IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, l993

FILED

October 10, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 03C0l-9307-CR-0022l
	)	
	)	HAMILTON COUNTY
V.	)	
	)	HON. STEPHEN M. BEVIL
	)	JUDGE
SARAH HUTTON DOWNEY	)	
	)	(On Remand)
APPELLANT	)	

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REVERSED AND DISMISSED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

This appeal arises from the judgment of the Criminal Court of Hamilton County, Division III, following the appellant's nolo contendere plea to driving under the Influence, first offense. Pursuant to Tenn. Code Ann. § 55-10-403(a)(1), the trial court sentenced the appellant to eleven months and twenty-nine days in the county workhouse, fined her two hundred and fifty ($250.00) dollars, and ordered that her license be suspended for a period of one year. All but forty-eight hours of the sentence was suspended on the condition that the appellant attend the Hamilton Sheriff's Department Alcohol and Drug Rehabilitation School.

With consent of the trial court and the District Attorney General, the appellant's conditional plea reserved the right to appeal a certified question of law under Rules 11(e) and 37(b)(2)(i) of the Tenn. R. Crim. P.[1] The certified questions presented on appeal, as stated in the appellant's brief, are as follows:

> (1) Did the trial court err in overruling the defendant's motion to suppress her warrantless arrest in violation of Article I, §§ 7 and 8 of the Tennessee Constitution on the grounds that her constitutional rights were violated by her detention at a roadblock conducted by law enforcement officials in Hamilton County, Tennessee?
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> (2) Did the trial court err in overruling the defendant's motion to suppress her warrantless arrest in violation of Article I, §§ 7 and 8 of the Tennessee Constitution on the grounds that her constitutional and statutory rights were violated by her detention at a roadblock conducted by law enforcement officials in Hamilton County, Tennessee, under the subterfuge of being a traffic enforcement roadblock which, in fact, was a sobriety checkpoint?[2]

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[1]Initially, this Court determined that the appellant failed to adequately preserve the certified question for appeal. State of Tennessee v. Sarah Hutton Downey, Tennessee Criminal Appeals, opinion filed at Knoxville, July 6, l994. By an order filed October 31, 1994, the Supreme Court granted the appellant's application for permission to appeal and remanded the case to this Court for consideration of the following certified issue: "whether the warrantless stop and arrest of the defendant, where the stop was caused by a highway sobriety check point roadblock, violated Article 1, Sections 7 and 8 of the Tennessee Constitution."

[2]We have deleted a portion of the appellant's second issue which contended that the roadblock in question violated Tenn. Code Ann. § 55-50-351 because the officer who stopped the appellant was not a state trooper. This action was taken pursuant to the Supreme Court Order (see footnote 1) which remanded

(3) Did the trial court err in overruling the defendant's motion to suppress her warrantless arrest in violation of Article I, §§ 7 and 8 of the Tennessee Constitution on the grounds that her constitutional rights were violated by the failure of the employees of the Tennessee Department of Safety (Tennessee Highway Patrol) to follow the administrative rules of their department as outlined in General Order 410 pertaining to traffic enforcement roadblocks?

As stated in footnote 1, the Supreme Court framed the issue as follows:

(W)hether the warrantless stop and arrest of the defendant, where the stop was caused by a highway sobriety check point roadblock, violated Article 1, Sections 7 and 8 of the Tennessee Constitution.

FACTS

At the suppression hearing, Lieutenant Ronnie Hill of the Tennessee Highway Patrol testified that he set up a checkpoint on August 8, 1992, beginning at approximately 12:00 midnight on Hixson Pike in Hamilton County, Tennessee. The roadblock was conducted for approximately two hours. He was assisted by officers from the local police and the Sheriff's Department who were members of the Chattanooga Police Department DUI Task Force, the Hamilton County DUI Task Force, auxiliary or "ride-along" officers of the Sheriff's Department, and one other highway patrolman. Although he conceded that the bulk of the officers operating the roadblock were members of the DUI Task Forces, Lt. Hill stated that the purpose of the roadblock was to check drivers' licenses. Advance notice to the public concerning the nature, location and purpose of the checkpoint was not given.

