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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000666-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 15-CI-00009

HONORABLE JERRY CROSBY,
OLDHAM DISTRICT COURT JUDGE
AND SHAWN SCRUGGS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: The Commonwealth of Kentucky appeals from an Oldham Circuit Court's order denying the Commonwealth's petition for a writ of prohibition and/or mandamus. For the following reasons, we affirm.

I. Factual and Procedural Background

On May 4, 2014, Shawn Scruggs was stopped by Oldham County Sheriff Deputy Chris Fitzner at a roadblock checkpoint. Scruggs was subsequently arrested and charged with driving under the influence ("DUI"), first offense.

Kentucky State Trooper Barrett Brewer and Oldham County Sheriff's Deputies Chris Fitzner and Don Menard conducted the checkpoint. Trooper Brewer testified that they were conducting checkpoints as part of the Kentucky State Police ("KSP") Oaks-Derby enforcement plan. He had participated in "three or four" that weekend as part of a campaign that was distributed to media outlets by KSP public affairs officer, Trooper Arterburn. The checkpoint was supposed to have run from 2:30 a.m. to 5:00 a.m. and Trooper Brewer was the officer in charge. Trooper Brewer testified that every car was stopped at the checkpoint except during a shutdown which occurred at 3:17 a.m. At 2:59 a.m., Trooper Brewer and Deputy Fitzner stopped and arrested Scruggs. Once Trooper Brewer made an arrest, he had to shut down the checkpoint because he was the officer in charge and the two sheriff's deputies could not continue to operate the checkpoint on their own. Trooper Brewer could not remember exactly why the roadblock was shut down.[1]

Scruggs filed a motion to suppress the evidence seized by officers following his stop and arrest, arguing that the checkpoint was unconstitutional. A suppression hearing was held, during which Trooper Brewer testified that he

[1] Presumably, the checkpoint was shut down because Trooper Brewer made an arrest and left the scene.

sought and obtained permission to conduct the checkpoint from a Sgt. Gabbard the day before while they were conducting another checkpoint. However, Trooper Brewer admitted that he had no written proof of approval for the checkpoint and that the approval was not noted on the CAD (Computer Aided Dispatch) sheet.

The district court entered an order granting Scruggs' motion to suppress evidence obtained as a result of the checkpoint. The district court found: (1) Trooper Brewer did not give adequate answers to questions regarding prior approval for the checkpoint by Sgt. Gabbard; (2) no plan was put in place to maintain the checkpoint when Trooper Brewer made an arrest; and (3) no evidence was presented on the time cards or CADs that the vehicle checkpoint had been properly planned, authorized, and undertaken. The district court then considered the "non-exclusive factors" identified in *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003), to determine the reasonableness of a checkpoint. Based on the *Buchanon* factors and the totality of the circumstances, the district court ruled that the checkpoint in question was unreasonable, and thus unconstitutional, and subsequently suppressed the evidence seized during Scruggs' arrest.

The Commonwealth then petitioned the Oldham Circuit Court for a writ of prohibition seeking to prohibit the district court from suppressing the evidence seized. The Commonwealth argued that the district court's findings were not supported by substantial evidence and that the district court misapplied the law. After reviewing the record, the circuit court concluded that sufficient proof supported the district court's conclusion that the checkpoint failed for lack of

adequate planning and that the district court properly applied the *Buchanon* factors. Accordingly, the circuit court refused to disturb the district court's ruling and denied the Commonwealth's motion for a writ of prohibition and/or mandamus. From that order, the Commonwealth appeals.

II. Standard of Review

> The issuance of a writ is inherently discretionary. Even if the requirements are met and error found, the grant of a writ remains within the sole discretion of the Court. Because of the discretion inherent in granting a writ, we review the decision of the Court of Appeals for an abuse of discretion. When questions of law or findings of fact made by the Court of Appeals en route to their ultimate decision are raised, however, we review de novo and for clear error, respectively.

Caldwell v. Chauvin, 464 S.W.3d 139, 145–46 (Ky. 2015).

III. Arguments

A writ is an "'extraordinary remedy' that Kentucky courts 'have always been cautious and conservative both in entertaining petitions for and in granting such relief.'" *Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 613 (Ky. 2005) (quoting *Bender v Eaton*, 343 S.W.2d 799, 800 (Ky. 1961)).

> It is within the Court's discretion to grant a writ when it falls within one of two classes of cases: The first is where 'the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an immediate court…' …The second class of writ may issue where 'the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.'"

PremierTox 2.0 v. Miniard, 407 S.W.3d 542, 546 (Ky. 2013)(citing *3M Co. v. Engle*, 328 S.W.3d 184, 187 (Ky. 2010)). The Commonwealth petitions for the second class of writs since it will be unable to proceed without the evidence obtained at the checkpoint, and unable to appeal if Scruggs is acquitted of the DUI charge.

