

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
vs. : No. 636 CR 2014  
RONALD A. COHEN, :  
Defendant :

Criminal Law - Regulatory Checkpoints - Constitutionality -  
Suppression

1. The stopping of a motor vehicle and the detention of its occupants is a seizure subject to constitutional restraints.
2. Checkpoints stops, even though not supported by reasonable suspicion or probable cause, are constitutionally allowed provided such stops are conducted pursuant to certain guidelines which guard against arbitrary, random traffic stops.
3. In balancing the public interest of the government in ensuring that dangerous drivers and unsafe vehicles are kept off the road against the right to privacy of individual members of the public, checkpoint stops must be conducted within certain prescribed parameters in order to protect individuals from arbitrary invasions at the unfettered discretion of officers in the field.
4. To protect against unreasonable searches and seizures, the Pennsylvania Supreme Court has developed guidelines (the "Tarbert/Blouse guidelines") to minimize the intrusiveness of a roadblock seizure to a constitutionally acceptable level. These guidelines, in the context of a DUI checkpoint, require that: (1) vehicle stops must be brief and must not entail a physical search; (2) there must be sufficient warning of the existence of the checkpoint; (3) the decision to conduct a checkpoint, as well as the decisions as to time and place for the checkpoint, must be subject to prior administrative approval; (4) the choice of time and place for the checkpoint must be based on local experience as to where and when intoxicated drivers are likely to be traveling; and (5) the decision as to which vehicles to stop at the checkpoint must be established by

administratively pre-fixed, objective standards, and must not be left to the unfettered discretion of the officers at the scene.

5. With respect to driving under the influence checkpoints, the fourth guideline requires that the route selected for the roadblock be one which, based on local experience, is likely to be traveled by intoxicated drivers. To meet this requirement, the Commonwealth must introduce detailed evidence concerning the number of DUI-related arrests and/or accidents to support the checkpoint's location; generalized conclusions summarizing specific data reviewed is insufficient to establish compliance with the Tarbert/Blouse guidelines.
6. Where a regulatory safety checkpoint is at issue, the fourth of the Tarbert/Blouse guidelines is tailored to require that the location of the checkpoint be one where license, equipment and inspection violations are likely to occur. To meet this requirement and satisfy constitutional safeguards, the Commonwealth must present evidence regarding the number of prior safety violations and/or accidents at the checkpoint location within a relevant time period.
7. Where police do not comply with the Tarbert/Blouse guidelines in selecting and conducting a motor vehicle checkpoint, the evidence derived from a checkpoint stop, including the results of field sobriety testing, must be suppressed.

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COMMONWEALTH OF PENNSYLVANIA :  
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 vs. : No. 636 CR 2014  
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 RONALD A. COHEN, :  
 Defendant :  
  
 Joseph D. Perilli, Esquire : Counsel for Commonwealth  
 Assistant District Attorney  
  
 Matthew J. Rapa, Esquire : Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - September 17, 2015

Before the Court is Defendant Ronald A. Cohen's Omnibus Pretrial Motion. Defendant has been charged with Driving Under the Influence of a Controlled Substance ("DUI")<sup>1</sup> and Careless Driving.<sup>2</sup> In his motion, Defendant argues the evidence against him was obtained pursuant to an unconstitutional regulatory checkpoint and should be suppressed.<sup>3</sup> A hearing was held on Defendant's motion on June 19, 2015. For the reasons which follow, Defendant's motion is granted.

FINDINGS OF FACT

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<sup>1</sup> 75 Pa.C.S.A. § 3802(d)(2).

<sup>2</sup> 75 Pa.C.S.A. § 3714(a).

<sup>3</sup> This evidence consists of the arresting trooper's observations of Defendant at the checkpoint and the State Police Barracks, statements Defendant made at the checkpoint and the State Police Barracks, and the results of field sobriety tests administered to Defendant.

At the conclusion of the June 19, 2015, hearing, we made the following findings of fact:

1. On September 22, 2013, the Pennsylvania State Police set up a regulatory checkpoint at the intersection of Maury Road and Long Run Road, Franklin Township, Carbon County.
2. The purpose of this checkpoint, in contrast to a DUI checkpoint, was for administrative purposes: to check whether drivers possessed valid driver's licenses, whether vehicles displayed current inspection and registration stickers, and whether required seatbelts/child seats were being used, as well as whether any equipment violations existed.
3. As planned, all vehicles were to be stopped and checked, however, if traffic backed up, vehicles would be allowed to pass through in order to alleviate the backup.
4. On September 22, 2013, Defendant was stopped by Trooper Ryan Kempinski as he approached the checkpoint heading north on the Maury Road.
5. During this stop, Trooper Kempinski observed that Defendant had bloodshot eyes. Trooper Kempinski asked Defendant to produce his driver's license, registration and proof of insurance. While speaking with Defendant, Trooper Kempinski

noticed Defendant's speech was slurred and he was unable to produce his license.

