

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

CITY OF ASHTABULA,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-A-0068
JAMIE C. PRESCIANO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula Municipal Court, Case No. 10 TRC 01883.

Judgment: Affirmed.

Lori B. Lamer, Assistant Ashtabula City Solicitor, Ashtabula Municipal Court, 110 West 44th Street, Ashtabula, OH 44004 (For Plaintiff-Appellee).

Thomas J. Simon, 1105 Bridge Street, P.O. Box 3048, Ashtabula, OH 44005-3048 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Jamie C. Presciano appeals from the decision of the Ashtabula Municipal Court denying his motion to suppress. Mr. Presciano was arrested for OVI and failure to comply with an order of a police officer in June 2010, when he passed through a sobriety checkpoint on S.R. 531 without stopping. He challenges the constitutionality of this particular sobriety checkpoint, arguing that the state failed to demonstrate that the checkpoint was established and operated in a manner consistent with the Ashtabula

County OVI Task Force manual. Because we find that the state provided sufficient evidence to demonstrate this sobriety checkpoint was not constitutionally infirm, we affirm the decision of the Ashtabula Municipal Court.

Substantive Facts and Procedural History

{¶2} Pursuant to a grant from the Ohio Traffic Safety Office, first awarded in March 2008, an OVI Task Force (“ACOVITF”) was established in Ashtabula County. ACOVITF is a multi-jurisdictional task force comprised of all the law enforcement agencies of Ashtabula County, with the exception of the Village of Orwell. At the time this case arose, ACOVITF was coordinated by Sgt. Paul Dibble of the Ashtabula County Sheriff’s Office.

{¶3} In accordance with the grant requirements, an executive board was named to oversee the policies and operations of ACOVITF; the board met monthly and consisted of representatives from each of the participating law enforcement agencies. The executive board adopted a written policy and procedures manual, which was to be used as “a guideline to assist [ACOVITF] in developing and sustaining an OVI enforcement program.” The manual guided the determination of date, time, location, lighting, personnel, method of stopping cars, and investigative procedures for all ACOVITF sobriety checkpoints. Sometime in May 2009, the executive board met to establish the dates and locations for sobriety checkpoints for the 2010 grant year.

{¶4} On June 12, 2010, a sobriety checkpoint was established on S.R. 531 in Saybrook Township. The checkpoint conformed to ACOVITF’s guidelines, in that it had proper warning signage at 750 feet, 500 feet, and 250 feet from the entrance to the checkpoint, it had sufficient illumination, it was staffed by either ten or 11 uniformed

officers with official vehicles, the location had been selected with the visibility to and safety of oncoming motorists in mind, as well as based on data related to OVI arrest and crash locations, history and prevalence. The cars were stopped based on a method pre-determined by an administrative officer.

{¶5} Mr. Presciano approached the sobriety checkpoint around 2:30 a.m., headed westbound on S.R. 531. Despite the substantial warning signage, illumination, and presence of uniformed law enforcement officers waiving lighted batons at him to slow down for the checkpoint, Mr. Presciano proceeded through the checkpoint without stopping. A chase car was dispatched to stop him. Mr. Presciano was charged with one count of OVI in violation of R.C. 4511.19(A)(1)(a), one count of OVI in violation of R.C. 4511.19(A)(1)(d), and one count of failure to comply with an order of a police officer in violation of R.C. 2921.331(A).

{¶6} Mr. Presciano entered a not guilty plea to all three counts, and filed a motion to suppress the evidence based on the state's use of a sobriety checkpoint claiming a violation of his Fourth Amendment and Section 14, Article I rights. Mr. Presciano asserted this particular checkpoint "was not utilized in accordance with the law of the United States and/or State of Ohio in that it, and the implementation of the same, did not and cannot, pass constitutional muster at either the Federal or State level." He claimed that the State failed "to insure the required tests and safeguards were met and utilized."

{¶7} The trial court held a hearing on the matter in early January 2011, and then provided the state five additional days to submit ACOVITF's manual into the record, and an additional 15 days after the transcript of the hearing became available

for the parties to further brief the matter. The state submitted its brief on March 7, 2011, while Mr. Presciano never submitted a brief on the matter.

{¶8} The state moved the trial court to overrule Mr. Presciano's motion to suppress. The trial court issued a judgment entry the following day overruling the motion to suppress. Mr. Presciano subsequently entered a plea of no contest to one count of OVI in violation of R.C. 4511.19(A)(1)(a), and the state dismissed the remaining charges. The trial court issued a stay of Mr. Presciano's sentence pending appeal.

