

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR 590-2009
	:	
GENO TESSITORE,	:	
Defendant	:	
Joseph Matika, Esquire		Counsel for the Commonwealth
Paul Levy, Esquire		Counsel for the Defendant

MEMORANDUM OPINION

Nanovic, P.J. - June 17, 2011

Defendant has been charged with two counts of driving under the influence, a first offense. Defendant was arrested as a result of being stopped at a DUI checkpoint. Defendant has made a motion to suppress the evidence of his blood alcohol level at the time of arrest due to the alleged unconstitutionality of the checkpoint.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, Geno Tessitore, was arrested on or about May 24, 2009, and charged with two counts: Driving under the Influence of Alcohol - General Impairment of Driving Safely¹ and

¹ 75 P.S. § 3802 (A)(1)

Driving under the Influence of Alcohol - General Impairment (BAC .08-.10).² The arrest occurred on Mauch Chunk Street, Mahoning Township, Carbon County, Pennsylvania at a DUI checkpoint located at the former location of the Big Chief Restaurant at approximately 1:40 a.m.

Defendant was driving northbound on Mauch Chunk Street (S.R. 209) in a 1998 GMC vehicle bearing a Pennsylvania registration of GNE6149. Defendant was traveling with a female companion in the car. Defendant was stopped in Mahoning Township by an officer who waved him into the sobriety checkpoint. While in the checkpoint, an officer detected an odor of alcohol coming from the vehicle. The Defendant was then asked to perform several field sobriety tests - finger to nose, one leg stand, nine step heel to toe, and preliminary breath test. Defendant failed these tests and was then placed under arrest and submitted to a blood test. The sample was drawn at 1:55 hours and yielded a BAC of .094%

The Defendant, through his attorney Paul Levy, Esq., has filed an Omnibus Pre-trial Motion which seeks suppression of the evidence of his blood alcohol level due to alleged constitutional violations regarding the checkpoint. Defendant alleges that the checkpoint was unconstitutional due to a lack

² 75 P.S. § 3802 (A)(2)

of sufficient warning and lack of prior administrative approval. The hearing on this motion was held on November 12, 2010.

The following evidence was presented at the hearing. Officer Audie Mertz who was in charge of the checkpoint testified for the Commonwealth and stated that the roadblock was set up in compliance with all guidelines, including the erection of required signage informing drivers of the roadblock. According to PennDOT's DUI Law Enforcement Manual, there must be two signs visible to oncoming drivers, one at four hundred feet and one at six hundred feet. Defendant asserted that there was only one sign warning of the roadblock and that it was less than the required 400 feet from the checkpoint.³ In response, Officer Mertz testified for the Commonwealth that there had been two signs placed appropriately four hundred and six hundred feet before the checkpoint. The Officer testified that he measured out the distances and had other officers place the signs at these distances. The Officer also testified that sufficient notice of possible locations of the checkpoint was provided in the form of a press release in advance to the local news media. The Officer was unsure if such information was actually published but testified that he did provide such information to the media.

³ The Defendant asserted that the sign was at most 300 feet before the checkpoint.

Defendant also challenges the checkpoint on the basis of a lack of prior administrative approval. Officer Mertz testified that he is a traffic safety coordinator, as appointed by the Chief of Police on September 1, 2008, and had inherent power through that position to conduct sobriety checkpoints throughout the township. Therefore it is the Commonwealth's position that no further administrative approval was necessary.

Following the hearing, the parties asked for the opportunity to submit briefs on the matter which was granted. The sole issue before us is whether the sobriety checkpoint was constitutionally permitted, the lynchpin of Defendant's motion to suppress.

DISCUSSION

Defendant challenges the constitutionality of the traffic stop which resulted in the DUI charges now pending against him. Defendant's challenge is based on the sufficiency of the warning of the checkpoint, and an alleged lack of prior administrative approval of the checkpoint.

