

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 20, 2006 Session

STATE OF TENNESSEE v. MARGIE LYNN CLARK

**Direct Appeal from the Circuit Court for Montgomery County
No. 40400505 Michael R. Jones, Judge**

No. M2005-02001-CCA-R3-CD - Filed October 20, 2006

The appellant, Margie Lynn Clark, pled guilty in the Montgomery County Circuit Court to driving under the influence (DUI), a Class A misdemeanor. The trial court sentenced her to eleven months and twenty-nine days in the county jail, to be suspended after serving forty-eight hours, and imposed a three hundred fifty dollar fine. Pursuant to the plea agreement, the appellant reserved the right to appeal a certified question of law challenging the trial court's denial of her motion to suppress. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Branch H. Henard, III, (on appeal) and V. Michael Fox (at trial), Nashville, Tennessee, for the appellant, Margie Lynn Clark.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Bill Cloud and Joel Perry, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that on Friday, March 12, 2004, the Montgomery County Sheriff's Department (MCSD) set up a sobriety checkpoint on Highway 48/13 between Riverside Drive and Zinc Plant Road near the Clarksville fairgrounds. The checkpoint began at 11:00 p.m. and lasted three hours. According to preliminary hearing testimony, the appellant was driving south on Highway 48/13 and approached the checkpoint sometime after midnight. Officers used their flashlights to motion for her to stop, but the appellant traveled one hundred twenty feet past the checkpoint before stopping. An officer approached the appellant's car and noticed a strong odor

of alcohol coming from the vehicle. He also saw that the appellant's eyes were red and watery. At

first, the appellant denied drinking any alcohol. However, she later told another officer that she had consumed about three beers. An officer administered three standard field sobriety tests, and the appellant failed all three. She also refused to take a breathalyzer test or sign an implied consent form, and a computer check of her driver's license revealed that it had been suspended. The appellant was indicted for DUI, violating the implied consent law, driving on a suspended license, and reckless driving. Subsequently, she filed a motion to suppress any evidence against her, claiming that she had been illegally seized because the State could not show that the MCSD complied with Tennessee Department of Safety General Order 410-1, which has established guidelines for sobriety checkpoints.

_____ At the suppression hearing, Jerry Tucker testified that on March 12, 2004, he was a sergeant with the MCSD and the on-site supervisor for the sobriety checkpoint. He stated that Order 410-1 was designed specifically for use by the Tennessee Highway Patrol (THP), and he read aloud a clause in the Order which provides, "This Order is advisory in nature, and local commanding supervisors may alter these guidelines as, in their professional judgement, local circumstances may require." Tucker stated that in addition to Order 410-1, the MCSD had its own written standard operating procedures (SOP) for the March 12 checkpoint. Tucker stated that in determining where to set up a DUI checkpoint, an agency must have knowledge of alcohol-related crashes in the particular area. Tucker stated that although the particular area for the March 12 checkpoint was not on the THP's pre-approved list for sobriety checkpoints, two other locations on Highway 48/13 were on the list and had "a history of unexplained alcohol related traffic crashes and D-U-I arrests." He also stated that he had "personal knowledge of alcohol related crashes and arrests in that particular area on that highway." However, he did not know exactly how many crashes or arrests had occurred in that area. On March 5, 2004, Sheriff Norman Lewis selected the site for the March 12 sobriety checkpoint, which was inside the Clarksville city limits. Tucker stated that in deciding where to set up the checkpoint, the MCSD used information from the Fatality Analysis Reporting System (FARS). The State introduced into evidence a table of FARS information compiled by the University of Memphis, showing that seventy-eight alcohol-related fatal crashes occurred in Montgomery County between 1994 and 2003.

Tucker testified that Order 410-1 requires that a checkpoint be announced to the public in advance and that the March 12 checkpoint was announced in the local newspaper on March 8th and 10th. He also stated that a pre-checkpoint briefing was held for the twenty-five officers who participated in the checkpoint and that Order 410-1 was read to all of the officers during the briefing. Officers were also instructed at the briefing to detain cars for "no longer than what a normal person would expect waiting for a stop light to change." Traffic cones were set up at the checkpoint, state-approved signs announcing "sobriety checkpoint ahead" were placed at each end of the checkpoint, and all officers wore safety vests. Marked patrol cars were present, and "all lighting equipment on them was lit and visible." All vehicles traveling north and south on Highway 48/13 had to stop at the checkpoint, and Tucker estimated that each car was detained for about twenty-five seconds. Due to traffic congestion, Sergeant Tucker twice ordered that vehicles be allowed to travel through the checkpoint without stopping. Once traffic cleared, officers resumed stopping vehicles at the checkpoint. Officers gave each driver stopped at the

checkpoint a “you booze and lose it, click it or ticket” brochure. Tucker stated that pursuant to Order 410-1, he could not participate in any stops or arrests at the checkpoint and that he was “strictly there for safety measures.”