6. Based upon these observations, Trooper Kempinski asked Defendant to exit his vehicle in order that he could better determine if Defendant was capable of safe driving.
7. Once outside the vehicle, Trooper Kempinski observed Defendant was sluggish. Trooper Kempinski asked Defendant whether he had consumed any alcohol or was taking any medication. Defendant denied having ingested alcohol and stated that while he did have a prescription, he had not taken any medication that day.
8. Trooper Kempinski then administered several field sobriety tests to Defendant. The first test was the horizontal gaze nystagmus (HGN) test. The Trooper observed signs of failure, *i.e.*, Defendant's eyes did not move smoothly. Next was the walk and turn test which Trooper Kempinski first demonstrated for Defendant. Defendant performed this test but again exhibited signs of intoxication, *i.e.*, his gait was wobbly and he needed to raise his arms to maintain his balance. The third test Trooper Kempinski attempted to administer was the one leg stand test; Defendant was unable to perform this test. As a result of Defendant's failure of the two field sobriety tests, he was taken into custody

and transported to the Pennsylvania State Police barracks in Lehighton.

9. At the Lehighton barracks, a drug recognition expert (DRE) evaluated Defendant, the results of which were not placed in evidence. Defendant was then read his *Miranda* rights and asked to give a blood sample for alcohol and drug testing. Defendant refused to supply a blood sample.
10. The patrol unit supervisor of the regulatory checkpoint on September 22, 2013, was Corporal Michael Borosh.
11. Prior to setting up and implementing this checkpoint, Corporal Borosh conducted a pre-deployment briefing at the Lehighton barracks at which he informed the troopers participating in the checkpoint of the standards to be applied in its administration, including that every vehicle would be subject to the checkpoint and that if traffic backed up, vehicles would be permitted to pass.
12. Corporal Borosh was present at the checkpoint during the entire time it was in operation. As implemented, vehicles were only permitted to pass when a backup occurred; otherwise, all vehicles were checked without exception.
13. Corporal Borosh testified the location of the checkpoint at the intersection of Maury Road and Long Run Road was selected by him based on numerous accidents in the area

within the one year period preceding September 22, 2013, numerous DUI crashes within the one year period prior to September 22, 2013, the results of three previous regulatory checkpoints at the same location, and complaints of speeding, stop sign violations, and other Vehicle Code violations in the area. Another consideration was the clear line of sight at this intersection, making it a safe location to conduct a checkpoint.

14. During the time the checkpoint was in operation, signs announcing the checkpoint were posted approximately 400 feet on either side of the checkpoint in each direction.
15. The date when the checkpoint was in place, September 22, 2013, was during a weekend.

#### DISCUSSION

Defendant argues the Commonwealth's reasons for choosing the site at which the regulatory checkpoint was set up do not meet the requirements set down by the appellate courts of this Commonwealth, and therefore, the stop of his vehicle was unconstitutional. In consequence, Defendant requests the suppression of all evidence obtained against him as a result of this stop.

At a suppression hearing, the Commonwealth has the burden "of going forward with the evidence and of establishing that the

challenged evidence was not obtained in violation of the defendant's rights." Pa.R.Crim.P. 581(h); see also Commonwealth v. Galendez, 27 A.3d 1042, 1046 (Pa.Super. 2011) (*en banc*), *appeal denied*, 40 A.3d 120 (Pa. 2012). The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect the people from unreasonable searches and seizures. See Commonwealth v. Chase, 960 A.2d 108, 112-13, 116 (Pa. 2008). Moreover, "[i]t is undisputed that the stopping of an automobile and the detention of its occupants is a seizure subject to constitutional restraints." Commonwealth v. Blouse, 611 A.2d 1177, 1178 (Pa. 1992) (citing, *inter alia*, Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990); Commonwealth v. Swanger, 307 A.2d 875 (Pa. 1973)). See also Commonwealth v. Tarbert, 535 A.2d 1035 (Pa. 1987) (plurality).