[T]he conduct of the roadblock itself can be such that it requires only a momentary stop to allow the police to make a brief but trained observation of a vehicle's driver, without entailing any physical search of the vehicle or its occupants. To avoid unnecessary surprise to motorists, the

existence of a roadblock can be so conducted as to be ascertainable from a reasonable distance or otherwise made knowable in advance. The possibility of arbitrary roadblocks can be significantly curtailed by the institution of certain safeguards. First the very decision to hold a drunk-driver roadblock, as well as the decision as to its time and place, should be matters reserved for prior administrative approval, thus removing the determination of those matters from the discretion of police officers in the field. In this connection it is essential that the route selected for the roadblock be one which, based on local experience, is likely to be travelled by intoxicated drivers. The time of the roadblock should be governed by the same consideration. Additionally, the question of which vehicles to stop at the roadblock should not be left to the unfettered discretion of police officers at the scene, but instead should be in accordance with objective standards prefixed by administrative decision... Substantial compliance with the guidelines is all that is required to reduce the intrusiveness of the search to a constitutionally acceptable level. Tarbert, 517 Pa. at 293, 535 A.2d at 1043.

Commonwealth v. Blouse, 611 A.2d 1177, 1180 (Pa.1992). These standards must be substantially complied with in order for a roadblock to survive constitutional scrutiny. See *id.* "The precise issue of whether drunken driver roadblocks were constitutional under our state Constitution eluded the Court in Tarbert. However, 'it is clear that of the six [justices] who participated [in Tarbert], four [justices] expressed the view that systematic roadblocks are constitutional.'" Commonwealth

v. Yastrop, 768 A.2d 318, 321 (Pa. 2001) (citing Blouse, 611 A.2d at 1179) (extending the constitutionality of systematic roadblocks to those aimed at detaining and discouraging drunk drivers).

To be constitutionally valid, the Court must find that the checkpoint substantially complied with the Tarbert-Blouse factors. See *id.* at 323. If this standard is not met, evidence gained from the checkpoint must be suppressed. Accordingly, it is against the Tarbert-Blouse factors by which constitutionality in the context of substantial compliance is measured.

1. The stop of a vehicle at a checkpoint must be brief and not entail a physical search. See Tarbert, 535 A.2d at 1043; see also Blouse, 611 A.2d at 1180.

Here the initial stop was brief. The Defendant was stopped and asked a few questions. After detecting alcohol, the Officer directed the Defendant to pull over and perform the field sobriety tests. No physical search was done of the vehicle prior to arrest. The initial stop and questioning was brief, sobriety tests were only administered after detecting the odor of alcohol on the Defendant giving the Officer probable cause to detain the Defendant longer.

2. Motorists must be given sufficient warning of the existence of the checkpoint. See Tarbert, 535 A.2d at 1043; see also Blouse, 611 A.2d at 1180.

A press release was provided to local news media giving information about potential times and places for the checkpoint. It is immaterial that the press release included additional locations beyond the primary two sites for the checkpoint as the location and time of the checkpoint was covered within the release. The burden is not on the Commonwealth to make sure that the press release is actually published, showing that a press release was issued is sufficient.

In Commonwealth v Rastogi, a defendant challenged the validity of a checkpoint in part because there was no evidence that a press release was ever published or broadcast. The court held that actual publication or broadcast of the press release is not required to make the checkpoint constitutional. See 816 A.2d 1191, 1195 (Pa.Super. 2003). In fact, "[n]either Blouse nor Tarbert mandate that the police must place advance notice of the DUI checkpoint in any local or regional publication." *Id.* (citation omitted).

The Court also accepts the testimony of Officer Mertz that the signs for the checkpoint were properly placed at 400 and 600 feet, respectively. A diagram of the layout of the

checkpoint was provided at the hearing. Although the diagram was not to scale, it depicted an appropriate layout with two signs warning of the checkpoint. Additionally as far as adequate notice of the stop is concerned "[a] sign indicating that the motorist is about to be stopped and suggesting the nature of the stop may provide advance warning of the roadblock." Tarbert, 535 A.2d at 1041.

