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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,	)	
	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

Elizabeth R. McFarlan (#3759)
Chief of Appeals
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

November 17, 2014

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STATUTE

NATURE AND STAGE OF THE PROCEEDINGS

On April 28, 2012, Edward Cook was arrested for driving under the influence (DUI) at a Checkpoint Strike Force sobriety checkpoint. Because it was his fourth DUI-related offense, Cook was charged with Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177 as a felony, and the proceedings in his case were conducted in the Superior Court. A7. Cook moved to suppress the evidence and his statements. A1 at DI 18. Superior Court conducted a hearing on the motion on August 31, 2012. A3 at DI 15. Superior Court denied the motion in a written opinion on February 13, 2013.[1] On February 14, 2013, Cook and the State waived a trial by jury and a one-day trial before a judge of the Superior Court took place the same day. A4 at DI 30 & 31. The judge found Cook guilty of fourth offense DUI.

On May 24, 2013, Cook moved for a certificate of reasonable doubt. A5 at DI 37. After receiving the State's response, Superior Court issued a certificate of reasonable doubt and stayed the sentence pending the outcome of this appeal. A5 at DI 40. On June 27, 2014, Superior Court sentenced Cook to two years at Level V incarceration, suspended after three months for probation.[2] Cook docketed a

[1] *State v. Cook*, 2013 WL 1092130 (Del. Super. Ct. Feb. 13, 2013) (attached as Ex. A to Op. Br.).

[2] *State v. Cook*, Del. Super. Ct., ID No. 1204020357, Parkins, J. (July 16, 2014) (Corrected Sentence Order) (Ex. B to Op. Br).

timely appeal and filed an opening brief. This is the State's answering brief on appeal.

SUMMARY OF THE ARGUMENT

1. Appellant's argument is denied. The trial court properly denied Cook's motion to suppress. The Fourth Amendment requires that a sobriety checkpoint be established pursuant to a neutral plan that limits officer discretion, and that a reasonable nexus exists between the location of the checkpoint and the purpose of curbing drunken driving. A reviewing Court gives wide deference to law enforcement's selection of the time and location for a sobriety checkpoint. The trial court applied the correct legal standard in denying Cook's motion to suppress. The Fourth Amendment does not require the State to prove strict compliance with police procedures governing sobriety checkpoints. When applying the appropriate legal standard for stops at sobriety checkpoints the Court should find that the establishment of the checkpoint here was permissible under the Fourth Amendment of the United States Constitution. Cook's argument under the Delaware Constitution is waived because he failed to brief the issue.

STATEMENT OF FACTS[3]

On April 27, 2012 at 10:00 p.m., the CheckPoint Strike Force set up a sobriety checkpoint on southbound South Market Street in Wilmington. The checkpoint was scheduled to operate until 2:00 a.m. the next morning. The site was selected because of the comparatively high rate of drunk driving arrests in that area—in 2010 there were 26 DUI arrests and one alcohol-related motor vehicle fatality in the vicinity of the checkpoint where Defendant was stopped.

In the instant case there could be little doubt to an approaching motorist that a sobriety checkpoint was ahead. There were large illuminated signs warning motorists that they were approaching a sobriety checkpoint. Marked police cars with their emergency lights flashing abounded, and spotlights illuminated the checkpoint's command post. Specially trained uniformed police officers, wearing reflective vests, manned the checkpoint. Orange traffic cones topped by flashing lights served to narrow the traffic to one lane as the motorists approached the checkpoint itself.

The intrusion upon motorists at the checkpoint was minimal. All cars were stopped and each driver was asked to roll down the window. The police would depart from the practice of stopping all cars when traffic backed up, in which case all of the backed-up traffic was permitted to pass through the checkpoint without

[3] The facts are taken from the Superior Court's opinion denying Cook's motion to suppress. *State v. Cook*, 2013 WL 1092130 (Del. Super. Ct. Feb. 13, 2013).

stopping. A uniformed officer did not question the driver but simply explained to the driver that the police were operating a sobriety checkpoint. If the officer saw no signs of impairment, the driver was permitted to go on his or her way, in which case the entire encounter with the police officer lasted no more than a few seconds. In instances where the officer observed signs of impairment, the driver was asked to pull off to a well lit area for further investigation.

