

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

State of Delaware, : Cr.A. No. 06-08-1974
 : Case No. 0608016750
 vs. :
 :
 Adrian Gonzalez-Ortiz, :
 :
 Defendant. :

Decision upon Defendant's Motion to Suppress

Date of Hearing: December 4, 2006

Final Submission: January 30, 2007

Defendant's Motion to Suppress is denied.

Nicholas Krayner, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware 19901, attorney for the State.

William G. Bush, IV, Esquire, 214 South State Street, Dover, Delaware 19901 Delaware 19899, attorney for Defendant.

Trader, J.

The defendant was arrested at a sobriety checkpoint and charged with driving under the influence pursuant to 21 Del.C. Sec. 4177. The defendant has filed a motion to suppress on the grounds that the “Checkpoint Strike Force” has failed to demonstrate sufficient compliance with Checkpoint Strike Force Sobriety Checkpoint Procedures required by Office of Highway Safety (OHS). I hold that the Checkpoint Strike Force has carefully complied with substantially all of the OHS procedures in setting up and operating its checkpoint. Accordingly, the defendant’s motion to suppress is denied.

The relevant facts are as follows: Under the OHS Program, federal monies are allocated to OHS for the purpose of establishing a program to prevent impaired driving and promote public safety. Lisa Moore is the program manager for OHS and authorizes highway checkpoints based on statistical data that she receives from municipal police forces concerning the number of DUI arrests, alcohol related fatal crashes, and alcohol related injury crashes in a particular area. The local police officers participating in the Checkpoint Strike Force are given authority by the Delaware State Police for a period of one year and may make arrests outside their jurisdiction. The attorney general has authority to grant statewide police arrest enforcement powers pursuant to 29 Del.C. Sec. 2516(a).

The location of the checkpoint shall be based upon a demonstrated problem with persons driving under the influence in that particular area and these locations shall be selected by OHS. The checkpoints shall be selected on the basis of alcohol related fatal crashes, alcohol related personal injury or property damage crashes, and in areas with a high incidence of DUI arrests.

Statistics for the year 2005 submitted by the Milford Police Department indicated that fifty-two alcohol related crashes occurred on Route 1 within the jurisdiction of the City of Milford. (State's Exhibit 5). Statistics also showed that there were forty-seven DUI arrests in 2005 on Route 1 within the City of Milford's jurisdiction. (State's Exhibit 6). Other statistics show that the most motor vehicle crashes occurred on Friday and Saturday between the hours of 8:00 P.M. and 4:00 A.M. (State's Exhibit 4).

It is required that the checkpoints be conducted in a safe location to allow approaching traffic ample time to realize that a stop is imminent. Flares, reflectors, and signs shall be used to alert approaching traffic concerning the checkpoint. The checkpoint must be conducted in a manner designed to minimize anxiety on the part of the drivers who are stopped. The police officer at the checkpoint should clearly identify himself and the reason for setting up the roadblock. This introduction by the police officer gives him ample time to observe the driver and detect an odor of alcohol emanating from the vehicle.

All vehicles shall be stopped at a checkpoint and there must be a supervisor at the checkpoint that has the responsibility for recording and compiling the results of the checkpoint. The checkpoints shall be four hours in duration and occur between the hours of 8:00 P.M. and 4:00 A.M. The checkpoints must be manned by at least six officers and all officers must wear a reflective safety vest. All officers who are responsible for administering the field sobriety tests to any persons believed to be under the influence of alcohol must have completed the National Highway Traffic Safety Administration's (NHTSA) Standardized Field Sobriety Testing and the Horizontal Gaze Nystagmus

Course (HGN). There is also a press release every week setting forth notice a week in advance of the sobriety checkpoint location.

The director of OHS reviews the statistics submitted by the local police administration and makes a decision based on the submitted data. The decision to establish a check point is based on the number of alcohol related personal injury crashes, and the number of DUI arrests. Because of the large number of personal injury crashes and DUI arrests on Route 1, the Director of OHS authorized a checkpoint on Route 1 in the City of Milford and this was based on the statistical data submitted by the Milford Police Department. The supervisor of the roadblock selected the exact location that the roadblock would be placed on Route 1 in the City of Milford. During the checkpoint 59 cars were stopped and 3 persons were arrested for DUI.