At the time of the hearing the defense argued that there was no place for a northbound driver to make a lawful "U turn" after seeing signage for the checkpoint. The Commonwealth asserted that a northbound driver could have executed a lawful "U turn" in the parking lot where the DUI checkpoint was located. Few, if any, drivers would believe that a "U turn" could be executed in the very parking lot where a checkpoint is located. However, due to the otherwise adequate warnings of the checkpoint through press release and signage, and the fact that "neither Blouse nor Tarbert suggest that motorists approaching a DUI checkpoint must be afforded an opportunity to avoid the checkpoint," this is not a controlling issue and will not lead to suppression of the evidence. *Id.*

3. The decision to conduct a checkpoint, including the decision as to the time and the place for the checkpoint must be subject to prior administrative approval. See Tarbert, 535 A.2d at 1043; see also Blouse, 611 A.2d at 1180.

Testimony showed that Officer Mertz, who organized the checkpoint, was a traffic safety coordinator for Mahoning Township. It was stated that inherent in his position is the authority to schedule and conduct checkpoints. The harm to be avoided by requiring administrative approval of checkpoints is to remove the possibility of random, unplanned, and unorganized checkpoints for both constitutional and safety concerns. Here the checkpoint was clearly planned out and clearly organized. Officer Mertz was given authority by the township to plan such checkpoints. We cannot say that this authority is constitutionally unfounded as precautions were taken to avoid the possible dangers of "surprise" checkpoints. The checkpoint was organized with safety concerns in mind and sufficient warning was given to put drivers on notice that a checkpoint would occur.

4. The time and place for a checkpoint must be based on local experience as to where and when intoxicated drivers are likely to be traveling. See Tarbert, 535 A.2d at 1043; see also Blouse, 611 A.2d at 1180.

Testimony showed that Officer Mertz studied statistical data from both Mahoning Township and PennDOT showing that the location chosen was one likely to be travelled by intoxicated drivers. Officer Mertz reasonably relied on this information in determining that the location and time of the

checkpoint would be well calculated for the purpose of a sobriety checkpoint. Both the location and time for the roadblock followed statistical data according to the officer's testimony.

5. The decision as to which vehicles are stopped must be established by an administratively, pre-fixed, objective standard and not be left to the discretion of the officers at the checkpoint. See Tarbert, 535 A.2d at 1043; see also Blouse, 611 A.2d at 1180.

In the instant case, every officer involved was issued a "Standard Operating Procedure" which stated the purpose of the checkpoint, the site, implementation, and detainment procedures for vehicles at the checkpoint. Only the Coordinator was allowed to deviate from the "Standard Operating Procedure." Every vehicle entering the checkpoint was stopped with one exception: if traffic became unreasonably backed up, twenty cars would be allowed to pass through to alleviate congestion. This is allowed under Commonwealth v. Worthy, 957 A.2d 720, 725-26 (Pa. 2008).

The testimony showed that the plan for vehicle stoppage was laid out prior to implementation of the checkpoint. The officers had no discretion as to which vehicles to stop and how to proceed once stopped. Accordingly, this factor of the Tarbert-Blouse test has been met.

Having found that all the factors for a checkpoint to be constitutionally permissible were substantially complied with, we find that there were no constitutional violations such that the evidence against the Defendant should be suppressed.

CONCLUSION

In accordance with the foregoing, Defendant's Motion to Suppress will be denied.

BY THE COURT

P.J.

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ORDER

AND NOW, this 17th day of June, 2011, upon consideration of the Defendant's, GENO TESSITORE, Omnibus Pretrial Motion, and in consideration of the parties' submissions thereto and the argument thereon, it is hereby

ORDERED and DECREED that Defendant's Motion to Suppress is DISMISSED and DENIED.

BY THE COURT

P.J.