

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAWRENCE SCHEEL

APPELLANT

v.

CAUSE NO: 2007-KM-00345

CITY OF FLORENCE

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF RANKIN COUNTY, MISSISSIPPI**

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the appellate courts of, Mississippi may evaluate possible disqualification or recusal.

1. Honorable Samac Richardson
Circuit Court Judge
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2. Honorable Kent McDaniel
Rankin County Court Judge
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Statement of the Issue

The trial court neither erred nor abused its discretion by overruling the defendant's motion to suppress fruits of unlawful search and seizure.

Statement of the Case

On or about July 22, 2005, the City of Florence established a checkpoint at the intersection of Hwy 469 and Williams Road within the city limits of Florence, Mississippi. Every vehicle that came through the checkpoint was stopped. (T5, Line 7). The checkpoint was established for the purpose of checking for drivers' licenses and insurance. (T31, Line 7). Mr. Lawrence F. Scheel ("Scheel"), born June 10, 1962, drove to the checkpoint where Officer Nelson was able to discern an odor of an intoxicating beverage emanating from the vehicle. (T6, Line 7). Mr. Scheel submitted to an Intoxilyzer test which revealed a blood alcohol content of eleven one hundredths percent (.11%). Mr. Scheel was subsequently charged with violation of § 63-11-30(1) of the *Mississippi Code of 1972*, as amended.

Before trial, the defendant filed a Motion to Suppress Fruits of Unlawful Search and Seizure seeking to suppress any evidence gathered after Scheel reached the check point for lack of probable cause for the traffic stop. It is the States's opinion that this checkpoint was not unlawful under the standard set forth in *Sasser. Sasser v. City of Richland*, 850 So.2d 206, 208 (Miss. Ct. App. 2003) The trial court agreed and denied the Motion to Suppress Fruits of Unlawful Search and Seizure. (R54). Scheel was convicted of having violated Miss. Code Ann. §§ 63-11-30-(1)(a) and 63-11-30(1)(c)), first offense. The defendant then appealed to the Circuit Court which affirmed the trial court. This appeal follows.

Summary of the Argument

It is well settled in this state that fixed roadblocks do not violate the Fourth Amendment to the Constitution of the United States, and the Mississippi Constitution affords no higher level of protection from searches and seizures than does the Fourth Amendment. Under the Fourth Amendment a seizure is not unconstitutional if it is reasonable. One whose Fourth Amendment rights have not been violated cannot benefit from the exclusionary rule.

In the case at hand the defendant was arrested for driving under the influence after being stopped at a fixed roadblock. The fixed roadblock met all of the requirements of reasonableness and, therefor, was not a violation of the Fourth Amendment to the Constitution of the United States. The subsequent arrest was also reasonable due to the defendant committing the offense in the presence of the officer.

None of the defendant's Fourth Amendment rights were violated. Accordingly, the defendant can not use the exclusionary rule to suppress any evidence gathered during or after the initial stop at the fixed roadblock. No reversible error was committed by the Trial Court.

Argument

FIXED ROADBLOCK WAS LEGAL

Fixed “roadblocks . . . do not violate the Fourth Amendment to the Constitution of the United States.” *Sasser v. City of Richland*, 850 So.2d 206, 208 (Miss. Ct. App. 2003), quoting *Briggs v. State*, 741 So.2d 986, 989-90 (Miss. Ct. App. 1999). Mississippi Court of Appeals has held that the Mississippi Constitution does not create any “higher level of insulation from searches and seizures than those afforded by the Fourth Amendment.” *Sasser v. City of Richland*, 850 So.2d 206, 209 (Miss. Ct. App. 2003). The checkpoint established by the City of Florence on July 22, 2005 was a fixed roadblock in that all motorists were subjected to a brief stop as outlined in *Briggs*. *Briggs*, 741 So. 2d at 989-990. Defendant contends that the roadblock was illegal, but offers no legal or factual basis for his position.

SEIZURE WAS REASONABLE

A stop of any kind is a seizure, but a seizure, under the Fourth Amendment, is not unlawful if it is reasonable. *Brown v. Texas*, 443 U.S. 47, 50 (1979). In determining the reasonableness of a seizure the court must weigh the “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.” *Brown*, 443 U.S. at 50-51; *See also Dale v. State*, 785 So.2d 1102, 1104 (Miss. Ct. App. 2001).

The first part of this three part balancing test involves the importance of the public concern served by the seizure. The two purposes of this checkpoint were to check for

driver's licenses and insurance. The Mississippi Court of appeals has held that the State has an interest in making sure that drivers of vehicles are properly registered. *Dale*, 785 So. 2d at 1105. The checkpoint served this public concern and thereby so did the seizure. Furthermore, according to the United States Supreme Court, "it is the primary purpose which determines whether a roadblock is Constitutional." *McLendon v. State*, 2005-KM-01480-SCT (¶ 19), citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). Since the primary purpose of this checkpoint was to check for license and insurance, both of which serve public concerns, this checkpoint is Constitutional.

"The effectiveness of the seizure at serving the governmental interest must also be considered in this balancing test." *Dale*, 785 So. 2d at 1105, citing *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 450 (1990). At the checkpoint in question, every driver who came through the checkpoint was stopped. "The procedure of stopping each driver is a very effective means of determining whether drivers are properly licensed." *Dale*, 785 So. 2d at 1106. Similar to the case in hand, *Dale* had little evidence presented as to the number of people stopped at the roadblock or whether they had proper driver's licenses, but the Court found the roadblock effective based on the fact every motorist was stopped. *Dale*, 785 So. 2d at 1106. Any absence of set procedures or guidelines is irrelevant as the Mississippi Supreme Court has previously upheld roadblocks where there were no set procedures. *Dale*, 785 So. 2d at 1106. Stopping every driver removes any discretion by the officer as well as any potential unconstitutionality. *McLendon* 2005-KM-01480-SCT (¶ 21). Since every driver who came through the checkpoint was stopped, the checkpoint meets the requirements of this prong of the balancing test.

