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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-000957-DG

BILLY COX

APPELLANT

ON DISCRETIONARY REVIEW FROM MARION CIRCUIT COURT  
v. HONORABLE ALLAN RAY BERTRAM, JUDGE  
ACTION NOS. 12-XX-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING

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BEFORE: CAPERTON, LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: This matter is before the Court on discretionary review from an order of the Marion Circuit Court. The circuit court affirmed a jury verdict before the Marion District Court convicting Billy Cox of driving under the influence, second offense (DUI II), failure to wear seatbelts, and possession of an open alcohol container in a vehicle. Cox argues that the police roadblock at which he

was stopped was not established or operated in a constitutional manner, and therefore any evidence seized as a result of that stop should have been suppressed. He also argues that the Kentucky State Police (KSP) Trooper failed to establish his qualifications to conduct field sobriety exercises, and thus he should not have been permitted to testify concerning Cox's performance of those exercises. Finally, Cox maintains that the Trooper's references to those exercises as "tests" and his use of terms such as "pass," "fail," or "indicators" imputed a degree of scientific or technical accuracy to those procedures which was not established by expert testimony. We conclude that the roadblock at issue was not conducted in a constitutional manner. Consequently, any evidence obtained as a result of Cox's stop must be suppressed. Hence, we reverse the order of the circuit court and direct that the convictions be vacated.

On February 2, 2008, a vehicle driven by Cox was stopped at a roadblock conducted by the KSP at the intersection of U.S. Highway 68 and Kentucky Highway 243 in Marion County. Trooper Clint Walker administered a series of field sobriety exercises and subsequently arrested Cox on charges of DUI II, failure to wear seatbelts, and possession of an open alcohol container.

Subsequently, Cox appeared before the Marion District Court on the charges and entered a plea of not guilty. His counsel moved to dismiss the charges for lack of probable cause on the grounds that the roadblock was unconstitutional. Cox also moved to suppress the results of the field sobriety tests, arguing that Trooper Walker failed to conduct the field sobriety exercises in conformity with

the guidelines propounded by the National Highway Traffic Safety Administration (NHTSA). In the alternative, Cox sought to preclude Trooper Walker from referring to the field sobriety tests as “tests” or use words such as “pass,” “fail,” “indicators,” or by any terms which impute scientific reliability.

On the first issue, the district court denied the motion to dismiss, finding that the roadblock was established and operated in a constitutional manner. On the second issue, the district court found that there is no requirement that field sobriety exercises be conducted in strict accordance with the NHTSA Guidelines, and any deviation from those Guidelines merely went to the weight of the testimony and not its admissibility. Finally, the district court held that Trooper Walker could testify to his perceptions of how Cox completed the exercises, and that the use of specific terms did not imply a scientific accuracy.

Following a jury trial, Cox was convicted of all three charges. He received a sentence of fourteen days in jail, thirty days (240 hours) of community labor, and a \$350.00 fine for the DUI II; a \$25.00 fine for failing to wear a seatbelt; and a \$35.00 fine for possessing an open alcoholic beverage container in a motor vehicle. However, the district court postponed imposition of the sentence to allow Cox to file a notice of appeal.

On direct appeal, the circuit court affirmed the conviction. But on discretionary review, a panel of this Court found that Cox had prematurely filed his notice of appeal prior to the imposition of the final judgment and sentence. Consequently, the Court concluded that his appeal was interlocutory and dismissed

the appeal. *Cox v. Commonwealth*, 2012 WL 410835(Ky. App. 2012)(2010-CA-001340-DG).

Following dismissal of that appeal, the district court entered the judgment but stayed imposition of the sentence pending an appeal. The circuit court again affirmed. Thereafter, this Court granted Cox's motion for discretionary review.

Cox again raises the three issues presented in his prior appeal. The first two issues involve Cox's motion to suppress evidence seized as a result of the traffic stop. In determining whether the trial court properly denied the motion to suppress, this Court is presented with a mixed question of fact and law. Initially, we review the circuit court's factual findings of fact under the clearly erroneous standard. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). Those findings are deemed conclusive if they are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78. Next, we undertake a *de novo* review to determine if the law was properly applied to the facts. *Copley v. Commonwealth*, 361 S.W.3d 902, 905 (Ky. 2012). The remaining issue involves Cox's motion to limit Trooper Walker's testimony. We review the trial court's evidentiary rulings for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

Cox primarily argues that the traffic roadblock used by the KSP was unconstitutional and therefore any evidence obtained as a result of that stop should be suppressed. In *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003), the

Kentucky Supreme Court discussed the standards for determining whether a traffic checkpoint or roadblock is constitutional in light of the Federal Constitutional authority set out by the United States Supreme Court. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450, 110 S. Ct. 2481, 2485, 110 L. Ed. 2d 412 (1990); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); and *United States v. Martinez–Fuerte*, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082, 49 L. Ed. 2d 1116 (1976).

