IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	
WILLIE A. TERRY,	)	Case No. 1209012999
	)	
Defendant.	)	
	)	
	)	
	)	

Submitted: June 7, 2013
Decided: July 18, 2013

Upon Respondents' Motion to Suppress
GRANTED

James K. McCloskey, Esquire, Deputy Attorney General, Wilmington, Delaware, A*ttorney for State of Delaware.*

Thomas A. Foley, Esquire, Wilmington, Delaware, *Attorney for Defendant Willie A. Terry*.

DAVIS, J.

INTRODUCTION

Defendant Willie A. Terry was arrested on August 17, 2012 during a stop at a sobriety checkpoint (the "Checkpoint") and charged with the offenses of (i) driving under the influence of alcohol (the "DUI Offense") in violation of Title 21, Section 4177 (a) of the Delaware Code of 1974, as amended; and (ii) driving a vehicle while license is suspended or revoked in violation of Title 21, Section 2756(a) of the Delaware Code of

1974, as amended (the "DDS Offense"). On May 6, 2013, Mr. Terry's counsel filed a motion to suppress (the "Motion") that challenged the validity of the Checkpoint and the subsequent arrest. On June 7, 2013, the Court held an evidentiary hearing (the "Hearing") on the Motion and, at the end of the Hearing, reserved decision on the Motion.

After a review of the record, the applicable authorities, and the legal arguments and factual presentation made at the Hearing, the Court **GRANTS** the Motion.

BACKGROUND

General and Procedural Background

Through the Motion, Mr. Terry challenges the validity of the Checkpoint and his subsequent arrest, contending the State failed to demonstrate the Checkpoint was properly established and operated as required under certain Delaware sobriety checkpoint procedural guidelines.[1] The Motion contends that the evidence obtained during the stop should be suppressed and the case dismissed because of this failure.

On August 17, 2012, Mr. Terry was arrested and charged with the DUI Offense the DDS Offense. The Motion was filed on May 6, 2013. The State responded to the Motion on June 5, 2013. The Court then set June 7, 2013 as the date for an evidentiary hearing on the Motion.

On June 7, 2013, the Court held the Hearing on the Motion. At the Hearing, the State called one witness – Corporal Anthony Pray of the University of Delaware Police Department. Corporal Prey is the investigating officer in this criminal action and the officer who stopped and arrested Mr. Terry at the Checkpoint. Corporal Prey was not the

[1] *See, e.g.*, *State v. Stroman*, Nos. IN83-02-0055T, N83-04-0132T, N83-09-0620T, 1984 WL 547841 (Del. Super. May 18, 1984); *Bradley v. State*, 858 A.2d 960, 2004 WL 1964980 (Del. Super. Ct. 2004).

officer charged with supervising the establishment and operation of the Checkpoint. After hearing his testimony, the Court finds Corporal Prey to be a credible witness.

In addition to Corporal Prey, the State introduced the Self Authenticating Declaration Under Delaware Rules of Evidence 902(11) of Lisa M. Shaw dated January 7, 2011 (the "902(11) Declaration"). At the Hearing, Mr. Terry's counsel objected to the admissibility of the 902(11) Declaration on a number of grounds. As part of the objection, Mr. Terry's counsel opposed the admission of the 902(11) Declaration because, it was contended, the State had failed to comply with Delaware Rule of Evidence 902(11)(C).

In support of this particular objection, Mr. Terry's counsel provided the Court with a letter dated March 14, 2013 from Thomas A. Foley, Esq., to James K. McCloskey, Esq. (the "Discovery Request Letter"). The Discovery Request Letter, in part, provides:

> I did receive the discovery material. However, regarding the statistical information relied upon by the Office of Highway Safety in establishing the DUI Checkpoint, can you please provide me a copy of the actual "raw" traffic statistics/data supplied by the Wilmington Police Department, that were forwarded to the Office of Highway Safety, along with any cover letters or emails accompanying the request for data by OHS, and the subsequent response by WDP.[2]

Although the Letter does not specifically reference the 902(11) Declaration, the "actual 'raw' traffic statistics/data supplied by the Wilmington Police Department…." sought is statistical information for driving under the influence incidents (alcohol-related fatal crashes, alcohol-related personal injury crashes and DUI arrests) occurring in the State in general and at Church Street and 4th Street in Wilmington – the Checkpoint.[3] The State

[2] Defendant's Ex. 1.
[3] 902(11) Declaration at pp. 4-5 (Document entitled "Crash Stats – Source DSP 2011 Annual Statistics" and Memorandum from Lisa Shaw to Chief Michael Capriglione dated "August 5th, 2012").

did not respond to the Discovery Request Letter and, to the Court's knowledge, never produced any of the "actual raw" traffic statistics relating to the Checkpoint.

