

IN THE MEDINA MUNICIPAL COURT
MEDINA COUNTY, OHIO

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MEDINA MUNICIPAL COURT
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STATE OF OHIO

Plaintiff

-vs-

CASE NO. 12 TRC 06348

JOHN H. HIRSCH

Defendant

JUDGMENT ENTRY

This matter is before the Court on the defendant's Motion to Suppress evidence on three grounds (see Judgment Entry of Jan. 29, 2013): (1) compliance with National Highway Traffic Safety Administration (NHTSA) standards for standardized field sobriety tests; (2) probable cause to arrest for operating a vehicle under the influence of alcohol; and (3) validity of the sobriety checkpoint.

Ohio State Patrol Lt. William Haymaker and Hinckley Township Police Officer Jeffrey Kenney testified. The Court admitted six State's exhibits:

1. Ohio State Patrol memorandum of OVI checkpoint plan
2. Ohio State Patrol media release (10/22/12)
3. Ohio State Patrol media release of (10/26/12)
4. Ohio State Patrol media release of (10/27/12)
5. Ohio State Patrol policy on sobriety checkpoints: OSP-200.21
6. Ohio State Patrol video of OVI checkpoint and traffic stop

The Court has reviewed all exhibits and evaluated the credibility of both witnesses.

For the reasons indicated herein, the Motion to Suppress is granted. All evidence seized after the original detention of the vehicle, including identification of the defendant, is suppressed.

FACTS

On October 27, 2012, the Ohio State Patrol, working with the Medina County OVI Task Force, established a sobriety checkpoint in Medina Township, Medina County, Ohio, in the westbound lanes of State Route 18 between the Speedway gas station and the Bil-Jac company. This area is west of the Interstate 71 interchange and east of the intersection of State Route 18 with River Styx road.

Lt. Haymaker initiated the planning and setup of the checkpoint. In deciding on the location he used three different traffic-related databases maintained by the Ohio State Patrol and/or the Ohio Department of Transportation. He reviewed statistics on alcohol-related traffic crashes (15) in Medina Township from the latest available year (2011). He determined that six of seven fatal crashes in Medina County so far in 2012 were alcohol or drug-related (86%). In 2011, 5 of 14 fatal Medina County crashes were alcohol or drug-related (35%). He considered the safety of this location on State Route 18, which is the main corridor for traffic in and out of Medina Township. This location was a straight and level area with two lanes in each direction and a 40 mph posted speed limit. There were no statistics presented that were specific to this precise location. He did not examine any traffic volume studies but used his personal knowledge of the area and common sense in determining the plan for which vehicles to stop.

The checkpoint had specified beginning and ending times. All officers were in uniform and wearing reflector vests. At the entrance and exit of the check point there were traffic cones and two marked police cruisers with overhead lights flashing. The cones had small white strobe lights on top. 750 feet from the entrance was a sign reading: "OVI Checkpoint Ahead." 500 feet from the entrance was a sign reading: "prepare to Stop." A westbound vehicle could turn around after the first sign and before entering the checkpoint at the Speedway gas station or at a road going north. Portable speed bumps were placed in the lanes of the checkpoint area to slow traffic. All of this is visible on the DVD (State's Exhibit 6).

Policy 200.21 (State's Exhibit 5) establishes the Ohio State Patrol guidelines for establishing and conducting roadside sobriety checkpoints.

The testimony on who approved this checkpoint is internally contradictory:

Prosecuting Attorney Lanier: "Did your superiors approve the location that you had selected?"

Lt. Haymaker: "Right. I went ahead – after I selected the location, I wrote up the plans, and then I forwarded it to our general headquarters in Columbus, and our operations captain looked it over. They also looked at the location and everything that I had written up in the plan and they approved it."

Prosecuting Attorney Lanier: "Handing you what's been marked as State's Exhibit 1. Take a look at that for a second. It's a three-page document. Correct?"

Lt. Haymaker: "Correct."

Prosecuting Attorney Lanier: "And is that the memo that you sent to your superiors after you had made the determination of when and where?"

