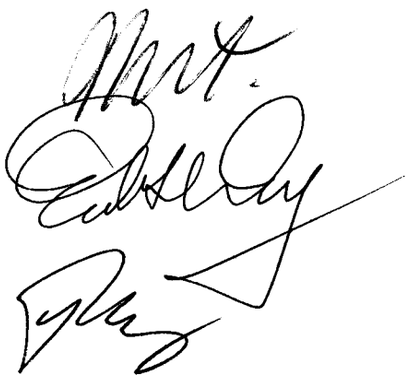
NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 KA 0015



STATE OF LOUISIANA

VERSUS

RANDALL HERPIN HODGES

Judgment Rendered: JUN 05 2015

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Appealed from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case No. 29955

The Honorable Elizabeth P. Wolfe, Judge Presiding

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Scott M. Perrilloux **District Attorney** **Patricia Amos** **Assistant District Attorney** **Livingston, Louisiana**	**Counsel for Appellant** **State of Louisiana**
Scott H. Nettles **Denham Springs, Louisiana**	**Counsel for Defendant/Appellee** **Randall Herpin Hodges**

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

THERIOT, J.

The defendant, Randall Herpin Hodges, was charged by bill of information with possession with intent to distribute heroin (count 1), a violation of La. R.S. 40:966(A)(1); possession with intent to distribute marijuana (count 2), a violation of La. R.S. 40:966(A)(1); possession with intent to distribute tetrahydrocannabinol (count 3), a violation of La. R.S. 40:966(A)(1); possession with intent to distribute methamphetamine (count 4), a violation of La. R.S. 40:967(A)(1); possession with intent to distribute oxycodone (count 5), a violation of La. R.S. 40:967(A)(1); possession with intent to distribute hydromorphone (count 6), a violation of La. R.S. 40:967(A)(1); possession with intent to distribute testosterone (count 7), a violation of La. R.S. 40:968(A)(1); possession with intent to distribute dehydrochloromethyltestosterone (count 8), a violation of La. R.S. 40:968(A)(1); possession with intent to distribute nandrolone (count 9), a violation of La. R.S. 40:968(A)(1); sale, distribution, or possession of a legend drug, sildenafil, without a prescription (count 10), a violation of La. R.S. 40:1238.1; sale, distribution, or possession of a legend drug, tadalafil, without a prescription (count 11), a violation of La. R.S. 40:1238.1. The defendant pled not guilty to the charges. The defendant filed a motion to quash the bill of information. The trial court granted the motion to quash and ordered all charges be dismissed. The State now appeals the ruling of the trial court. We vacate the granting of the motion to quash.

FACTS

This matter was dismissed pretrial, so the facts were not developed. A review of the discovery in the appellate record indicates that on August 24, 2013, the defendant, along with a male passenger, was stopped at a DWI checkpoint at the intersection of La. Hwy. 16 and La. Hwy. 447 in Port

Vincent, Louisiana. The officer smelled marijuana and saw rolling papers inside the truck. The officer also noticed the defendant was rather nervous. When the officer asked the defendant to pull into the parking lot at the intersection for a more thorough investigation, the defendant fled in his truck. Police officers gave pursuit, and, during the chase, drugs, money, and a bag were thrown out of the truck. The defendant was apprehended, and he and his passenger were arrested. Officers seized the money and drugs thrown from the truck, as well as the bag, which contained drugs and money. Officers also found drugs and cash inside the truck.

ASSIGNMENT OF ERROR

In its sole assignment of error, the State argues the trial court erred in granting the defendant's motion to quash the bill of information. Specifically, the State contends the trial court relied on jurisprudence that has been expressly overruled.