{¶9} Mr. Presciano timely appealed and now brings the following assignment of error:

{¶10} "On August 18, 2011, the Trial Court committed prejudicial error in overruling Defendant-Appellant's, Jamie C. Presciano's, December 2, 2010, Motion to Suppress based upon its opinion the State of Ohio met its burden in demonstrating that the State of Ohio's June 12, 2010, Roadblock Sobriety (OMVI) Checkpoint was constitutionally established and maintained."

Standard of Review

{¶11} "At a hearing on a motion to suppress, the trial court functions as the trier of fact, and, therefore, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. McGary*, 11th Dist. No. 2006-T-0127, 2007-Ohio-4766, ¶20, quoting *State v. Molek*, 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶24, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, "[a]n appellate court must accept the findings of fact of the trial court as long as those findings are supported by competent, credible evidence." *Id.*, quoting *Molek* at ¶24,

citing *State v. Retherford*, 93 Ohio App.3d 586, 592 (2d Dist.1994). See also *City of Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶13. “After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met.” *Id.*

Did this Particular Sobriety Checkpoint Pass the Test?

{¶12} In his sole assignment of error, Mr. Presciano argues that the state failed to demonstrate that the June 12, 2010 ACOVITF sobriety checkpoint had been set up and maintained in a constitutional manner. While at the trial court level, Mr. Presciano challenged the constitutionality of the checkpoint only generally; he now takes particular issue with the lack of publication of the exact location of the checkpoint, the number of uniformed officers present and whether they were deputized by the Ashtabula County Sheriff's Office, as indicated was required in the manual, and whether empirical data was used to determine the location of this particular checkpoint.

{¶13} We note that Mr. Presciano did not submit a brief to the trial court after the hearing and upon receipt of the ACOVITF manual, as requested, and his initial motion to suppress was an inexplicit and general challenge to the constitutionality of the checkpoint. “[T]he prosecutor cannot be expected to anticipate the specific legal and factual grounds upon which the defendant challenges the legality a warrantless search. * * * Therefore, the defendant must make clear the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or seizure.” *Xenia v. Wallace*, 37 Ohio St.3d 216, 218 (1988). Because Mr. Presciano failed to initially challenge the checkpoint with specificity, he cannot now raise specific alleged

deficiencies in administration of the checkpoint, as they have been waived. See *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-1298, ¶19-20.

{¶14} A review of the evidence presented at the suppression hearing, and applicable Ohio case law, reveals that the sobriety checkpoint was established and maintained in a constitutional manner. Therefore, Mr. Presciano's assignment of error is without merit.

{¶15} The Supreme Court of the United States, in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), held that a state's use of sobriety checkpoints does not violate the Fourth or Fourteenth Amendments. Although the *Sitz* court held that a stop at a sobriety checkpoint did constitute a Fourth Amendment "seizure," the intrusions were outweighed by the state's interest in combating and reducing drunk driving.

{¶16} The Supreme Court of Ohio has not yet ruled on a case involving sobriety checkpoints, however, in *State v. Orr*, 91 Ohio St.3d 389 (2001), it utilized the *Sitz* analysis to uphold the constitutionality of a driver's license checkpoint in the city of Dayton. The *Orr* court proclaimed a general method for determining the constitutionality of a police checkpoint, stating that "courts evaluate the following three factors: (1) the particular checkpoint's intrusion on privacy, (2) the state's interest in maintaining the checkpoint, and (3) the extent to which the checkpoint advances the state interest." *Orr* at 392-393, citing *Sitz, supra*.

{¶17} Ohio appellate courts have addressed the constitutionality of sobriety checkpoints, holding them conceptually constitutional. The Second District addressed checkpoints in *State v. Goines*, 16 Ohio App.3d 168 (2d Dist.1984), utilizing *Sitz*. The

Goines court established the following requirements for sobriety checkpoints, in order to ensure that such checkpoints are established and operated constitutionally, utilizing a four-part test found in *State v. Hilleshiem*, 291 N.W. 2d 314 (Iowa 1980):

{¶18} “(1) a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists;

{¶19} “(2) adequate advance warning signs, illuminated at night, timing informing approaching motorists of the nature of the impending intrusion;

{¶20} “(3) uniformed officers and official vehicles in sufficient quantity and visibility ‘to show * * * the police power of the community;’ and

{¶21} “(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.” *Goines* at 171, quoting *Hilleshiem* at 318.