Tucker testified that the checkpoint lasted from 11:00 p.m. to 2:00 a.m. and that officers stopped four hundred sixty-three vehicles during that time. Twenty-six cars were detained for further investigation, and officers arrested five people for DUI. Tucker acknowledged that there are two discrepancies between Order 410-1 and the March 12 SOP. First, Order 410-1 provides that a checkpoint cannot operate for more than two hours “without permission from the Colonel/Deputy Commissioner or a designated representative.” However, the March 12 SOP provided that the MCSO would conduct the checkpoint for three hours. Second, according to the SOP, the checkpoint site was to be determined by the specific needs of the MCSO and selected by the supervisor in charge of the checkpoint, pending final approval by the sheriff. However, in this case, Sheriff Lewis selected the site pursuant to Order 410-1.

On cross-examination, Tucker acknowledged that he had no input as to the site selection in this case. He also acknowledged that he did not have any statistical data or personal experience about an abnormal or unusual number of DUI crashes or arrests at the location of the checkpoint. He acknowledged that the March 12th SOP provided that the on-site supervisor was supposed to select the checkpoint site but said that Sheriff Lewis chose the March 12 site pursuant to Order 410-1. He stated that Order 410-1 requires an “escape route” for motorists who do not want to stop at the checkpoint and that a road into the fairgrounds was the escape route in this case. Although the fairgrounds probably closed at 11:00 p.m., Tucker did not know whether motorists who used the fairgrounds road as an escape route would have been trespassing. During the March 12 checkpoint, two vehicles entered the fairgrounds road, turned around, and left the area. Tucker acknowledged that he did not have any data to compare the number of DUI arrests made with checkpoints versus the number of DUI arrests made without them. However, he stated that a National Highway Traffic Safety Administration study has concluded that an alcohol-related crash is most likely to occur between 11:00 p.m. Friday and 3:00 a.m. Saturday.

Montgomery County Sheriff Norman Lewis acknowledged that he authorized the March 12 checkpoint and selected the site. Before becoming Sheriff of Montgomery County, Lewis was a trooper with the THP for thirty-one years and worked numerous alcohol-related accidents and “nonaccident situations” on Highway 48/13. On cross-examination, Sheriff Lewis testified that Highway 48/13 is approximately twelve miles long, and he had no data or personal knowledge about an abnormal number of DUI accidents or arrests at the specific location for the March 12 sobriety checkpoint. He acknowledged that officers stopped over four hundred cars at the checkpoint but arrested only five people for DUI and said that he did not know the arrest-rate for “normal D-U-I detection efforts.” When asked why the March 12 checkpoint was conducted for three hours as opposed to two, he could give no specific reason but said, “It’s within the scope that it can be extended beyond the two hours of [Order 410-1] upon the authority either by the commissioner or, in my case, the sheriff.” Sheriff Lewis stated that he was not present at the checkpoint.

In a written order, the trial court concluded that Sheriff Lewis had selected the site and that the site selection process met the criteria established in State v. Downey, 945 S.W.2d 102 (Tenn. 1997), and the state and federal constitutions. The court noted that Highway 48/13 “is a main artery for persons entering and leaving Riverside in Clarksville” and that Sheriff Lewis and Sergeant Tucker testified, based upon their many years of experience, that Highway 48/13 “was an area of arrests and accidents involving intoxication.” The court also noted that the checkpoint properly gave notice to the public and had an escape route. The court determined that the fact that a driver used the escape route “negated any issue that the escape route was not adequate.” The court concluded that Sergeant Tucker had followed the SOP guidelines for conducting the checkpoint and stated as follows:

General Order 410-1 is not law in the State of Tennessee. Each jurisdiction may desire to prepare its own standard operating procedure that meets the needs of its jurisdiction as long as it meets the limitations of our constitutions and Downey. The 3 hours time limit does not violate either the provisions of Downey or our constitutions. The 3 hours duration[] was set administratively by the Sheriff prior to the roadblock. No field officers made that decision.