Lt. Haymaker: "Yes. It is."

Prosecuting Attorney Lanier: "Who did you send that memo to?"

Lt. Haymaker: "Uhm. It went to – at the top right corner where it says "Attention To:" It went to Staff Lt. Sheppard. And then from there he forwarded it to our general headquarters. And I believe – and I was trying to think of his name before the trial here – and I think it – uhm – Major Rucker – I believe is the one who ultimately ended up approving it."

[Digital Record: 10:23:30 – 10:24:50]

Media notice was provided as shown by State's Exhibits 2, 3, and 4.

The operational plan is contained in State's Exhibit 1. In the event that traffic became too backed up due to checkpoint operations, the checkpoint would be temporarily discontinued and all vehicles allowed through. This would be at the discretion of the checkpoint commander. Otherwise,

every vehicle would be stopped for no more than 45 seconds unless the vehicle operator did not have a driver's license with them, an odor of alcohol was detected, or some other criminal or traffic probable cause issue arose.

Officer Kinney was part of the Medina County OVI Task Force. He was in uniform and wearing a reflector vest. There were five officers stationed in the checkpoint to stop vehicles and speak to the drivers. He was the westernmost officer, so a vehicle approaching him would have gone by both signs, a cruiser with overhead lights flashing, a series of traffic cones with strobes, and four other officers with flashlights and wearing reflector vests each standing about a car length apart.

At approximately 10:13 p.m., the defendant's vehicle entered into the checkpoint and did not reduce speed. It passed everything and everybody before reaching Officer Kinney's location. Officer Kinney shined his flashlight at the defendant, jumped out of the way, and yelled at the defendant who then came to a stop 15 feet west of the officer.

Officer Kinney approached the vehicle and spoke with the defendant who said he thought it was a construction zone. The defendant's eyes appeared bloodshot and glassy. His speech was slurred. He admitted to consuming "a couple" beers. Officer Kinney directed him to the diversion area.

The interaction between the defendant and officer Kinney in the diversion area is on the in-cruiser DVD, State's Exhibit 6. The field sobriety tests were performed in the Bil-Jac parking lot which was smooth and level, although "somewhat wet" due to mist in the air.

The Court takes judicial notice of the National Highway Traffic Safety Administration (NHTSA) standards for field sobriety tests in effect at the time of this arrest.

For each test, Officer Kinney gave proper instructions and, where necessary, appropriate demonstrations.

The defendant scored six out of six clues on the horizontal gaze nystagmus (HGN) test.

While attempted to perform the one-leg-stand (OLS) test, the defendant stated, "Dude, I'm not drunk" and put his foot down three times before reaching the count of 1012.

On the walk-and-turn (WAT) test, the defendant wobbled during the instruction/demonstration phase, stepped off the line at the beginning, missed touching heel-to-toe several times, took an incorrect number of steps, and made an improper turn.

CONCLUSIONS OF LAW

(1) NHTSA Standards

R.C. § 4511.19(A)(1)(d) provides:

* * * ...if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

(i) The officer may testify concerning the results of the field sobriety test so administered.

(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

The Court holds that all three field sobriety tests meet this standard and are admissible in these proceedings.

(2) Probable Cause

In determining probable cause to arrest the Court must consider whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was under the influence of alcohol and/or a drug of abuse. *State v. Homan* (2000), 89 Ohio St.3d 421; 2000-Ohio-212; *Beck v. Ohio* (1964), 379 U.S. 89, 85 S.Ct. 223, 13 L. Ed.2d 142; *State v. Timson* (1974), 38 Ohio St.2d 122, 67 Ohio Op.2d 140. In making this determination, the Court examines the “totality” of facts and circumstances surrounding

the arrest. See *State v. Miller* (1997), 117 Ohio App.3d 750, *State v. Brandenburg* (1987), 41 Ohio App.3d 109.

