

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-000572-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO 16-CI-00502

HON. JERRY CROSBY,  
OLDHAM DISTRICT COURT JUDGE;  
AND JOHN SPELLMAN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: The Commonwealth appeals from an original action filed in the Oldham Circuit Court denying its petition for a writ of prohibition and mandamus. The Commonwealth urged the Circuit Court to determine the Oldham District Court had erroneously found the local police department had operated an

unconstitutional traffic safety checkpoint and suppressed results of a blood alcohol content (BAC) test occurring in the checkpoint's wake. The Circuit Court concluded the petition was properly filed under *Hoskins v. Maricle*, 150 SW.3d 1, 20 (Ky. 2004), but ultimately agreed with the District Court in determining the checkpoint did not comport with the Fourth Amendment. The Circuit Court further agreed suppression of a .135 BAC test result collected from John J. Spellman was proper because Officer Matthew Lay, a trained breathalyzer technician, failed to observe Spellman before administering the test—"at the location of the test for a minimum of twenty (20) minutes"—as required by KRS<sup>1</sup> 189A.103(3)(a). Following review of the record, the briefs and the law, we affirm.

On December 8, 2015, Sgt. James Brown of the Oldham County Police Department approved a traffic safety checkpoint at the Oldham/Jefferson County Line from 8:00 p.m. until 11:00 p.m. on December 11, 2015. According to an email sent by Brown on April 15, 2016, the purpose of the roadblock was to check for licenses, insurance and registration. Advance notice was not provided to the media, and signs were not posted along the roadway advising drivers they were approaching a checkpoint. No written police policy on checkpoints was produced.

Six to seven officers gathered in a parking lot near Jucy's BBQ Restaurant on Highway 146 near Pewee Valley in Oldham County on the evening of December 11, 2015. All officers were dressed in uniforms and reflective vests. Each officer arrived in a separate police vehicle. Sgt. Brown, the Second Shift

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<sup>1</sup> Kentucky Revised Statutes.

Supervisor, briefed the detail on how the checkpoint would be conducted and remained on site during the roadblock. Every vehicle was to be stopped and each driver was to be asked to produce a driver's license, proof of insurance and proof of registration. Upon supplying same, the driver was to be allowed to proceed. If illegal activity was suspected, the driver was to be asked to pull into the parking lot to allow traffic to continue flowing. If traffic became congested, the checkpoint was to be suspended.

Officer Lay participated in the checkpoint. He had worked other roadblocks with Sgt. Brown, but never at this location. He considered the operation, which began at 8:00 p.m.—when it was dark—to be “highly visible,” and heard no complaints from drivers about being surprised. Lights were activated on most police vehicles at the checkpoint to ensure safety of officers and the public.

Officer Lay was paired with Officer Justin Flynn. As Spellman reached the checkpoint, Officer Flynn smelled alcohol and Spellman was asked to pull into the parking lot. When asked whether he had consumed any drinks, Spellman replied, “two beers.” At that point, Spellman was given three field sobriety tests which he did not perform well. Officer Lay arrested Spellman at 10:22 p.m., handcuffed him behind his back, placed him in the backseat of Lay's cruiser, and began transporting Spellman to the Oldham County Jail—where the breathalyzer is located. En route, Officer Lay watched Spellman in the rearview mirror.

At 10:26 p.m., Officer Lay reached the Pewee Valley railroad tracks, about twelve miles from the jail. At that point, he began a mandatory twenty-minute observation period, directing Spellman not to eat, drink, smoke or place anything in his mouth or up his nasal passages for the next twenty minutes. On reaching the jail, Officer Lay—still sitting in his cruiser with Spellman in the backseat—began typing Spellman’s citation. At 10:43 p.m., Officer Lay read Spellman the implied consent form, after which Spellman declined to contact an attorney and agreed to take a breathalyzer test.

Twenty minutes had expired when Spellman entered the BAC room. When asked whether he had brought anything up from his stomach in the last twenty minutes, Spellman indicated he had not. At 10:59 p.m., the BAC test was administered, after which Spellman was charged with operating a motor vehicle while under the influence of alcohol (DUI) pursuant to KRS 189A.010. Spellman refused both independent testing and an attorney.

