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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001839-MR

SENECA L. SHELTON — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 18-CR-00200

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: After entering a conditional guilty plea, Seneca Shelton appeals from an order of the Muhlenberg Circuit Court denying his motion to suppress the evidence obtained from the search of his person and vehicle at a roadblock set up and operated by Kentucky State Police ("KSP"). After careful review, we affirm.

Shelton was stopped at a roadblock operated by KSP at KY 246 and Wyatt Cemetery Road in Muhlenberg County on or about August 22, 2018. Sometime prior to this date, KSP issued a Holiday Traffic Enforcement Plan to be in effect from August 17–September 3, 2018. On August 1, 2018, KSP issued a media announcement entitled "Traffic Safety Check Point Reminder." The announcement listed numerous pre-approved traffic safety checkpoint locations in Muhlenberg and surrounding counties and included the location of KY 246 and Wyatt Cemetery Road. On the night of Shelton's arrest, the site of the roadblock was chosen by Sergeant Jeff Ayers from the list of pre-approved locations. Sergeant Ayers contacted his subordinate, Trooper Curtis Crick, for assistance in set-up and operation of the roadblock. The officers met at the location, and the roadblock began operation at 9:02 p.m. It was shut down by Sergeant Ayers at 9:46 p.m. Sergeant Ayers and Trooper Crick were in full uniform and wearing agency-issued safety vests; they also utilized marked cruisers with blue lights flashing. There were no road signs announcing the checkpoint to approaching motorists, nor were there traffic cones.

Shelton was the third or fourth vehicle to pass through the roadblock. All vehicles prior to Shelton were also stopped. Trooper Crick made initial contact with Shelton. Upon approach, Trooper Crick noted the smell of "green" (*i.e.*, unsmoked) marijuana coming from Shelton's vehicle. During the initial

conversation between Trooper Crick and Shelton, Sergeant Ayers remained in the roadway, waiting for other vehicles. Trooper Crick eventually asked Shelton to exit the vehicle, and Shelton complied. When Trooper Crick asked Shelton if he had anything in his pockets, Shelton removed a large amount of cash and a rag. Shelton opened the rag, which contained a pipe used for smoking methamphetamine. Trooper Crick administered field sobriety tests. Shelton passed one test but failed several others. Trooper Crick searched Shelton's vehicle and found more cash, containers of marijuana, and approximately 20 grams of methamphetamine. Shelton was later indicted by the grand jury in the Muhlenberg Circuit Court on numerous offenses.

Shelton motioned the trial court for suppression of evidence, arguing that the roadblock was unconstitutional because it did not comply with the factors set forth in *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003). The trial court denied his motion and Shelton entered a conditional guilty plea to trafficking in a controlled substance, first degree, two or more grams (methamphetamine), and possession of drug paraphernalia.[1] He received a sentence of ten years' imprisonment. This appeal followed.

[1] In exchange for his guilty plea, the Commonwealth agreed to dismiss charges of persistent felony offender and trafficking in marijuana, eight or more ounces, but less than five pounds.

Before we turn to the merits of Shelton's arguments, we note that in contravention of CR[2] 76.12(4)(c)(v), Shelton does not have a preservation statement at the beginning of each argument and while he provides some citations to the record in his factual section, none are provided in any of his arguments in contravention of CR 76.12(4)(c)(iv) and (v), which require ample references to the trial court record supporting each argument. The Court recently addressed these issues (again) in *Curty v. Norton Healthcare, Inc*., 561 S.W.3d 374, 377-78 (Ky. App. 2018). Given the length at which the Court in *Curty* urged compliance with CR 76.12(4)(c), we quote the rationale for the rule and the Court's warnings that leniency should not be presumed.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and

[2] Kentucky Rule of Civil Procedure.

> therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

> . . .
>
> **Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance**. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Curty's brief or dismiss her appeal for her attorney's failure to comply. *Elwell*. While we have chosen not to impose such a harsh sanction, we strongly suggest counsel familiarize himself with the rules of appellate practice and caution counsel such latitude may not be extended in the future.

Curty, 561 S.W.3d at 377-78 (emphasis added).

As the Court in *Curty*, we would be well within our discretion to strike Shelton's brief, we have chosen not to do so **at this time.**

Turning to the merits, we review the trial court's findings of fact for clear error. CR 52.01. A trial court's findings of fact on a suppression motion are deemed conclusive and will not be overturned so long as they are supported by substantial evidence. *Smith v. Commonwealth*, 181 S.W.3d 53, 58 (Ky. App. 2005). "Substantial evidence means evidence that when taken alone or in light of

all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." *Turley v. Commonwealth*, 399 S.W.3d 412, 420 (Ky. 2013) (internal quotations and citation omitted). If a trial court's findings of fact are supported by substantial evidence the next question addressed by the reviewing court is "whether the rule of law as applied to the established facts is or is not violated." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citing *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996)).

A highway stop of motorists at a government-operated checkpoint constitutes a seizure for Fourth Amendment purposes. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L. Ed.2d 412 (1990). "In order to pass constitutional muster, the seizure must be reasonable[.]" *Buchanon*, 122 S.W.3d at 568. The Kentucky Supreme Court has enumerated non-exclusive factors for determining the reasonableness of any particular roadblock:

> 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 the 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 not to 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 is handled.
>
> 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.
>
> 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.

Id. at 571.

Shelton argues that KSP failed to comply with the first three *Buchanon* factors. He also argues that there are "other factors" that made the roadblock unconstitutional. We disagree.