To determine whether an officer had probable cause to arrest an individual, the Court must examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. *State v. Pencil*, 2007-Ohio-7164, ¶15 (2nd App. Dist); citing *Maryland v. Pringle* (2003), 540 U.S. 366; 124 S.Ct. 795; 157 L. Ed.2d 769.

The Court holds that the combination of the operation of the defendant's vehicle through the checkpoint, the bloodshot and glassy eyes, slurred speech, admission of consumption of alcoholic beverages, and performance on the field sobriety tests establish probable cause for the arrest.

(3) Sobriety Checkpoint

State of Ohio v. Gerald Williams, 181 Ohio App.3d 472; 2009-Ohio-970; 2009 Ohio App. LEXIS 812 (1st App. Dist.) cogently summarizes the law on sobriety checkpoints:

[¶6] The United States Supreme Court has set the standard for determining the constitutionality of a sobriety checkpoint. It has espoused a three- part balancing test to determine the reasonableness of stops and seizures under the *Fourth Amendment*. "Consideration of the constitutionality of such seizures involves (1) a weighing of the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty." *Brown v. Texas* (1979), 443 U.S. 47, 51, 99 S.Ct. 2637 61 L. Ed.2d 357; *State v. Robinette* (1997), 80 Ohio St.3d 234, 1997 Ohio 343, 685 N.E.2d 762.

[¶7] Individual liberty, or privacy, has further been broken down into objective and subjective intrusions. An objective intrusion is based on "the duration of the seizure and the intensity of the investigation," while a subjective intrusion is based on "the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444, 452 110 S.Ct. 2481, 110 L.Ed.2d 412.

[¶8] While the three-part test used by the U.S. Supreme Court is more general, the Second Appellate District in *State v. Goines* has adopted a more particular analysis to determine the constitutionality of sobriety checkpoints. A

vehicle may be stopped where there are all of the following: “(1) a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists; (2) adequate advance warning signs, illuminated at night, timely informing approaching motorists of the nature of the impending intrusion; (3) uniformed officers and official vehicles in sufficient quantity and visibility to show the police power of the community; and (4) a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria.” *State v. Goines* (1984), 16 Ohio App.3d 168, 16 Ohio B. 178, 474 N.E.2d 1219, quoting *State v. Hilleshiem* (Iowa 1980), 291 N.W.2d 314, 318.

The United States Supreme Court has held that the objective and subjective intrusion of a checkpoint on a motorist’s privacy is minimal. *Sitz*, supra, at 452-453.

The gravity of public concern in reducing accidents of driving under the influence of alcohol is a legitimate one. A sobriety checkpoint in a township where there were 15 alcohol-related traffic crashes in 2011 (latest available year) and conducted on the main corridor for traffic through the township advances the public interest in preventing crashes and the behavior which causes them.

***Goines* criterion (1): “a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists”**

The location on State Route 18 is a straight and level area with two lanes in each direction, a 40 mph speed limit, and a parking area immediately adjacent for moving cars off the roadway. The area is visible to motorists approaching from either direction.

***Goines* criterion (2): “adequate advance warning signs illuminated at night, timely informing approaching motorists of the nature of the impending intrusion”**

Illuminated warning signs 750’ and 500’ from the checkpoint entrance adequately warned approaching motorists.

***Goines* criterion (3): “uniformed officers and official vehicles in sufficient quantity and visibility to show the police power of the community”**

Police cruisers at each end of the checkpoint with flashing overhead lights, numerous traffic cones with flashing strobe lights, and at least five uniformed officers with flashlights and reflector vests demonstrates the assertion of the police power of the community.

***Goines* criterion (4): “a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria.”**

This is the crux of the defendant’s argument. Defendant contends that the absence of traffic volume studies and data for this location, and the lack of alcohol-related crash and arrest data *specific to this location*, indicate this aspect of the *Goines* criteria is not met.

Use of five to six-year old data to choose a checkpoint location can be appropriate. *State of Ohio v. Nelson*, 2002-Ohio-1008; 2002 Ohio App. LEXIS 934 (10th App. Dist.).