Lt. Hill testified that he conducted the roadblock pursuant to written guidelines established by the Department of Safety for driver's license checkpoints. He stated that these guidelines were applicable to the operation of

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this case for consideration of the merits of the appellant's "constitutional" issues. We note parenthetically, however, that this issue is without merit. See State v. James Herbie Hinkle, Jr., No. 80-89-III, slip op. at 3-4 (Ct. Crim. App., at Nashville, Dec. 9, 1980); Tenn. Op. Atty. Gen. No. 85-104 (April 8, 1985).

any genre of roadblock. He also stated that he and the other highway patrolman at the checkpoint, Sergeant (or Lieutenant) Monger, chose to set up the roadblock on Hixson Pike because they thought that the area would have a "high traffic index."[3] Neither officer sought the approval of their superior officers concerning the establishment, time, or location of the checkpoint. No data or statistics were entered into the record to substantiate that Hixson Pike was heavily traveled or that individuals without licenses were more likely to be in that area in the early morning hours than at other places in Hamilton County.

Concerning the operation of the roadblock, Lt. Hill testified prior to its inception that he gave general instructions to the assisting officers on how to conduct the roadblock. At the scene, patrol cars with their blue lights flashing were positioned along each side of the road and in the center turn lane. There was adequate visibility in both directions to avoid accidents and congestion. Cones were not used to mark the lanes of traffic but, in Lt. Hill's opinion, the lanes were sufficiently marked by existing lines on the roadway.

All automobiles which were travelling north or south were stopped unless the flow of traffic became impeded. In such an event, all traffic was allowed to proceed through the roadblock until the congestion was relieved; then the roadblock was resumed. With the exception of dealing with safety hazards caused by congestion, the officers did not exercise any discretion as to which vehicles to stop.

Lt. Hill supervised the operation of the checkpoint. Lt. Hill did not recall having any role in the detention or arrest of the appellant or any other motorist.

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[3]Mr. Monger was referred to as both "Sergeant" and "Lieutenant" in the testimony.

He also had no recollection of the actual number of cars stopped at the roadblock, but believed that the number stopped would exceed one hundred.[4]

At the suppression hearing, a transcript of the testimony of Robert Starnes at the preliminary hearing was introduced as an exhibit. Mr. Starnes, an officer of the Hamilton County Sheriff's Department and the county DUI Task Force, was the officer who stopped and arrested the appellant. He testified that he stopped the appellant's car at the checkpoint at about 1:20 a.m. He initially asked the appellant to see her driver's license, but subsequently asked her to pull over to the side of the road after smelling alcohol "about her person" and learning that she had been drinking earlier in the evening. Mr. Starnes then administered three field sobriety tests to the appellant. In his opinion, she failed each test. A breathalizer test was administered to her in a "Batmobile" which was present at the scene. The appellant's blood-alcohol level was determined to be 0.17% at 1:46 a.m. Consequently, she was arrested and transported from the scene.

Mr. Starnes testified that the appellant did nothing to arouse his suspicion as she approached the roadblock and that she was stopped for the same purposes and in the same manner as other motorists who passed through the checkpoint. Moreover, he, like Lt. Hill, stated that the roadblock was established solely for the purpose of checking drivers' licenses, use of seatbelts and various traffic violations, but was not set up to check for intoxicated drivers.

The appellant's testimony at the suppression hearing was substantially similar to the testimony of Mr. Starnes at the preliminary hearing, at least in all respects pertinent to this appeal. Therefore, to avoid tautology, we omit any rendition of her testimony.

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[4]One hundred cars passing a given point in a two hour period can hardly be termed a "high traffic index," since that averages less than one car per minute.

I. CONSTRUCTION OF THE FEDERAL AND STATE CONSTITUTIONS

Based on a review of her brief, the appellant apparently concedes that the roadblock in question did not violate the Fourth Amendment of the United States Constitution,[5] but instead contends that Article I, §§ 7 and 8 of the Tennessee Constitution[6] provide broader protection of individual liberties under circumstances such as the ones present in this case. We disagree with both the appellant's concession and contention.

