

2013 PA Super 186

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CIPRIANO GARIBAY

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 758 WDA 2012

Appeal from the Judgment of Sentence April 3, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0004217-2010

BEFORE: SHOGAN, J., OTT, J., and STRASSBURGER, J.*

OPINION BY OTT, J. FILED: July 12, 2013

Cipriano Garibay appeals from the judgment of sentence entered against him on April 3, 2012, following his conviction on the charge of driving under the influence of a controlled substance (marijuana).¹ In this timely appeal, Garibay claims the suppression court erred in failing to suppress testimony and documentary evidence² obtained from a checkpoint stop where the Commonwealth failed to produce sufficient reports, data, or

* Retired Senior Judge assigned to the Superior Court.

¹ 75 Pa.C.S. § 3802(d)(1).

² Specifically, testimony regarding his stuporous appearance and the results of a blood test indicating the presence of marijuana (Delta-9 THC and Delta-9 Carboxy THC), **see** Toxicology Report, 1/11/20.

statistics upon which the police relied to set the location and time of the checkpoint. Garibay argues the lack of reports, etc., rendered the checkpoints unconstitutional. Following a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.

The findings of fact from the suppression hearings held December 2, 2011 and December 15, 2011 are stated by the trial court in its Pa.R.A.P. 1925(a) Opinion.

[On November 19, 2009], the City of Pittsburgh had set up a checkpoint in conjunction with the Click It or Ticket program run by the Pennsylvania Department of Transportation. (T.R. 12/2/11, p. 7). The purpose of the checkpoint was to ensure compliance with [seatbelt] and motor vehicle equipment requirements on the inbound side of Banksville Road. (T.R. 12/2/11, p. 8).

Sergeant Richard Howe, of the City of Pittsburgh Police Department, served as the liaison between the City of Pittsburgh Police Department and the statewide Click It or Ticket Buckle Up campaign and ordered the checkpoint to be set up on Banksville Road on November 19, 2009. (T.R. 12/15/11, p. 4). The Pittsburgh checkpoint on Banksville Road was part of a concerted statewide effort to ensure [seatbelt] usage. (T.R. 12/15/11, p. 4). The Commonwealth advertised the efforts with billboards and radio ads, as well as by providing road signs for the Click It or Ticket checkpoint and pamphlets to be handed out to drivers passing through the checkpoint. (T.R. 12/15/11, p. 4). The Commonwealth wanted the Click It or Ticket checkpoints performed on high traffic volume roadways [within] the City of Pittsburgh, which it determined based on a review of information regarding vehicle traffic, traffic volume and high accident locations. (T.R. 12/15/11, p. 6). Busy roads within the City of Pittsburgh, such as Banksville Road, West Liberty Avenue, Route 51 and Bigelow Boulevard were selected for this program by the Commonwealth. (T.R. 12/15/11, p. 7). Sergeant Howe, based on his experience as an officer and his familiarity with Banksville Road, agreed that it was a high traffic volume and

high accident location within the City of Pittsburgh. (T.R. 12/15/11, p. 7).

On November 19, 2009, the checkpoint began on inbound Banksville Road, near the intersection with Crane Avenue. (T.R. 12/2/11, p. 8). At that location, there were signs notifying drivers that they were approaching a seatbelt safety checkpoint area. (T.R. 12/2/11, p. 9). The signs were approximately 75 yards from the location of the contact officers. (T.R. 12/2/11, p. 9). A marked police unit [was] also in the vicinity of the sign in order to illuminate the area. (T.R. 12/2/11[, p. 9]). The left lane of inbound Banksville Road was blocked with traffic barriers in order to direct all traffic into one lane, the right-hand lane. (T.R. 12/2/11, p. 9). Officers were standing in the left-hand lane to make contact with drivers as they proceeded into the single right-hand lane. (T.R. 12/2/11, pp. 9-10). A contact area, in which more lengthy contacts with a driver could occur, was set up in the Boilermakers Union parking lot, located to the right of the right-hand lane. (T.R. 12/2/11, p. 10). As a vehicle proceeded into the single right-hand lane of the checkpoint, Officer Mitchell, a contact officer, would inform the driver about the Click It or Ticket checkpoint, explaining why he was stopping the vehicle. (T.R. 12/2/11, p. 10). He would check to make sure that the vehicle occupants had [seatbelts] on and would also check for vehicle equipment violations. (T.R. 12/2/11, pp. 10-11). Assuming there were no violations, Officer Mitchell would then hand the occupants a flier about the PennDot [sic] program and send them on their way. (T.R. 12/2/11, p. 11). Generally, occupants of vehicles would roll down their window to speak with the checkpoint officers. (T.R. 12/2/11, p. 11).