The severity of the interference with the defendant's liberty must be considered. Any interference or intrusion on the liberty of the defendant that may have existed was minimal at the most. This was a fixed checkpoint which the defendant could see before arriving. The officers exercised no discretion as to which vehicles to stop. The defendant likely saw other vehicles stop ahead of him. This checkpoint was a "routine roadblock" and not a random stop. "[T]he degree of fear created by a roadblock is far less intrusive than the degree of fear created by a random stop check." *Dale*, 785 So. 2d at 1107, citing *Sitz*, 496 U.S. at 452-53. Therefore, any intrusion upon the civil liberty of the defendant was minimal and is outweighed by the importance of the public concern in assuring that drivers are properly registered and the effectiveness of using roadblocks to serve that concern.

The defense also contends that this checkpoint is unconstitutional because Officer Nelson's orders to set up the road block came from one Sergeant Bunkley who is only one step up the chain of command from Officer Nelson. However, Sergeant Bunkley was also the shift supervisor. The roadblock that was held to be constitutional in *Dale* was also ordered by a shift supervisor. *Dale*, 785 So. 2d at 1103. The fact that the order came from Sergeant Bunkley does not effect the constitutionality of the checkpoint in question. The constitutionality of the checkpoint depends upon whether or not it meets the requirements of the three part balancing test, which it does. Accordingly, the checkpoint is not unconstitutional.

**ARREST OF DEFENDANT WAS REASONABLE
DUE TO OFFENSE BEING COMMITTED
IN THE PRESENCE OF AN OFFICER**

Section 63-11-30(1) *Mississippi Code of 1972*, as amended, provides that “[i]t is unlawful for any person to drive or otherwise operate a vehicle within this state who . . . (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law”. The legal age to purchase alcohol is twenty-one. *Mississippi Code of 1972* §67-3-53(b). Mr. Scheel’s date of birth is June 10, 1962, therefore he was forty-three at the time of his arrest. Mr. Scheel’s Intoxilyzer test indicated that his blood alcohol concentration was eleven one hundredths percent (.11%). Mr. Scheel drove to the checkpoint in his vehicle where Officer Nelson encountered Mr. Scheel. Mr. Scheel was driving a vehicle in Mississippi. His alcohol concentration was greater than eight one-hundredths percent (.08%). He was above the legal age for the purchase of alcohol pursuant to the laws of this state. Therefore, Mr. Scheel was clearly in violation of §63-11-30(1) and as this was Mr. Scheel’s first arrest for driving under the influence the penalty for such violation is a misdemeanor under §63-11-30(2)(a) *Mississippi Code of 1972*, as amended.

**EXCLUSIONARY RULE DOES NOT REQUIRE
SUPPRESSION OF EVIDENCE GAINED VIA LAWFUL MEANS**

Only persons whose Fourth Amendment rights have been violated can benefit from the protections of the exclusionary rule. *Walker v. State*, 913 So.2d 198, 225 (Miss. 2005).

Fixed “roadblocks . . . do not violate the Fourth Amendment to the Constitution of the United States.” *Sasser v. City of Richland*, 850 So.2d 206, 208 (Miss. Ct. App. 2003), quoting *Briggs v. State*, 741 So.2d 986, 989-90 (Miss. Ct. App. 1999). The checkpoint where Mr. Scheel was stopped was a fixed checkpoint, therefore, it does not violate the Fourth Amendment to the Constitution of the United States. Mississippi Court of Appeals has held that the Mississippi Constitution does not create any “higher level of insulation from searches and seizures than those afforded by the Fourth Amendment.” *Sasser V. City of Richland*, 850 So.2d 206, 209 (Miss. Ct. App. 2003). As Mr. Scheel’s Fourth Amendment rights have not been violated, and the Mississippi Constitution does not create a greater protection he therefore cannot utilize the exclusionary rule to suppress his detention, arrest, Intoxilyzer test and any and all other evidence obtained by Officer Nelson.


Conclusion

The Trial Court committed no error by denying the defendant's motion to suppress. The defendant persistently contends that the checkpoint was unconstitutional. The controlling law in the case at hand states that fixed roadblocks are not unconstitutional. The defendant claims that he was unlawfully seized. The controlling law in this case states that a seizure is not unlawful if it is reasonable. It has been shown that the checkpoint in question was a fixed roadblock and the seizure in question met the requirements of reasonableness.

The Trial Court committed no error by finding the defendant guilty of driving under the influence. The defendant was over the age of twenty-one at the time of his arrest. He was operating a vehicle in the state of Mississippi. His blood alcohol concentration was over eight one-hundredths of a percent. The evidence shown in the case at hand undoubtedly shows that the defendant was guilty of driving under the influence.

For these reasons, the State requests that this Court affirm the decision of the Trial Court.

Respectfully Submitted, this the 19th day of July, 2007.



David Ringer, Esq.,
City Prosecutor for the
City of Florence, Mississippi

CERTIFICATE OF SERVICE

I, David Ringer, Prosecuting Attorney for the City of Florence, Mississippi, do hereby certify that I have this day mailed by first class United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, to the following at his usual address of:

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Circuit Court Judge
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Brandon, Mississippi 39042

Honorable Kent McDaniel
Rankin County Court Judge
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THIS, the 19th day of July, 2007.



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