Corporal Todd Michelau was the supervisor of the Checkpoint Strike Force. He set up the roadblock in a safe area on Route 1, Milford, Delaware. The police officers stopped all vehicles going northbound on Route 1 on August 5 and August 6, 2006 between 10:00 P.M. and 2:00 A.M. There were flares and emergency equipment that was activated to warn approaching motorists of the roadblock and there was also a sign 75 to 100 feet from the roadblock. There were fifteen officers present at the roadblock and thirteen emergency vehicles that displayed flashing lights. All of the officers had completed the NHTSA training for standardized field sobriety tests and all officers had completed a HGN course.

On August 6, 2006, Patrolman Adam Coleman approached a white Mustang that was stopped at the roadblock. He gave a short introduction to the driver and noticed a strong odor of alcoholic beverage on his breath. The driver was told to pull to the side of

the road. When the driver exited the vehicle, he staggered and stated he was already drunk. After a series of coordination tests, the defendant was arrested for driving under the influence of alcohol. Blood was drawn from the defendant at Milford Memorial Hospital and the defendant has moved to suppress the results of the blood tests.

At the conclusion of a suppression hearing, the Court ruled that there was reasonable and articulable suspicion to require the defendant to submit to coordination tests and that there was probable cause to arrest the defendant for driving under the influence. I also rejected the defendant's challenge to the chain of custody in regard to the blood tests. The issue of the constitutionality of the roadblock has been briefed by counsel and this is the Court's decision on defendant's motion in regard to the legality of the roadblock.

It is well settled that stopping a vehicle at a checkpoint constitutes a Fourth Amendment Seizure. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Where a sobriety checkpoint is involved, the court must balance the state's interest in preventing injury and damage caused by drunk driving and the level of intrusion on individual privacy as the result of a checkpoint. *Id.* at 449. Routine checkpoints have been upheld as reasonable as opposed to roving patrols because motorists are less likely to be frightened or taken by surprise and because checkpoints involve less discretion of the law enforcement officers. *State v. Stroman*, 1984 WL 547841 (Del. Super. May 18, 1984). In *Sitz, supra*, the state's interest in preventing drunk driving and the degree of intrusion upon individual motorists weighed in favor of the program because of the magnitude of the drunken driving problem, the minimal intrusion resulting from the checkpoint, and the lessened concern of lawful travelers at a checkpoint stop. The federal and state

constitutions require that the checkpoint procedure be constitutionally appropriate under a balancing test. *Brown v. Texas*, 443 U.S. 47 (1979). The state is required to carefully comply with substantially all checkpoint procedures and policies. *Bradley v. State*, 2004 WL 1964980 at *1 (Del. Aug. 19, 2004).

The defendant contends that the State has failed to comply with the Strike Force Roadblock Procedures and that unfettered discretion is placed in the hands of the Strike Force Police. I will address the defendant's contentions seriatim.

The defendant first contends that the location of the roadblock was selected by Corporal Michelau, the leader of the strike force, who is not an employee of OHS. He argues that this violates the procedure that the location of the roadblock would be selected by OHS. I disagree.

Lisa Moore testified that "she contacted the Kent County Task Force Leader and told him what location I would like the checkpoint to be conducted at." TR 12. She authorized a checkpoint on Route 1 within the jurisdiction of the Milford City Police on the basis of alcohol-related fatal crashes, alcohol related personal injury or property damage accidents, and a high incidence of DUI arrests in that area. There was substantial statistical support for the selection of this area. Therefore, OHS established the checkpoint on Route 1 within the jurisdiction of the town of Milford based on statistics supplied by the Milford Police Department. Based on safety concerns, Cpl. Michelau selected the precise location of the checkpoint according to the guidelines of OHS and within the area authorized by OHS. He selected a location on the north bound lane of Route 1 just north of the merger of Route 1 and Route 113. I, therefore, conclude that the general checkpoint area is established by OHS, but that based on safety concerns

Corporal Michelau may select the precise location. A similar checkpoint was approved by the Superior Court in *Bradley v. State, supra*.