A checkpoint established based on “statistics on OVI crashes, OVI arrests” and where the determination of which vehicles to stop was made in advance “based on an assessment of traffic volume” was held valid. *City of Ashtabula v. Presciano*, 2012-Ohio-3418; 2012 Ohio app. LEXIS 3020 (11th App. Dist.).

The procedure of stopping every third vehicle due to a high volume of traffic and every vehicle when traffic decreased was held valid. *State of Ohio v. Park*, 2012-Ohio-4069; 2012 Ohio app. LEXIS 3586 (5th App. Dist.).

Lt. Haymaker, as post commander, is an administrative officer although no testimony or exhibit established that he is one of the “policy-making administrative officers” of the Ohio State Patrol.

The Ohio State Patrol adopted policy #OSP-200.21 governing sobriety checkpoints. This checkpoint was apparently reviewed by officers of the Ohio State Patrol senior to Lt. Haymaker, but the actual operational position of these officers is unknown.

Three advance press releases announced the checkpoint (State’s Exhibit 2, 3, and 4).

The data used to support the choice of checkpoint location was general for Medina County as it regards alcohol-related fatal crashes and for the whole of Medina Township as to alcohol-related traffic crashes. The State of Ohio presented no data specific to State Route 18 in the area of the checkpoint. No testimony indicates whether such precise data is available.

Ohio State Patrol Policy Number OSP-200.21 (State's Exhibit 5) specifies required pre-checkpoint activities for site selection:

B. PRE-CHECKPOINT ACTIVITIES

1. **Site Selection** – Current Supreme Court guidelines require that the site of the checkpoint be selected by an official other than those who will conduct the checks. Therefore, the Office of Field Operations shall authorize the use of all sobriety checkpoints. Requests must be directed through the district commander to the Field Operations Commander. The district commander shall determine the location, day(s), and time for checkpoint operations.

a. **Statistical Considerations** – The Supreme Court requires the law enforcement agency planning to conduct a checkpoint to demonstrate that there is a significant alcohol crash problem at the location chosen for the checkpoint. The site of the proposed checkpoint must have a significant history of alcohol-related crashes and impaired driving violations. The time and day of the checkpoint must parallel the peak periods of alcohol crash involvement.

1) The Integrated Traffic Records System should be used to determine the magnitude of the alcohol crash problem at the proposed site, including the peak hours and days of occurrence.

2) The district commander should contact the GHQ Statistical Analysis Unit to obtain a historical record of OVI violations in the area of the site. This historical record must be submitted with the request for a sobriety checkpoint.

3) The Field Operations Commander may then grant the authority to conduct the sobriety checkpoint based on this information.

b. **Safety Considerations** – The site selection process must consider the safety of motorists and officers. The checkpoint should not create a hazard as great as the driving behavior we are attempting to deter. The site must allow officers to divert vehicles out of the traffic stream without creating a hazard or traffic backup.

No testimony or exhibit established compliance with the policy that the "Office of Field Operations shall authorize the use of all sobriety checkpoints."

No testimony or exhibit established compliance with the policy that "Requests must be directed through the district commander to the Field Operations Commander."

No testimony or exhibit established compliance with the policy that "The district commander shall determine the location, day(s), and time for checkpoint operations."

No testimony or exhibit established compliance with the policy that "The site of the proposed checkpoint must have a significant history of alcohol-related crashes and impaired driving violations."

No testimony or exhibit established compliance with the policy that "The time and day of the checkpoint must parallel the peak periods of alcohol crash involvement."

Lt. Haymaker used three separate databases to support his memorandum of October 19, 2012 (State's Exhibit 1). One database indicated alcohol-related crashes in Medina Township. He emailed an unspecified OSP officer for additional data and received the same statistics as provided to him in August 2012. This email exchange was not presented at the hearing.

Lt. Haymaker also consulted a map containing points for crashes and alcohol-related arrests for Medina County for the past three years which he saved on his computer. This map was not presented at the hearing.