Facts Developed in Connection with the Motion

The State called Corporal Prey to testify at the Hearing in connection with the Motion. Corporal Prey is employed by the University of Delaware Police Department. Corporal Prey performs both supervisory and patrol duties. Corporal Prey first received training with respect to DUI enforcement in the New Castle County Police Academy in 1997 and took a refresher course on DUI enforcement in 2010.

On August 17, 2012, Corporal Prey was among "twenty or so" officers manning the Checkpoint. Corporal Prey was not the officer charged with supervising the establishment and operation of the Checkpoint. In addition, Corporal Prey also had nothing to do with determining the location of the Checkpoint. According to Corporal Prey, Corporal Prey was "out of the loop" with respect to how the Checkpoint was selected. Instead, Corporal Prey testified that he signed up for duty in connection with the Checkpoint and was later told where to go.

Corporal Prey worked at the Checkpoint while in full uniform. Corporal Prey also wore a reflective vest. At the Checkpoint, the officers located police vehicles with lights on and cones in the roadway to direct approaching motorists. Corporal Prey testified that all vehicles where stopped. Corporal Prey testified that each officer would introduce themselves and make observations as to the vehicle's driver concerning any odor of alcohol, appearance, eyes and speech. If there were no obvious signs of impairment, Corporal Prey testified that the officer was to release the vehicle.

Corporal Prey made contact with Mr. Terry at the Checkpoint. Mr. Terry drew attention to his vehicle when he almost drove through the Checkpoint and passed Corporal Prey. After getting Mr. Terry to stop, Corporal Prey introduced himself and immediately detected an odor of alcohol. Corporal Prey then directed Mr. Terry into an adjoining parking lot for further testing.

Per agreement of the parties, the testimony of Corporal Prey ended at this point of his interaction with Mr. Terry on August 17, 2012.

ANALYSIS

Mr. Terry contends that the evidence relating to his arrest at the Checkpoint should be suppressed because the State cannot demonstrate that this "seizure" was reasonable under the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution. Specifically, in this case, Mr. Terry argues that the State did not prove that the Checkpoint was created and operated pursuant to Delaware State Police policy guidelines (the "Guidelines")[4] – guidelines that have been implemented by the Delaware State Police to ensure that any seizure in connection with a sobriety checkpoint does not violate the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution.

The State counters and contends that strict compliance with the Guidelines is not necessary for the State to meet its burden to demonstrate that the seizure of Mr. Terry at the Checkpoint was reasonable under the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution. Instead, the State argues that in order to determine whether the Checkpoint satisfies constitutional requirements, the State must show that the Checkpoint (i) was clearly visible; (ii) was

[4] The Guidelines are attached to the 902(11) Declaration. *See* 902(11) Declaration at pp. 2-3.

part of some systematic procedure that strictly limits the discretionary authority of police officers; and (iii) detained drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity. In support, the State relies, in part, upon the reasoning set forth in the recently issued decision by this Court in *State v. Cook*.[5]

For the reasons set forth below, the Court agrees with the arguments made by Mr. Terry and, therefore, grants the relief requested in the Motion.

A. Legal Standards for DUI Checkpoints

Stopping a vehicle at a checkpoint constitutes a seizure under the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution, which prohibit "unreasonable" seizures.[6] Whether a seizure is reasonable depends upon "a balance between the public interest and the individual's right to personal security from arbitrary interference by law officers."[7] In assessing the reasonableness of a sobriety checkpoint, the United States Supreme Court has articulated a test that balances the state's interest in preventing injury and damage caused by drunk driving and the effectiveness of sobriety checkpoints as a means of prevention versus the level of intrusion on individual privacy as a result of a checkpoint.[8]

Delaware courts have approved the legality and use of sobriety checkpoints in this State. Such sobriety checkpoints are "reasonable" seizures when procedures are in existence to ensure that cars passing through checkpoints are stopped in a reasonably safe

[5] Case No. 1204020357, 2013 WL 1092130 (Del. Super. Feb. 13, 2013).
[6] *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *Bradley v. State*, 858 A.2d 960, 2004 WL 1964980 (Del. 2004).
[7] *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).
[8] *Sitz*, 496 U.S. at 455.

manner and that sufficient safeguards are in place limiting the discretion of law enforcement officers with respect to the location of each checkpoint and the stopping of vehicles.[9]