DISCUSSION

At the motion to quash hearing, defense counsel argued that the bill of information should be quashed because the DWI checkpoint was unconstitutional for several reasons. The defendant contended the checkpoint unconstitutionally attempted to regulate crimes, or DWI, rather than highway offenses. According to defense counsel, "if you could have a D.W.I. checkpoint you could also I guess have a murder checkpoint. People would drive up and you would say, "Hey, have you killed anybody?" The defendant further contended the checkpoint was unconstitutional because its likelihood of success was not established. Citing **State v. Jackson**, 2000-0015 (La. 7/6/00), 764 So.2d 64; **State v. Church**, 538 So.2d 993 (La. 1989), overruled, **State v. Jackson**, 2000-0015 (La. 7/6/00), 764 So.2d 64; and **State v. Parms**, 523 So.2d 1293 (La. 1988), rejected, **State v. Jackson**,

2000-0015 (La. 7/6/00), 764 So.2d 64, the defendant maintained "there has got to be some reasonable success with the checkpoint." In the instant matter, according to the defendant, the report submitted by the sheriff's department indicated that 517 cars were stopped and only four DWI arrests were made. This was a .7 percent success rate. The defendant again referenced **Church** and stated, "[t]he court held that their success rate was not good enough to pass constitutional muster and their success rate was 1.5 percent, more than double the success rate in our case."

The defendant further argued that the sheriff's department protocol "left out **Miranda**."[1] According to the defendant, if a driver was going to be questioned about a crime, an officer had to tell the driver he had the right to remain silent. Finally, the defendant argued there was no "objective standard" in the DWI protocol. Citing **Jackson**, **Church**, and **Parms** for the proposition that no discretion is allowed on the part of the officer, the defendant suggested, "[w]e've got the police officer deciding, I suppose, that this person looks drunk or smells drunk or his eyes are drooping or something and he's got to use his discretion and that is the key in all of these . . . cases here is trying to take away th[a]t discretion[.]"

The prosecutor provided the following response:

> As far as D.W.I. checkpoints being unconstitutional, this matter has been decided by the United States Supreme Court in **Michigan versus Sitz** back in 1990 as well as a Louisiana Supreme Court in the case that he was citing too, **State versus Jackson**. Also in **State versus Jackson**, I know he dismissed it, but as far as the media is concern[ed] the court stated no specific media requirement is required. That was in Louisiana Supreme State Court.

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[1] Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. **Miranda v. Arizona**, 384 U.S. 436, 444-445, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

> Furthermore in **State v. Owens** which is a second circuit court it states that the **Jackson** guidelines should be followed but they stress that mandatory and precise adherence to each guideline is not an absolute necessity although it may be preferable. They go on to say that none of these factors can even arguably support a claim for suppression of evidence.
>
> [The defendant] mentioned that the checkpoint protocol lists that it has prior success at the checkpoint but it doesn't label what kind of checkpoint. I think it goes without being said that because it's put into a D.W.I. checkpoint protocol they're referring to prior D.W.I. checkpoints at that exact location, therefore based on the prior number of arrests and the prior number of success I think in hindsight just because you pull over a couple hundred vehicles and you only arrest even one person - I mean, I don't know how that makes it unconstitutional if it's always worked there in the past.
>
> He also mentions the officer's discretion and there has to be an objective standard. The protocol lists they're going to stop every single car. That's about as objective as it gets. The law requires that it be an objective standard and I believe prior courts have mentioned that means either stopping every car, every second car, every fifth car, some standard to where there is no discretion.
>
> By stopping every single vehicle that comes through that limits the officer discretion completely because they can't pick and choose which car. They say every single car no matter what.
>
> As far as being **Mirandized**, **Miranda** is only included if you're under arrest.

In granting the motion to quash, the trial court made the following findings:

> I am convinced, for the reasons given by [the defendant] and the argument has merit, particularly where the operational plan must show the likelihood of success or the checkpoint must be the reasonableness of the success or the success rate.
>
> In this case, as [the defendant] calculates, .7 percent success rate. The **Church** case clearly said the 1.5 percent success rate was not enough to pass constitutional muster, likewise I find that in this case, for those reasons the motion to quash is granted. The defendant does not need to be given another date. At this point the charges have been quashed.