{¶22} The Tenth District, in *State v. Bauer*, 99 Ohio App.3d 505 (10th Dist.1994), recognized *Goines*’ holding, stating that it approached the analysis of the case before it “on the basis that a sobriety checkpoint which does not exceed the constitutionally permissible level of intrusiveness on motorists will comply with the Fourth Amendment to the United States Constitution. We conclude at the outset, based on *Sitz*, that prevention of drunk driving serves a public concern of sufficient gravity that carefully limited interference with personal liberty is warranted * * *.” *Id.* at 510.

{¶23} This court, citing *Goines*, has also recognized that “a safety search conducted in a non-random fashion at a fixed point does not run afoul of the Fourth Amendment prohibition against unreasonable searches and seizures.” *State v. Daniels*, 11th Dist. No. 92-T-4730, 1994 Ohio App. LEXIS 5900, *8 (Dec. 23, 1994), *overruled in*

part on other grounds, *State v. Corrado*, 11th Dist. No. 96-L-104, 1998 Ohio App. LEXIS 642 (Feb. 20, 1998). In *State v. Havens*, 11th Dist. No. 99-P-0089, 2000 Ohio App. LEXIS 6122 (Dec. 22, 2000), we held that “a stop that comports with the factors set forth in *Goines* satisfies the search and seizure requirements of both the Ohio and United States Constitutions. These factors are satisfactory to address concerns of the safety of officers and motorists and lessen the fear of motorists by requiring a clear display of police presence and the purpose of the roadblock. The requirements further lessen the exercise of arbitrary discretion by the officers operating the checkpoint by providing that decisions about the operation of the roadblock be made by policy-making administrative officers.” *Id.* at *9.

{¶24} In reviewing the evidence presented by the state at the suppression hearing, we find that the trial court properly determined that the June 12, 2010 checkpoint met all four prongs of the *Goines* test, and therefore the establishment and operation of this particular checkpoint was not constitutionality infirm.

Selection of Checkpoint Location

{¶25} The first prong of the *Goines* test requires that the location of a sobriety checkpoint must be selected for safety and visibility to oncoming motorists. Sgt. Dibble testified at the suppression hearing that he and the executive board had utilized statistics regarding OVI arrests, crashes, and fatalities to establish the location of the ACOVITF checkpoints a year in advance. He stated that this particular checkpoint location on S.R. 531 had been selected based on empirical data, and that the board had taken into consideration visibility and diversion. Further, they had identified and provided adequate escape routes for motorists determined to avoid the checkpoint. The

criteria for site selection was also laid out in the ACOVITF manual, which clearly stated that sites “should permit the safe stopping of traffic in the primary lane for observation of drivers,” “should have characteristics and conditions that support a safe environment for field testing,” and should “offer maximum visibility from both directions of travel and sufficient illumination from ambient and artificial lighting.”

{¶26} Given Sgt. Dibble’s testimony and the policies laid out in the manual, the state met the first prong of the test.

Adequacy of Advance Warning Signs and Illumination

{¶27} The second prong of the test requires that the checkpoint contain adequate advance warning signs, properly illuminated, and timely informing approaching motorists of the checkpoint. Sgt. Dibble testified that signs were set up at 750 feet, 500 feet, and 250 feet warning of the impending checkpoint. He further stated that they had lights on the cones demarcating the checkpoint lane, and a light tower which illuminated the entire area for safety purposes. This clearly meets the requirements of the second prong.

Show of Police Power

{¶28} The third prong of the test requires that the checkpoint have uniformed officers and official vehicles in sufficient quantity and visibility to show the police power to the community. Sgt. Dibble testified that generally there were five or six uniformed police officers on the checkpoint line, two state troopers in a diversion area, a commander, a diversion commander and a coordinator all present during the operation of a sobriety checkpoint. He confirmed that this particular checkpoint had at least five or

six uniformed officers, and that he was present in his coordinator capacity that evening. Therefore, the third prong of test was met.

Pre-determination of Location, Time and Procedures

{¶29} Finally, the fourth prong of the *Goines* test requires that there be predetermination by administrative officers as to the location, time and procedures to be employed at the checkpoint. 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,” and that the checkpoint hours were generally 10:00 p.m. to 2:30 a.m. He also explained that a determination of which cars would be stopped was made in advance of the checkpoint becoming active, based on an assessment of traffic volume. On this particular night, all cars were stopped due to lower traffic volume.