The Vehicle Code in Pennsylvania authorizes police to stop vehicles and conduct systematic DUI or traffic safety checkpoints, even though such stops are not based on reasonable suspicion or probable cause standards. See 75 Pa.C.S.A. § 6308(b). However, the public interest of the government in ensuring that dangerous drivers and unsafe vehicles are kept off the road must be balanced against the individual right to privacy; therefore, in order to protect individuals "from arbitrary invasions at the unfettered discretion of the officers



in the field," systematic checkpoint stops must be conducted within certain prescribed parameters to guard against "the discretion that is problematic in random traffic stops." Blouse, 611 A.2d at 1178-79 (upholding the state constitutionality of systematic, non-discriminatory, non-arbitrary roadblocks instituted to detect registration, licensing and equipment violations) (citing, *inter alia*, Brown v. Texas, 443 U.S. 47 (1979)). To meet this standard, when conducting DUI checkpoint stops in Pennsylvania, law enforcement must comply with the guidelines established by our Supreme Court in Tarbert and Blouse, namely:

(1) vehicle stops must be brief and must not entail a physical search; (2) there must be sufficient warning of the existence of the checkpoint; (3) the decision to conduct a checkpoint, as well as the decisions as to time and place for the checkpoint, must be subject to prior administrative approval; (4) the choice of time and place for the checkpoint must be based on local experience as to where and when intoxicated drivers are likely to be traveling; and (5) the decision as to which vehicles to stop at the checkpoint must be established by administratively pre-fixed, objective standards, and must not be left to the unfettered discretion of the officers at the scene.

Commonwealth v. Worthy, 957 A.2d 720, 725 (Pa. 2008) (citing Blouse, *supra*, and Tarbert, *supra*) (hereinafter the

"Tarbert/Blouse guidelines").<sup>4</sup> As to the fourth guideline, "it is *essential* that the route selected for the roadblock be one which, based on local experience, is likely to be traveled by intoxicated drivers." Blouse, 611 A.2d at 1180 (citation omitted) (emphasis added). "These guidelines . . . are designed to protect individuals from *unreasonable* searches and seizures, pursuant to the United States and Pennsylvania Constitutions." Commonwealth v. Garibay, 106 A.3d 136, 143 (Pa.Super. 2014) (Ott, J., dissenting).<sup>5</sup>

Like DUI checkpoints, checkpoints established to detect license, registration and equipment violations are lawful, provided the checkpoint complies with the procedural requirements delineated by the Tarbert/Blouse guidelines. Commonwealth v. Garibay, 106 A.3d 136, 140 (Pa.Super. 2014) (*en banc*) (citing In re J.A.K., 908 A.2d 322, 325-26 (Pa.Super. 2006)). However, where a regulatory safety checkpoint is at issue, as here, the fourth guideline is adjusted accordingly to identify likely areas where license, equipment and inspection

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<sup>4</sup> In Worthy, the Pennsylvania Supreme Court held that the exercise of discretion by on-site police officers to suspend temporarily the operation of a sobriety checkpoint because of traffic backup that has created unreasonable delay or safety concerns complies with the dictates of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. Commonwealth v. Worthy, 957 A.2d 720, 727 (Pa. 2008).

<sup>5</sup> On this point, the Court in Blouse stated: "We now adopt the guidelines set forth in Tarbert, because they achieve the goal of assuring that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Commonwealth v. Blouse, 611 A.2d 1177, 1180 (Pa. 1992).

violations occur. "Substantial compliance with the Tarbert/Blouse guidelines is all that is necessary to minimize the intrusiveness of a roadblock seizure to a constitutionally acceptable level." *Id.* (quoting Commonwealth v. Yastrop, 768 A.2d 318, 323 (Pa. 2001) (plurality)). Where police do not comply with these guidelines in establishing a checkpoint, the evidence derived from a checkpoint stop, including the results of field sobriety testing, should be suppressed. *Id.* (citing Commonwealth v. Blee, 695 A.2d 802 (Pa.Super. 1997)).

At the conclusion of the hearing held on June 19, 2015, we concluded that the Commonwealth established that the state police complied with the first, second, third, and fifth Tarbert/Blouse guidelines. Defendant claimed that the Commonwealth had failed to comply with the fourth guideline, *i.e.*, "that the route selected for the roadblock be one which, based on local experience, is likely to be traveled by [unsafe drivers or vehicles]." Specifically, Defendant argued that the Commonwealth's evidence as to the basis for its selection of the checkpoint site was too generalized and did not meet the specificity of data required by the case law to support the selection of a specific checkpoint location. Consequently, we requested counsel to brief this issue.