Lt. Haymaker was aware of "more than two" alcohol-related crashes on State Route 18 in the area of the checkpoint. No information on the source of this knowledge or its timeliness was presented at the hearing, and this information is not contained in his memorandum.

No testimony or exhibit established compliance with the policy the data reviewed was adequate to "determine the magnitude of the alcohol crash problem at the proposed site, including the peak hours and days of occurrence."

No testimony or exhibit established compliance with the policy that "The district commander should contact the GHQ Statistical Analysis Unit to obtain a historical record of OVI violations in the area of the site. This historical record must be submitted with the request for a sobriety checkpoint."

No testimony or exhibit established compliance with the policy that "The Field Operations Commander may then grant the authority to conduct the sobriety checkpoint based on this information."

One Ohio Court of Appeals has apparently (the decision is not specific as to the testimony) accepted non site-specific testimony. *Presciano*, supra, at ¶29:

Sgt. Dibble testified to the creation of the executive board and its development and adoption of the ACOVITF manual. This manual laid out in great detail the method for choosing a location and the procedures to be employed during administration of a checkpoint. Sgt. Dibble stated that the location had been chosen in May 2009, based on "statistics on OVI crashes, OVI arrests, and picking a safe location for the checkpoint and visibility," * * *

In *Nelson*, supra, at p. 9-10, the 10th Appellate District upheld, in a similar challenge as in this case, a sobriety checkpoint on West Broad Street in Columbus where the evidence established:

The record reveals that Officer Ross Staggs inherited conclusory roadway crash data from Karl Booth, the Sergeant before him, that was five to six-years-old. After reviewing these statistics, Sergeant Booth examined the safety of the site. After he had determined that the location was safe enough for motorists and officers, he submitted two requests on August 2, 2000: one to the Ohio Department of Public Safety for **crash data specific to the location**, and another to Chief Deputy Gilbert Jones for approval of the location. Chief Deputy Jones indicated his approval by initialing and dating the request August 2, 2000. Sergeant Staggs received the crash data in a memo from the Ohio Department of Public Safety, dated August 8, 2000. **Included in the memo was the total number of fatal injuries, property-damage crashes, and alcohol-related fatal injuries that occurred on West Broad Street.** (emphasis added)

A California Appellate Court, applying California case law similar to *Goines*, reversed the denial of a Motion to Suppress a sobriety checkpoint stop:

Ingersoll stated: "The sites chosen [for sobriety checkpoints] should be those which will be most effective in achieving the governmental interest; i.e., on roads having a high incidence of alcohol related accidents and/or arrests. Safety factors must also be considered in choosing an appropriate location." (*Ingersoll*, supra, 43 Cal.3d at p. 1343.) "[A] sobriety checkpoint would be improper at a location without any significant traffic or incidence of drunk driving" (*Id.* at p. 1344.) This factor is significant, because without it the essential deterrent effect of the sobriety checkpoint is not served. (*Banks*, supra, 6 Cal.4th at p. 944.)

There was no evidence explaining the selection of the specific checkpoint site used here. To be sure, there was evidence that the site had been used before. But there was no evidence that the intersection at issue had a high incidence of alcohol-

related accidents. The trial court apparently sua sponte found that the location was on a "major thoroughfare" and, apparently, near a freeway. Even if the taking of judicial notice actually occurred, and assuming the process was handled properly, the record only supports the finding that the locale was one where a good deal of traffic might be expected. The People's suggestion here that, because it was "Super Bowl Sunday," many people might be drinking and driving, would justify checkpoints in an almost infinite set of locations in the county. The record does not support a finding that the location here focused "on roads having a high incidence of alcohol related accidents and/or arrests." (*Ingersoll, supra*, 43 Cal.3d at p. 1343.)

People v. Alvarado, 193 Cal.App. 4th Supp.13; 123 Cal. Rptr.3d 222; 2011 Cal. App. LEXIS 381, at 18-19 and 226-227.