The Court reviewed the relevant holdings of these cases, first noting that a highway stop of motorists at a government-operated checkpoint effectuates a seizure for Fourth Amendment purposes. In order to pass constitutional muster, the seizure must be deemed reasonable, which requires “a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *Buchanon*, 122 S.W.3d at 568, quoting *Brown v. Texas*, 443 U.S. 47, 50–51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979).

But, while the Fourth Amendment generally requires an individualized suspicion of wrongdoing, an individualized suspicion is not required in order for the brief seizure of motorists to be reasonable. *Id.* On the other hand, a checkpoint may not be operated in a manner which allows the officers to use unconstrained discretion in randomly stopping members of the general public. Rather, the checkpoint must be established and operated according to a systematic

plan in accordance with established guidelines. *Id.* at 569. *See also* *Commonwealth v. Bothman*, 941 S.W.2d 479 (Ky. App. 1996).

Based on these considerations and the necessary balancing of the competing interests at stake, the Kentucky Supreme Court suggested four nonexclusive factors which trial courts should consider in determining the reasonableness of a particular roadblock.

First, it is important that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law enforcement officials in a supervisory position, rather than by the officers who are out in the field. Any lower ranking officer who wishes to establish a roadblock should seek permission from supervisory officials. Locations should be chosen so as not to affect the public's safety and should bear some reasonable relation to the conduct law enforcement is trying to curtail.

Second, the law enforcement officials who work the roadblock should comply with the procedures established by their superior officers so that each motorist is dealt with in exactly the same manner. Officers in the field should not have unfettered discretion in deciding which vehicles to stop or how each stop is handled.

Third, the nature of the roadblock should be readily apparent to approaching motorists. At least some of the law enforcement officers present at the scene should be in uniform and patrol cars should be marked in some manner. Signs warning of a checkpoint ahead are also advisable.

Fourth, the length of a stop is an important factor in determining the intrusiveness of the roadblock. Motorists should not be detained any longer than necessary in order to perform a cursory examination of the vehicle to look for signs of intoxication or check for license and registration. If during the initial stop, an officer has a reasonable suspicion that the motorist has

violated the law, the motorist should be asked to pull to the side so that other motorists can proceed.

*Buchanon* at 571.

The *Buchanon* Court emphasized that the above list of factors is not exhaustive, and mere violation of one factor does not automatically result in a violation of constitutional proportions. Rather, the Court held that these guidelines are to be applied on a case-by-case basis in order to determine the reasonableness of each roadblock. *Id.* With these criteria in mind, we now turn to the facts of the current case.

Prior to the jury trial, the district court conducted an evidentiary hearing to address Cox's challenge to the reasonableness of the roadblock. Trooper Walker testified regarding the establishment and operation of the roadblock at which Cox was stopped. He testified that on the evening in question, the roadblock was approved by his supervisor, Sergeant David Gibbs, and the location was selected from a list of sites which were preapproved by the KSP. Trooper Walker added that the roadblock began operation immediately after approval was received. Sergeant Gibbs designated Trooper Nathan Rhodes as the officer in charge. However, Trooper Rhodes did not arrive at the roadblock until twenty minutes after it had begun. In addition to Troopers Walker and Rhodes, the roadblock was also operated by Troopers Adams and Cornett, and Deputy Belcher.

All vehicles approaching the roadblock were stopped, but there was no set duration for the operation of the roadblock. Trooper Walker also testified

that he was not aware of any media announcements made on that date stating that a roadblock would be conducted and there were no signs posted advising drivers that a roadblock was being conducted ahead. The emergency lights on the officers' cruisers were activated. However, Trooper Walker admitted that he was not wearing his safety vest, and he could not recall if the other officers were wearing their vests.

Cox argues that the roadblock was deficient in several significant respects. He first notes that the location and duration of the roadblock were left to the discretion of the officers. Although the location was at a preapproved site, Cox points out that Sgt. Gibbs gave his authorization shortly prior to the implementation of the roadblock, after the officers were at the scene. Cox further emphasizes that there was no set time for the beginning or the end of the roadblock. As a result, Cox contends that the implementation and operation of the roadblock left too much discretion in the hands of the officers.

Cox further argues that the officers failed to conduct the roadblock in accord with established KSP procedures or the suggested *Buchanon* factors. There were no advance media announcements of the roadblock, nor were there any signs advising motorists that they were approaching a police checkpoint. While the emergency lights on the police vehicles were activated, the officers were not wearing safety vests. Cox also reiterates that there were no set times for the roadblock to begin or end. Although Trooper Rhodes was designated as the officer in charge of the roadblock, he did not arrive at the scene until twenty minutes after



it had begun. Cox further complains that Trooper Rhodes had no supervisory authority over the other officers.

