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Case Number 388,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD J. COOK,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	**No. 388, 2014**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE COUNTY

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DATED: December 5, 2014

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I. **THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED MR. COOK'S MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO MEET ITS BURDEN AND DEMONSTRATE THAT THE SOBRIETY CHECKPOINT WAS PROPERLY ESTABLISHED AND OPERATED IN ACCORDANCE WITH THE STANDARDS SET BY THE IV AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS VI AND VII OF THE DELAWARE CONSTITUTION, THE GUIDELINES AND STANDARDS ESTABLISHED BY THE STATE OF DELAWARE OFFICE OF HIGHWAY SAFETY, AND RELEVANT CASE LAW**.

The State in its Answering Brief serves a plate full of icing and a few crumbs of cake. As one example, the State dwells at length and in detail about how the checkpoint complied with the requirements of the Fourth Amendment because all vehicles passing through were stopped; the initial contact with motorists was brief and was not prolonged unless they observed signs of intoxication; and the checkpoint had traffic cones, flashing lights and posted signs alerting approaching motorists. Ans. Br. at 4; 10; 15-16. However, the State, like the Superior Court, fails to recognize that even compliance with these enumerated requirements does not cure the Fourth Amendment violation born out of the police, without necessitous or emergency circumstance, or other rationale, repositioning the location of the sobriety checkpoint, intentionally, and without knowledge whether or not the repositioned location was to be found within the designated grid that was

approved. In the same vein, it is astonishing that the State provides a recitation of the facts that would leave one never knowing that the sobriety checkpoint was actually constructed and operated 0.3 miles south of the location [grid 106-354] confirmed and approved by the Deputy Director of the Office of Highway Safety. (A-10-11). Ans. Br. at 4-5.

Properly, the State acknowledges that "[c]heckpoint programs are not without their limitations, [] because a checkpoint stop must still comply with Fourth Amendment reasonableness standards." Ans. Br. at 8. In support, the State relies on *United States v. Henson*, a Fourth Circuit decision that articulates the factors to be considered in determining the reasonableness and thus the constitutionality of a checkpoint stop.[1] This decision supports Cook's argument when examined closely. The State glosses over factor (2), which requires the checkpoint to be "part of some systematic procedure that strictly limits the discretionary authority of police officers." *Id.* The State fails to address that factor because the record in the instant case fails to support it.

The State also admits, as it must, that "in determining whether or not this sobriety checkpoint was properly established, a court should determine whether the checkpoint was operated pursuant to a neutral plan, and in a

1 351 F. App'x 818, 821 (4th Cir. 2009).

reasonable manner that limited police officers' discretion." Ans. Br. at 14. Here the checkpoint failed on both levels. The record is silent as to the basis behind the deviation from the neutral plan and the decision making in moving the checkpoint from its approved grid location. "The government officials who have a unique understanding of, and a responsibility for, limited public resources" and who ultimately make choices among reasonable alternatives did not testify in this case. Ans. Br. at 10. The State's failure to provide substantive testimony from a supervising official acting in an administrative or managerial capacity was fatal to the State's case.[2]

On this record, it can't be emphasized enough that the arresting officer and State's lone witness had little to no knowledge of how or why the particular checkpoint, which was moved from the approved location, was established and operated in the manner and location. As a result, we are left to assume that police had unfettered discretion in moving the checkpoint. Like the Superior Court, the State posits that "close" is good enough even though the testifying officer admitted that he did not have any idea of the special boundary of the grid which was authorized. Under the State's contention, so long as there was "a reasonable nexus", police would have

2 *State v. Hollinger*, 2012 WL 5208792 at *7 (Del.Com.Pl. Oct. 10, 2012).

discretion to move the checkpoint from the approved location on South Market Street on Friday at 10:00 p.m. to Route 13 in Smyrna on Saturday at 2:00 a.m. Ans. Br. at 16. This hardly makes logical sense.

In its answering brief, the State argues that "[L]ocal police procedures cannot provide the basis for determining reasonableness under the Fourth Amendment" and that "[i]f state laws or local procedural guidelines could define what is reasonable in a particular jurisdiction, then the protections of the Fourth amendment would vary from place to place." Ans. Br. at 13. The State's argument is perhaps the most dubious of all because it contradicts the State's own position and the authority it relies on. Ans. Br. at 7. On one hand the State suggests that the Fourth Amendment is meant to be, and must be, applied uniformly across the country. On the other hand, the State relies on *Michigan Dep't of State Police v. Sitz*[3] and *United States v. Henson*, two cases that clearly stand for the consideration of State programs and systematic procedures [i.e. neutral plan] in determining the constitutionality of a checkpoint. The State can't have it both ways.

Moreover, the State contends that protections of the Fourth amendment do not vary from place to place. Not so. One need only look to Delaware to prove otherwise. "The Delaware Constitution, like the

3 496 U.S. 444, 455 (1990).

constitutions of certain other states, may provide individuals with greater rights than those afforded by the United States Constitution. For example, [this Court has] held that the Delaware Constitution provides greater rights than the United States Constitution in the preservation of evidence used against a defendant the right of confrontation, the right to counsel, and the right to trial by jury." *Jones v. State*, 745 A.2d 856, 863-64 (Del. 1999).

Finally, it should be noted that the decision by the lower Court is not new law. *Cook* merely restates the rule of law as we know it - that substantial or careful compliance, and not strict compliance, with administrative policies and procedures is that which is required.[4] The same holds true in *McDermott, Hollinger,* and cases in other jurisdictions.[5] Furthermore, all of these cases (*Cook, McDermott,* and *Hollinger*) agree that the court must balance the gravity of the public concern served by the search and seizure, the degree to which the search and seizure advances the public interest, and the severity of the interference with individual liberty. The record in the instant case makes clear that the State did not prove substantial or careful compliance.

Here, the State attempts to expand *Cook's* criticism of *McDermott*,

4 *State v. Cook*, 2013 WL 1092130 *5 (Del. Super. Feb. 13, 1013).
5 *State v. McDermott*, 1999 WL 1847364 *3 (Del.Com.Pl. April 30, 1999), *State v. Hollinger*, 2012 WL 5208792 *5 (Del.Com.Pl. Oct. 10, 2012); *Com. v. Yastrop*, 768 A.2d. 318, 323 (Pa. 2001); *State of New Jersey v. Kirk*, 202 N.J. Super. 28, (1985).

and use that criticism to support the State's position that the data and statistics speak for themselves, and that the State has unfettered discretion to establish and operate a checkpoint where ever they so desire. Ans. Br. At 14. They do not. The bottom line is the State failed to meet their burden in proving that the checkpoint and the seizure of Mr. Cook complied with constitutional standards. On this record, or the lack thereof, 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. Specifically, the State failed to demonstrate that the checkpoint was established properly and operated in a manner that limited law enforcement discretion. Thus, reversal is required.

CONCLUSION

For the reasons and upon the authorities set forth herein, the Court should reverse Mr. Cook's conviction.

Respectfully submitted,

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DATED: December 5, 2014