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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001332-MR

COREY MALONE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 99-CR-002692

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: Appellant, Corey Malone, appeals from his conviction of illegal possession of a controlled substance in the first degree and carrying a concealed weapon, pursuant to a conditional guilty plea reserving the right to appeal the trial court's denial of a suppression motion. Having determined that the police roadblock at issue had the constitutional purpose of checking driver's license, registration, and insurance, and not the unconstitutional purpose of general crime control, we affirm.

A summary of the suppression hearing testimony is as follows. On September 9, 1999, a police roadblock was set up at 16th and Oak in Louisville, Kentucky. Louisville police officer

Ozzie Gibson (Sgt. Gibson) testified that every car was stopped at the roadblock, and checked for driver's license, proof of insurance, and registration. If these documents were produced, the car was sent on its way. If these documents were not produced, or if Sgt. Gibson observed any other signs of illegal activity, the car was directed to pull over to the side of the road where other officers would check further. A car driven by Cristobal Colon (Colon), in which appellant was the only passenger, was stopped at the roadblock. Sgt. Gibson testified that he detected an odor of marijuana from Colon's car, and therefore did not ask for a license, but instructed Colon to pull over to the side. Sgt. Gibson then called Officer Jason Lainhart over and told him he smelled marijuana.

Officer Lainhart testified that his duties in the roadblock were to address any vehicles that had problems or violations of the law. Lainhart testified that as he approached the passenger side of Colon's car, he smelled marijuana coming from the passenger side window, which was down. Lainhart testified that appellant reached under the seat, then Lainhart pushed him back against the seat, then appellant reached under the seat again, at which point Lainhart removed appellant from the car. Lainhart then handcuffed appellant and patted him down for weapons, finding a rock of crack cocaine in appellant's left sock. Appellant was placed under arrest, the vehicle searched, and an automatic handgun found under the front passenger seat.

Cristobal Colon, the driver and owner of the car, testified that upon approaching the roadblock, he was told to

stop and was immediately "waved" over to the side of the road, at which time his window was still up. According to Colon, he lowered his window as an officer approached the car, and then the officer told him to step out of the car. Colon got out of the car, after which he was handcuffed and told he was being charged with DUI. Colon testified that the officer said he assumed Colon had been drinking because he saw a cup containing alcohol in the car, and also said that he smelled marijuana. No sobriety tests were conducted. Colon stated that he asked for a breathalyzer test, but the officer refused do so. A breathalyzer test conducted later at the police station registered 0.00. Colon testified that he had a valid driver's license, insurance, and registration, but was never asked for them. Colon stated that he had not been smoking marijuana.

Appellant testified that the officers at the roadblock did not talk to him or Colon about driver's licenses, registration, or insurance, nor did they tell him why he was supposed to get out of the car or say anything about marijuana. Appellant testified that he and Colon had not been smoking marijuana and that he did not reach under the seat. Appellant further stated that Colon had not rolled down his window until after they had been pulled off to the side of the road. Appellant testified that he (appellant) had been drinking, but that the officers would not have been able to observe that prior to the stop because the car had tinted windows.

On November 3, 1999, appellant was indicted by the Jefferson County Grand Jury on one count of illegal possession of

a controlled substance in the first degree (cocaine) while in possession of a firearm, and one count of carrying a concealed deadly weapon. On March 20, 2000, appellant filed a motion to suppress the evidence seized at the roadblock (cocaine and gun). The court held a suppression hearing on April 11, 2000. On April 12, 2000, appellant entered a conditional guilty plea to illegal possession of a controlled substance in the first degree (cocaine) and carrying a concealed deadly weapon, reserving the right to appeal the court's ruling on the motion to suppress. On April 17, 2000, the court entered an order denying the suppression motion. This appeal followed.

On appeal, appellant argues that the trial court erred in overruling his motion to suppress as the evidence was seized as a result of an unconstitutional vehicle stop. Appellant contends that the roadblock was constitutionally deficient, as the officer's purpose, to look for illegal activity, was unconstitutionally broad and permitted the exercise of unconstrained discretion by the officers to single out individuals without adequate government purpose. Appellant contends that, in reality, the officers were more likely than not attempting to detect drugs at the roadblock, using the facade of checking for license, registration, and proof of insurance.

A motorist who has been stopped at a police checkpoint has been seized within the meaning of the Fourth Amendment. United States v. Martinez-Fuerte, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082, 49 L. Ed. 2d 1116 (1976); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 450, 110 S. Ct. 2481, 2485, 110 L.

Ed. 2d 412 (1990). "In order for a checkpoint seizure to satisfy the constitutional requirements of the Fourth Amendment, it must be reasonable under the circumstances." United States v. Huguenin, 154 F.3d 547, 551 (6th Cir. 1998), citing Whren v. United States, 517 U.S. 806, 809, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Whether a particular checkpoint seizure is reasonable is determined by the balancing test established in Brown v. Texas, 443 U.S. 47, 50-51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), which 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." Huguenin, 154 F.3d at 551-552.