Sobriety checkpoints in Delaware are created and operated under certain Delaware State Police Department policy guidelines.[10] The policy guidelines describe the objective criteria used for choosing the location of the checkpoint, the manner of notifying officials and the procedures for actually conducting the roadblock.[11] These guidelines address, among other things, selection of the location, visibility of the checkpoint, suggested language of the officers, appropriate actions for determining sobriety and requirements for a supervisor (or designee) to monitor the checkpoint, record and compile the results of the checkpoint.[12]

The policy guidelines act as a substitute for the reasonable requirements of the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution.[13] To meet the requirements of reasonableness, the State must demonstrate careful compliance with the policy guidelines.[14] The decision in *State v. Cook* takes issue with the two legal points made in this paragraph. These legal points are best analyzed and articulated in *State v. McDermott*.[15] This Court, in *Cook*, disagrees and holds that the reasoning – and, thus, the holding, in *McDermott* is flawed.

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[9] *Bradley*, 2004 WL 1964980, at *1.
[10] *See State v. McDermott*, 1999 WL 1847364, at *2 (Del. Com. Pl. Apr. 20, 1999); 902(11) Declaration at pp. 2-3.
[11] *McDermott*, 1999 WL 1847364, at *2.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.; see also Bradley*, 858 A.2d 960, 2004 WL 1964980, at *1 (discussing *McDermott* as that case relates to the Guidelines and the need to demonstrate compliance with same).

For this decision, the Court does not need to reconcile the decisions in *Bradley v. State* (which refers to without criticizing *McDermott*) and *McDermott* with the holding in *Cook*. Here, the State has failed to demonstrate that the Checkpoint was located at 4th Street and Church Street pursuant to a plan that limited the unfettered discretion of the police officer in the field.[16] And, although wide deference is to be afforded police agencies in selecting a location for a sobriety checkpoint, all of the decisions referenced here (*Bradley*, *McDermott* and *Cook*) agree that a sobriety checkpoint has to be located in the first instance under a pre-existing plan.[17] In this case, however, the State has produced no competent evidence that the location of the Checkpoint was determined pursuant to such a plan.

B. The State Cannot Demonstrate that the Checkpoint was Established Pursuant to a Pre-Existing Plan.

In this case, the State attempts to prove that the Checkpoint and the stop of Mr. Terry carefully complied with necessary constitutional standards through the testimony of Corporal Prey and the 902(11) Declaration. On the record before the Court here, the State has failed to prove that the Checkpoint met such standards. There just is not enough competent evidence for the Court to hold that the Checkpoint was "reasonable" for purposes of the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution.

[16] *Bradley*, 2004 WL 1964980, at *1 ("…sufficient safeguards were in place to check the Millsboro Police's discretion in locating the site of the DUI checkpoint and stopping the vehicles."); *Cook*, 2013 WL 1092130, at *1-4 (pre-existing plan existed that sited the checkpoint at a location with a "comparatively high rate of drunk driving arrests"); *McDermott*, 1999 WL 1847364, at *2 (checkpoints, established pursuant to statistics relating to DUI incidents, "involve less discretion of the law enforcement officers.").
[17] *Id.*

1. The 902(11) Declaration will not be considered in this criminal matter as admissible evidence.

At trial, the State sought to introduce the 902(11) Declaration under DRE 902(11)(C). The Court agrees that DRE 902(11)(C) is available in criminal proceedings, including in cases involving sobriety checkpoints. However, under the facts present here, the Court holds that the State has failed to meet the standards of admissibility under Delaware Rule 902(11)(C).

DRE 902(11) provides:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
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> ***
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> (11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any law of the United States or of this State, certifying that the record
>
> ***
>
> (C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.[18]

DRE 902(11)(C) is available in criminal proceedings if the party offering the document satisfies the requirements of the rule.[19]

In order to meet the requirements of DRE 902(11), the proffering party must provide a written declaration from the custodian of record or other qualified person that

[18] Del. R. Evid. 902(11).
[19] *See, e.g., State v. Hollinger,* Case No. 1012016310, 2012 WL 52087922 (Del. Com. Pl. Oct. 10, 2012); *State v. Andrews*, Nos. 0208019127, N02-09-0621, 2003 WL 22931333, at *8-9 (Del. Com. Pl. Aug. 22, 2003).

specifically certifies that the records constitute records of regularly conducted activity.[20] Moreover, the proffering party must provide written notice of intention to use the DRE 902(11) declaration as evidence and must make the records and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with an opportunity to challenge the records and/or the declaration.[21] The notice requirements of DRE 902(11)(C) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.[22]

The State, through a letter (the "Transmittal Letter"), provided a copy of the 902(11) Declaration to Mr. Terry on April 10, 2013. The Transmittal Letter puts Mr. Terry on notice that the State intends to use the 902(11) Declaration as evidence in any legal proceedings.