Defense counsel filed two suppression motions. One sought suppression of the checkpoint based on violations of the Fourth Amendment; *Commonwealth v. Buchanon*, 122 S.W.3d 565, 568 (Ky. 2003); and, *Commonwealth v. Cox*, 491 S.W.3d 167 (Ky. 2015). A second sought suppression of the BAC test result because the entire twenty-minute observation period had not occurred “at the location of the test” as statutorily mandated. “It has been stated that the purpose of the observation period is so the operator ‘can testify positively that during this twenty-minute observation period defendant had nothing to eat or

drink, did not regurgitate or smoke.’ *Tipton v. Commonwealth*, Ky. App. 770 S.W.2d 239, 240 (1989) (citing Chemical Test Manual for Kentucky § 8.8 B (3)).” *Eldridge v. Commonwealth*, 68 S.W.3d 388, 391 (Ky. App. 2001). “The clear purpose of the twenty-minute observation period is to ensure that any residual alcohol present in the mouth has dissipated so that the Breathalyzer® machine measures only the alcohol content of breath exhaled from the lungs.” *Id.* at 392.

A suppression hearing was held on August 2, 2016. Officer Lay, testifying as the Commonwealth’s sole witness, confirmed part of the observation period occurred in his cruiser. It was undisputed Officer Lay did not observe Spellman a full twenty minutes at the location in which the test was given. Defense counsel argued Officer Lay could not have driven at night in the dark along a rural road and remained focused on Spellman for the length of the drive to positively state Spellman had not regurgitated while in the back seat of the cruiser.

On August 19, 2016, the Oldham District Court entered an order suppressing all evidence seized by the Oldham County Police as a result of the checkpoint and Spellman’s BAC test. The District Court began by finding stopping motorists at a checkpoint constitutes a Fourth Amendment seizure under *Buchanon*, 122 S.W.3d at 568, and law enforcement supervisors must control the checkpoint and restrain the use of discretion by field officers under *Commonwealth v. Bothman*, 941 S.W.2d 479, 481 (Ky. App. 1996). The District Court then quoted the four factors for checkpoints recognized in *Buchanon*:

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*, 122 S.W.3d at 571. The District Court then cited *Cox*, 491 S.W.3d 167, in which compliance with three of the four *Buchanon* guidelines was characterized as “ambiguous” or “seems to have been satisfied.” Only the fourth guideline, requiring as short a stop as necessary to satisfy its purpose, was fully satisfied in

*Cox. Buchanan* specifies the four factors it mentions are not “exhaustive.” *Id.*

Furthermore, violation of one factor may not create “a violation of constitutional proportions.” *Id.* Moreover, “[t]he guidelines are to be applied on a case-by-case basis in order to determine reasonableness of each roadblock.” *Id.*

Comparing Spellman’s case to *Cox*, the District Court found in neither case were warning signs posted on the roadway advising motorists they were approaching a checkpoint, nor was the checkpoint announced to the media. Determining the checkpoint that snared Cox was an unreasonable seizure, the Supreme Court of Kentucky wrote,

[w]e simply cannot conclude that law enforcement adequately complied with the *Buchanon* factors substantially enough to render this roadblock a “reasonable” seizure performed in the absence of a warrant or individualized suspicion.

*Cox*, 491 S.W.3d at 173. Additionally, the District Court in Spellman’s case found the Oldham County Police Department had no written policy governing checkpoints, nor did it attempt to explain how the checkpoint’s location was chosen, nor how it would achieve its desired purpose while keeping the public safe. The District Court concluded the checkpoint Spellman encountered did not pass constitutional muster.

The District Court also suppressed the BAC test result due to Officer Lay’s statutory noncompliance. Citing the clear language of KRS 189A.103(3)(a), the District Court found the BAC test result could not be validated as accurate

because the full twenty-minute observation period did not occur “at the location of the test for a minimum of twenty (20) minutes.”

Finding the District Court properly applied the law to the underlying facts, the Circuit Court upheld the District Court’s order, denied the Commonwealth’s petition for a writ of prohibition and mandamus, and lifted a temporary stay entered on September 2, 2016, allowing the underlying case to proceed. This appeal followed.

Before addressing the merits of the appeal, we must discuss the Commonwealth’s failure to comply with CR<sup>2</sup> 76.12(4)(c)(v)—an error pointed out by Spellman. The rule requires the brief for appellant to “contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” The Commonwealth launches into its argument without any statement of preservation. When Spellman called the deficiency to the Commonwealth’s attention, the Commonwealth did not admit wrongdoing, but merely argued in its reply brief it had substantially complied with the rule.

