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IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS:

CIRCUIT COURT CASE NO. 08-M-AP-13  
(Magistrate Court Case No. 07-M-1756)  
Paul M. Blake, Jr., Judge

JOHN R. MULLENS

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ORDER

This matter is before the Court upon the defendant's proper appeal of a November 28, 2007 conviction for the offense of driving under the influence of alcohol. The State is represented by Brian D. Parsons, Assistant Prosecuting Attorney, and the defendant is represented by Jack Thompson, Esquire. At the status conference in this matter, both counsel announced that the facts of this case were agreed upon and agreed that each party would submit proposed conclusions of law based upon such appeal facts. The Court has now received such submission from both counsel. Based upon all of the foregoing, the Court finds as follows:

1. On Saturday evening September 29, 2007, a few minutes past 10:00 p.m., the defendant was traveling east on Ames Heights Road, Fayette County, West Virginia, driving a 2003 model Jeep Wrangler, silver in color.
2. In front of the 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 human figures stood in the approximate middle of the roadway, each holding a flashlight.
3. Within coming approximately 75 feet of the individuals, the defendant discerned the

individuals were wearing police uniforms. Such officers were part of a four-man unit assigned to such area.

4. A Fayette County Sheriff's Department cruiser was backed onto the eastern end of the former store's parking lot. Its official emergency blue lights were not in use, not flashing.
5. The two individuals stood approximately 50 feet apart and were dressed in light-weight, summer uniforms—absent were the bright orange, reflective safety vest that police officers commonly wear in traffic situations.
6. There were neither roadside flares nor other cautionary lights to indicate to passing motorists that anything was amiss and that, in fact, traffic was being stopped.
7. There was no roadside sandwich board indicating "Safety Check Point Ahead" or "Be Prepared to Stop."
8. As the defendant approached, the first individual (later to be identified as Deputy Sheriff Steven L. Yarber, Jr.) shone his flashlight into the windshield of the defendant's vehicle and held up his hand as an indication to stop.
9. The defendant stopped his vehicle beside Deputy Yarber.
10. Deputy Yarber stepped toward the defendant's vehicle and requested to see driver's license, vehicle registration, and proof of vehicle insurance.
11. As the defendant retrieved the registration and insurance cards from the glove compartment and his license from his wallet, Deputy Yarber physically pressed his torso against the driver's door of the vehicle. Deputy Yarber testified that he detected the odor of alcohol coming from the defendant's vehicle.

12. The defendant produced the three requested documents.
13. Deputy Yarber asked if the driver was the person identified in the license. The defendant replied, "Yes, sir, I am."
14. The vehicle's state inspection sticker, license plate decal, and registration card were all current and valid. There were no burnt-out headlights, taillights, or any other malfunctioning equipment on the vehicle.
15. Due to the smell of alcohol coming from defendant or his vehicle, Deputy Yarber asked the defendant to pull his vehicle onto the parking lot of the defunct convenient/grocery store.
16. The defendant drove off the roadway and onto the parking lot.
17. Deputy Yarber walked to the vehicle and asked the defendant to exit his vehicle, and the defendant complied.
18. Deputy Yarber asked the defendant if he had been drinking. The defendant replied, "Not really." Deputy Yarber 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."
19. The second individual (later identified as Deputy Sheriff Patrick Jeb McCutcheon) walked from the road onto the parking lot and joined the defendant and Deputy Yarber after the defendant had exited the vehicle.
20. Deputies testified in Magistrate Court that they met at 4:00 p.m., at the beginning of their shift of work, at the Fayette County Field Office and decided to conduct the traffic check that evening, September 29, 2007. Such operation began at approximately 5:00 p.m. The operation, designated by the officers as an

administrative road check, was discussed with and approved by Cpl. S. L. Campbell, Shift Supervisor.

21. Both Deputies testified that the alleged "administrative road check" disbanded and resumed "several " times throughout the evening as they were dispatched by 911 to handle emergency calls.
22. From approximately 10:10 p.m. to 10:45 p.m., from the time of initial contact with the defendant through the arrival of City Wrecker Service, three vehicles drove past the alleged "administrative road check,"-- two vehicles traveling east to west, and one vehicle traveling west to east.
23. The Fayette County Sheriff's Department has a detailed, written policy on sobriety checkpoint stops. There is no written policy on "Administration Safety Road Checks."

### CONCLUSIONS OF LAW

The sole issue presented in this case is whether or not the Petitioner's Constitutional rights as it pertains to the right to be free from unreasonable searches and seizures. More precisely, the Petitioner's intoxication while operating a motor vehicle is an inquiry this Court need not address if the law dictates that the seizure in question violates the Petitioner's rights. However, our Supreme Court has addressed this issue in prior rulings and based on precedence, the seizure in question does not pose a violation of the Petitioner'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. Davis at 81-82. The appellant in that matter argued that the roadblock was an unreasonable search and seizure, as prohibited by the 4<sup>th</sup> Amendment of the U. S. Constitution and Article III Sec. 6 of the W. Va. Const., 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 located as part of a pre-planned, pre-conceived response to local resident's complaints about excessive speed and motorists driving without operators licenses. 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 Petitioner's vehicle, the officers detected the odor of an alcoholic beverage about the Petitioner's person which created probable cause to initiate a DUI investigation.

**CONCLUSION**

Based on the foregoing statements of law and argument, the appellant has provided the Court with no legal basis or error that mandates the relief requested. Therefore, the defendant's appeal is DENIED, and the judgment entered in this matter is affirmed. The defendant's objections and exceptions are preserved.

The Clerk of this Court is directed to forward attested copies of this order to all counsel of record and to the Fayette County Magistrate Court Clerk.

ENTERED this 26<sup>th</sup> day of February, 2008.

**PAUL M. BLAKE, JR.  
JUDGE**

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PAUL M. BLAKE, JR., JUDGE

A TRUE COPY of an order entered  
February 27, 2008  
Teste: Daniel S. Wright  
Circuit Clerk Fayette County WV