First, we are unconvinced that Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), foreclosed the issue of whether a particular sobriety checkpoint violates the Fourth Amendment. The only issue addressed by the Supreme Court in Sitz was "whether a State's use of highway sobriety checkpoints violates the Fourth and Fourteenth Amendments to the United States Constitution." Id. 496 U.S. at 447, 110 S. Ct. at 2483. The Court made clear that the action before it "challenge(d)" only the use of sobriety checkpoints generally." Id. 496 U.S. at 450, 110 S. Ct. at 2485. In other words, the Court merely held that roadblocks established pursuant to the state's sobriety checkpoint program were not per se unconstitutional, leaving

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[5]The Fourth Amendment provides: "Unreasonable searches and seizures.---The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6]Article I, § 7 provides: " Unreasonable searches and seizures---General warrants.---That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."

Article I, § 8 provides: "No man to be disturbed but by law.---That no man shall be taken or imprisoned, or disseized off his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, property, but by the judgment of his peers or the law of the land."

unanswered the question of the constitutionality of individual roadblocks under particular circumstances. See Id. 496 U.S. at 455, 110 S. Ct. at 2488.

In its order of remand our Supreme Court, apparently unconvinced by the officers' description of the roadblock, characterized the roadblock as "a highway sobriety check point." Furthermore, the Supreme Court framed the certified question entirely as to whether Article I, §§ 7 and 8 of the Tennessee Constitution were violated by the roadblock. The United States Constitution was not mentioned.

Concerning the proper interpretation of our constitution, we decline to interpret the protection under Article I, §§ 7 and 8 as being broader than Fourth Amendment guarantees in the context of this case. In Sneed v. State, 22l Tenn. 6, l3, 423 S.W.2d 857, 860 (l968), our Supreme Court stated:

> Since guarantees of the Fourth Amendment of the Federal Constitution against unreasonable searches and seizures now apply to states through the due process clause, (Mapp v. Ohio, (1961), 81 S. Ct. 1684, 367 U.S. 643, 6 L. Ed. 2d 1081, . . .), and this is the supervening law of the land, federal cases on search and seizure must be abided by. And as our own constitutional provision, Article I, § 7, is identical in intent and purpose with the Fourth Amendment, it is reasonable that we should not limit it more stringently than federal cases limit the Fourth Amendment, and so should regard such cases as particularly persuasive.

Since Sneed, the only two areas where the Supreme Court of Tennessee has refused to interpret the protection under the Fourth Amendment and Article I, § 7 identically concern the "open fields" doctrine, see State v. Lakin, 588 S.W.2d 544, 548 (Tenn. 1979), and the sufficiency of affidavits used to obtain search warrants. See State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989). Moreover, in State v. Meadows, 745 S.W.2d 886, 89l (Tenn.Crim.App. l987), this Court, citing Sneed, stated that "[w]e, and our Supreme Court of Tennessee, have

historically given Article I, Section 7 of our constitution a meaning in harmony with that given to the Fourth Amendment of the federal Constitution by the United States Supreme Court . . . ."

We express no opinion as to whether Article I, § 8 of the Tennessee Constitution provides broader protection to the appellant than the Fourth Amendment. Although the appellant proffers Section 8 as a basis for relief in her list of issues on appeal, she cites no authority from this State or any other jurisdiction which holds that due process rights are violated by a detention or arrest such as the one in this case. Therefore, the issue was waived. see Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988); State v. Smith, 735 S.W.2d 831, 836 (Tenn. Crim. App. 1987); see also Tenn. R. App. P. 27(a)(7).