We have options when a party fails to comply with CR 76.12. We may ignore the flaws and grant review; strike the brief or its offending portion(s), CR 76.12(8)(a); or review the issues for manifest injustice only. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990); *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Due to the result we reach, we choose not to impose a sanction, but

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<sup>2</sup> Kentucky Rules of Civil Procedure.



remind the Commonwealth it is subject to CR 76.12 and leniency should not be expected in the future.

“[I]ssuance of a writ is inherently discretionary. Even if the requirements are met and error found, the grant of a writ remains within the sole discretion of the Court.” *Caldwell v. Chauvin*, 464 S.W.3d 139, 145-46 (Ky. 2015). On appeal, we review the Circuit Court’s decision for an abuse of discretion. *Id.* at 146. The test being whether the decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The Circuit Court found the District Court’s findings of fact were based on substantial evidence and were, therefore, conclusive. The Commonwealth did not challenge the factual findings, only the conclusions the District Court drew from them.

The Circuit Court further found the Commonwealth had correctly argued a written police policy on checkpoints, use of checkpoint warning signs to oncoming motorists, and advance notice to the media are not mandatory. However, having them in place provides greater assurance the checkpoint is being conducted within permissible constitutional contours. To punctuate the point, the Circuit Court quoted *Cox*.

It is implicit in our analysis that without proper planning and notice, roadblocks are susceptible to the type of discretion and intrusion the Fourth Amendment exists to forbid. It is unclear to us here whether those discretion-limiting procedures were adequately performed. A

focused analysis of the facts of this case in comparison to the *Buchanon* guidelines ultimately confirms our suspicions that the proper procedures were not in place in establishing the roadblock that ultimately led to Cox's arrest.

*Cox*, 491 S.W.3d at 171. Based on *Cox* and *Buchanon*, we discern no error in the Circuit Court's denial of the petition regarding the checkpoint's illegality.

As for suppression of the BAC test result, the Circuit Court found the District Court had properly concluded observation for several minutes in the back of a police cruiser did not satisfy any portion of the required twenty-minute observation of Spellman which is to occur "at the location of the test." KRS 189A.103(3)(a). In 2000, the General Assembly added the observation requirement to the statute. No published case interprets the requirement and unpublished cases discussing it disagree. Spellman argues the entire twenty-minute observation period must occur at the site of the breath test—as the lower courts concluded. The Commonwealth argues observation in a police cruiser while en route to the testing site should count as part of the observation period. We agree with Spellman and the lower courts.

At the time of Spellman's arrest in 2015, 500 KAR<sup>3</sup> 8:030 Section 1

(1)<sup>4</sup> required in part, the "certified breath test operator shall have continuous

<sup>3</sup> Kentucky Administrative Regulations.

<sup>4</sup> As of December 1, 2017, 500 KAR 8:030 Section 1 (1) was amended to mirror KRS 189A.103(3)(a), requiring the mandatory observation to occur "at the location of the test[.]" The current version reads:

[a] certified breath test operator shall have the person under personal observation at the location of the test for a minimum of twenty (20) minutes prior to the breath alcohol analysis. During that period the subject shall not have oral or nasal intake

control of the person by present sense perception for at least twenty minutes prior to the breath alcohol analysis.” Officer Lay had control of Spellman. Spellman’s hands were cuffed behind his back and he was in the backseat of a cruiser.

However, it is unlikely Officer Lay could unequivocally confirm Spellman did not belch or regurgitate during the ride to the jail. Several significant factors would have impeded Officer Lay’s ability to perform the requisite observation of Spellman. First, it was dark. Second, they were traveling on a rural road. And third, there was no testimony Officer Lay drove with his interior lights illuminated to reveal Spellman’s face. Additionally, on arriving at the jail, though Officer Lay remained in his cruiser with Spellman in the backseat, his attention was focused on crafting the citation. We are unconvinced the purpose of the observation period—to ensure residual alcohol dissipates from the subject’s mouth and all testing measures is the alcohol content of the breath being exhaled from the lungs, *Eldridge*, 68 S.W.3d at 392—was satisfied in this case. Therefore, any test result was unreliable and suppression was appropriate.

For the reasons stated above, the Oldham Circuit Court’s order denying the Commonwealth’s petition for writ of prohibition and mandamus is affirmed.

ALL CONCUR.

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of substances which will affect the test.

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