The court denied the appellant’s motion to suppress.

II. Analysis

The appellant claims that the trial court erred by refusing to grant her motion to suppress evidence. She contends that the sobriety checkpoint was unconstitutional because (1) the MCSD had no justification for the location of the checkpoint; (2) the MCSD conducted the checkpoint for more than two hours without justification; (3) the checkpoint had no viable escape route; and (4) the checkpoint was no more effective in detecting drunk drivers than normal law enforcement techniques. The State claims that the sobriety checkpoint was constitutional. We agree with the State.

The trial court’s findings of fact in a suppression hearing will be upheld on appeal unless the evidence preponderates against those findings. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.

Id. However, the application of the law to the trial court’s findings of fact is a question of law subject to de novo review. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

Both the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Tennessee Constitution prohibit unreasonable searches and seizures by law enforcement officers. The purpose of the Fourth Amendment and Article 1, Section 7 is to “safeguard the privacy and security of individuals against arbitrary invasions of government officials.” Downey, 945 S.W.2d at 106 (quoting Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730 (1967)). Police activity involving the stop of an automobile qualifies as a seizure under both the state and federal constitutions. Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979); State v. Westbrooks, 594 S.W.2d 741, 743 (Tenn. Crim. App. 1979).

Ordinarily, a law enforcement officer may conduct a brief investigatory stop only if the officer has a reasonable suspicion based upon specific and articulable facts that a criminal offense has been, is being, or is about to be committed. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). However, in Downey, our supreme court recognized that “[a] roadblock seizure . . . is a departure from . . . fundamental constitutional principles [because] [i]t permits officers to stop and question persons whose conduct is ordinary, innocent, and free from suspicion.” 945 S.W.2d at 104. The court determined that the constitutionality of such seizures depends upon a balancing of (1) the public interest served by the seizure, (2) the degree to which the seizure advances that public interest, and (3) the severity of the interference with an individual’s liberty. Id. at 107. The court concluded that the State has a compelling interest in alleviating drunk driving and that sobriety checkpoints are effective tools for detecting impaired drivers. Id. at 110. Therefore, the first two prongs of the balancing test weigh in favor of finding sobriety checkpoints constitutional.

In analyzing the third prong of the test, a court must examine whether the checkpoint was “established and operated in accordance with predetermined operational guidelines and supervisory authority that minimize the risk of arbitrary intrusion on individuals and limit the discretion of law enforcement officers at the scene.” Id. at 104. In making this determination, the factors to be considered include any advance publicity about the checkpoint; neutral procedures for the checkpoint, such as stopping all cars traveling in both directions; the warning of motorists about the checkpoint; whether the checkpoint was set up in a safe and visible area and consisted of uniformed officers and marked patrol cars with flashing blue lights; whether the selected site and decisions about the operating procedures for the checkpoint were made by a supervisor as opposed to an officer at the scene; and the availability of less intrusive methods for combating the problem. See id. at 110-11. “Not every factor must weigh in favor of the state to uphold a given roadblock, nor is any single one dispositive of the issue.” Id. at 110. It is the State’s burden to show that the seizure was reasonable. State v. Cross, 700 S.W.2d 576 (Tenn. Crim. App. 1985).

A. Site Selection

The appellant first contends that the location of the checkpoint was not “carefully targeted” because the State offered no statistical proof of any abnormal or unusual DUI arrests or crashes at the checkpoint’s location. While such proof may mitigate “the questionable effectiveness of an individual roadblock,” it is “not required to demonstrate that the checkpoint contributes in a meaningful way to achieving the compelling state interest.” State v. Hicks, 55 S.W.3d 515, 532 (Tenn. 2001). Moreover, in the instant case, paragraph III.A.1. of Order 410-1

simply provides that “[i]ndividual site selections will be based on the knowledge of alcohol related crashes and the knowledge of DUI arrests in a particular area.” As noted by the trial court, Sheriff Lewis testified that he had personal knowledge of numerous alcohol-related crashes on Highway 48/13. Therefore, we believe the site selection complied with Order 410-1.