The motion to quash is essentially a mechanism by which to raise pretrial pleas or defenses, *i.e.*, those matters which do not go to the merits of the charge. **State v. Beauchamp**, 510 So.2d 22, 25 (La. App. 1 Cir.), writ denied, 512 So.2d 1176 (La. 1987); see La. C.Cr.P. arts. 531-38. It is treated

much like an exception of no cause of action in a civil suit. **Id.** In considering a motion to quash, a court must accept as true the facts contained in the bill of information and in the bill of particulars and determine, as a matter of law and from the face of the pleadings, whether or not a crime has been charged. While evidence may be adduced, such may not include a defense on the merits. The question of factual guilt or innocence of the offense charged is not raised by the motion to quash. **Id.** In general, an appellate court reviews a trial court's rulings under a deferential standard with regard to factual and other trial determinations, but the legal findings of a trial court are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751. **State v. Thomas**, 2012-0470 (La. App. 1 Cir. 11/14/12), 111 So.3d 386, 389.

The trial court erred in granting the motion to quash the bill of information. Its reasoning is based in great part on reliance of jurisprudence that has been overruled or subsequently rejected. The **Jackson** decision discussed the history of checkpoints in this State and concluded that Article I, § 5 of the Louisiana Constitution does not prohibit use of checkpoints to "seize" an automobile and expressly overruled the supreme court's prior holding in **Church**. **Jackson**, 764 So.2d at 65. **Jackson**, itself, was an insurance checkpoint case, but the supreme court refused to distinguish between the insurance checkpoint and the DWI checkpoint on artificial grounds and found that, given the proper guidelines, both are constitutional. The **Jackson** Court stated, "[t]his court has considered the constitutionality of checkpoints to check for drunken motorists in [**Parms**] and [**Church**]" and that in "**Parms**, this court concluded that the particular DWI checkpoint under consideration failed to pass muster under the federal constitution." **Jackson**, 764 So.2d at 68. Subsequently, as noted by the **Jackson** Court, the

United States Supreme Court in **Michigan Dep't of State Police v. Sitz**, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), held that sobriety checkpoints were constitutional. **Jackson**, 764 So.2d at 67-68. The **Jackson** Court noted that in both **Parms** and **Church**, the stops began with a driver's license check that developed into more extended detentions if the officers detected signs of intoxication. **Jackson**, 764 So.2d at 69. As such, the supreme court noted, "it becomes impossible as a practical matter to distinguish one kind of checkpoint from another under the Louisiana Constitution because checkpoints of this nature can serve multiple purposes." **Id**. at 70. Accordingly, the **Jackson** Court declined to "draw a distinction that makes the result in a given case depend on how police characterize the checkpoint," and concluded "that a consistent approach to checkpoints, regardless of which laws they are designed to enforce, can be implemented that withstands scrutiny under the Louisiana Constitution." **Id**.

Based on the foregoing, it is clear the defendant was incorrect that the checkpoint was unconstitutional because it sought to check for drunken motorists rather than "highway offenses." Both our supreme court and the United States Supreme Court have found DWI checkpoints constitutional. The defendant's argument was also incorrect that the checkpoint was unconstitutional because it had a .7 percent success rate. The **Jackson** Court specifically noted that the **Church** rationale that a 1.5 percent success rate result for DWI drivers was ineffective has been repudiated by the U.S. Supreme Court in the **Sitz** decision. **Jackson**, 764 So.2d at 71 n.9.