See, also, *State of Indiana v. Gerschoffer*, 763 N.E.2d 960, 968; 2002 Ind. LEXIS 193 (Supreme Ct. Indiana), which affirmed the granting of a Motion to Suppress:

The location's selection casts further doubt on whether this roadblock was sufficiently related to the public danger of drunk driving. The officers in charge sensibly chose a well-lighted, reasonably busy area that was amenable to traffic control. (R. at 145-46.) They chose this particular site partially because they had conducted a checkpoint in the same location the previous winter and wanted to compare results. (R. at 136.)

When asked the reasons for the site selection, however, **neither officer indicated that drunk driving had been a particular problem at this location.** (R. at 103-04, 145-46.) Corporal Williams said only that a high volume of general traffic violations occurred in the area. (R. at 145-46.)

The officers operated the roadblock from 11:30 p.m. until 1:30 a.m. because "traffic is easier to handle; it's not exactly that we were going to get a lot of [OWI] arrests." (R. at 107-08.) Also, businesses were closed at that hour and shoppers were no longer out, but it was still early enough for a "substantial amount of traffic." (R. at 108.) Finally, the timing was convenient based upon officer shift changes. (*Id.*) **As with location, the State did not link the timing to the danger being addressed.**

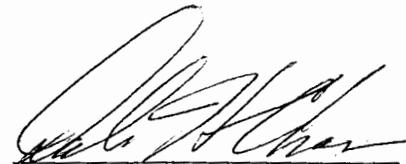
To be constitutionally reasonable, the location and timing of sobriety checkpoints should take into account police officer safety, public safety, and public convenience. The roadblock should also effectively target the public danger of impaired driving. Here, the State did not offer any evidence of objective considerations such as an unusually high rate of OWI-related accidents or arrests in the chosen area. The State has therefore not shown that this roadblock was sufficiently related to the legitimate law enforcement purpose of combating drunk driving. (emphasis added)

See, also, *Commonwealth v. Blee*, 695 A.2d 802, 804; 1997 Pa. Super. LEXIS 999 (Superior Court Pennsylvania) which affirmed granting a Motion to Suppress:

To the testimony at the hearing revealed the following in that regard: Deputy Chief William Barrett of the Wilkes-Barre Police Department testified that he was responsible for determining the site of the checkpoint. He decided to locate the checkpoint on Route 11 approximately one-quarter mile south of Main Street, near the shopping center in Edwardsville. In making this decision, Deputy Chief Barrett considered motorist safety, traffic volume, availability of lighting and whether motorists would have ample opportunity to avoid the checkpoint if they so desired. He also testified that he reviewed studies from the Pennsylvania Department of Transportation (PennDOT) regarding DUI arrests and DUI-related accidents in Luzerne County during the years 1989 through 1994. These studies were introduced into evidence and made a part of the record. On cross-examination, Deputy Chief Barrett admitted that **the studies were not specific to DUI-related accidents and arrests at the particular location of the sobriety checkpoint, that is, Route 11 in Edwardsville.** Rather, the studies provided general information indicating the number of DUI-related accidents and arrests in Luzerne County, the municipalities located in Luzerne County and the roads bordering Luzerne County. Specifically, the studies indicated that, among the roads in Luzerne County, Route 11 had the second highest incidence of alcohol-related accidents, and that, among the municipalities in Luzerne County, Edwardsville had one of the highest incidence of alcohol-related accidents. **The studies did not provide any information concerning DUI-related accidents or arrests in the area of the checkpoint nor did it indicate the likelihood of the checkpoint location being traveled by drunk drivers. Simply put, there was no data regarding DUI-related accidents or arrests on Route 11 in Edwardsville.** (emphasis added)

The fact that no testimony or exhibits established compliance with these various policies does not necessarily mean that compliance did not happen. However, it is evidence that must show compliance and it is the duty of the State of Ohio to present such evidence. The State of Ohio has not met that burden.

The Court holds that the State of Ohio has failed to demonstrate "a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria." Accordingly, the checkpoint does not meet U.S. or Ohio constitutional standards.



DALE H. CHASE,
JUDGE