

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002058-DG

DOW DUNLAP

APPELLANT

ON DISCRETIONARY REVIEW FROM CARROLL CIRCUIT COURT  
v. HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 04-XX-00009

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

JOHNSON, JUDGE: Dow Dunlap entered a conditional guilty plea to driving under the influence (DUI)<sup>1</sup> in the Carroll District Court, and his conviction was affirmed on appeal by the Carroll Circuit Court. Having granted discretionary review, we conclude that the district court did not err in denying Dunlap's motions to suppress evidence of his consumption of alcohol obtained during a roadblock as a violation of KRS 189.125, which places

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<sup>1</sup> Kentucky Revised Statutes (KRS) 189A.010.

restrictions on the enforcement of the seatbelt law, or as being unconstitutional on due process grounds. Hence, we affirm.

On November 24, 2003, the Kentucky State Police had planned to conduct a roadblock at the intersection of U.S. Highway 42 and Kentucky Highway 55 in Carrollton, Carroll County, Kentucky, between 4:00 p.m. and 6:00 p.m. This roadblock was planned as part of this Commonwealth's statewide highway safety campaign referred to as "Buckle Up Kentucky." The purpose of the campaign was to promote highway safety with special emphasis on encouraging the use of seatbelts to save lives. The time and place of the roadblock had been previously established by a supervisor, and Trooper Howard Rice was designated as the officer in charge at the roadblock. Trooper Rice was assisted by Trooper Jeff Goins.

On November 24, 2003, shortly after the roadblock began, Trooper Rice stopped Dunlap's vehicle. After Trooper Rice approached Dunlap's vehicle, he smelled the presence of alcohol. Dunlap was detained while Trooper Goins administered several field sobriety tests, all of which Dunlap failed. Dunlap was subsequently transported to the Carroll County Detention Center by both Trooper Rice and Trooper Goins and charged with DUI. As a result of the arrest, Trooper Rice notified the Kentucky State Police Post that the roadblock had ended. The roadblock did not resume.

On March 14, 2004, Dunlap filed two motions to suppress evidence arguing that the roadblock was in violation of KRS 189.125 and unconstitutional.<sup>2</sup> Dunlap argued the initial stop was improper, making his subsequent arrest also improper. The district court denied the motions. On June 10, 2004, Dunlap entered a conditional guilty plea to DUI, reserving his right to appeal the denial of his motions to suppress. On September 9, 2004, the Carroll Circuit Court affirmed the district court's judgment of conviction entered on July 10, 2004. On October 6, 2004, Dunlap petitioned this Court for discretionary review, which was granted by an order entered on January 21, 2005.

KRS 189.125(6) mandates that passengers in, and operators of, a motor vehicle must be "wearing a properly adjusted and fastened seatbelt[.]" Section (7) states that "[a] peace officer shall not stop or seize a person nor issue a uniform citation for a violation of subsection (6) of [KRS 189.125] if the officer has no other cause to stop or seize the person other than a violation of subsection (6) of [KRS 189.125]." Dunlap argues that the language, "no other cause to stop," in KRS 189.125(7) makes a roadblock to check for seatbelt compliance unlawful. In essence, he argues that because he could not be stopped solely for a violation of KRS 189.125, he

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<sup>2</sup> Dunlap filed a third motion to suppress the breathalyzer test because it was improperly administered. However, this motion is not the subject of this appeal.

could not be detained during a roadblock if the officers had no further belief he was breaking the law prior to the stop. The Commonwealth asserts that Dunlap was not stopped for violation of KRS 189.125, but, rather, "[h]e, along with the other motorists so stopped, [were] briefly detained for the purpose of encouraging the public to use seatbelts and remind them that the failure to do so is a violation of Kentucky law." There was no evidence that the Kentucky State Police was stopping cars at the roadblock to cite them for seatbelt violations.

We agree with Dunlap that one of the most fundamental rights granted to United States citizens is to be free from unreasonable search and seizure. However, we also agree with the Commonwealth that "preventing death and serious physical injury far outweigh the interference with individual liberty." In determining whether KRS 189.125(7) prohibits such roadblocks, we are guided by three principles of statutory construction. First, a "[c]ourt's duty in construing statutes is to ascertain and give effect to the intent of the [Legislature]. . . ." <sup>3</sup> The second principle is that "[d]oubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishments totally disproportionate to the

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<sup>3</sup> White v. Check Holders, Inc., 996 S.W.2d 496, 497 (Ky. 1999).

gravity of the offense" [citations omitted].<sup>4</sup> Third, a "court must not interpret a statute so as to bring about an absurd or unreasonable result" [citations omitted].<sup>5</sup> We conclude that section (7) of KRS 189.125 prohibits a police officer from making a routine traffic stop for a seatbelt usage violation, but that it does not prohibit a roadblock that checks for general motor vehicle safety violations. Such roadblocks advance an important highway safety interest, with limited personal interference.

