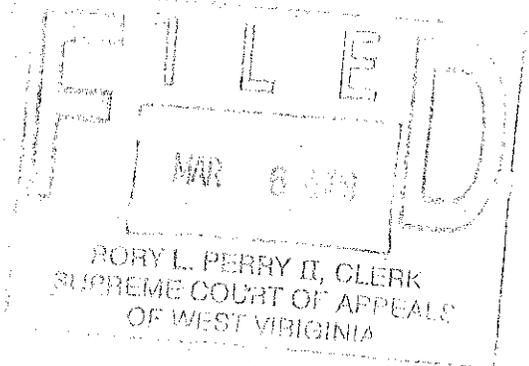


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON

**JOHN R. MULLENS, DEFENDANT BELOW,
APPELLANT**



VS:

APPEAL NO. 34584

**STATE OF WEST VIRGINIA, PLAINTIFF BELOW
APPELLEE**

AMENDED APPELLEE BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA

BRIAN D. PARSONS
Fayette County Assistant Prosecuting Attorney
108 East Maple Avenue
Fayetteville, WV 25840
(304) 574-4230
West Virginia State Bar No. 8105

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STATEMENT OF THE CASE

The appellant appeals the Finding of Fact and Conclusions of Law of the Fayette County Circuit Court which upheld a conviction of guilty for the crime of driving under the influence of alcohol as set forth in West Virginia Code Section 17C-5-2 by the Fayette County Magistrate Court as it pertains to the appellant's conduct on September 29, 2007.

ISSUE PRESENTED

Whether a safety checkpoint conducted by the police for the purpose of checking licensure, vehicle registration, and auto insurance is violative of the appellant's constitutional rights?

STATEMENT OF FACTS

At 4:00 p.m. on September 29, 2007, members of the Fayette County Sheriff's Department met for evening shift instructions. In response to a number of complaints received

by the public concerning individuals that were operating motor vehicles on Ames Heights Road, in Fayette County, the shift commander established a safety check point on the road in question that evening. When possible, due to answering calls, the deputies were to check for driver's licenses. On at least three occasions that evening before 10:00 p.m., the deputies were pulled off of the checkpoint to answer emergency calls. A few minutes past 10:00 p.m., the appellant was traveling east on Ames Heights Road, Fayette County, West Virginia, driving a 2003 Jeep Wrangler, silver in color. In front of a former convenient/grocery store located east of the split of Ames Heights Road, Possum Creek Road and Burma Road, and approximately one half mile from Class VI River Runners and Smokey's on the Gorge, two (2) deputies stood approximately in the middle of the roadway, each holding a flashlight. Seventy five (75) feet from the deputies, the appellant discerned the deputies were wearing police uniforms. A Fayette County Sheriff's Department cruiser was backed onto the eastern end of the former store's parking lot with no emergency blue lights in use. The deputies stood approximately fifty (50) feet apart and were dressed in uniforms. There were no signs, flairs or lights in use.

As the appellant approached, a deputy sheriff shone his flashlight into the windshield of the appellant's vehicle and held up his hand as an indication to stop. The appellant stopped his vehicle beside the deputy. The deputy requested to see the appellant's driver's license, vehicle registration, and proof of vehicle insurance. The appellant possessed and produced the three requested documents.

Upon observing the appellant retrieve the requested items, the deputy noticed a smell of alcohol in the car and coming from the appellant's person. The deputy asked the appellant to

pull his vehicle onto the parking lot of the aforementioned convenient/grocery store and exit his vehicle. The appellant was asked if he had been drinking. The appellant replied, "Not really." The deputy responded, "Either you have or haven't. Which is it? It doesn't really matter, I can smell alcohol. I'm going to do a sobriety test."

The appellant was given an opportunity to take the three regularly accepted, standardized field sobriety tests. The appellant failed all three. The appellant was thereafter placed under arrest for driving under the influence of alcohol.

CONCLUSIONS OF LAW

The sole issue presented in this case is whether the appellant's constitutional rights, as it pertains to the right to be free from unreasonable searches and seizures, has been infringed. This Court has addressed this issue in prior rulings and based on precedence, the seizure in question does not pose a violation of the appellant's constitutional protections.