On November 19, at approximately 9:05 p.m., a white Dodge Caravan driven by the Defendant approached the checkpoint and drew the attention of Officer Mitchell due to the extremely loud noise coming from the exhaust. (T.R. 12/2/11, p. 11). The van was the fourth or fifth in a line of vehicles that were all cars. (T.R. 12/2/11, pp. 14-15). There were no other white vans at that time. (T.R. 12/2/11, p. 15). As the van approached Officer Mitchell, he directed the Defendant to pull over to the designated contact area because of a possible equipment violation relating to the exhaust. (T.R. 12/2/11, pp. 11-13). Officer Mitchell informed Officer Suzensky, who was about 25 feet away in the designated contact area, that the

Defendant was being sent to the area to check his exhaust. (T.R. 12/2/11, pp. 12-13).

Officer Suzensky directed the Defendant to pull into the contact parking lot so that he could evaluate the Defendant's van and determine if any citations should be issued. (T.R. 12/2/11, p. 21). The officer had difficulty directing the Defendant into the parking lot because he could not get the Defendant's attention. (T.R. 12/2/11, p. 21). Officer Suzensky described the Defendant as driving in a "trance-like state." (T.R. 12/2/11, p. 21). Once the vehicle was stopped in a spot, Officer Suzensky approached the van and tapped on the driver side window to get the Defendant's attention. (T.R. 12/2/11, p. 23). It took Officer Suzensky tapping several times and then finally yelling repeatedly at the Defendant to wind down his window before the Defendant complied with the officer's direction. (T.R. 12/2/11, p. 23). When the Defendant rolled down his window, Officer Suzensky noticed a very pungent odor of marijuana, which he described as "like getting punched in the face with a ton of marijuana." (T.R. 12/2/11, p. 23). Officer Suzensky then requested certain documentation from the Defendant, which he had to request repeatedly. (T.R. 12/2/11, p. 24). It took the Defendant a long time to turn over his license, registration and insurance card. (T.R. 12/2/11, p. 24).

Officer Suzensky then instructed the Defendant to exit the van and step behind the vehicle, during which he observed that the Defendant continued to move in a trance-like state, although not quite as much, and continued to require repeated commands and questions. (T.R. 12/2/11, p. 25). Officer Suzensky asked the Defendant to perform certain field sobriety tests, again having to repeat the instructions several times and demonstrate them. (T.R. 12/2/11, p. 25). When Officer Suzensky asked the Defendant if he understood the instructions, he could not tell if the Defendant actually understood him. (T.R. 12/2/11, p. 25). Although Officer Suzensky performed an HGN test, he did not perform additional field sobriety tests because the Defendant was having difficulty walking and was leaning against his van. (T.R. 12/2/11, p. 27). The officer also observed that there was a strong smell of marijuana coming from the Defendant. (T.R. 12/2/11, pp. 25-26). Officer Suzensky determined that the Defendant was unable to operate a motor vehicle because of the marijuana coming from the vehicle. (T.R. 12/2/11, p. 27). Officer Suzensky placed the Defendant under arrest at this point.

(T.R. 1/16/12, p. 5). During a search incident to arrest, the officer patted down the Defendant and found, in his right front jacket pocket, a white porcelain item with the word "Grolsch" on it, which he believed to be used for smoking marijuana. (T.R. 1/16/12, pp. 5, 7). The Defendant submitted to a blood test after his arrest, which tested positive for marijuana. (T.R. 1/16/12, p. 5).

Trial Court Opinion, 11/20/12, at 2-5.