Dunlap also argues that regardless of the statutory restrictions on a "seatbelt roadblock," the roadblock was unconstitutional based on the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, which forbid unreasonable searches and seizures of citizens. Dunlap argues that since there was no evidence of particularized suspicion of criminal activity, the deterrence purpose was general, not specific.<sup>6</sup> In support of this argument, Dunlap

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<sup>4</sup> Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 465, 467 (Ky. 1961).

<sup>5</sup> Williams v. Commonwealth, 829 S.W.2d 942, 944 (Ky.App. 1992).

<sup>6</sup> Despite Trooper Goins's testimony that the troopers "check[ed] for everything in general," we do not agree with Dunlap that the roadblock in question was a general roadblock. While the initial purpose of the roadblock was to check vehicles for seatbelt violations and remind motorists of the importance of compliance with Kentucky's seatbelt law, the troopers were checking for any type of motor vehicle or traffic safety violation, such as driver's license and vehicle registration.

cites Commonwealth v. Buchanon,<sup>7</sup> where our Supreme Court stated that "[i]n order to pass constitutional muster, the seizure must be deemed reasonable, which requires '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'" [citation omitted].<sup>8</sup> Dunlap argues that law enforcement's duty to promote highway safety conflicts with constitutional due process rights when it conducts unlawful roadblocks.

We are guided by the United States Supreme Court cases of Delaware v. Prouse,<sup>9</sup> and City of Indianapolis v. Edmond,<sup>10</sup> in determining the constitutionality of the roadblock. In Prouse, the Supreme Court stated that roadblocks to verify drivers' licenses and vehicle registrations which are minimally intrusive and which do not involve the unconstitutional exercise of discretion are permissible to serve a highway safety interest.<sup>11</sup> In Edmond, the City of Indianapolis conducted vehicle checkpoints on Indianapolis roads "in an effort to interdict

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<sup>7</sup> 122 S.W.3d 565 (Ky. 2004).

<sup>8</sup> Id. at 568.

<sup>9</sup> 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

<sup>10</sup> 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).

<sup>11</sup> Prouse, 440 U.S. at 663.

unlawful drugs[.]”<sup>12</sup> The Supreme Court held that the drug interdiction roadblock violated the Fourth Amendment because its “primary purpose” was indistinguishable from the “general interest in crime control.”<sup>13</sup> The Supreme Court noted in Edmond that it had “never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”<sup>14</sup> The Supreme Court further stated as follows:

It goes without saying that our holding today does nothing to alter the constitutional status of the sobriety and border checkpoints that we approved in [Michigan Department of State Police v. Sitz, 496 U.S. 444, 450-55, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990)] and [United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)] or of the type of traffic checkpoint that we suggested would be lawful in Prouse. The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program [citations omitted].<sup>15</sup>

In the case before us, the Kentucky State Police had established a Traffic Safety Checkpoint Policy, referred to as OM-E-4, which provided general guidelines to follow when conducting roadblocks. While adhering to the principles established by the United States Supreme Court, this Court has

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<sup>12</sup> Edmond, 531 U.S. at 40-41.

<sup>13</sup> Id. at 41.

<sup>14</sup> Id.

<sup>15</sup> Id. at 47.

looked to the OM-E-4 guidelines when reviewing the lawfulness of roadblocks conducted in this Commonwealth. In Steinbeck v. Commonwealth,<sup>16</sup> this Court stated as follows:

[A] state's use of sobriety checkpoints does not violate the Fourth and Fourteenth Amendments to the United States Constitution when the state is conducting such checkpoints pursuant to a systematic plan. This exception does not attach where the checkpoints are random or discretionary [citations omitted].<sup>17</sup>

Later, this Court stated in Commonwealth v. Bothman,<sup>18</sup> as follows:

In general, a checkpoint must be established in such a manner as to avoid the "unconstrained discretion" inherent in random stops, and must be reasonably calculated to protect public safety. Other factors to be considered are whether the checkpoint was conducted pursuant to a systematic plan, and whether only some vehicles were stopped or all vehicles were stopped [citations omitted].<sup>19</sup>

Dunlap attempts to distinguish Bothman from his case by stating that ultimately there was no violation of OM-E-4 in Bothman.<sup>20</sup>

While the Commonwealth concedes that the Kentucky State Police committed two procedural violations, i.e., failure

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<sup>16</sup> 862 S.W.2d 912 (Ky.App. 1993).