The primary precedence on point is the case of State v. Davis, 195 W. Va. 79 (1995). In Davis, a motorist traveling to Marlinton, Pocahontas County was stopped at a safety checkpoint. As the motorist approached the roadblock, the car slowed suspiciously and upon speaking to the driver, police officers detected the odor of alcohol and a subsequent DUI investigation and conviction resulted. Id. at 81-82. The appellant in that matter argued that the roadblock was an unreasonable search and seizure, as prohibited by the 4th Amendment of the United States Constitution and Article III Section 6 of the West Virginia Constitution, and was in fact a

sobriety checkpoint, which must follow rules and procedures promulgated by the West Virginia Department of Public Safety guidelines and procedures.

The Court in Davis, citing State vs. Frisby, 161 W. Va. 734 (1978), stated, "While police officers may enforce the licensing and registration laws for drivers and motor vehicles respectively by routine checks of licenses and registrations, such checks must be done according to some non-discriminatory, random, pre-conceived plan such as established check points or examination of vehicles with particular number or letter configurations on a given day. . ." In short, the Court ruled that if a road block is established in a manner consistent with Frisby, it is not unconstitutional. Davis at 84.

In the instant case, it is established that the checkpoint in question was planned hours in advance of the traffic stop in question and was positioned in response to complaints about motorists operating vehicles without licenses and driving at excessive speeds. The checkpoint was not placed in an area intended to intimidate motorists and was uniformly conducted, that is all vehicles passing the checkpoint were stopped in a minimally intrusive manner. Upon stopping the appellant's vehicle, the officers detected the odor of an alcoholic beverage about the appellant's person which created probable cause to initiate an investigation for driving under the influence of alcohol ("DUI").

The authorities cited by the appellant previously authored by this Court are factually not on point and are thereby not persuasive authority. The Court in Carte v. Cline, 194 W.Va. 233 (1995) addresses a DUI checkpoint, not a safety checkpoint, as exists in this case. Even so, the Court, again relying on Frisby, found that such stops are constitutionally sound so long as they

are within the guidelines established by the Court in that decision and not random stops giving the police "unbridled discretion". Id. at 237. Furthermore the Court in Carte, citing the United States Supreme Court in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) adopted "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state programs." Id. at 455.

The appellant's citation of State v. Legg, 207 W.Va. 686 (2000) is off the mark. The Court in Legg dealt with the constitutionality of the Department of Natural Resources stopping random vehicles for the purpose of conducting a game-kill survey. There was no evidence in the Legg case that the officers had probable cause to stop the vehicle in question. The facts in this case bear little resemblance to the instant case, as the DNR officers were not randomly stopping vehicles, but rather targeted the defendant as part of a strategy to reduce illegal hunting.

CONCLUSION

Clearly the public has an interest and desire to see that all citizens who drive on the highways and back roads of our state are properly licensed and insured and in condition to arrive to each driver's destination safely. However, the motoring public has an interest in the right of privacy and the right each of us has to be free from unreasonable searches and seizures. The delicate balance between the two interests is the responsibility this Court owes to that public. In the case before this Court, the State's position is that the police officer's mode of operation on the night in question strikes the balance between the two important concepts in that the safety check in question was pre-planned, non-discriminatory in nature, equally applied and minimally

intrusive. Based thereon, the State respectfully requests this Court deny the relief sought and uphold the underlying conviction for driving under the influence of alcohol against the appellant.

STATE OF WEST VIRGINIA
By Counsel



BRIAN D. PARSONS
Assistant Prosecuting Attorney
108 East Maple Avenue
Fayetteville, WV 25840
West Virginia State Bar No. 8105

CERTIFICATE OF SERVICE

I, BRIAN D. PARSONS, Assistant Prosecuting Attorney for Fayette County, do hereby certify that service of the foregoing *AMENDED APPELLEE BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA* was made by mailing and/or hand-delivering true copies thereof to Mr. Jack Thompson, Attorney At Law, P. O. Box 85, Oak Hill, West Virginia 25901 by United States mail with postage prepaid, if mailed, on this 5th day of March, 2009.



BRIAN D. PARSONS