When Cook stopped at the checkpoint, the officer detected signs he was impaired. In accordance with standard procedure, Cook was asked to pull over to the side, where police conducted an additional investigation which revealed that Cook was intoxicated.

I. THE TRIAL JUDGE APPLIED THE CORRECT LEGAL PRINCIPLES IN DENYING COOK'S MOTION TO SUPPRESS THE EVIDENCE

Question Presented

Whether the trial judge correctly applied legal principles to the facts of this case in ruling that the sobriety checkpoint was properly established to satisfy the requirements of the Fourth Amendment of the United States Constitution.

Standard and Scope of Review

This Court reviews the granting of a motion to suppress for an abuse of discretion.[4] However, to the extent that the Court examines the trial judge's legal conclusions, the review of the trial judge's determinations is *de novo* for errors in formulating or applying legal concepts.[5]

Merits

Cook alleges that his rights under both the Fourth Amendment of the United States Constitution and Article I, Sections 6 & 7 of the Delaware Constitution were violated, because the sobriety checkpoint at which he was stopped and ultimately "seized" did not comply with constitutional requirements. As to his claim under the Delaware Constitution, Cook has not briefed any claim specific to Delaware constitutional jurisprudence, and as a result, he has waived any claim under the

[4] *Culver v. State*, 956 A.2d 5 (Del. 2008); *see also Rambo v. State*, 939 A.2d 1275 (Del. 2007).

[5] *Chavous v. State*, 953 A.2d 282 (Del. 2008).

Delaware Constitution.[6] Cook contends that because the checkpoint was allegedly not established and operated in accordance with various standards, including National Highway Traffic Safety Administration guidelines, that Superior Court erred in denying Cook's motion to suppress evidence and statements. Op. Br. at 6. Cook attempts to turn compliance with administrative policies into constitutional mandates. He is wrong.

The burden is on the State to prove, by a preponderance of the evidence, that a warrantless search of a vehicle did not violate the defendant's constitutional rights.[7] Ordinarily, a police officer must have reasonable, articulable suspicion to believe a crime or traffic violation is being, or has been, committed, in order to stop a motor vehicle.[8] The United States Supreme Court has held, however, that suspicion-less stops at sobriety checkpoints are constitutionally valid, given the legitimate State interest involved, and the limited intrusion and anxiety imposed upon motorists at such checkpoints.[9] Specifically, the Supreme Court held that "the balance of the State's interest in preventing drunken driving, the extent to

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[6] *See Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (citing *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005)).

[7] *Hunter v. State*, 783 A.2d 558, 561 (Del. 2001).

[8] *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *see also Brown v. Texas*, 443 U.S. 47, 51 (1979).

[9] *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *see also State v. Stroman*, 1984 WL 547841, at *7 (Del. Super. Ct. May 18, 1984) (finding roadblock effective to state interest in traffic safety because "[w]hen one considers the potential death and destruction that could be caused by a single drunk driver, one must conclude that the contribution to highway safety is anything but marginal, and more likely tremendous.").

which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped weighs in favor of the state program."[10] Checkpoint programs are not without their limitations, however, because a checkpoint stop must still comply with Fourth Amendment reasonableness standards. In *United States v. Henson*, the Fourth Circuit suggested factors to be considered in determining the reasonableness and thus the constitutionality of a checkpoint stop:

> Factors to weigh intrusiveness include whether the checkpoint: (1) is clearly visible; (2) is part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) detains drivers no longer than is necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity.[11]

In determining the relationship between checkpoint guidelines and the Fourth Amendment, courts should look to whether the stop and seizure of the defendant were reasonable. A policy or standard promulgated by OHS or some other state agency is not synonymous with the Fourth Amendment. However, substantial compliance with reasonable policy and procedures are strong evidence of reasonableness.[12] For example, in the context of warrantless probationer searches, another category where the United States Supreme Court has found a strong

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[10] *Sitz*, 496 U.S. at 455.

[11] *United States v. Henson*, 351 F. App'x 818, 821 (4th Cir. 2009).