B. Duration

The appellant also contends that the checkpoint was unconstitutional because its three-hour duration failed to comply with Order 410-1. According to the appellant, “[t]he plain language of General Order 410-1 clearly requires specific justification to operate a roadblock beyond two (2) hours . . . [and] the Sheriff’s unreasoned decision to increase the time by 50% is utterly inconsistent with the very concept of administration planning required by Downey.” We disagree. Paragraph III.C.1.a. of Order 410-1 provides that the “duration of the checkpoint will not exceed two (2) hours without permission from the Colonel/Deputy Commissioner or a designated representative.” Nothing in the Order requires a stated reason for the extension. In this case, Sheriff Lewis signed the SOP for the checkpoint on March 5, and the SOP provided that the checkpoint would operate for three hours. Thus, the SOP complied with the express language in Order 410-1, which requires that a designated representative give permission to extend the checkpoint beyond the usual two-hour time limit. Sheriff’s Lewis’ decision to extend the duration of the checkpoint also complied with Downey’s concern about limiting discretion by officers in the field. We conclude that Sheriff Lewis’ lack of justification for the extending the checkpoint by one hour did not violate Order 410-1 and did not render the checkpoint unconstitutional.

C. Escape Route

Next, the appellant claims that the checkpoint was unconstitutional because the escape route into the Clarksville fairgrounds, which were closed at the time of the checkpoint, was not viable. Paragraph VI.H.1. of Order 410-1 states that a “motorist who chooses to avoid a checkpoint should be allowed to proceed unless traffic violations are observed or probable cause exists to take other action.” The SOP contains an almost-identical escape-route provision. Jerry Tucker testified that an escape route was available in this case and that two cars used the escape route. The trial court concluded that the fact that a motorist used the escape route “negated any issue that the escape route was not adequate.” The evidence does not preponderate against the trial court’s finding that a viable escape route existed in this case.

D. Effectiveness

Finally, the appellant contends that the sobriety checkpoint was unconstitutional because the checkpoint “was no more effective in catching drunk drivers than other normal law enforcement techniques.” However, in Downey, our supreme court concluded that “we should not determine which among reasonable law enforcement approaches is the most effective. We leave that decision to politically accountable public officials who are responsible for limited public resources.” 945 S.W.2d at 110. Moreover, in Hicks, 55 S.W.3d at 531, the court stated that “courts should generally refrain from analyzing whether other constitutionally reasonable measures are more effective in accomplishing the state’s interest.” In any event, the March 12

checkpoint resulted in five drivers being arrested for DUI in a three-hour time frame. Although this appears to be a small number, we believe it demonstrates a meaningful link between the establishment of the checkpoint and the State's compelling interest to detect intoxicated drivers. See *id.* at 532; see also *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 2488 (1990).

We note that the ultimate question in this case is whether the third prong of the *Downey* test weighs in favor of the checkpoint's reasonableness. The witnesses' testimony established that the MCSO announced the checkpoint in the local newspaper prior to March 12 and that all vehicles traveling in both directions were stopped at the checkpoint. When traffic became congested, Sergeant Tucker temporarily suspended the checkpoint until traffic cleared and the checkpoint could resume. The MCSO set up signs at each end of the checkpoint to warn approaching motorists; the MCSO used safety cones and marked patrol cars with emergency lights; and officers wore safety vests and carried flashlights, demonstrating that the checkpoint was conducted in a safe manner. All of these factors were enumerated in *Downey* and weigh in favor of finding that the checkpoint did not violate constitutional requirements. Moreover, Sheriff Lewis' selecting the location for the checkpoint and the MCSO's setting up and operating the checkpoint in accordance with predetermined guidelines weigh particularly heavily in the State's favor. See *Hicks*, 55 S.W.3d at 533 (stating that "the most important attribute of a reasonable roadblock is the presence of genuine limitations upon the discretion of the officers in the field"); *Downey*, 945 S.W.2d at 110-11 (stating that "[v]irtually every court has emphasized the importance of limiting the discretion of police officers at the scene").

According to the predetermined guidelines in this case, officers were to approach stopped motorists, identify themselves, and announce the purpose of the checkpoint. Officers then were required to "release the vehicle without further delay" if they saw no signs of intoxication or to detain any driver suspected of impaired driving. The appellant has made no claim that the checkpoint officers failed to follow these procedures. Therefore, we conclude that the level of intrusion to motorists was minimal in this case and that the stopping of motorists at the checkpoint was reasonable. The trial court properly denied the appellant's motion to suppress the evidence against her.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE