

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. LARRY ALLEN HICKS

**Direct Appeal from the Criminal Court for Hamilton County
No. 221717 Douglas A. Meyer, Judge**

**No. E1999-00957-CCA -R3-CD Decided
May 19, 2000**

The Defendant, Larry Allen Hicks, was indicted by a Hamilton County Grand Jury for unlawful and knowing possession of marijuana, a controlled substance, with intent to sell or deliver, in violation of Tennessee Code Annotated § 39-17-417. He subsequently moved to suppress the evidence obtained against him at a roadblock. After a hearing, the trial court granted the motion to suppress, and the case was dismissed. Pursuant to Rule 3(c) of the Tennessee Rules of Appellate Procedure, the State now appeals as of right, arguing that the trial court improperly suppressed the evidence obtained against the Defendant at the roadblock. In reply, the Defendant argues (1) that the roadblock, which was established to check drivers' licenses, was unconstitutional *per se*; (2) that even if it was not unconstitutional *per se*, it was nonetheless unconstitutional as implemented; and (3) that even if it was not unconstitutional, it was unlawful. Because we find that the trial court erred in granting the Defendant's motion to suppress, we reverse the decision of the trial court and remand for further proceedings.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Trial Court Reversed.

WELLES, J., delivered the opinion of the court, in which SMITH, J., joined. TIPTON, J., filed a dissenting opinion.

Jerry H. Summers, Chattanooga, Tennessee, for the appellee, Larry Allen Hicks.

Paul G. Summers, Attorney General and Reporter, Erik W. Daab, Assistant Attorney General, Bill Cox, District Attorney General, Dean C. Ferraro, Assistant District Attorney General, for the appellant, State of Tennessee.

OPINION

The issues presented in this appeal all relate to the legality of the stop of the Defendant's vehicle at a driver's license check roadblock. The evidence at the suppression hearing revealed that between midnight and 2:00 a.m. on October 11, 1997, the Tennessee Highway Patrol organized and supervised a driver's license check roadblock pursuant to General Order 410 on Suck Creek Road near the Hamilton County and Marion County line. In addition to two Highway Patrol officers, two Chattanooga Police Department officers, one of which was a K-9 officer, and two Red Bank Police

Department officers were present at the roadblock. At approximately 1:15 a.m., the Defendant approached the roadblock in his vehicle. The vehicle was stopped by Officer Marty Penney of the Red Bank Police Department, who was assisted by Sergeant Greg Short of the Chattanooga Police Department. Other than supervising the roadblock, neither Highway Patrol officer had any personal participation with the stop and subsequent arrest of the Defendant. Sgt. Short testified that the officers smelled an odor of marijuana coming from the Defendant's vehicle when it stopped at the roadblock, so the Defendant was asked to pull to the side of the road. A drug dog alerted the officers to the presence of drugs in the vehicle, and five pounds of marijuana were then found in the front seat of the car.

Sgt. Short testified that no signs were posted on Suck Creek Road indicating that a roadblock was ahead. No orange cones were used to direct traffic. Sgt. Short did not recall wearing an orange vest for identification or illumination. He did not believe that there was any advance publication of the roadblock. The only indications of the roadblock were police vehicles with blue lights parked at each end of the roadblock and officers in uniform. When a vehicle approached, the officers would wave the car down and then ask to see the driver's license. Sgt. Short verified that although this was a driver's license roadblock, Detective Dyer of the Red Bank Police Department was showing motorists a picture of a suspect believed to be the "North Chattanooga Rapist" and was asking them if they knew that person.

Lieutenant Ronnie Hill of the Tennessee Highway Patrol testified that he was the supervising authority at the roadblock and that Lieutenant Phillips, his troop commander, ordered him to set up the roadblock. He said that although officers from the Chattanooga and Red Bank Police Departments were assisting at the roadblock, those officers were acting under his supervision. Before the roadblock, Lt. Hill met with the other officers and explained the purpose and procedures. The roadblock was established pursuant to General Order 410. He said that the purpose was to check for drivers' licenses. The officers were to stop every car that approached the roadblock. Lt. Hill conducted two roadblocks at this location, one on Friday night and another on Saturday night. He believed that other roadblocks had been conducted by other officers during the day at the same location, but the Highway Patrol records revealed that only Lt. Hill conducted roadblocks at that location.

Lt. Hill confirmed the testimony of Sgt. Short that no advance publicity of the roadblock was given and that the only indications of the roadblock were police vehicles at each end. He could not recall whether red batons were used. He testified, however, that the roadblock was conducted in a safe location where motorists could pull over to the side of the road without blocking any traffic and that it was visible to oncoming motorists. He also stated that he did not have any contact with the Defendant or any involvement with his stop and arrest.

After hearing this testimony, the trial court found that "it is a bad search" because the police officers did not follow all of the procedures — "the publicity and everything" — required by prior decisions of our supreme court and this Court. It then granted the Defendant's motion to suppress.

Essentially, the trial court determined that the seizure of the Defendant in the roadblock was an unlawful seizure requiring suppression of the evidence obtained as a result thereof.

MOTION TO SUPPRESS

I.

In this appeal, the State argues that the seizure of the Defendant was lawful because it was conducted in “substantial compliance” with the requirements of State v. Downey, 945 S.W.2d 102 (Tenn. 1997). In reply, the Defendant argues (1) that roadblocks to check for drivers' licenses are unconstitutional per se under both the United States and Tennessee Constitutions; (2) that even if such roadblocks are not unconstitutional per se, this roadblock was unconstitutional because it did not comply with constitutional guidelines; and (3) that even if the roadblock was constitutional, it was nevertheless unlawful because highway patrol officers cannot delegate their exclusive statutory and regulatory authority to stop a motorist in order to check his or her driver's license.

When reviewing the grant or denial of a motion to suppress,

[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the application of the law to the facts as found by the trial court is a question of law which the appellate court reviews de novo. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997) (citing Beare Co. v. Tennessee Dept. of Revenue, 858 S.W.2d 906, 907 (Tenn. 1993)).

The Fourth Amendment to the United States Constitution provides:

Unreasonable searches and seizures.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Similarly, Article 1, § 7 of the Tennessee Constitution guarantees

that the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

The intent and purpose of the prohibition against unreasonable searches and seizures found in the Tennessee Constitution has been found to be the same as that found in the Fourth Amendment to the United States Constitution. State v. Simpson, 968 S.W.2d 776, 779 (Tenn. 1998) (citing State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997); Sneed v. State, 423 S.W.2d 857, 860 (Tenn. 1968)). According to the Supreme Court, the purpose of the prohibition against unreasonable searches and seizures in the Fourth Amendment is to “safeguard the privacy and security of individuals against arbitrary invasions of government officials.” Camara v. Municipal Court, 387 U.S. 523, 528 (1967). While the intent and purpose behind the prohibition is the same, the Tennessee Supreme Court has recognized that the Tennessee Constitution “may afford citizens of Tennessee even greater protection” than the United States Constitution. Downey, 945 S.W.2d at 106 (citing State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989); Miller v. State, 584 S.W.2d 758 (Tenn. 1979)).

Under both the United States and Tennessee Constitutions, a search or seizure conducted without a warrant is presumed unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Simpson, 968 S.W.2d at 780; State v. Watkins, 827 S.W.2d 293, 295 (Tenn. 1992). Therefore, evidence seized as a result of a search or seizure conducted without a warrant must be suppressed unless the State proves by a preponderance of the evidence that the search was reasonable under the United States and Tennessee Constitutions. Id.

The stop of an automobile and the detention of its occupants constitutes a seizure, even if the purpose of the stop is limited and the detention is brief. Wren v. United States, 517 U.S. 806, 709-10 (1996); Delaware v. Prouse, 440 U.S. 648, 663 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976); State v. Vineyard, 958 S.W.2d 730, 734 (Tenn. 1997). Generally, for the seizure of an automobile to be reasonable, there must be some type of individualized suspicion of wrongdoing justifying the stop. It has been deemed reasonable to seize an automobile and its occupants if an officer has probable cause to believe that a criminal offense has occurred or that a traffic violation has occurred. See Wren, 517 U.S. at 810; Prouse 440 U.S. at 655, 659; Vineyard, 958 S.W.2d at 734. Similarly, it has been deemed reasonable to temporarily seize an automobile and occupants for investigation in the absence of probable cause if a police officer has reasonable suspicion, based on specific and articulable facts, that the occupants have been involved in or are about to be involved in criminal activity. See Ornelas v. United States, 517 U.S. 690, 693 (1996); Terry v. Ohio, 392 U.S. 1, 30 (1968); State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998); Vineyard, 958 S.W.2d at 734.

In some circumstances, however, it may also be considered reasonable under the United States and Tennessee Constitutions to seize an automobile and its occupants without any type of individualized suspicion. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Supreme Court approved for the first time suspicionless seizures of automobiles at “permanent checkpoint” sites to search for illegal aliens. Id. at 556-57. It determined that the government had an important interest in preventing the flow of illegal aliens into this country and that the interest was well served by the checkpoints. Id. The checkpoints were located on important highways, making it more difficult to smuggle aliens into the country because the aliens would either be apprehended at the checkpoints or would try to enter the country by less heavily traveled roadways, slowing their progress and making them more detectable by roving patrols. Id. at 557. The Court also found that the intrusion upon motorists was minimal. There was only a brief detention, during which the occupants of the vehicle were required to answer a few brief questions. Id. at 558. In addition, the Court noted that checkpoint stops are less discretionary than most kinds of law enforcement activities. The location of a fixed stop is chosen by superior officers, which the Court assumes “will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.” Id. at 559. Also, only those vehicles going through the checkpoint are stopped, making “less room for abusive or harassing stops of individuals.” Id. The Court thus held that “stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant.” Id. at 566. Fourth Amendment protection at checkpoint stops “lies in appropriate limitations on the scope of the stop.” Id. at 567.

Later, in addressing seizures without individualized suspicion, the Supreme Court stated, “The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends ‘on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’” Brown v. Texas, 443 U.S. 47, 50 (1979) (citations omitted). The Court went on to explain that

[c]onsideration of the constitutionality of such seizures involves 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.

Id. at 50-51. A key concern in balancing these interests is to “assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” Id. at 51. Thus,

the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Id. (emphasis added).

In Michigan v. Sitz, 496 U.S. 444 (1990), the Supreme Court applied the three-part test from Brown and Martinez-Fuerte in holding that a state's use of a highway sobriety checkpoint does not per se violate the Fourth Amendment and that the checkpoint in question was lawful. Id. at 450-55. In finding an important state interest, the Court proclaimed, “No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it.” Id. at 451. The Court had before it data showing that the checkpoint resulted in about 1.6 percent of drivers stopped being arrested for driving under the influence of alcohol, and an expert testified that the average of arrests for drunk driving in sobriety checkpoints around the country was around one percent. Id. at 455. Even though these percentages were small, the Court refused to inject its judgment of appropriate law enforcement techniques over that of law enforcement officials, saying that there are several methods of addressing the drunk driving problem and that “the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.” Id. at 453-54. Based on these percentages, the Court found the checkpoint to be effective. Id. at 455. The Court also found the intrusion on the motorists to be slight. Id. at 451. The checkpoint was established pursuant to a sobriety checkpoint pilot program developed by the Michigan Department of Police. Id. at 447. As required by the established guidelines, all vehicles passing through the checkpoint were stopped and the drivers briefly examined for signs of intoxication. Id. If the driver exhibited no signs of intoxication, the vehicle was permitted to resume its journey. Id. If signs of intoxication were detected, the driver was directed to a location out of the flow of traffic where further investigation occurred. Id. After examining all of these factors, the Supreme Court determined that the factors weighed in favor of the constitutionality of the checkpoint. Id. at 455.

Our supreme court considered the constitutionality of sobriety checkpoints under the Tennessee Constitution for the first time in State v. Downey, 945 S.W.2d 102 (Tenn. 1997). After examining the Supreme Court cases addressing the constitutionality of roadblock seizures and cases from other states addressing the same issue, the court adopted the balancing test outlined in Sitz as the appropriate constitutional standard under the Tennessee Constitution as well,

so that when a seizure occurs, an individual’s reasonable expectation of privacy is not subject to the arbitrary invasions solely at the unfettered discretion of officers in the field, and the seizure is carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Downey 945 S.W.2d at 110. The court recognized the State’s “compelling interest” in detecting and deterring intoxicated drivers and asserted its conviction that roadblocks are effective tools in combating the drunk driving problem. It agreed with the Sitz court that the courts “should not determine which among reasonable law enforcement approaches is the most effective.” Id. In light of these findings, the supreme court held “that the use of a sobriety roadblock may be used to advance the State’s compelling interest provided it is established and operated in a manner that minimizes intrusion and limits discretion.” Id.

Although the supreme court in Downey addressed the constitutionality of sobriety checkpoints as opposed to driver's license checkpoints, we conclude that the same approach and rationale apply when assessing the constitutionality of driver's license checkpoints as well. We will first address the Defendant's assertion that roadblocks established to check for drivers' licenses are per se unconstitutional. Using the balancing test set forth in Brown and Sitz and adopted by our supreme court in Downey, we conclude that driver's license checkpoints effectively serve a legitimate state interest; thus they are reasonable so long as they are conducted pursuant to a neutral, explicit plan designed to limit the discretion of officers in the field.

In Delaware v. Prouse, 440 U.S. 648 (1979), the United States Supreme Court recognized that states "have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Id. at 658. While the Court in Prouse held that roving suspicionless stops to check for drivers' licenses violated the Fourth Amendment, the Court also stated, "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." Id. at 663. Thus, the Supreme Court has suggested that roadblocks established to check for drivers' licenses are not per se unconstitutional.

In the unpublished case of State v. David Lynn Hagy, C.C.A. No. 03C01-9505-CR-00152, 1995 WL 712355 (Tenn. Crim. App., Knoxville, Dec. 5, 1995), we considered the constitutionality of a roadblock, similar to this one, which was established by the Tennessee Highway Patrol pursuant to General Order 410. Id. at *1. In addressing the constitutionality of the roadblock in question, we stated, "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 individualized officers.'" Id. at *2 (quoting Brown, 443 U.S. at 51.).

We agree with the Supreme Court in Prouse and with our prior determination in Hagy that the State has a significant interest in regulating drivers and vehicles on the roadways. Ensuring that only qualified drivers are operating vehicles on the public highways increases the safety on those highways. We also believe that roadblocks are an effective way to further that interest because they both detect and deter unlicensed drivers. Like the Supreme Court in Sitz and our supreme court in Downey, we will leave the determination of which among reasonable law enforcement approaches is most effective to the officials who are accountable for limited public resources. Therefore, we hold that roadblocks to check for unlicensed drivers are constitutional under the United States and Tennessee Constitutions so long as they are "established and operated in accordance with predetermined guidelines and supervisory authority that minimize the risk of arbitrary intrusions on individuals and limit the discretion of law enforcement officers at the scene." Downey, 945 S.W.2d at 112.

II.

Next, we consider the constitutionality of the particular roadblock in question. The Defendant asserts that the roadblock was unconstitutional because it failed to comply with all of the requirements of Downey. The State, on the other hand, argues that the roadblock was constitutional because it was conducted in “substantial compliance” with Downey. We find that the roadblock was reasonable under the United States and Tennessee Constitutions because it was conducted pursuant to a neutral, explicit plan which limited the discretion of the officers in the field. Although there were minor deviations from the guidelines, those deviations were not significant enough to invalidate the roadblock.

As a framework for determining whether a roadblock minimizes intrusion and limits discretion, the supreme court in Downey adopted the criteria delineated in three cases from Iowa, California, and Kansas. Downey, 945 S.W.2d at 110 (citing State v. Loyd, 530 N.W.2d 708 (Iowa 1995); Ingersoll v. Palmer, 743 P.2d 1299 (Cal. 1987); State v. Deskins, 673 P.2d 1174 (Kan. 1983)). Those criteria include: (1) supervisory authority which carefully targets the time and location of roadblocks and establishes neutral procedures for their operation; (2) adequate warnings; (3) advance publicity; (4) minimizing the length and nature of detention; (5) adequate safety precautions; and (6) the availability of less intrusive methods for combating the problem. Id. After outlining these factors, the court also noted that a list of relevant factors “can take any length or form” and that “[n]ot every factor must weigh in favor of the state to uphold a given roadblock, nor is any single one dispositive of the issue.” Id. It maintained that “the overriding question is whether the roadblock was established and operated in a constitutionally reasonable manner that minimized the intrusion on individuals and limited the discretion afforded to officers at the scene.” Id.

The supreme court in Downey exemplified aspects of that roadblock which were consistent with constitutional standards. The discretion of the officers at the scene was limited because all cars traveling in both directions were stopped, and when the traffic became congested, motorists were permitted to pass through the roadblock. Also, safety measures were taken to warn approaching motorists, as the roadblock was set up in a safe and visible area and consisted of uniformed officers and marked patrol cars with flashing blue lights. Id. After setting forth these aspects of the roadblock, the court determined that “[a]ll of the remaining evidence . . . indicated that this roadblock was not established and operated in a manner that was consistent with article I, section 7 of the Tennessee Constitution.” Id. It explained as follows:

First and foremost, the decision to set up a roadblock was made by an officer in the field. Likewise, the site selected for the roadblock and the procedure to be used in operating the roadblock were matters left to the discretion of an officer in the field. No supervisory authority was sought or obtained, and no administrative decisions were made with regard to these critical factors. The State maintains on appeal that the absence of formal, supervisory participation was of “little weight” since Lt. Hill supervised the roadblock at the scene. We disagree. Virtually every court has

emphasized the importance of limiting the discretion of police officers at the scene.
...

The lack of administrative or supervisory decision making was also evidenced by the absence of publicity surrounding the roadblock. We believe advance publicity furthers the deterrence rationale for the use of a sobriety roadblock. . . . The State's contention that advance publicity was unnecessary because the roadblock was well-marked at the scene completely ignores the deterrence rationale. . . .

Finally, the absence of supervisory or administrative decision-making in this case may have contributed to creating an issue as to the purpose of the roadblock. The testimony in the record is that officers set up this roadblock for the purpose of checking drivers' licenses in accordance with General Order 410 of the Department of Safety. All the remaining evidence in the record, however, indicates that the actual purpose was the detection of alcohol-impaired motorists. We do not decide whether the roadblock was a "subterfuge" or a "pretext" for investigating drunk drivers, or address the implication that might follow such a finding. Instead, this discrepancy in the proof is a reflection of the overall failure by law enforcement officers to establish this roadblock in a manner consistent with administrative and supervisory oversight.

Id. at 110-11.

Like the supreme court did in Downey, we will first look at the evidence in this case which supports factual findings consistent with constitutional standards. The testimony at the hearing revealed that the roadblock was established pursuant to Tennessee Department of Safety General Order 410 to check for unlicensed drivers. Lt. Hill testified that he was ordered to set up the roadblock by his troop commander, Lt. Phillips. Under General Order 410, a lieutenant or sergeant is authorized to establish such a roadblock after ensuring that all the provisions of the Order are met. While Lt. Hill could have established the roadblock himself under General Order 410, the fact that another officer, who was not at the scene, ordered the roadblock indicates that there was administrative and supervisory decision-making. This administrative and supervisory decision-making is completely opposite from the situation in Downey, where the decision to establish the roadblock was made by an officer in the field. See id.

The testimony also revealed limits on the discretion of officers at the scene. As mandated by General Order 410, every pre-determined vehicle was stopped. If the traffic became too congested, the officers were to let the vehicles pass until the congestion cleared. This is very similar to the situation in Downey, which was found to be consistent with constitutional standards. See id. at 110.

In addition, safety measures were taken to warn motorists of the roadblock. The testimony indicated that the roadblock was set up in a safe and visible location, that it was marked by patrol

cars with flashing blue lights, and that it was operated by uniformed police officers. This was all in accordance with General Order 410 and was again similar to safety measures found to be consistent with constitutional standards in Downey. See id.

The Defendant, however, argues that the roadblock was unconstitutional because of failure to comply with specific guidelines, a lack of publicity, and the questionable nature and purpose of the roadblock. With respect to the specific guidelines, the Defendant points out that the officers may not have been wearing orange vests and that they did not have red batons as required by General Order 410. These particular guidelines were obviously established to ensure safety and certainly should be followed, but the failure to have orange vests and red batons does not in and of itself render the roadblock unsafe. As we said in State v. Eric Christopher Miller, C.C.A. No. 02C01-9410-CC-00200, 1996 WL 75344 (Tenn. Crim. App., Jackson, Feb. 21, 1996), “[w]hile . . . there are violations of the General Order which might invalidate the stop, a general violation of the guidelines does not necessarily require exclusion of the evidence acquired as a result of the detention. The real question is whether the deviation from the guidelines was of such a nature or degree that the roadblock, as implemented, was unreasonable.” Id. at *3. This roadblock was conducted in a safe and visible manner with marked patrol cars and officers in uniform. Thus, we conclude that these minor deviations from the guidelines are not of such a nature or degree as to make the roadblock unreasonable.

The Defendant also points out that the roadblock did not have signs warning of the stop and that orange cones were not used to direct traffic. These safety precautions are not mandated or even mentioned in General Order 410; thus, the failure to have them is not a failure to follow the established guidelines. Also, such safety measures are not mentioned as necessary or appropriate in Downey. See Downey, 945 S.W.2d at 110-11. While it may be good procedure to have such devices, we do not find that the failure to provide cones and signs made the roadblock unreasonable.

The Defendant places much emphasis on the lack of publicity in this case. We first note that advance publicity is not required by or even mentioned in General Order 410. However, the supreme court placed weight on the lack of publicity in Downey, finding that “advance publicity furthers the deterrence rationale for the use of a sobriety roadblock” and that the “omission [of advance publicity] in the present case likewise weighs against the reasonableness of the roadblock used to stop the defendant.” Id. at 111. In a footnote, the court explained, “We merely stress that the presence or absence of publicity is a factor in assessing the reasonableness of the roadblock. The absence of evidence in this record regarding the publicity or lack of publicity surrounding this roadblock, we believe, is indicative of the State’s overall failure to show that this roadblock was established in accordance with supervisory and administrative standards.” Id. at 111 n.8.

In State v. Freddie Ray Guye, C.C.A. No. 01C01-9803-CC-00141, 1999 WL 54805 (Tenn. Crim. App., Nashville, Feb. 8, 1999), we considered the constitutionality of a sobriety roadblock which was established pursuant to pre-determined guidelines of the White House Police Department. The defendant in that case argued that the roadblock was unconstitutional because the guidelines did not provide for roadblocks to be publicized in advance. We again asserted that “the lack of publicity

is only one factor to be considered when determining the reasonableness of a roadblock.” Id. at *2. The lack of publicity “is not, in and of itself, determinative.” Id. Because the other requirements of Downey were met, we upheld the roadblock despite the lack of publicity. Id.

We reach a similar result in this case as well. Although the lack of publicity is one factor we must consider in determining the reasonableness of a roadblock, in this case it is not an indication that the roadblock was not established in accordance with supervisory and administrative standards. Like the guidelines in Guye, the guidelines in this case do not require advance publicity. However, the guidelines do provide for supervisory and administrative decision-making and do set forth procedures which limit the discretion of officers in the field. Thus, we do not believe that the lack of publicity is sufficient to render this roadblock unreasonable.

We also do not believe that a possible “pretext” or “subterfuge” made this roadblock unreasonable. General Order 410 explicitly states that a driver’s license roadblock may not be used as a “subterfuge to search for D.U.I.’s or other crimes.” The Defendant argues that the nature of this roadblock was “questionable,” thereby making the actual purpose of the roadblock a possible subterfuge which would weigh against the reasonableness of the roadblock. We recognize that evidence of a subterfuge would make this roadblock constitutionally suspect. In Downey, the testimony was that the roadblock was established to search for unlicensed drivers, but all of the other evidence indicated that the roadblock was actually a sobriety checkpoint. See Downey, 945 S.W.2d at 111. The roadblock was conducted from midnight to 2:00 a.m., a mobile breathalyser unit was at the scene, and virtually every officer at the scene was a member of the city or county DUI task force. Id. at 105. The supreme court concluded that this “discrepancy in the proof is a reflection of the overall failure by law enforcement officers to establish this roadblock in a manner consistent with administrative and supervisory oversight.” Id. at 111. Similarly, in State v. Kenneth F. Walker, C.C.A. No. 03C01-9708-CR-00357, 1998 WL 608220 (Tenn. Crim. App., Knoxville, Sept. 11, 1998), the testimony was that the roadblock was set up to check for alcohol-impaired or drug-impaired drivers, while the other evidence strongly indicated that the primary purpose was to detect motorists who might be transporting drugs. Id. at *6. The officer conducting the roadblock was assigned to the Narcotics Department of the Roane County Sheriff’s Department. He testified that his salary was paid from money received from drug forfeitures, and that the money from drug forfeitures also paid for the purchase and maintenance of his drug-sniffing dog, the D.A.R.E. wagon, his patrol car, and any other operational expenses associated with his office. He further testified that he did not even have a mobile breathalyser on the scene. Also, the roadblock was conducted at a remote area at the end of an exit ramp off of Interstate 40. On the interstate before the exit were signs indicating that a DUI/drug checkpoint was ahead. Only those motorists traveling eastbound on I-40 who chose to get off the interstate at the next exit past the posted signs were stopped, and they could not see the checkpoint until they had already exited the interstate and had no choice but to continue through the checkpoint. Id. We held that this evidence of a pretext, combined with a lack of publicity and a lack of other supervisory decision-making, made the roadblock constitutionally unreasonable. Id.

Unlike the evidence in Downey and Walker, the evidence in this case does not demonstrate that the actual purpose of the roadblock was anything other than to search for unlicensed drivers. Both Sgt. Short and Lt. Hill testified that the purpose was to check drivers' licenses. The motorists were asked for their licenses, and if there were no indications of problems, they were allowed to continue their journey. The Defendant, however, points out that the roadblock was conducted from midnight to 2 a.m., that a drug dog was present on the scene, and that the Red Bank police officers were asking motorists if they recognized a picture of a person known as the "North Chattanooga Rapist." While the timing of a roadblock and the presence of a drug dog could support a finding in some circumstances that a roadblock is actually designed to search for drunk drivers or persons transporting drugs, we are hesitant to decide that these factors, standing alone, invalidate the stated purpose of a roadblock. Were we to say that the police could never have a drug dog on hand while conducting a roadblock, we would be greatly hindering the police in the performance of their duties. A police officer who happened to be a K-9 officer as well would not be allowed to assist with a driver's license checkpoint. We do not think this is a logical result.

Furthermore, the evidence here does not "strongly indicate" that the driver's license roadblock was a pretext for other purposes. The Tennessee Highway Patrol was assisted by members of the Chattanooga and Red Bank Police Departments, but those officers were not members of any specialized DUI or drug task forces like the officers in Downey and Walker. Also, there was no evidence of a breathalyser on the scene, like in Downey, indicating that the officers hoped to apprehend drunk drivers. Although the Red Bank Police Department officers were asking motorists whether they had seen a person suspected of being the "North Chattanooga Rapist," there was no proof that the roadblock was established to find that suspect. There is also no proof that apprehending the suspect became the purpose of the roadblock. We do not see why seeking assistance in locating a suspected rapist, while participating in a driver's license checkpoint, should make the checkpoint itself unconstitutional.

After closely examining the record and analyzing applicable precedent, we conclude that the roadblock was constitutional. It was conducted pursuant to explicit, neutral guidelines which limited the discretion of the officers at the scene. The minor deviations from the guidelines were not significant enough to make the roadblock itself unreasonable. Therefore, the operation of the roadblock was permissible under the United States and Tennessee Constitutions.

III.

Finally, the Defendant argues that even if the roadblock was constitutional, it was nonetheless unlawful because the Tennessee Highway Patrol improperly delegated to other law enforcement officers its exclusive statutory authority to stop a motorist solely to check his or her driver's licence. He relies on two Tennessee statutes which appear to give the Tennessee Highway Patrol, and only the Tennessee Highway Patrol, the authority to stop motorists solely for the purpose of checking

drivers' licenses.¹ See Tenn. Code Ann. §§ 55-50-351(a); 40-7-103(b). He also relies on a provision in General Order 410 which states that roadblocks may be held in conjunction with city or county law enforcement agencies, but then proclaims, “Only uniformed commissioned members of the Tennessee Highway Patrol are empowered to stop a vehicle and request exhibition of a driver [sic] license at a roadblock.” Using these statutes and General Order 410, the Defendant argues that the authority to stop a vehicle and demand to see a driver’s license rests solely in the hands of the Tennessee Highway Patrol; therefore, the seizure of the Defendant at the roadblock was unlawful because he was seized by a member of the Red Bank Police Department who did not have the authority to demand the license.

In the unreported case of State v. James Herbie Hinkle, C.C.A. No. 80-89-III (Tenn. Crim. App., Nashville, Dec. 9, 1980), we considered this precise issue. There, the defendant was stopped at a roadblock established by the Tennessee Highway Patrol, which was assisted at the roadblock by the Gallatin Police Department. Because a Gallatin Police Department officer actually stopped the defendant, as opposed to a Tennessee Highway Patrol officer, the defendant argued that his arrest was unlawful. At the suppression hearing, the trial court determined that the Gallatin officer was acting under the direct supervision and control of the Tennessee Highway Patrol and thus that his action in requesting the defendant’s license was lawful. We concluded that this analysis was correct and upheld the defendant’s arrest. Hinkle, C.C.A. No. 80-89-III, slip op. at 3. We also pointed to another statute, enacted after the one relied upon by the defendant, which provides,

The licensee shall have the licensee’s license in immediate possession at all times when driving a motor vehicle and shall display it upon demand of any officer or agent of the department or any police officer of the state, county or municipality.

Tenn. Code Ann. § 55-50-803 (formerly Tenn. Code Ann. § 55-7-404). We concluded that the later statute, to the extent it conflicted with the earlier, controlled, and that the later statute, “requiring the motorist to display his or her license upon demand of any law enforcement officer, is a bar to a defense based on the language of § 55-7-109 (now § 55-50-351), under facts such as those involved here.” Hinkle, C.C.A. No. 80-89-III, slip op. at 4.

We reach the same result in this case. Without question, the Tennessee Highway Patrol had the authority to establish a roadblock to check for drivers' licenses. General Order 410 provides that city or county agencies may assist with such roadblocks. When they do assist, they are acting under the direct supervision and control of the Tennessee Highway Patrol and must follow the Highway Patrol guidelines. We see no difference between a Highway Patrol officer at such a roadblock asking

¹These statutes give the highway patrol the authority to stop motorists and ask for the driver’s license, without expressly limiting the authority to roadblock stops. To the extent that the statutes give the highway patrol the authority to randomly stop motorists to request exhibition of a license, they would be appear to be unconstitutional under Delaware v. Prouse, 440 U.S. 648, 663 (1979). However, the constitutionality of these statutes has not been challenged; thus we need not determine their scope or constitutionality at this time.

for motorists' drivers' licenses and a city or county police officer, acting under the control and supervision of the Highway Patrol, asking for the licenses. Here, the "stop" was made by the Tennessee Highway Patrol. Accordingly, we find that it was lawful for the Red Bank Police Department officer to request the Defendant's driver's license.

CONCLUSION

We conclude that the roadblock at which the Defendant was stopped was constitutional under the United States and Tennessee Constitutions and that the stop of the Defendant at the roadblock by a Red Bank Police Department officer was lawful. Therefore, the trial court erred in granting the Defendant's motion to suppress the evidence obtained at the roadblock. The decision of the trial court is reversed, and the case is remanded for further proceedings.