II. STATUS OF THE LAW

It is beyond dispute that the stopping of an automobile and the detention of the occupants therein at a "checkpoint" constitutes a "seizure" within the meaning of the Fourth Amendment of the United States Constitution, Sitz, 496 U.S. at 450, 110 S. Ct. at 2485; Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082, 49 L. Ed. 2d 1116 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607 (1975), and Article I, § 7 of the Tennessee Constitution. See State v. Manuel, No. 87-96-III, 1988 WL 123988, at *1 (Ct. Crim. App. Nov. 23, 1988). Since Article I, § 7 of the Tennessee Constitution prohibits "unreasonable searches and seizures," the question becomes whether the seizure of the appellant at the roadblock was reasonable under Article I, § 7.[7] Concerning this inquiry, the

[7]In this appeal, we address only the initial stop or detention of the appellant at the checkpoint and the associated preliminary questioning and observation by the arresting officer. We note, however, that the United States Supreme Court

State must bear the burden of proof. Manuel, 1988 WL 123988, at *2; see also State v. Harmon, 775 S.W.2d 583, 585 (Tenn. 1989); State v. Cross, 700 S.W.2d 576, 577 (Tenn. Crim. App. 1985).

In assessing the reasonableness of a particular search or seizure under the Fourth Amendment, the United States Supreme Court has utilized a balancing test. In Brown v. Texas, 443 U.S. 47, 50-51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979), the Court promulgated the test as follows:

> Consideration of the constitutionality of such seizures involves 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. See, e.g., [Brignoni-Ponce, 422 U.S.] at 878-883, 95 S. Ct., at 2578-2581.
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> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. (Citations omitted) To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. (citations omitted)

The Brown three-prong balancing test was reaffirmed by the Court in Sitz, 496 U.S. at 450, 110 S. Ct. at 2485.

Although no published case from this State has previously addressed the constitutionality of roadblocks, in the two unpublished cases dealing with the issue, this Court has applied the Brown test. State v. Cunningham, No. 03C01-9112-CR-00389, 1992 WL 194571, at *1 (Tenn. Crim. App. Aug. 13, 1992);

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in Sitz stated, by way of dictum, that "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." 496 U.S. at 451, 110 S. Ct. at 2485 (citing Martinez-Fuerte, 428 U.S. at 567, 96 S. Ct. at 3087).

Manuel, 1988 WL 123988, at *2, *4. Explaining its usage of the Brown balancing test in Manuel, this Court stated:

> In the case before us the roadblock stop was not based on probable cause to believe that appellant had committed a crime which would justify a warrantless arrest in the traditional sense as contemplated in our T.C.A. Sec. 40-7-103, or on articulable and reasonable suspicion that he was involved in criminal activity which would justify a seizure for limited purposes as in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny. Appellant was not suspected individually at all and his seizure was only an incident of the roadblock procedure used by the police to detect and prosecute violators of the drunk driving laws. Consequently, the balancing test in appellant's case could not involve a standard based on his conduct as an individual such as probable cause or articulable and reasonable suspicion. It must involve another and different standard calculated to protect his rights against invasions by the police.

Id. at *1. Brown remains the appropriate test under Tennessee law.

Several state courts have promulgated a number of factors to consider in determining the reasonableness of a seizure in a particular case. The factors set forth in State v. Deskins, 234 Kan. 529, 54l, 673 P.2d 1174, ll85 (1983) are representative:

> (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.

We endorse the utilization of these factors to the extent that they identify areas of concern in analyzing the facts of a case under the three prongs of the Brown test.[8] However, these factors do not displace the Brown test.

III. WHETHER THE ROADBLOCK WAS AN ILLEGAL SUBTERFUGE

The first prong of the Brown test involves an examination of the state's interest in instituting the roadblock. We must, however, ascertain what interest the State sought to advance by the operation the roadblock before the validity and gravity of the interest may be addressed. In her second issue on appeal, the appellant contends that the driver's license checkpoint was in reality a subterfuge for a DUI roadblock and that such conduct is constitutionally impermissible under Cox v. State, 181 Tenn. 344, 181 S.W.2d 338, 340 (1944) (where our Supreme Court reversed a conviction for possession of "whisky" because the stopping of his car by the Highway Patrolman ostensibly to check his driver's license was "a mere subertfuge" to discover the whisky, an action the Supreme Court was "unwilling to sanction").