The defendant's argument was also incorrect that **Miranda** is required upon the initial stop of a motorist. The checkpoint guidelines set forth in the **Jackson** decision do not mention **Miranda** in evaluating the constitutionality of a checkpoint. **Id** at 72-73 Moreover, **Miranda** warnings

are required only when the suspect is subject to custodial interrogation. See **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); **State v. Payne**, 2001-3196 (La. 12/4/02), 833 So.2d 927, 934. The obligation to provide **Miranda** warnings attaches only when a person is questioned by law enforcement after he has been taken into custody or deprived of his freedom of action in any significant way. See **State v. Shirley**, 2008-2106 (La. 5/5/09), 10 So.3d 224, 229. Although a motorist stopped for a traffic violation or an individual detained in a **Terry**[2] stop based on reasonable suspicion has had his freedom of movement curtailed in a significant way, until an arrest actually occurs, these Fourth Amendment seizures do not constitute custody for **Miranda** purposes. **Id.** See **Berkemer v. McCarty**, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984).

The defendant was also incorrect when he argued that there was not an objective standard, or a way to keep the officer's discretion at a minimum, in the DWI protocol. **Jackson** requires law enforcement to use systematic, non-random criteria for stopping motorists. **Jackson**, 764 So.2d at 73. The Livingston Parish Sheriff's Office Sobriety Checkpoint Operational Plan in the record before us appears to do precisely that. Section G of the operational plan provides the following relevant information:

> This checkpoint will be conducted on La 16 at La 447 in Port Vincent LA. East and west bound lanes on La 16 and southbound lane on La 447 will be screened. The screening area will be in the travel lanes at the approach to the stop signs. The screening area will be cordoned off by traffic cones. Vehicles that require

[2] Pursuant to the Fourth Amendment, a police officer who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion. The stop and inquiry must be reasonably related in scope to the justification for their initiation. **Terry v. Ohio**, 392 U.S. 1, 30-31, 88 S.Ct. 1868, 1884-85, 20 L. Ed. 2d 889 (1968).

> further screening will be directed into the parking area of Parkers Grocery for further investigation. Operators in the screening area that do not warrant further investigation will be allowed to continue.
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> * * *
>
> Every vehicle that passes the C/P will be screened. Officers will approach every driver, identify themselves and their department, state the reason for the stop and ask if the driver is impaired. If a driver is found to need further screening, he will be asked to exit the vehicle. An officer will escort the driver to the SFST area and another officer will move the vehicle to a safe area. If the driver is found to not be impaired, he/she will be safely directed back onto the highway. If an arrest is made, the arrestee will be taken for a breath test to be performed. All arrestees will be booked or summoned and entered in AFIS at LPSO. Vehicles will be handled per policy.
>
> The C/P supervisor will assign one officer to keep data on the C/P.
>
> The C/P supervisor will conduct a debriefing and collect all data. He will forward to [sic] the information to DWI grant administrator.

Accordingly, it appears every vehicle was to be stopped at the checkpoint, and every driver was to be questioned. Such a procedure satisfies the objective standard. Moreover, in **State v. Owens**, 43,397 (La. App. 2 Cir. 3/13/08), 977 So.2d 300, writ denied, 2008-0808 (La. 6/6/08), 983 So.2d 921, the defendant's motion to suppress was granted because, according to the trial court, there were two **Jackson** deficiencies in the Operations Plan; namely, lack of a detailed explanation of the exact type of specific non-random criterion to be used in stopping motorists and lack of a stated duration of the checkpoint. The Second Circuit reversed the granting of the motion to suppress, finding that while the operational plan admittedly did not define the specific means of assuring a non-random criterion for stopping motorist, the language in fact required a non-random criterion for stopping motorists, in that "***[e]very*** vehicle was stopped during the 150 minute check point" and, as such, "the stops could not have been more 'non-

random.'" **Id.** at 301. The **Owens** court concluded that minimal variation from the **Jackson** guidelines should not result in the suppression of the evidence of impairment revealed by the check point through reasonable police activity. **Id.** at 302.

CONCLUSION

There was no merit to the arguments provided by the defendant at the motion to quash hearing. Accordingly, we find the trial court erred in granting the motion to quash and, as such, the ruling on the motion is reversed. The defendant's motion to quash is denied, and this matter is remanded for further proceedings consistent with this opinion.

REVERSED, RENDERED AND REMANDED.