> Applying this balancing analysis, the Supreme Court has upheld the constitutionality of government checkpoints set up to detect drunken drivers, Sitz, 496 U.S. at 444, and illegal immigrants, Martinez-Fuerte, 428 U.S. at 543, as long as they involve no more than an "initial stop . . . and the associated preliminary questioning and observation by checkpoint officers." Sitz, 496 U.S. at 450-451. In concluding that these checkpoint stops do not violate the Fourth Amendment even though the officers do not have probable cause or a warrant for the seizure, the Supreme Court has focused on the lack of discretion afforded the individual officers, the standardized procedures employed, and the minimal intrusion imposed on motorists. Id. at 453-54.

Id. at 552.

In Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), the United States Supreme Court held unconstitutional a random stop of a vehicle for a spot check of the driver's license and registration, made without probable

cause or reasonable suspicion of illegal activity. The Court stated:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations [Footnote omitted.] — or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered — we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. [Citations omitted.]

Prouse, 440 U.S. at 661. However, the Prouse Court suggested that a roadblock in which all oncoming traffic was questioned for the purpose of checking driver's licenses and vehicles would be constitutionally permissible, recognizing a state's "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Id. at 658; See also Commonwealth v. Mitchell, Ky., 355 S.W.2d 686 (1962) (Holding that systematic and indiscriminate stopping of all motor traffic at a police roadblock for the good faith purpose of inspecting driver's licenses was constitutional.)

The United States Supreme Court recently revisited the issue of police roadblocks, holding that a police roadblock for the purpose of general crime control is unconstitutional. City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447, 148 L.

Ed. 2d 333 (2000).[1] In Edmond, the police set up checkpoints on Indianapolis roads for the purpose of interdicting illegal narcotics. A predetermined number of vehicles were stopped at each location, and, pursuant to written directives, the officers had no discretion to stop a vehicle out of sequence, were required to conduct each stop in the same manner until particularized suspicion developed, and were permitted to conduct a search only by consent or based upon the appropriate level of particularized suspicion. Edmond, 121 S. Ct. at 450. An officer would inform the driver that he was being stopped briefly at a drug checkpoint, and ask the driver to produce a license and registration. The officer would look for signs of impairment, conduct an open-view examination of the vehicle from the outside, and a drug sniffing dog would walk around the outside of each stopped vehicle. Id. at 450-451. In invalidating the narcotics checkpoint as one having the unconstitutional purpose of general crime control, the Court stated:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in Prouse that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. 440 U.S. at 659, n. 18. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the

[1] We note that appellant's brief was filed November 8, 2000. Edmond was decided by the United States Supreme Court on November 28, 2000.

> necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.
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> . . . .
>
> We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

Id. at 454-455. The Supreme Court reiterated, however, that a properly conducted license checkpoint, as discussed in Prouse, would be constitutionally permissible, stating:

> It goes without saying that our holding today does nothing to alter the constitutional status of the sobriety and border checkpoints that we approved in Sitz and Martinez-Fuerte, or of the type of traffic checkpoint that we suggested would be lawful in Prouse. The constitutionality of such programs still depends on a balancing of the competing interests at stake and the effectiveness of the program. [Citations omitted.] When law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . , however, stops can only be justified by some quantum of individualized suspicion.

Id. at 457.

The evidence available to this court indicates that the roadblock at issue had the constitutional purpose of license and vehicle check. Id; Prouse, 440 U.S. 648. Although Sgt. Gibson first testified that the purposes of the roadblock were to check cars for license, registration, and proof of insurance, or "any illegal activity that I would see right there", he later

clarified in his testimony that the purpose of the roadblock was to check for license, registration, and insurance, but that if he saw anything which gave him probable cause to suspect illegal activity, then the car would be investigated further. Such action does not transform the constitutional purpose of license and vehicle check into the unconstitutional purpose of general crime control. Police officers may "act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose." Edmond, 121 S. Ct. at 457. Hence, the officer's were not required to ignore the smell of marijuana. Cooper v. Commonwealth, Ky. App., 577 S.W.2d 34 (1979), overruled on other grounds by Mash v. Commonwealth, Ky., 769 S.W.2d 42 (1989); Richardson v. Commonwealth, Ky. App., 975 S.W.2d 932 (1998). Further, we believe Sgt. Gibson's testimony provided substantial evidence to support the trial court's finding that every car was being stopped at the checkpoint, hence, the "unconstrained discretion" held unconstitutional in Prouse was not present at the checkpoint. See Kinslow v. Commonwealth, Ky. App., 660 S.W.2d 677 (1983); RCr 9.78. Having determined that the roadblock had the constitutional purpose of license and vehicle check, and was conducted in a constitutional manner, we conclude that the trial court did not err in denying the motion to suppress.[2]

[2] We note that appellant's brief contests only the constitutionality of the police roadblock, and not the subsequent (continued...)

For the aforementioned reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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[2](...continued)
search of appellant's person or vehicle, which we nevertheless conclude were proper. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Commonwealth v. Ramsey, Ky., 744 S.W.2d 418 (1987).