In Garibay, the Pennsylvania Superior Court, sitting *en banc*, stated that the Commonwealth must introduce evidence concerning the number of DUI-related arrests and/or accidents in explaining the choice of a DUI checkpoint's location to comply with the Tarbert/Blouse guidelines, otherwise the checkpoint will be deemed unconstitutional. Garibay, 106 A.3d at 140-41 (citing, *inter alia*, Blee, 695 A.2d at 806).<sup>6</sup> The Court also

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<sup>6</sup> Quoting extensively from Commonwealth v. Blee, 695 A.2d 802 (Pa.Super. 1997), the Court stated:

"[T]o ensure that the intrusion upon the travelling public remains minimal, we cannot accept [ ] general testimony elicited at [a suppression] hearing as proof of 'substantial compliance' with the [Tarbert/Blouse guidelines]." Blee, 695 A.2d at 806. Rather, "[a]t the very least, the Commonwealth [must] present information sufficient to specify the number of DUI-related arrests and/or accidents [at] ... the specific location of the sobriety checkpoint." *Id.* If the Commonwealth fails to introduce evidence concerning the number of DUI-related arrests and/or accidents in explaining the choice of a checkpoint's location, then the checkpoint will be deemed unconstitutional.

Commonwealth v. Garibay, 106 A.3d 136, 140-41 (Pa.Super. 2014). However, unlike Garibay's focus on the sufficiency of the evidence to prove the requirement that "the route selected for the roadblock be one which, based on local experience, is likely to be traveled by intoxicated drivers," the focus in Blee was the need to prove the requirement itself. In Blee, because the PennDOT studies relied upon by the police official in charge of choosing the checkpoint's location were not specific to DUI-related accidents and arrests at the particular location of the sobriety checkpoint, the Court held that the fourth of the Tarbert/Blouse guidelines had not been proven. The Blee Court did not distinguish between the type or quality of the evidence needed to prove this requirement. To the contrary, in addition to the above-quoted language in Garibay, Blee cited approvingly to three previous cases of the Court where the location of the checkpoint chosen was based on an evaluation or review of DUI-related accidents and arrests for the particular district, road or area where the checkpoint was located.

As we read the Garibay decision, the Commonwealth's reliance on research or a review of statistical data to identify checkpoint locations likely to be traveled by intoxicated drivers, without specifically introducing into evidence the actual number of DUI related arrests and/or accidents evaluated, will not satisfy the procedural requirements of the Tarbert/Blouse guidelines. In particular, in Garibay, notwithstanding certain evidence presented as to how the specific checkpoint site was selected - information

stated that the procedural requirements for non-DUI checkpoints are identical to those for DUI checkpoints. *Id.* (citing In re J.A.K., a seatbelt safety checkpoint case). In the case of a regulatory checkpoint intended to check for safety violations, the Commonwealth must present evidence regarding the number of prior safety violations and/or accidents at the specific checkpoint location to satisfy constitutional safeguards. *Id.*

The checkpoint at issue in Garibay was one set up in conjunction with the Pennsylvania Department of Transportation's

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provided by PennDOT, culled from its database of traffic information, that the area of the road in question had a high volume of traffic and number of accidents; that the information received from PennDOT comported with the experience and familiarity with the specific road of the officer in charge of selecting the checkpoint site; and that the checkpoint site had previously been identified and used as a safety checkpoint because of its high traffic volume and high accident rate - because specific information as to the number of prior safety violations and/or accidents at the specific checkpoint location was not introduced, the evidence was held insufficient to establish substantial compliance with the Tarbert/Blouse guidelines. Garibay, 106 A.3d at 141 n.7.

The majority opinion's reference in Garibay to the Yastrop decision of the Pennsylvania Supreme Court with an explanatory comment, "sobriety checkpoint constitutional where officer who set up checkpoint testified that he reviewed PennDOT records and information that led him to conclude the checkpoint location was a route likely to be traveled by intoxicated drivers," does not appear to qualify the majority's ultimate holding of the need for specific checkpoint information to meet the Tarbert/Blouse test. *Id.* at 141. In Commonwealth v. Yastrop, 768 A.2d 318 (Pa. 2001), a plurality of the Pennsylvania Supreme Court found that a DUI checkpoint was constitutional when the supervising officer reviewed PennDOT records and DUI arrest records prior to selecting the location of the checkpoint. *Id.* at 323-24. The opinion does not state whether the officer testified as to the specific numbers of drunk-driving related accidents and DUI arrests that occurred in the vicinity of the checkpoint. However, even if the Court in Yastrop had determined that testimony by the officer in charge of selecting the location of the checkpoint relied upon statistical information in making that decision (without the underlying data itself being presented to the suppression court) was sufficient to meet the Commonwealth's burden, Yastrop is a plurality decision that does not have precedential value. See e.g., Commonwealth v. Brown, 872 A.2d 1139, 1165 (Pa. 2005) ("Plurality opinions, by definition, establish no binding precedent for future cases."); and Hoy v. Angelone, 720 A.2d 745, 750 (Pa. 1998) (a plurality decision lacks precedential value).