Additionally, Sergeant Howe testified to the differences between a DUI checkpoint and a safety checkpoint.³

[Sergeant Howe:] A DUI checkpoint has a lot more interaction involved. A DUI checkpoint every vehicle gets stopped, every driver is interacted with, a license check is done, so on and so forth. A seatbelt safety checkpoint is different as where with all the signage that is up, the vehicles come through the checkpoint, it is an approximate five second interaction. If we do not observe any violation of the Vehicle Code violations [sic] they are handed a flyer that we were given from the state, basically public awareness things for seatbelts, and then they are sent on their way.

N.T. Suppression Hearing, 12/15/11, at 6.

In addition to summary offenses relating to his vehicle, Appellant was charged with two counts of driving under the influence of a controlled

³ We note there is another difference between a DUI and a seatbelt safety checkpoint. In a DUI checkpoint, the purpose is to locate and arrest drivers who are intoxicated. Whereas a driver who is not wearing a seatbelt is not subject to arrest. A person in violation of 75 Pa.C.S. 4581, regarding use of restraint systems, cannot be convicted unless the person is also convicted of another violation of the Motor Vehicle Code (Title 75) which occurred at the same time. **See** 75 Pa.C.S. § 4581(b).

substance, and possession of drug paraphernalia. On September 11, 2011, Appellant filed an omnibus pretrial motion, which included a motion to suppress evidence. The trial court heard testimony on the motion on December 2, 2011 and December 15, 2011. On December 23, 2011, the trial court denied the motion to suppress in a written order.

On January 6, 2012, Appellant proceeded to a non-jury trial during which defense counsel stipulated to the admission of Appellant's blood test results. The trial court found Appellant guilty of one count of Driving Under the Influence of a Controlled Substance. On April 3, 2012, the trial court sentenced Appellant to four days of intermediate punishment and six months of probation. This appeal followed.

"When we review the ruling of a suppression court, we must determine whether its factual findings are supported by the record. Where the defendant challenges an adverse ruling of the suppression court, we will consider only the evidence for the prosecution and whatever evidence for the defense which is uncontradicted on the record as a whole; if there is support on the record, we are bound by the facts as found by the suppression court...." ***Commonwealth v. Holt***, 711 A.2d 1011, 1014 (Pa. Super. 1998).

"Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error." ***Commonwealth v. Collazo***, 692 A.2d 1116, 1118 (Pa. Super. 1997). "Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts." *In the Interest of D.M.*, 743 A.2d 422, 424 (Pa. 1999).

Commonwealth v. McCleese, 750 A.2d 320, 323-24 (Pa. Super. 2000).

In this appeal, Garibay claims the Commonwealth did not “sustain its burden of proof at a suppression hearing challenging the constitutionality of a checkpoint stop where the Commonwealth fail[ed] to produce documentary or testimonial evidence that specifi[ed] the reports, data, or statistics the police relied upon in selecting the location [and time] of the checkpoint.”⁴

The authority to conduct a traffic safety checkpoint arises from 75 Pa.C.S. § 6308 (b), which states, in pertinent part:

§ 6308. Investigation by police officers

* * *

b) Authority of police officer. – Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle’s registration, proof of financial responsibility, vehicle identification number or engine number or the driver’s license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S. § 6308(b).

To ensure the constitutionality of checkpoints the Commonwealth has adopted the guidelines initially proposed in the plurality decision

⁴ Garibay presented his argument as two questions. We have consolidated the challenges to location and time of the checkpoint for ease of reference.

Commonwealth v. Tarbert, 535 A.2d 1035 (Pa. 1987). The guidelines were announced specifically in reference to DUI checkpoints, that is, a systematic program of checking vehicles, used by the police to discover intoxicated drivers. They were formally adopted by our Supreme Court in ***Blouse, supra***. The guidelines are:

[T]he conduct of the roadblock itself can be such that it requires only a momentary stop to allow the police to make a brief but trained observation of a vehicle's driver, without entailing any physical search of the vehicle or its occupants. To avoid unnecessary surprise to motorists, the existence of a roadblock can be so conducted as to be ascertainable from a reasonable distance or otherwise made knowable in advance. 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. In this connection it is essential that the route selected for the roadblock be one which, based on local experience, is likely to be travelled by intoxicated drivers. The time of the roadblock should be governed by the same consideration. 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.