<sup>17</sup> Id. at 913.

<sup>18</sup> 941 S.W.2d 479 (Ky.App. 1997).

<sup>19</sup> Id. at 481.

<sup>20</sup> In Bothman, this Court stated there had only been "technical non-compliance."



to make specific media announcements<sup>21</sup> and failure of officers to wear reflective safety vests,<sup>22</sup> the Commonwealth claims that "neither of the two safety issues rise to a violation of constitutional law." Despite these deficiencies, the Commonwealth claims the roadblock in question met the following guidelines: (1) media announcements were made (while not specific as to dates and times);<sup>23</sup> (2) a pre-approved checkpoint was used; (3) the location was safe and visible to the public; (4) flashing blue lights were activated;<sup>24</sup> (5) the time and location of the checkpoint was supervisor-approved; (6) an officer was designated as the officer in charge of the checkpoint; (7) the officers were in uniform; (8) all vehicles

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<sup>21</sup> However, the Commonwealth claims that general announcements of such roadblocks were highly publicized.

<sup>22</sup> During the suppression hearing, Trooper Goins testified that he was wearing his reflective vest during the roadblock. Dunlap argues that there was proof on a videotape, subpoenaed for the suppression hearing, that Trooper Goins was not wearing a reflective safety vest, despite the requirement to do so under OM-E-4. This videotape has not been made a part of the record on appeal and, thus, we cannot consider it. See Miller v. Commonwealth, Dept. of Highways, 487 S.W.2d 931, 933 (Ky. 1972) (noting that when the appellate record does not include evidence presented, we must presume that the missing evidence supported the judgment of the circuit court). However, the Commonwealth concedes that the officers did not wear the reflective safety vests.

<sup>23</sup> Trooper Goins testified that he had no written proof to offer that the media announcements were made, but he was told that such announcements were made.

<sup>24</sup> Trooper Goins testified at the suppression hearing that there were flashing lights at the roadblock and that there was sufficient length of roadway to allow drivers a sufficient opportunity to see the lights before they approached the roadblock.

were stopped;<sup>25</sup> and (9) the vehicles were inspected for obvious safety defects and regulation violations.

We agree with the Commonwealth and conclude that the officers conducted the roadblock according to the standards established by OM-E-4. "Technical noncompliance with OM-E-4, which does not have the force of law, does not inexorably lead to the conclusion that the establishment of the checkpoint was violative of the constitutions of the United States or of the Commonwealth."<sup>26</sup> "[A] mere violation of one factor does not automatically result in a violation of constitutional proportions. The guidelines are to be applied on a case-by-case basis in order to determine the reasonableness of each roadblock."<sup>27</sup> At the roadblock at issue, all vehicles were stopped and the roadblock was limited in duration. Each stop made by the officers was conducted in the most non-intrusive manner possible. While it is unclear from the record how many vehicles were stopped during the duration of the roadblock or how many warnings were given for safety violations, it is apparent that the roadblock was reasonably effective in detecting safety violations.

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<sup>25</sup> Trooper Goins testified that he stopped all vehicles during the roadblock.

<sup>26</sup> Bothman, 941 S.W.2d at 481.

<sup>27</sup> Buchanon, 122 S.W.3d 571.

Dunlap argues that the Kentucky State Police did not establish a reason for the roadblock as required by OM-E-4. We have already concluded that the purpose of the roadblock in question was to check for highway safety concerns. Further, Trooper Goins testified that the basis for the roadblock was seatbelt enforcement and this particular area (checkpoint) was chosen because it was a high traffic area.<sup>28</sup> We conclude that the roadblock was solely used to promote Kentucky's strong interest in preventing traffic accidents and to promote the highway safety of its citizens; and therefore, we hold that the roadblock in question was statutorily and constitutionally valid.

Dunlap is correct that the officers could not have issued citations for seatbelt violations at the roadblock. However, once the officers had reasonable suspicion that a DUI violation had occurred in their presence, they not only had the right but an obligation to enforce the law. The Commonwealth is correct that the officers had probable cause to believe that Dunlap was committing the offense of DUI at the time he was detained at the roadblock. Because the roadblock was constitutionally valid, the officers' plain view observation of

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<sup>28</sup> This testimony was based on a memo written 18 months prior to the roadblock which predated Trooper Goins's employment.

Dunlap's suspected violation of KRS 189A.010 gave them the right to proceed with an investigation and to charge Dunlap with DUI.<sup>29</sup>

Accordingly, the order of the Carroll Circuit Court is affirmed.

ALL CONCUR.

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<sup>29</sup> Edmond, 531 U.S. at 48 (stating that "[o]ur holding . . . does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose").