiding motorists would take the exit at issue because the checkpoint was set up in an isolated area.\(^{158}\) Even if this were relevant, however, the court is making an erroneous assumption because, as other courts have noted, there are many valid reasons why a law-abiding citizen may wish to avoid a checkpoint. As the dissenting opinion noted, "[t]he reasons for desiring not to encounter a checkpoint could range from a desire to get to one's home or other area destination, to a desire to avoid having to deal with a delay in one's travel plans, to a fear of the police due to prior unpleasant encounters with other officers in the past."\(^{159}\) Or the driver may simply wish to avoid "the unusual process of being stopped on the Interstate highway."\(^{160}\) Likewise, in Michigan Department of State Police v. Sitz,\(^{161}\) the United States Supreme Court noted "those who have found—by reason of prejudice or misfortune—that encounters with the police

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155. Id. at 714 (Stith, J., dissenting) (the record indicates that 60 to 150 cars exited during the drug checkpoint's operation and all of them were stopped).
156. Id. (Stith, J., dissenting).
157. See Florida v. Royer, 460 U.S. 491, 498 (1983) (a person need not answer any questions the police ask; in fact, the person "may decline to listen to the questions at all and may go on his way"); Brown v. Texas, 443 U.S. 47, 52-53 (1979) (a Texas statute could not require persons to identify themselves in the absence of reasonable suspicion).
158. Mack, 66 S.W.3d at 709.
159. Id. at 716 (Stith, J., dissenting).
160. Id. at 717 (Stith, J., dissenting).
may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior."  

Furthermore, "[b]eing stopped by the police is distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe."  

It is an erroneous assumption, therefore, that only criminals, and not law-abiding citizens, will "take the bait" and exit the highway to avoid a deceptive drug checkpoint.

Consequently, the police in Mack "created" individualized suspicion in order to stop motorists for general crime control purposes. If police in Missouri are allowed to do this in Missouri, where would it stop? As the dissent noted:

There is something fundamentally unsettling and counter-intuitive about labeling as suspicious a person’s conduct in avoiding the state’s own unconstitutional conduct . . . [because] the drug checkpoint that the police made drivers believe was one mile ahead on the highway itself would have been unconstitutional under Edmond.

Nevertheless, the Mack court allowed legal activity to be used as a basis for interfering with the fundamental right to be free from unreasonable searches and seizures. Today, the court’s decision affects only drug checkpoints. Tomorrow, however, the court’s decision could affect much more than we would like to imagine.

VI. CONCLUSION

The holding in State v. Mack impermissibly expands the power of law enforcement authorities to create checkpoints that would otherwise have been unlawful simply by setting up “ruse” checkpoints. After Mack, Missouri police have the power to enforce a checkpoint for any general crime control purpose, so long as they create circumstances which allegedly lead to individualized suspicion. Police can accomplish this simply by posting a sign along the highway that informs motorists of a checkpoint ahead, and stopping any motorist who attempts to exit before he or she reaches the advertised checkpoint. By allowing this kind of activity, the court in Mack allows police to create individualized suspicion where there originally is none. In the process, the court in Mack is completely ignoring the conclusions of the United States Supreme Court’s decision in Edmond, which was to limit police power in the absence of reasonable suspicion.

162. Id. at 465 (Stevens, J., dissenting).
163. Id. (Stevens, J., dissenting).
164. Mack, 66 S.W.3d at 717 (Stith, J., dissenting).
Furthermore, Mack is a disturbing case because its holding does not establish any real boundaries for law enforcement officers in Missouri. As long as law enforcement officers follow “proper” procedures in developing ruse checkpoints, they can conceivably develop a checkpoint for any purpose. Although crime control and prevention is a top priority for many citizens of Missouri, the price is too high when it means Missourians have to give up their constitutional right to be free from unreasonable searches and seizures.

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