Considering these deficiencies, Cox asserts that the trial court clearly erred in finding that the roadblock was established and operated in a constitutional manner. The Commonwealth concedes that the establishment and operation of the roadblock did not strictly comply with KSP Procedures, such as General Order OM–E–4.<sup>1</sup> Although most of the violations are relatively minor, we are most

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<sup>1</sup> In *Smith v. Commonwealth*, 219 S.W.3d 210 (Ky. App. 2007), this Court quoted the pertinent language from KSP General Order OM–E–4:

A. The following guidelines shall be followed when **establishing** traffic safety checkpoint locations:

1. Post supervision shall establish and maintain a list of authorized traffic safety checkpoints and the justification for these checkpoint locations.
2. Traffic safety checkpoints shall not be held at locations other than those on the list, except under extenuating circumstances.
3. Locations of traffic safety checkpoints shall be selected based on considerations of safety and visibility to the public. Traffic safety checkpoints shall only be established on roadways with clear visibility in all directions of travel.
4. Officers shall consider the weather condition and its adverse effects on officers and public safety when establishing a traffic safety checkpoint.
5. The determination of where and when a traffic safety checkpoint will be held shall bear a reasonable and articulable relationship to a public safety or traffic violation problem that has been experienced or is anticipated in a particular location.
6. Non-supervisory officers may request to establish traffic safety checkpoints at approved locations and times consistent with the above guidelines.
7. Post supervisors shall note the locations, approximate times and officer-in-charge of the traffic safety checkpoints on the post work schedule.
8. Media announcements shall be made periodically to inform the public that traffic safety checkpoints would be established in the area. The specific locations and times need not be announced.

B. The following procedures shall be followed when **conducting** a traffic safety checkpoint:

troubled by the short notice for approval of the roadblock and the absence of any set duration for the operation of the roadblock.

Indeed, the focus of the *Buchanon* factors is whether the roadblock was established and operated in a manner which limits the officers' discretion to conduct stops. Although the Troopers received advance supervisory approval for

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1. Traffic safety checkpoints shall be utilized to enforce the laws relating to:
    - a. Motor vehicle equipment safety;
    - b. Licensing of drivers;
    - c. Registration of motor vehicles; and
    - d. Operation of motor vehicle while under the influence of intoxicants.
  2. The decision to conduct a traffic safety checkpoint must be approved by a supervisor.
  3. Assigned personnel shall conduct traffic safety checkpoints at the scheduled time and location unless:
    - a. Other law enforcement activities obligate the officer(s);
    - b. There are extenuating circumstances that make the detail unreasonable;or
    - c. A supervisor cancels the detail.
  4. Traffic safety checkpoints may be conducted by one or more uniformed officer(s) and shall include a supervisor **OR** an officer designated by a supervisor as the officer-in-charge to monitor the traffic safety checkpoint.
  5. Traffic safety checkpoints with traffic volume too great for effective monitoring by a single officer shall be conducted by a sufficient number of officers to ensure a safe and efficient operation of the traffic safety checkpoint and minimal disruption to the public.
  6. Traffic safety checkpoints shall include uniformed officers. Marked vehicles, with blue lights operating, shall be used at all scheduled traffic safety checkpoints.
  7. All officers conducting a traffic safety checkpoint **shall** wear their agency-issued reflective safety vest.
  8. All vehicles that pass the checkpoint shall be checked unless the officer is involved in investigating or enforcing an observed or suspected violation of the law, or unless the volume of traffic creates congestion.
  9. Should the officer(s) be unable to check each vehicle due to enforcement obligations or traffic congestion, all vehicles shall be passed through the checkpoint until one or more officer(s) becomes available for an orderly check of traffic. In these circumstances, a traffic stop shall not be made unless there is an

the roadblock in a preapproved location, that approval was given immediately prior to the establishment of the roadblock. The mandate for advance supervisory appeal does not expressly require the scheduling of the roadblock prior to the commencement of the participating officer's shift. *Bothman*, at 481. But at the same time, the requirement contemplates more than a cursory approval by a supervisor immediately before the commencement of the roadblock. Rather, the supervisor's approval must be given with sufficient advance notice to allow a meaningful independent review of the decision to establish the roadblock and to ensure that the roadblock can be carried out according to a systematic plan.

Here, there was no opportunity to allow this type of oversight.

Trooper Walker gave no indication in his testimony that he discussed the particular need for this roadblock when he sought approval from Sgt. Gibbs. The lack of such discussion indicates that Sgt. Gibbs did not make an independent determination that the location and duration of the roadblock bore "a reasonable and articulable relationship to a public safety or traffic violation problem that has

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observed violation of traffic or criminal law or a reasonable and articulable suspicion of some violation prior to the stop.