In response, Mr. Terry's counsel sent the Discovery Request Letter and asked for the statistical information that supported establishing the Checkpoint at 4th Street and Church Street. In essence, the Discovery Request Letter is an attempt by Mr. Terry to compile information that would allow Mr. Terry a "fair opportunity to challenge" the 902(11) Declaration and the contents of the files attached to the 902(11) Declaration. The State did not respond to the Discovery Request Letter.

Here, that challenge is credible. At the Hearing, Mr. Terry's counsel demonstrated that the "business records" attached to the 902(11) provide information that indicates that the Checkpoint may not have been established pursuant to the Guidelines, *i.e.*, the pre-existing systematic plan which limits the police agency from locating a

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[20] Del. R. Evid. 902(11)(C).
[21] *Id.*; *see, also, Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004)
[22] *See* 5 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL §902.04[2] (9th ed. 2008).

sobriety checkpoint at its unfettered discretion.[23] Specifically, the purported "statistical information" relating to the Checkpoint is ambiguous as to whether the Checkpoint is an area with a "demonstrated problem" with DUIs – 2011 information is cross-referenced with what appears to be 2009 information, purported statistical percentages do not match up, etc. No one at the Hearing, counsel for the parties, Corporal Prey or the Court, could satisfactorily reconcile the statistics.

By failing to respond to the Discovery Request Letter or providing the statistical back-up, the State frustrated Mr. Terry and the Court with respect to the reliability of the 902(11) Declaration and its "business records." This problem could have been dispelled prior to the Hearing with the State providing a response or at the Hearing through a competent witness. This did not happen.

The law is clear that the State and not Mr. Terry must demonstrate compliance with certain important procedural requirements as part of any sobriety checkpoint DUI prosecution.[24] The Court does not believe that denying Mr. Terry an opportunity to test the adequacy of the foundation set forth in the declaration is harmless error. The requirements of DRE 902(11)(C) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.[25] DRE 902(11)(C) places the burden of notification of intent to use written declarations and to provide adequate information regarding the purported business records on the proffering party – here, the State. The State did not do this and, thus, prevented Mr. Terry from fair

[23] 902(11) Declaration at pp. 2-3, Guidelines at ¶4.
[24] *See State v. Stroman,* Nos. IN83-02-0055T, N83-04-0132T, N83-09-0620T, 1984 WL 547841 (Del. May 18, 1984); *State v. Hollinger,* 2012 WL 52087922 (Del. Com. Pl. Oct. 10, 2012); *State v. Gonzalez-Ortiz*, No. CR.A.06-08-1974, 2007 WL 549907 (Del. Com. Pl. Jan. 30, 2007); *State v. Rentoul*, No.0507024886, 2006 WL 951315 (Del. Com. Pl., April 6, 2006); *State v. McDermott*, Cr. Action No. S98-07-0875, 1999 WL 1847364, at *2 (Del. Com. Pl. April 30, 1999)
[25] *See* STEPHEN A. SALTZBURG, ET AL., *supra* Note 22, §902.04[2].

opportunity to challenge the 902(11) Declaration. Moreover, the Court has concerns that the "business records" attached to the 902(11) Declaration were reliable and/or trustworthy. As such, an important condition precedent to admissibility was not satisfied, and the 902(11) Declaration is not admissible for use at the Hearing.

2. The testimony of Corporal Prey is not enough to demonstrate that Checkpoint was established pursuant to a pre-existing plan.

Corporal Prey was the only witness to testify at the Hearing. Corporal Prey was a credible witness. However, Corporal Prey had no involvement with locating the Checkpoint at 4th Street and Church Street. In fact, Corporal Prey said that it was "a little bit of a surprise" as to where the Checkpoint was located, and that he was "not in the loop" in selecting the site for the Checkpoint. Corporal Prey's other testimony did show some compliance with some type of pre-existing plan – uniformed police officers in safety vests, the stopping of every motor vehicle, the use of cones, the type of questions asked – but this testimony is not enough for the State to meet its burden in demonstrating that the seizure of Mr. Terry at the Checkpoint was reasonable under the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution.[26]

[26] *See, e.g., Bradley*, 858 A.2d 960, 2004 WL 1964980, at *1.

CONCLUSION

For the reasons stated in this opinion, the Court **GRANTS** the Motion and suppresses all evidence obtained during the stop or "seizure" of Mr. Terry at the Checkpoint.

The Clerk of the Court shall set this matter for trial.

IT IS SO ORDERED.

/s/ Eric M. Davis
Eric M. Davis
Judge