Despite the trial court's findings to the contrary, review of the record supports the appellant's assertion that the true purpose of the checkpoint was to check for intoxicated drivers. The proof at trial revealed that roadblock took place on a weekend night between 12:00 midnight and 2:00 a.m. With the exception of the two highway patrolmen and the auxiliary officers, all of the officers at the roadblock were members of the City of Chattanooga and Hamilton County DUI Task Forces. Immediately after surrendering her driver's license the

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[8]In emphasizing the limitations in applying such factors, we note that this Court in Manuel, 1988 WL 123988, at *2, stated: "[C]oncrete factors are so diverse and vary so much in significance from case to case that we do not find a recitation of such factors particularly helpful." It is true that all of the Deskins factors may not be applicable in a particular case and the significance of factors which are applicable may vary greatly. However, the benefits of considering such factors in applying the Brown balancing test outweigh their shortcomings.

appellant was asked whether she had been drinking. Moreover, and perhaps most significantly, the "Batmobile" (blood alcohol testing mobile unit) was present throughout the operation of the roadblock. Although some of these facts could be deemed consistent with a driver's license checkpoint, when they are viewed in the aggregate the notion that the primary purpose of the roadblock was to check licenses and not sobriety becomes untenable.

As previously noted, our Supreme Court was unpersuaded that the roadblock was for any purpose other than sobriety testing. Thus, we must also consider the roadblock "a highway sobriety check point roadblock."

The appellant's claim that an undisclosed or disguised purpose, standing alone, constitutes an abridgment of her constitutional guarantees is premised on a misreading of Cox. In that case two highway patrol officers made a random roving stop of an automobile under the pretense of checking the motorist's driver's license. 181 S.W.2d at 339-40. It was conceded, however, that the actual purpose of the detention was to discover illegal whiskey. Id. at 340. The evidence further revealed that the troopers believed that the defendant was another person. Id. Based on these facts, the Court reversed the conviction, holding that "[t]he arrest was a mere subterfuge" and "the effect of [the] defendant's apprehension was to require him to give evidence against himself." Id.

The appellant apparently interprets Cox as holding that a defendant's constitutional rights are violated any time an officer conceals the true reason for a stop. This interpretation fails to recognize the underlying substantive issue at stake in Cox and the present action. The proper line of inquiry is not whether the ostensible reason for the stop was genuine, but whether the actual or undisclosed purpose of the detention was constitutionally permissible. Having determined that the roadblock was a subterfuge for catching intoxicated

motorists, we must decide whether this sobriety checkpoint was constitutional under the Brown test.

IV. APPLICATION OF THE BROWN TEST

It is clear from Sitz, 496 U.S. at 449-51, 110 S. Ct. at 2484-86, and Manuel, 1988 WL 123988, at *4, that the particular purpose of or governmental interest to be served by a roadblock is a critical factor in assessing whether the roadblock was reasonable. Having determined that the roadblock at issue was in fact a sobriety checkpoint, the question posed concerns the gravity of the State's interest is in apprehending and deterring intoxicated motorists. On this issue, the courts almost uniformly agree that the public concern for deterring driving under the influence of an intoxicant is an extremely important governmental concern.

As the United States Supreme Court has observed, "[n]o one can seriously doubt the magnitude of the drunken driving problem or the States' interest in eradicating it." Sitz, 496 U.S. at 451, 110 S. Ct. 2485. "The slaughter on the highways of our Nation exceeds the death toll of all our wars." Perez v. Campbell, 402 U.S. 637, 657, 91 S. Ct. 1704, 1715, 29 L. Ed. 2d 223 (1971)(Blackmun, J., concurring); accord Breithaupt v. Abram, 352 U.S. 432, 439, 77 S. Ct. 408, 412, 1 L. Ed. 2d 448 (1957)("The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield"); see also 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.8(d), p. 71 (2d ed. 1987)("Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage"). In short, "[t]he carnage caused by drunk drivers is well documented," South Dakota v. Neville, 459 U.S. 553, 558, 103 S. Ct. 916, 919, 74 L. Ed. 2d 748 (1983), and the State need not present proof thereof. Manuel, 1988 WL 123988,

at *4. The fact that "[r]emoving the intoxicated driver from the road is a grave public concern" is not open to argument or dispute. Id.

_____The second prong of the Brown test requires an examination of the degree and extent to which the seizure advances the public interest. 443 U.S. at 50-51, 99 S. Ct. at 2640-41; Manuel, 1988 WL 123988, at *4. The governmental interest to be served by the sobriety checkpoint must be one that can reasonably be advanced by the operation of the checkpoint. See Sitz, 496 U.S. at 453-55, 110 S. Ct. 2487-88.

Many critics of DUI checkpoints contend that the mechanism of roadblock stops does not adequately advance the public interest because the problem of drunk drivers can be more effectively combatted by the traditional practice of stopping motorists whose driving reveals overt manifestations of intoxication. See e.g., State v. Koppel, 127 N.H. 286, 499 A.2d 977 (1985); State ex rel. Ekstrom v. Justice Court of the State of Arizona, 136 Ariz 1, 663 P.2d 992 (1983). Answering the "success of apprehension" argument, the Missouri Court of Appeals stated:

> There is no magic and certainly no basis for holding roadblocks are unconstitutional simply because a small number of intoxicated drivers were intercepted. Indeed, it takes only one impaired driver to possibly extinguish other lives, cause serious and life-long disability, and destroy property of otherwise innocent travelers upon our roadways.

State v. Welch, 755 S.W.2d 624, 633 (Mo. App. 1988). Moreover, "one very important purpose of a [DUI] roadblock is 'in serving as a deterrent to convince the potential drunk driver to refrain from driving in the first place.'" 4 LaFave at 74-75 (quoting People v. Bartley, 109 Ill.2d 273, 93 Ill.Dec. 347, 486 N.E.2d 880 (1985), cert. denied, 475 U.S. 1068, 106 S. Ct. 1384, 89 L. ED. 2d 608 (1986)).

The United States Supreme Court recently clarified that the effectiveness prong of the Brown balancing test "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." Sitz, 496 U.S. at 453, 110 S. Ct. at 2487. The Court further stated:

> Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

Sitz, 496 U.S. at 453-54, 110 S. Ct. at 2487. In light of the foregoing analysis, as well as this Court's holdings in Manuel and Cunningham, it is settled that proper utilization of the mechanism of roadblocks to check sobriety is constitutionally permissible.[9]

The third prong of the balancing test concerns the severity of interference with individual liberty. Brown, 443 U.S. at 50-51, 99 S. Ct. at 2640-41; Manuel, 1988 WL 123988, at *4. Generally, checkpoint operations present a lesser intrusion on a motorist's interests under the Fourth Amendment and Article I, § 7 than random, roving stops. In explaining this distinction, the United States Supreme Court reasoned in Prouse:

> [The] objective intrusion---the stop itself, the questioning, and the visual inspection---also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion---the generating of concern or even fright on the part of lawful travelers---is appreciably less in the case of a checkpoint stop.

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[9]As is evident from our ultimate holding in this case, in making this finding we do not foreclose the possibility that a particular roadblock could be found constitutionally infirm due to the manner in which it was established or conducted.

440 U.S. at 656, 99 S. Ct. at 1397 (quoting Martinez-Fuerte, 428 U.S. at 558, 96 S. Ct. at 3083). As the United States Supreme Court observed concerning the subjective intrusion on a motorist, a motorist is "much less likely to be frightened or annoyed" by a properly conducted checkpoint stop because he can see overt signs of the officers' authority, that other vehicles are being stopped, and the manner in which other motorists are detained. Prouse, 440 U.S. at 658, 99 S. Ct. 1398; citing United States v. Ortiz, 422 U.S. 891, 894-95, 95 S. Ct. 2585, 2587-88, 45 L. Ed. 2d 623 (1975). However, the mode of establishment, manner of operation, and physical characteristics of the roadblock affect the intrusiveness of a particular checkpoint stop.

Several factors in this case suggest that the sobriety checkpoint constituted a reasonable intrusion on the appellant's privacy. First, the officers stopped all traffic traveling in both directions of Hixson Pike, except in cases where safety concerns dictated that all traffic should be allowed to pass unimpeded. After the safety hazard was alleviated, the roadblock was reestablished. Moreover, the site for the roadblock was chosen because the troopers apparently believed, albeit erroneously, that the site would have a high traffic index. Overhead flashing blue lights on the patrol cars were activated in order to warn approaching traffic of the checkpoint. The officers were in uniforms which clearly depicted that they were law enforcement officers. Finally, the detention of motorists appears to have been brief unless a suspected violation was detected by an officer.

Other significant factors, however, weigh against a finding that this particular roadblock was reasonable. In her third issue on appeal, the appellant contends that the roadblock was unconstitutional because the law enforcement officers failed to comply with several administrative guidelines which govern the establishment and operation of roadblocks. This Court is unable to address

these assertions as presented, however, because examination of the record coupled with our independent research reveals that no administrative guidelines were in effect at the time of the seizure and arrest of the appellant.[10] Ironically, the absence of administrative guidelines is of constitutional significance. Because of the fundamental liberty interest at stake, we address this issue.

"[I]n Sitz, the United States Supreme Court appeared to place great emphasis on the fact that the roadblock was conducted under written 'guidelines setting forth procedures governing checkpoint operations, site selection, and publicity' that left virtually no discretion to the officer in the field." Hagood v. Town of Town Creek, 628 So.2d 1057, 1061 (Ala. Crim. App. 1993)(partially quoting Sitz, 496 U.S. at 447, 110 S. Ct. at 2484).[11] As previously stated, no guidelines were in force to limit the discretion of the field officers here.

Concerning the administrative guidelines that the appellant and apparently the officers erroneously believed were in effect, the appellant contends that the roadblock failed to comply in three areas: advance publicity,

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[10]As discussed in the "Facts" section above, the appellant was stopped at the roadblock and thereafter arrested on August 8, 1992. At trial and in this appeal, both parties' arguments concerning noncompliance with administrative guidelines are based upon a set of guidelines which did not govern sobriety checkpoints and, even more importantly, did not become effective until October 1, 1992 (See Dept. of Safety Gen. Order 410, dated October 1, 1992). The appellant supplemented the record on appeal with Gen. Order 410-1 which applies to sobriety checkpoints, but that order also did not become effective until October 1, 1992. Our research disclosed that the previous General Order No. 410-1 dated April l5, l987, which governed sobriety checkpoints, expired on April 14, 1992, pursuant to Gen. Order 100 dated February 28, l992. (That order set the maximum validity of General Orders at five years and provided that "(a)ll General Orders presently in force will remain in force until revised, revoked or they become obsolete due to the five-year expiration period.") This language did not extend the period of validity of orders then in force. Thus the previous order expired on April l5, l992 and no administrative guidelines governed the establishment and operation of sobriety checkpoints on August 8, l992, when the appellant was seized and arrested.

[11]The Hagood Court held Sitz superseded the Alabama court's earlier intimation in Cains, [555 So.2d at 297] "that a written policy is not a prominent factor in determining whether a particular roadblock was reasonable." 628 So.2d at 1061.

prior supervisory approval, and it was a subterfuge.[12] Even assuming the argued guidelines had been in effect, to resolve this case solely on a determination of whether the officers complied with the guidelines would elevate form to a triumphant position over substance. Instead, the proper inquiry is "whether the deviation from the guidelines was of such a nature or degree that the roadblock, as implemented, was 'unreasonable.'" Commonwealth v. Anderson, 547 N.E.2d 1134, 1139 (Mass. 1989)(Nolan, J., dissenting). The concept underlying this analysis applies regardless of the presence or absence of administrative guidelines. Therefore, we examine the merits of the appellant's allegations in order to determine if they render the sobriety checkpoint unreasonable.

First, the appellant points out that the government did not publicize the roadblock before its institution. In her brief, she cites People v. Banks, 16 Cal. App. 4th 1188, 13 Cal. Rptr. 2d 920 (Cal. Ct. App. 1992) as holding that Ingersoll v. Palmer, 43 Cal. 3d 1321, 241 Cal. Rptr. 42, 743 P.2d 1299 (Cal. 1987) and Sitz stand for the proposition that advance publicity of a roadblock is a constitutional requirement. Banks, 13 Cal. Rptr. 2d at 920-21. However, in People v. Banks, 6 Cal. 4th 926, 25 Cal. Rptr.2d 524, 863 P.2d 769, 782 (Cal. 1993), the California Supreme Court reversed the Court of Appeals and found that neither Sitz nor Ingersoll held that a lack of advance publicity necessarily results in an unreasonable seizure within the meaning of the Fourth Amendment. That is not to say that it is irrelevant. To the contrary, advance publicity is one of several factors[13] to be considered in the examination of "the relevant facts and circumstances [which] reflect . . . the degree of intrusion on the individual's right of personal security and privacy . . . ." Manuel, 1988 WL 123988 at *2.[14]

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[12]The third assertion of noncompliance has already been dealt with in this opinion and shall not be further discussed.

[13]See our discussion of the Deskins factors, 673 P.2d at 1185, supra, in this opinion.

[14]Some jurisdictions have viewed advance publicity as affecting not only the degree of intrusion upon the individual, but also the effectiveness of the

The appellant next contends that the field officers failed to obtain proper approval from supervisory personnel in setting up the sobriety checkpoint. The role and significance of administrative approval was succinctly summarized by the Supreme Court of Pennsylvania in Commonwealth v. Tarbert, 517 Pa. 277, 535 A.2d 1035, l043 (1987), where the court stated:

> The possibility of arbitrary roadblocks can be significantly curtailed by the institution of certain safeguards. First, the very decision to hold a drunk-driver roadblock, as well as the decision as to its time and place, should be matters reserved for prior administrative approval, thus removing the determination of those matters from the discretion of police officers in the field. . . . Additionally, the question of which vehicles to stop at the roadblock should not be left to the unfettered discretion of police officers at the scene, but instead should be in accordance with objective standards prefixed by administrative decision.

In the present case, administrative approval was not obtained or even sought. The decision to conduct the roadblock, as well as where and when it was to be located, rested solely in the discretion of two field officers of the Tennessee Highway Patrol, Lt. Hill and Sgt. Monger.

Although the lack of advance publicity is a factor of notable importance, it is the combined absence of administrative guidelines and supervisory approval which particularly exudes the stench of unfettered discretion in the field. As we held over a decade ago, "[t]o allow unfettered discretion in the State to arbitrarily seize anyone traveling upon the public highways strikes at the very heart of the protection guaranteed . . . citizens by the Fourth Amendment" and Article I, § 7. State v. Westbrooks, 594 S.W.2d 741, 743 (Tenn. Crim. App. 1979); see Brown, 443 U.S. at 50-51, 99 S. Ct. at 2640. Based upon a consideration of the facts of this case and the liberties inherent to citizens of this State, we hold that the seizure of the appellant was unreasonable. To allow it to go unremedied would

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roadblock in furthering the governmental interest to be served by the roadblock. See e.g., Banks, 863 P.2d at 777-81; State v. DeCamera, 237 N.J. Super. 380, 568 A.2d 86, 88 (1989). We concur with this analysis, but do not discuss it further in this opinion since it is not central to the resolution of the issues here.

constitute an affront to the appellant's constitutionally guaranteed rights to privacy and to security of her person. Accordingly, the judgment finding the sobriety checkpoint constitutional is reversed and this case is dismissed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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ADOLPHO A. BIRCH, JR., JUDGE

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PAUL G. SUMMERS, JUDGE