10. Each motorist stopped should be requested to present his/her operator's license, registration, and proof of insurance.

11. The vehicle may be inspected for obvious safety defects and registration violations. Any apparent or suspected violation of a traffic or criminal law may also be investigated and enforced.

12. If the officer detects any violation, the motorist may be directed to a nearby location out of the traffic flow where the appropriate enforcement action shall be taken.

13. All motorists are to be treated courteously, and are to be promptly allowed to proceed unless a violation is observed.

14. Officers participating in traffic safety checkpoints shall insure their arrival and departure times are logged on their timecard.

been experienced or is anticipated in a particular location.” General Order OM–E–4 ¶ A(5).

Furthermore, while Sgt. Gibbs designated Trooper Rhodes as the officer in charge, he did not arrive at the scene until twenty minutes after the roadblock had begun. Likewise, there was no opportunity to publish notices that a roadblock would be in operation, or even to bring necessary safety equipment and signage to the scene. The lack of sufficient planning undermines the Commonwealth’s contention that the roadblock was carried out according to a systematic plan.

But we are most troubled by the fact that the officers had complete discretion regarding the duration of the roadblock. During the suppression hearing, Trooper Walker admitted that there was no allotted period of time and could be discontinued at the officers’ discretion. The officers were only required to call in to obtain approval when they wanted to terminate the roadblock.

The Commonwealth essentially urges this Court to consider the constitutionality of the roadblock as applied to the particular stop of Cox’s vehicle. The Commonwealth takes the approach that none of the defects in the establishment and operation of the roadblock affected the officers’ stop of Cox’s vehicle. Although Trooper Rhodes was not on-site when the roadblock began, he was present when Cox was stopped. Furthermore, the roadblock was clearly marked and the officers were in uniform. All vehicles approaching the roadblock were stopped and all drivers were subject to the same level of initial scrutiny. In

addition, there was no evidence that the roadblock was discontinued immediately following Cox's arrest. In fact, the roadblock continued in operation for another hour after Cox was arrested. Based upon these undisputed facts, the Commonwealth maintains that the Trooper's stop of Cox's vehicle was constitutional even if the circumstances surrounding the establishment and operation of the roadblock were not.

Although the Commonwealth's suggested approach is appealing, we must conclude that it is not consistent with the approach taken in *Buchanon* or the other caselaw addressing the constitutionality of a police roadblock or checkpoint. In *Buchanon*, the Kentucky Supreme Court held that a roadblock must be established pursuant to some sort of systematic plan which constrains the discretion of officers at the scene. The factors set out by the Court in *Buchanon* look to the existence of such a systematic plan governing the roadblock rather than the facts surrounding a stop of any particular motorist. Similarly, this Court considered the constitutionality of the stops at issue in *Monin v. Commonwealth*, 209 S.W.3d 471 (Ky. App. 2007), and *Bothman, supra*, based upon the officers' compliance with the overall systematic plan.

Along these same lines, the United States Supreme Court in *City of Indianapolis v. Edmond, supra*, held that the "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion..." but the officers' "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis..."

.” 531 U.S. at 45-46, 121 S. Ct. at 456. The earlier cases from the United States Supreme Court also warn against the “grave danger” inherent in allowing law enforcement officers to exercise “standardless” and “unconstrained” discretion in conducting traffic stops. *Prouse*, 440 U.S. at 661–662, 99 S. Ct. at 1400-01. And, in *United States v. Martinez–Fuerte*, *supra*, the Court stated that a “claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.” 428 U.S. at 559, 96 S. Ct., at 3083-84.

Under the circumstances presented in this case, we must conclude that the roadblock at issue was unconstitutionally established and operated. The advance supervisory approval given for the roadblock was insufficient to limit the officers’ discretion concerning where, when and how long the roadblock would be operated. The officers at the scene retained an impermissible level of discretion in how they could chose to conduct the roadblock. Therefore, the stop of Cox’s vehicle was unconstitutional and any evidence seized pursuant to that stop must be suppressed. Since we are reversing on this ground, the issues relating to Trooper Walker’s testimony about Cox’s performance of the field sobriety exercises are moot.

Accordingly, the order of the Marion Circuit Court which affirmed the judgment of conviction by the Marion District Court is reversed and the conviction is set aside.

CAPERTON, JUDGE, CONCURS.

SEPARATE OPINION.

BRIEF AND ORAL ARGUMENTS  
FOR APPELLANT:

Gregory D. Simms  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General

BRIEF AND ORAL ARGUMENTS  
FOR APPELLEE:

Joseph H. Mattingly III  
Special Assistant Attorney General  
Frankfort, Kentucky