Regarding the first factor, the trial court found that Sergeant Ayers set up and conducted the roadblock pursuant to KSP's Holiday Traffic Enforcement Plan and that the site of the roadblock was pre-approved. Sergeant Ayers chose this location because he knew of numerous other drunk driving incidents that had

previously occurred in the area. The location was listed in the media announcement. Shelton argues that Sergeant Ayers' superiors did not choose the location. However, Sergeant Ayers testified he was the supervisor on duty that night because none of his superiors were working. Therefore, as supervisor, Sergeant Ayers was authorized to make decisions regarding the location and time of the roadblock. He further testified that the purpose of the roadblock was to look for traffic violations, driver's licenses, insurance, registration, and driving under the influence. Shelton argues that the roadblock was unconstitutional because Sergeant Ayers failed to specify a start and end time for the roadblock, but Shelton fails to cite any legal authority or KSP policy that mandates articulation of and strict adherence to a specific stop and start time. Sergeant Ayers testified that he contacted Trooper Crick via telephone to meet him at the chosen location. The roadblock did not begin operation until both officers arrived, at approximately 9:00 p.m. Sergeant Ayers testified that he intended to operate the roadblock for approximately one hour. We agree with the trial court that the fact that the roadblock was shut down approximately fifteen minutes early by Sergeant Ayers is not enough of a derivation from *Buchanon* to invalidate the roadblock. Hence, we find no error.

Regarding the second factor, Shelton argues that, because Ayers failed to stop any other vehicles after his arrest, each motorist that passed through the

roadblock was not treated in the same manner. The trial court found that set-up and operation of the roadblock complied with KSP procedures established by law enforcement supervisors. We agree. All cars up to and including Shelton's vehicle were stopped. Specific vehicles were not targeted for stops, nor were vehicle stops randomly conducted. *See, e.g., Smith v. Commonwealth*, 219 S.W.3d 210, 215-16 (Ky. App. 2007). Sergeant Ayers came to assist Trooper Crick sometime after Shelton exited his vehicle. While the officers were engaged with Shelton, any vehicles passing through the roadblock location were not stopped. Once Trooper Crick arrested Shelton and left the scene, Sergeant Ayers shut down the roadblock. Sergeant Ayers testified that, while KSP policy does permit operation of a roadblock with only one officer, he does not feel comfortable with any less than two officers on the scene.[3] Although Sergeant Ayers shut down the roadblock after Shelton's arrest, his uncontradicted testimony was that his reason for shutting it down was safety concerns as the only officer present. Shelton has not pointed to any KSP policy or legal authority that mandates an officer continue to operate a roadblock when faced with safety concerns. We find no error.

[3] Both parties cite to KSP's General Order OM-E-4 and Shelton has attached it as an appendix to his brief. However, careful review of the record shows that this document was not introduced into evidence during the suppression hearing. While Sergeant Ayers testified to general compliance with KSP policy, we are unable to consider the specific contents of General Order OM-E-4 in Shelton's brief as it is not contained in the record before us.

Shelton argues that the third factor was not met because the roadblock was not readily apparent. He asserts only that "[s]igns warning of a checkpoint are also advisable." *Buchanon,* 122 S.W.3d at 571. While signs may be advisable, they are not required under Kentucky law. The Kentucky Supreme Court has clarified that the third factor effectively requires adequate notice of the roadblock. *Commonwealth v. Cox,* 491 S.W.3d 167, 172 (Ky. 2015). The Court held that notice was inadequate where KSP "did not erect warning signs down the road to inform vehicles approaching the site, nor did they post any announcements of a proposed checkpoint to the media." *Id.* Similarly, in *Commonwealth v. Wheeler,* 558 S.W.3d 475 (Ky. 2018), the Court held that, even though troopers had activated their blue lights and were wearing safety vests at a roadblock, there was insufficient notice because the Commonwealth could not prove that a media announcement had been issued,[4] nor were there road signs or cones visible prior to motorists arriving at the roadblock. In the instant action, the Commonwealth presented evidence of a media announcement that was distributed to the public on August 1, 2018. Sergeant Ayers and Trooper Crick activated flashing blue lights on their marked vehicles and were wearing reflective safety vests. Even though

[4] In *Wheeler,* the defendant was arrested in March 2015. At the suppression hearing in *Wheeler,* the Commonwealth offered into evidence a press release from May 2015.

KSP did not erect signs or cones to warn drivers of the roadblock, we agree with the trial court that the third *Buchanon* factor was satisfied. We discern no error.

Finally, we reject Shelton's catch-all argument that the roadblock was unconstitutional due to "other factors." He asserts that the roadblock was not carried out "with great thought" and that it "was designed to catch one person and one person only." He points to no evidence in the record to show that he was singled out by KSP that night. Shelton argues that Sergeant Ayers should have called in additional officers to continue the roadblock after his arrest so that all motorists passing through would be stopped. Although Sergeant Ayers testified that he did not attempt to call the local Sheriff's department to request continued assistance at the roadblock, he also testified that he knew KSP did not have the available manpower to send more officers to that particular location. Sergeant Ayers did not shut down the roadblock because KSP singled out Shelton and subsequently arrested him.[5] Rather, Sergeant Ayers shut down the roadblock because he did not think it was possible to maintain it due to safety concerns as the only remaining officer.

Accordingly, we AFFIRM the Muhlenberg Circuit Court.

ALL CONCUR.

[5] *See, e.g., Monin v. Commonwealth*, 209 S.W.3d 471 (Ky. App. 2006).

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