{¶30} It is clear from the record that the state met the fourth prong of the test, in that the location, time and procedures had been pre-determined by a policy-making administrative body.

{¶31} Mr. Precsiano raises issues concerning the deputization of the officers working the night of June 12, 2010, and whether the public, via the media, had been adequately informed of the checkpoint date, time, and location. These issues do not implicate issues of constitutionality. See *Goines, supra* (identifying (1) location based on visibility and safety, (2) adequate signage and illumination warning of impending

checkpoint, (3) presence of sufficient and visible uniformed officers and vehicles, and (4) predetermination, based on neutral criteria, of location, time and procedures to be employed as the issues to be addressed in determining constitutionality). While the issues Mr. Presciano raises may relate to internal policy and guidelines developed by ACOVITF, they do not bear on a determination of whether the checkpoint was established and maintained in a manner consistent with either the U.S. or Ohio Constitutions. The U.S. Supreme Court in *Sitz* “certainly did not require the police to inform the public of the exact location of the checkpoint in order for it to comply with the Constitution.” *Havens, supra*, at *5. In fact, “[w]e do not find that any of the decisions on this issue set forth a requirement of actual precheckpoint publicity.” *Bauer, supra*, at 512. Nor does case law exist to support a contention that all participating officers be deputized by the organizing entity.

{¶32} Mr. Presciano essentially argues that the checkpoint's failure to strictly comply with the ACOVITF manual on June 12, 2010, renders the checkpoint unconstitutional. He fails to bring to our attention any case law to support such a proposition, nor did our research reveal any supporting cases. Further, the record does not clearly establish that the checkpoint failed to comply with the ACOVITF manual, and Mr. Presciano is unable to demonstrate determinatively that it did not comply.

{¶33} The law related to sobriety checkpoints does not mandate a manual and require strict compliance therewith. Rather, Ohio courts have developed, and we have adopted, the *Goines* four-prong test to evaluate the constitutionality of a specific checkpoint. The ACOVITF manual, which specifically states that it is to be used merely as “a guideline to assist [ACOVITF] in developing and sustaining an OVI enforcement

program,” is a compilation of best practices. Strict compliance with the manual would certainly ensure constitutionality of sobriety checkpoints in Ashtabula County, however, failure to strictly comply with these guidelines does not immediately render a checkpoint unconstitutional. These practices are not codified in the Revised Code, nor individually established by the line of sobriety checkpoint cases discussed above. Therefore, failure to establish and maintain the checkpoint in a manner strictly consistent with the manual does not automatically suggest a failure to establish and maintain a particular checkpoint in a manner consistent with our constitutions.

{¶34} It would appear Mr. Presciano is attempting to fashion a “NHTSA-esque” (National Highway and Traffic Safety Administration manual regarding field sobriety testing) compliance argument for the first time on appeal; that is, that a failure to strictly comply with each and every provision contained in an OVI enforcement program’s self-imposed manual of guidelines is per se fatal. But we would note that even in the case of the NHTSA manual, a national set of guidelines recognized at R.C. 4511.19(D)(4)(b), “the Supreme Court of Ohio in *State v. Boczar* (2007), 113 Ohio St.3d 148 , 2007 Ohio 1251, 863 N.E.2d 155 held that strict compliance is not required for admissibility at trial. Rather, ‘[i]n order for the results of the field sobriety tests to be admissible, the state must show by clear and convincing evidence that the officer performing the testing *substantially* complied with accepted testing standards.’ (Emphasis added.)” (Citation omitted.) *State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, ¶23 . Therefore, we decline to impose an expectation of strict compliance with the ACOVITF manual, when the totality of the circumstances demonstrated the checkpoint otherwise met all constitutional requirements.

{¶35} To evaluate the constitutionality of a particular checkpoint, an analysis under *Goines* is required. As determined above, the state has demonstrated that it has met the requirements of *Goines*; this is sufficient to establish the constitutionality of the June 12, 2010 checkpoint. Failure to strictly comply with each and every guideline in the manual, if in fact that was the case, does not automatically implicate issues of constitutionality, and Mr. Presciano is unable to demonstrate otherwise.

{¶36} Mr. Presciano, having failed to challenge the propriety of the checkpoint with specificity at the trial court level, opting instead for a shotgun approach, cannot now raise specific objections before this court. *See Hobbs, supra*. Therefore, we find that trial court did not err in holding that the June 12, 2010 ACOVITF checkpoint was established and maintained in a constitutional manner. The decision of the Ashtabula Municipal Court is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.