[12] *See, e.g., Bunting v. State*, 2006 WL 2587074, at *5 (Del. Sept. 7, 2006) (citing *Donald v. State*, 903 A.2d 315, 319 (Del. 2008)).

societal interest justifies reasonable warrantless searches,[13] this Court has held that:

> The purpose of the regulations is to ensure that the Department has sufficient grounds before undertaking a search. The individual procedures advance that goal but are not independently necessary, as demonstrated by the fact that the regulations explicitly state exceptions for when the search checklist need not be used.
>
> Even if the officers did not follow each technical requirement of the search regulations before searching [the probationer], they did satisfy those that affect the reasonableness inquiry under the United States and Delaware Constitutions.[14]

As recently noted by Superior Court in *State v. Mugo*, "the existence of a set of procedures is but one component, albeit a necessary one, to ensure Fourth Amendment compliance. It follows then, that the degree of compliance with the procedures must be sufficient so as not to make the search unreasonable under the Fourth Amendment."[15] This Court has "acknowledged that substantial compliance with departmental guidelines alone - not absolute compliance - sufficiently withstands review of an administrative search."[16]

Following the analysis discussed above, Superior Court in this case correctly

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[13] *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (listing circumstances where special needs allow reasonable warrantless searches under the Fourth Amendment).

[14] *Fuller v. State*, 844 A.2d 290, 292 (Del. 2004) (following *Griffin* Court's conclusion that when a regulatory scheme requires reasonable grounds for a search, compliance with those regulations is sufficient to render the search reasonable under the Fourth Amendment).

[15] 2014 WL 4724570, at *2 (Del. Super. Ct. Sept. 23, 2014) (finding the opinion in *State v. Cook* persuasive) (citations omitted).

[16] *Pendleton v. State*, 990 A.2d 417, 419 (Del. 2010) (clarifying standard announced in *Fuller*).

found that a sobriety checkpoint thus is constitutionally valid so long as a checkpoint is established pursuant to a neutral plan and conducted according to a pre-existing plan that limits officer discretion.[17] That is, officers must have no discretion in which vehicles are stopped. Further, the stop must be limited to "what can be seen without a search."[18] A stop of a motorist may only be prolonged where an officer observes signs that give rise to a reasonable suspicion to believe that a motorist is intoxicated.[19] Superior Court properly gave "wide deference to the police decision as to when and where to conduct a checkpoint."[20] While there may be a multitude of justifiable locations, "for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."[21]

Applying these standards to the facts of this case, Superior Court properly found Cook's initial detention at the sobriety checkpoint on South Market Street was lawful, and that his Fourth Amendment rights had not been violated. Cook has challenged only the establishment and operation of the sobriety checkpoint, not

[17] *Cook*, 2013 WL 1092130, at *5. *See Sitz*, 496 U.S. at 454-55.

[18] *Id.* at *3 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)).

[19] *Cook*, 2013 WL 1092130, at *3.

[20] *Cook*, 2013 WL 1092130, at *5.

[21] *Sitz*, 496 U.S. at 453-54.

the finding that Cook was under the influence. Thus, Superior Court correctly denied his motion to suppress evidence.

Cook contends that this Court should, in contravention of *Bradley v. State*,[22] apply the legal standard outlined by Superior Court in *State v. Terry*[23] and the Court of Common Pleas in *State v. McDermott* and *State v. Hollinger*. *See* Op. Br. at 8-11. In *McDermott*, the court held that the Fourth Amendment requires the State to demonstrate careful, or strict, compliance with OHS policy guidelines, finding that these guidelines, created by a state agency, act as a substitute for the Fourth Amendment. "Delaware State Police policy acts as a substitute for the Fourth Amendment [reasonableness] standard."[24] In *Hollinger*, the Court of Common Pleas first noted that the "[OHS] guidelines act as a substitute for the reasonable requirements of the United States Constitution . . . To meet the requirements of reasonableness, the State must demonstrate careful compliance with the policy guidelines."[25] Building upon this foundation, the *Hollinger* court also required the State to produce a witness to "testify substantively" in such a way

[22] 2004 WL 1964980, at *1 (Del. Aug. 19, 2004) (finding careful and substantial compliance to be sufficient with OHS checkpoint policy and procedures sufficient to comply with the Fourth Amendment).

