IN THE COURT OF CRIMINAL APPEALS

AT KNOXVILLE

SEPTEMBER 1995 SESSION

STATE OF TENNESSEE,	)	NO. 03C01-9505-CR-00152
	)	
Appellee	)	SULLIVAN COUNTY
	)	
V.	)	HON. R. JERRY BECK
	)	JUDGE
DAVID LYNN HAGY,	)	
	)	(Violation of Habitual Traffic
Appellant	)	Offender Order - Certified Question
	)	of Law - Tenn. R. Crim. P. 37(b)(2))

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, David Lynn Hagy, entered a plea of guilty to violating an habitual traffic offender order. Pursuant to Tennessee Rule of Criminal Procedure 37(b)(2), the plea was tendered to the court with the explicit reservation of the following certified question of law which is dispositive of the case.

> Did the trial court err in not suppressing any and all evidence actually taken or derived from a stop of the Defendant's vehicle at a roadblock on or about November 2, 1993, because same violated the Defendant's rights under the Fourth Amendment of the United States Constitution and Article 1, Section 7 of the Constitution of Tennessee, being and unreasonable search and seizure of his person and property. [1]

After a careful review of the record on appeal, we affirm the judgment of the trial court in overruling the appellant's motion to suppress.

The appellant was stopped at a roadblock where it was determined that he was driving a vehicle in violation of an habitual traffic offender order, a Class E felony. See Tenn. Code Ann. § 55-10-616 (1993 Repl.). The roadblock was set up pursuant to Tennessee Highway Patrol General Order 410. General Order 410 allows highway patrol officers to briefly detain "[e]very predetermined vehicle (supervisor's discretion; i.e., all vehicles, every 5th, 10th, etc.)" and ask to see the license of the driver. At the heart of the appellant's claim is that because General Order 410 was not strictly complied with and because the roadblock was initiated by a line officer, the roadblock violated his rights against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Article I, section 7 of the Constitution of the State of Tennessee.

There is no dispute but that the stop of the appellant was not based on an articulable and reasonable suspicion that he was involved in criminal activity. See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). It is well settled that any police activity which involves the stop of an automobile and even a brief

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[1] The question was reserved with the express consent of the State and the trial court. See Tenn. R. Crim. P. 37 (b)(2)(i)

detention of its occupants constitutes a seizure under both the United States and the Tennessee constitutions. Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) and State v. Westbrooks, 594 S.W.2d 741, 743 (Tenn. 1979).

The United States Supreme Court has, in roadblock and similar cases, substituted a balancing test in place of the traditional "probable cause" or "articulable and reasonable suspicion of criminal activity" standards used to determine the reasonableness of such police detentions. See Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979); Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). This court has adopted the same approach in analyzing similar search and seizure issues presented under Article I, section 7 of our constitution. See State v. Matthew Manuel, No. 87-96-III, Montgomery Co. (Tenn. Crim. App. , Nov. 23, 1988). The balancing to be conducted in roadblock cases is between the public interest and the individual right to personal security free from arbitrary interference by law officers. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

Where the individualized suspicion of the motorist is absent, as in a roadblock case, the standard or safeguard to be relied on in the balancing test is "that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." State v. Matthew Manuel, No. 87-96-III, Montgomery Co. (Tenn. Crim. App. , Nov. 23, 1988) (quoting Brown v. Texas, 443 U.S. 47 (1979). In Brown, the Supreme Court held that a routine driver's license checkpoint served a substantial state interest in regulating drivers upon public roads. We find a substantial state interest in regulating both vehicles and drivers upon the public roads of our State. Given this significant state interest, the State need only

prove that the roadblock set up in this case was conducted "pursuant to a plan embodying explicit, neutral limitation on the conduct of the individualized officers." Id.

The appellant does not take issue with the neutrality of General Order No. 410 as it relates to the Fourth Amendment; rather the appellant argues that because General Order 410 was not strictly complied with, the roadblock violated his right to be free from an unreasonable search and seizure under both state and federal constitutions. General Order No. 410 provides, in pertinent part, that " [s]ergeants will have authority to approve roadblocks" and that "[a]t least one member of supervisory rank should make an on-sight inspection of the roadblock."

The appellant contends that Trooper John Taylor, of the Tennessee Highway Patrol, initiated the roadblock and therefore exercised the discretion left to sergeants with regard to approving roadblocks within their respective counties. The transcript of the evidence from the suppression hearing clearly reveals that the roadblock was the brainchild of Trooper Taylor. Trooper Taylor testified that at around 9:30 or 10:00 a.m. on November 2, 1993, he contacted his supervisor, Sergeant Marvin Carden by police radio and advised Sgt. Carden that he was going to conduct a roadblock on Carden Hollow Road between Bristol and Blountville, Tennessee. His words at the suppression hearing were that he called Sgt. Carden in order to make Sgt. Carden "aware of " the fact that he was going to conduct a roadblock on Carden Hollow Road that morning. Sgt. Carden testified that Trooper Taylor called that morning and "asked permission to have a roadblock...on Carden Hollow Road with Sullivan County deputies." The sergeant testified that he inquired about the logistics of the roadblock and approved Trooper Taylor's plan to conduct the roadblock that morning. Importantly, Sgt. Carden and Trooper Taylor both testified that Sgt. Carden could have denied Trooper Taylor's request to conduct a roadblock, had in the past denied permission to conduct roadblocks, and was very familiar with the stretch of highway upon which the roadblock would be conducted. Sgt. Carden testified that he had, on

several occasions, supervised similar roadblocks where the roadblock in this case was conducted.

The trial court found significant the fact that the roadblock was not in place until about one hour after the roadblock was approved. This led the trial court to the conclusion that the appellant was not singled out by Trooper Taylor or any officer involved in the roadblock. The trial court correctly recognized the rationale behind insulating line officers from the decision making process concerning roadblocks. The purpose behind insulating line officers from the decision making process is to reduce the constitutionally intolerable danger that roadblocks would be set up to detain a specific individual for whom the police do not have probable cause or a reasonable and articulable suspicion of criminal activity. The trial court was satisfied that the detention of the appellant in this case was reasonable and that there was nothing untoward about this particular roadblock. We agree with this finding and note that the record is devoid of any suggestion that this roadblock was not carried out according to a neutral and explicit plan.

The appellant also contends that because no supervisory personnel were at the roadblock site, the roadblock and his ultimate detention at the roadblock were unlawful. General Order 410 recommends but does not require that supervisory personnel be at a roadblock site. The appellant's argument suggests that having no supervisory personnel on site is in and of itself a violation of the Fourth Amendment. This argument is without merit. Surely the purpose of having supervisory personnel attend roadblocks is to assure that the roadblocks are being carried out in a neutral and safe fashion. We agree with the trial court that the presence of supervisory personnel at roadblocks is preferable and would offer greater protections to citizens from the potential for unlawful searches and seizures by line officers. On the particular facts of this case, however, we also agree that the absence of a supervisor did not render this roadblock constitutionally infirm.

As the trial court recognized, the ultimate question involved in a detention of a citizen by the police is whether the detention is reasonable under all of the facts and circumstances. The trial court found that the state sufficiently established that the roadblock was carried out in a neutral fashion in compliance with General Order 410 and that there were no facts to support a finding that the appellant was singled out by any officer involved in the roadblock. This finding has the weight of a jury verdict and this court will not set aside the judgment of the trial court unless the evidence in the record preponderates against the finding. See State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990), cert. denied, 502 U.S. 1079, 112 S. Ct. 986, 117 L.Ed.2d 148 (1992); State v. Killebrew, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988).

In support of its conclusion that the roadblock was reasonable in this case, the trial court made the following findings of fact which are well supported by the record.

1. The sergeant made the ultimate decision to conduct the roadblock;

2. The roadblock was not in place until about one hour after the call to Sgt. Carden for his approval; and

3. Generally the provisions set out in General Order No. 410 were followed.

While we agree with the trial court that the State in this case came perilously close to placing too much discretion in the hands of Trooper Taylor, a line officer, we also agree with the trial court's finding that there was no factual basis to conclude that the stop was unreasonable.

Accordingly, we affirm the trial court's denial of the appellant's motion to suppress.

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WILLIAM M. BARKER, JUDGE

CONCUR BY:

JOHN K. BYERS, SENIOR JUDGE

F. LEE RUSSELL, SPECIAL JUDGE