The Commonwealth argues that the trial court's application of law to its findings of fact renders the decision to suppress the evidence incorrect as a matter of law. The trial court's determinations of law are subject to independent appellate determination.

The dispositive question is whether the establishment of the checkpoint and the subsequent discovery and seizure of evidence passes constitutional muster. A highway stop of motorists at a government-operated checkpoint effectuates a seizure for Fourth Amendment purposes. *Buchanon*, 122 S.W.3d at 568. All warrantless searches are "presumed to be unreasonable and unlawful, requiring the Commonwealth to bear the burden of justifying the search and seizure under one of the exceptions to the warrant requirements." *Dunn v. Commonwealth*, 199 S.W.3d 775, 776 (Ky. App. 2006). Kentucky law requires supervisory control over the establishment and operation of a checkpoint for that checkpoint to comply with the Fourth Amendment. Additionally, checkpoints in compliance with the Fourth Amendment put constraints on the use of discretion by individual officers. *Commonwealth v Bothman,* 941 S.W.2d 479, 481 (Ky. App. 1996). Evidence seized at checkpoints not complying with the Fourth Amendment

must be suppressed as a result of an unconstitutional seizure. *Turley v. Commonwealth*, 399S.W.3d 412, 424 (Ky. 2013). In *Buchanon*, 122 S.W.3d at 571, the Supreme Court set out a list of four non-exclusive factors to determine whether a road checkpoint complies with the Fourth Amendment:

> First, it is important that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law enforcement officials in a supervisory position, rather than by officers who are out in the field. Any lower ranking officer who wishes to establish a roadblock should seek permission from supervisory officials. Locations should be chosen so as to not affect the public's safety and should bear some reasonable relation to the conduct law enforcement is trying to curtail.
>
> Second, the law enforcement officials who work the roadblock should comply with the procedures established by their superior officers so that each motorist is dealt with in exactly the same manner. Officers in the field should not have unfettered discretion in deciding which vehicles to stop or how each stop should be handled.
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> Third, the nature of the roadblock should be readily apparent to approaching motorists. At least some of the law enforcement officers present at the scene should be in uniform and patrol cars should be marked in some manner. Signs warning of a checkpoint ahead are also advisable.
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> Fourth, the length of a stop is an important factor in determining the intrusiveness of the roadblock. Motorists should not be detained any longer than necessary in order to perform a cursory examination of the vehicle to look for signs of intoxication or check for license and registration. If during the initial stop, an officer has a reasonable suspicion that the motorist has violated the law, the motorist should be asked to pull to the side so that other motorists can proceed.

KSP has established a traffic safety checkpoint policy, referred to as OM-E-4. OM-E-4 requires written documentation of checkpoints on the weekly post schedule as well as on the CAD unit log. The Commonwealth is correct that "[t]echnical noncompliance with OM-E-4, which does not have the force of law, does not inexorably lead to the conclusion that the establishment of the checkpoint was violative of the constitutions of the United States or of the Commonwealth." *Bothman*, 941 S.W.2d at 481. However, Trooper Brewer's testimony regarding supervisory approval and reasonableness of the checkpoint was not adequate. He had no plan to maintain the checkpoint after making an arrest. The Commonwealth provided no documentation that this checkpoint had ever been approved, and the Commonwealth never called Sgt. Gabbard to testify about his alleged prior approval of the checkpoint. Finally, the Commonwealth presented no testimony regarding any reopening of the checkpoint or any arrest or stop occuring after 3:17 a.m. Based on the factual findings of the trial court, which we find are supported by substantial evidence, the Commonwealth failed to meet its burden and the checkpoint fails the *Buchanon* reasonableness test for lack of adequate approval and planning.

In addition to the *Buchanon* balancing test for reasonableness, courts must review the primary purpose of the roadblock. "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." *City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 121 S. Ct. 447, 454, 148 L. Ed. 2d 333 (2000). "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 necessity of ensuring roadway safety." *Id.* Arguably, the purpose of this checkpoint was to act as a sobriety checkpoint to remove drunk drivers from the road. However, no testimony as to the purpose of the checkpoint was provided by the Commonwealth which bore the burden to establish a specific purpose for the roadblock.

In this case, the circuit court considered the standard for a writ of prohibition, the clearly erroneous standard for findings of fact, and the Commonwealth's burden of proof to demonstrate that a warrantless checkpoint falls within an exception to the warrant requirement of the Fourth Amendment. We agree with the circuit court's conclusion that the district court properly applied the *Buchanon* factors and concluded that the traffic stop was unconstitutional. In light of this, the circuit court did not abuse its discretion by denying the Commonwealth's petition for a writ of prohibition.

IV. Conclusion

For the foregoing reasons, the order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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