[23] 2013 WL 3833085 (Del. Super. Ct. July 18, 2013).

[24] *McDermott*, 1999 WL 1847364, at *3.

[25] *Hollinger*, 2012 WL 5208792, at *5. *Hollinger* also cites *McDermott* for the proposition that Article I, Section 6 of the Delaware Constitution requires the State to prove careful or strict compliance with OHS guidelines. *Hollinger*, 2012 WL at *5. *McDermott*, however, was decided solely on U.S. constitutional grounds and does not reference the Delaware Constitution at all in its holding. *McDermott* at **2-4.

that "shows compliance with applicable sobriety checkpoint procedural guidelines."[26] The State must, according to *Hollinger*, do more than introduce documentary exhibits that purport to show that a reasonable nexus exists between the location of the checkpoint and the State's interest in curbing drunken and intoxicated driving. Instead, the State must produce a witness to testify and explain how the checkpoint in question strictly or carefully complied with OHS procedures in the selection of the location of the checkpoint, in addition to producing evidence that the checkpoint as it was conducted carefully or strictly complied with OHS procedures. These requirements far exceed the reasonableness requirement of the Fourth Amendment.

Nonetheless, this is the legal standard Cook asks this Court to apply to find that Superior Court abused its discretion by denying his motion to suppress. As explained by Superior Court, *McDermott* was erroneously decided. The legal standard outlined in *McDermott*, and expanded upon in *Hollinger* (yet rejected by this Court in *Bradley*) is not consistent with what the Fourth Amendment requires for police to lawfully conduct a sobriety checkpoint. As the court explained, *McDermott* was erroneously decided for two reasons. First, procedures promulgated by a state or local police department or other agency cannot serve as a

[26] *Hollinger*, 2012 WL 5208792, at *7.

"measuring stick" for determining reasonableness under the Fourth Amendment.[27] "[L]ocal police procedures cannot provide the basis for determining reasonableness under the Fourth Amendment."[28] The Fourth Amendment is meant to be, and must be, applied uniformly across the country.[29] If 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. Clearly, the OHS checkpoint procedures cannot act as a substitute for the Fourth Amendment. As the United States Supreme Court observed in 2008 in *Virginia v. Moore*,

> We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule. While those practices "vary from place to place and from time to time,' the Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'"[30]

Thus, the *Moore* Court makes clear that compliance with rules or guidelines created by a state agency, while helpful, cannot act as a substitute for the reasonableness requirement of the Fourth Amendment.[31]

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[27] *Cook*, 2013 WL 1092130 at *5.

[28] *Id.* at *6.

[29] *Virginia v. Moore* 553 U.S. 164, 172 (2008).

[30] 553 U.S. 164, 172 (internal citations omitted) (holding that police did not violate the Fourth Amendment when they made an arrest that was based upon probable cause but prohibited by state law). *See also California v. Greenwood*, 486 U.S. 35, 43 (1988) ("We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.").

[31] *Accord Mugo*, 2014 WL 4724570, at *2.

Superior Court also found the logic of *McDermott* lacking when it held that a failure on the part of the police agency to file a post-checkpoint statistical report amounted to a violation of the checkpoint procedures, and therefore, a violation of the Fourth Amendment.[32] As the court noted, the reasoning is flawed because "events occurring after a seizure can do nothing to invalidate a reasonable seizure, just as they can do nothing to validate an otherwise unreasonable seizure."[33] Given the flawed reasoning of *McDermott* and its progeny, and the more recent holding in *State v. Mugo* on this issue, it is evident that Superior Court correctly held that OHS procedures cannot act as a substitute for the reasonableness standard of the Fourth Amendment. Whether or not the police complied with the requirements of the Fourth Amendment cannot depend solely upon whether or not the State submits evidence that law enforcement officers strictly complied with procedures created by a state agency, in this case, procedures put into place by the Office of Highway Safety.

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 reasonable manner that limited police officers' discretion. The court should also determine whether there was a "reasonable

[32] *See McDermott*, 1999 WL 1847364, at *4.