Commonwealth v. Blouse, 611 A.2d at 1180, quoting ***Commonwealth v. Tarbert***, 535 A.2d at 1043.

Additionally, checkpoints for vehicle safety and seatbelt usage are lawful in Pennsylvania, provided the checkpoints comply with the procedural requirements as outlined in ***Tarbert/Blouse***. ***See In re J.A.K.***, 908 A.2d 322, 326 (Pa. Super. 2006).

The evidence demonstrates that the checkpoint was set up to produce only a momentary stop. Rather than observing the driver for indications of intoxication, this stop allowed officers to distribute literature on seatbelt use and allowed a general overview of the vehicle for any obvious equipment violations. There is no testimony that officers required drivers to activate windshield wipers or to take any actions at all to demonstrate the functionality of the vehicle.⁵ Therefore, the checkpoint represented a minimally invasive disruption to the motorists.

The location of the roadblock was determined administratively, by Sergeant Howe who worked in coordination with the Department of Transportation. The Department of Transportation initially provided a list of suggested roads it had determined were both high traffic and accident prone. The Department had determined this by examining its records. Sergeant Howe, based upon his 15 years of experience as a Pittsburgh police officer, agreed that Banksville Road fit the criteria of the Department of Transportation. Although the actual statistics the Department based its initial selection on were not introduced into evidence, case law does not require the introduction of any statistical analysis. ***See Commonwealth v. Rastogi***, 816 A.2d 1191, 1194 (Pa. Super. 2003) *quoting Commonwealth*

⁵ The officers' attention was drawn to Garibay's vehicle because of the improperly loud exhaust system that could be heard over all the other vehicles in line.

v. Ziegelmeier, 685 A.2d 559, 563 (Pa. Super. 1996). Sergeant Howe's testimony provided evidence that the checkpoint had been administratively determined prior to it being set up and that the administrative determination was supported by local experience. Additionally, Banksville Road was described as two lanes inbound at the location of the checkpoint. This also supports the determination that Banksville Road is a high volume road.

Further, unnecessary surprise to motorists was avoided through the use of signs placed 75 yards before the checkpoint. The area was illuminated by a marked police unit. The program itself was highly publicized through radio ads and billboards.

The final aspect of the **Tarbert/Blouse** guidelines to be addressed is the choice of time for the checkpoint. **Tarbert/Blouse** directs that the choice of time be governed by the same considerations as choice of location. The time should be administratively determined and supported by local experience. **See Blouse**, 611 A.2d at 1180.

In this matter, there was no testimony presented regarding the choice of time for this checkpoint. The only testimony regarding time was that Garibay encountered the checkpoint at approximately 9:00 p.m. There is no indication how long the checkpoint had been functioning prior to 9:00 p.m. or how long it remained in place following 9:00 p.m. Given that this is the only aspect of the **Tarbert/Blouse** guidelines that was not specifically addressed by the Commonwealth, the evidence, *in toto*, shows substantial

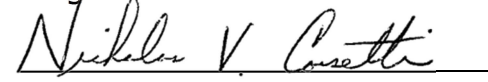
compliance with the guidelines. As the main purpose of the guidelines appears to be the prevention of the arbitrary and unconstitutional exercise of power to detain and search motorists, had there been any indication that this checkpoint was being used as a pretext to stop and search automobiles, substantial compliance would not have been demonstrated. However, there is no indication in the certified record that this checkpoint was set up as a pretext to allow the police to randomly stop and search vehicles. Rather, the checkpoint was part of a well-publicized, statewide effort to encourage motorists to use their seatbelts.

“Substantial compliance with the guidelines is all that is required to reduce the intrusiveness of the [DUI] search to a constitutionally acceptable level.” ***Commonwealth v. Blouse***, 611 A.2d at 1180. Here, the suppression/trial court determined the Commonwealth provided sufficient evidence of substantial compliance with the guidelines and denied the motion to suppress. The record supports the factual determinations and there are no errors of law in the conclusions drawn from those facts. Therefore, Garibay is not entitled to relief.

Judgment of sentence affirmed.

Shogan, J., files a Dissenting Opinion.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: 7/12/2013