Click It or Ticket program and was designed to ensure compliance with seatbelt and motor vehicle equipment requirements. In addressing whether specific evidence regarding the data, reports or statistics relied upon in selecting the location of the checkpoint was required to meet the Tarbert/Blouse test, or whether general conclusory testimony regarding the number of DUI arrests and accidents at the location of the checkpoint was sufficient, the Garibay Court held that

generalized testimony [which] provided no specifics whatsoever regarding accidents, arrests, citations, violations, etc., regarding seatbelt usage or non-usage at the specific checkpoint location, [and which presented no] insight into the selection of the checkpoint time and duration . . . . did not satisfy the requirements of the Tarbert/Blouse guidelines.

*Id.* at 142.

Garibay overruled *sub silentio* existing Superior Court precedent which held that the standard for proving that the checkpoint area chosen was one "likely to be traveled by intoxicated drivers" was met when the Commonwealth proved that its choice of location for the DUI checkpoint was based on its review and reliance upon traffic data, accident records, or other information evidencing generally a higher than average incidence of driving under the influence offenses in the general area of the checkpoint, without necessarily introducing this statistical information. Commonwealth v. Ziegelmeier, 685 A.2d

559, 563 (Pa.Super. 1996). Prior to Garibay, the Commonwealth was not required to introduce detailed information as to the exact, or even approximate, number of DUI related arrests and/or accidents at the specific location of the sobriety checkpoint, or to make part of the record the reports, data and statistics relied upon by the police in determining the location of the DUI checkpoint. *Id.*

Here, Corporal Borosh testified that his decision to establish a checkpoint at the intersection of Maury Road and Long Run Road was based on his research of the number of traffic accidents and DUI crashes at this location for the one year period preceding the date of the checkpoint, the number of citations for Vehicle Code violations issued during previous checkpoints at the same location, and complaints about speeding and stop sign violations in the vicinity. However, Corporal Borosh did not testify as to the specific number of accidents, citations, or complaints, or present any documentary evidence - including any statistics, data or reports - upon which his generalized conclusions that the number of accidents, citations and complaints was "numerous" was based. Nor did Corporal Borosh identify the author or source of the reports, data or statistics he relied upon in selecting the location and time of the checkpoint or maintain that he had conducted a statistical

analysis comparing the number of reported license, equipment and inspection violations at the site of the checkpoint with other areas in Franklin Township. Without this empirical information the record is inadequate to intelligently determine whether the selection of this particular checkpoint imposes a minimal intrusion upon the privacy interests of the traveling public when balanced against the Commonwealth's interest in ensuring roadway safety. See also Worthy, 957 A.2d at 730 ("[T]he elements of the Tarbert-Blouse standard . . . are designed to minimize interference with individual liberty by 'eliminating the discretion that is problematic in random traffic stops.'" ) (Saylor, J., dissenting).<sup>7</sup>

#### CONCLUSION

The Superior Court's decision in Garibay is binding on us.<sup>8</sup> The sole issue in Garibay, as here, was the sufficiency of the evidence regarding the location and time of the checkpoint, and the evidence there, as here, was general, conclusory testimony rather than detailed, numerical information. In accordance with that decision, we conclude that the

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<sup>7</sup> Parenthetically, we note that while Corporal Borosh testified he had available to him in the courtroom some of the material he had reviewed in selecting the location of the checkpoint, he did not identify what specific information he had brought nor did the Commonwealth attempt to move any of this information into evidence.

<sup>8</sup> As an *en banc* decision of the Superior Court, Garibay is also controlling authority relative to any contradictory or inconsistent panel decisions of that Court. See Commonwealth v. Rabold, 951 A.2d 329, 336 (Pa. 2008).



Commonwealth's evidence did not set forth with sufficient specificity the basis for its selection of the location, date, and time of the regulatory checkpoint so as to substantially comply with the fourth Tarbert/Blouse guideline. Having so concluded, the evidence derived from Defendant's stop at that checkpoint must be suppressed.

BY THE COURT:

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P.J.