[33] *Cook*, 2013 WL 1092130, at *6-7.

nexus" between the location of the checkpoint and the desired purpose of curbing drunk driving, giving due deference to police as to when and where to conduct a checkpoint.[34]

In applying this standard, Superior Court found that the sobriety checkpoint was operated in a reasonable manner, finding:

> The site and time for the instant checkpoint were selected on the basis of historical data and thus fall well within the deference accorded to such police decisions by the courts.
>
> Not only is there a sufficient relationship between the time and location of the checkpoint and the public interest in curbing drunk driving, but also it is clear that the officers manning the checkpoint did not have unfettered discretion. Importantly they were required to stop every car proceeding through the checkpoint—which prevented them from singling out motorists to be stopped on the basis of race or some other impermissible factor. The procedures also precluded officers from prolonging the stop unless they observed signs giving rise to a reasonable suspicion that the driver was intoxicated. The court finds, therefore, that the instant checkpoint was operated pursuant to a neutral plan.[35]

Those findings are supported by the record. The OHS Sobriety Checkpoint memorandum indicated approval for a checkpoint at "South Market at A Street." A11. The sobriety checkpoint was conducted in the 600 block of South Market Street just prior to leaving the city limits of Wilmington. A13. Statistical data in State's Exhibit 1 showed three alcohol-related personal injury crashes and 36

[34] *See Martinez-Fuerte*, 428 U.S. at 559 n.13.

[35] *Cook*, 2013 WL 1092130, at *5.

alcohol-related arrests in that area for 2009. A11. There was one fatal crash on South Market Street in 2010 (constituting 20% of the fatal crashes in the City of Wilmington for that year) and 26 DUI arrests on Market Street during the same year. A12-13. State's Exhibit 1 also contained documentation that a large portion of DUI-related accidents and arrests occurred on Friday, Saturday and Sunday nights, and in the evening. This evidence, given the discretion due to police regarding the choice of time and location for sobriety checkpoints, demonstrates that a reasonable nexus existed for conducting a sobriety checkpoint at that location, and for that day of the week and time of day.

Furthermore, the checkpoint as conducted, complied with the requirements of the Fourth Amendment. Officer Rubin testified that he and the other officers were instructed that they had no discretion in which vehicles they stopped. All vehicles that passed through the checkpoint were stopped. A14. He also testified that the initial contact with the motorists was brief, and that motorists were only detained if they showed signs of intoxication. A14, A15. In addition, Rubin testified that traffic cones with flashing lights and signs were posted ahead of the checkpoint alerting approaching motorists. A14. Rubin testified that the supervisor was present at the checkpoint throughout the time period. A15. Rubin estimated that the checkpoint was set up "maybe three, 400 yards, somewhere in that range" from the intersection of South Market and A Streets. A17. Further,

Rubin noted that "the supervisor has discretion to make sure it's conducted in a safe location." A17.

The evidence admitted at the suppression hearing demonstrated that the sobriety checkpoint in this case complied with the requirements of the Fourth Amendment. First, the sobriety checkpoint was established pursuant to a neutral plan that limited officer discretion. Second, a reasonable nexus existed between the location of the checkpoint and the purpose of curbing drunken driving. Further, officers had no discretion as to which vehicles were stopped at the checkpoint, and officers only detained individuals for further investigation if their observations gave them reasonable, articulable suspicion to investigate further.

Superior Court did not abuse its discretion by denying Cook's motion to suppress, after finding no violation of the Fourth Amendment based on the State's substantial compliance with OHS's reasonable sobriety checkpoint procedures.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

/s/Elizabeth R. McFarlan
Chief of Appeals
Del. Bar ID No. 3759
Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Dated: November 17, 2014

CERTIFICATE OF SERVICE

I, Elizabeth R. McFarlan, Esq., do hereby certify that on November 17, 2014, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

Santino Ceccotti, Esq.
Office of the Public Defender
Carvel State Building
820 N. French Street
Wilmington, DE 19801

/s/ Elizabeth R. McFarlan
Elizabeth R. McFarlan (No. 3579)
Chief of Appeals