The defendant next contends that the checkpoint was not based on a demonstrated problem with persons driving under the influence as required by the procedure. The defendant's contention is incorrect. The Milford Police Department supplied OHS with information concerning DUI arrests, personal injury accidents, and property damage accidents on Route 1. The information indicated that there were 47 DUI arrests on Route 1 and 52 alcohol related crashes on Route 1 within the jurisdiction of the City of Milford Police in 2005. The large number of DUI arrests and alcohol related crashes is an indication that there was a significant problem of persons driving under the influence on this short stretch of roadway. Based on submitted statistics there was a basis for a sobriety checkpoint. I conclude that there was a demonstrated problem with persons driving under the influence on Route 1 within the jurisdiction of the Milford City Police.

The defendant next contends that the checkpoint was set up just north of the city limits of Milford. He bases his argument on a map attached to his brief showing the city limits of Milford. But the jurisdiction of Milford City Police extends outside the city limits of Milford, and Corporal Michelau testified that the jurisdiction of the Milford City Police extended to the location of the Mercedes dealer, which was approximately one-half miles north of the checkpoint. The defendant's contention is without merit and is rejected.

The defendant next contends that the supervisor of the checkpoint did not select a safe location because an overpass blocked the driver's view of the roadway ahead as he traveled northbound on Route 1. The testimony of Corporal Michelau was that the

location was selected in a safe area. There were flares in the middle of the road, flashing lights on emergency equipment, marked police vehicles, and a sign 75 to 100 feet from the checkpoint to warn approaching motorists of the checkpoint. Therefore, I conclude that Corporal Michelau selected a safe location for the checkpoint. The defendant's argument that selection of a check point near the overpass is unsafe is entirely speculative and is not based on any evidence.

The defendant next contends that after the stop, the police officer detained the defendant for further investigation contrary to Checkpoint Procedure No. 6, in that there were no visual signs of impaired driving. The first sentence of this procedure states that "this introduction should give the officer ample time to observe the driver and detect an odor of alcohol emanating from the vehicle." Reading this section as a whole, it is evident that an odor of alcohol is precisely what the officer was checking for during his introduction. The police officer smelled a strong odor of alcoholic beverage emanating from the car and this was sufficient to detain him for further investigation. A strong odor of alcoholic beverage on the defendant's breath is an indication of intoxication and a factor in determining whether the defendant is under the influence of alcohol. Although a strong odor of alcoholic beverage is not a visible sign of impairment, a police officer is not precluded from making an assessment of impairment based on other sense impressions. I conclude that the arresting officer complied with Checkpoint Procedure No. 6.

The defendant contends in his reply brief that the supervisor of the checkpoint had unfettered discretion in regard to the road block. I disagree. The checkpoint supervisor permitted cars to go through the checkpoint only when the road was congested.

In this case, I conclude that the Police Strike Force carefully complied with substantially all of the OHS procedures in setting up and operating the checkpoint. In the case at bar, OHS guidelines limited officer's discretion in stopping particular vehicles during the checkpoint. Minor deficiencies do not affect the defendant's constitutional rights. *Bradley, supra*. The stop complained about in this case represented only a minimal intrusion on the defendant's right to be free from unreasonable searches and seizures. The checkpoint addresses the public concern concerning DUI and advances the public interest, and the interference with personal liberty is minimal. Therefore, the State has complied with the Fourth Amendment and Article 1, Section 6 of the Delaware Constitution.

The defendant contends that the checkpoint was constitutionally flawed under *State v. McDermott*, 1999 WL 1847364 (Del. Com. Pl. April 30, 1999). *McDermott* held that the State must establish that it has carefully complied with the guidelines. Based on the Delaware Supreme Court decision in *Bradley v. State, supra*, *McDermott* does not represent the law of this state. Additionally, the State has established careful compliance with the guidelines.

Based on these findings of fact and conclusions of law, the defendant's motion to suppress is denied.

IT IS SO ORDERED.

Merrill C. Trader
Judge