SC90978

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI

Respondent,

vs.

JACOB WALDRUP, JR.

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court Of Clay County, Missouri
Seventh Judicial Circuit, Division 5
The Honorable David Chamberlain, Associate Circuit Judge

APPELLANT'S SUBTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On September 9, 2008, a jury found Appellant Jacob Waldrup, Jr., guilty of one count of Possession of a Controlled Substance in violation of § 195.202 RSMo[1]. On November 6, 2008, the Honorable David P. Chamberlain entered judgment on the verdict and sentenced Mr. Waldrup as a prior and persistent offender to 12 years' imprisonment in the Missouri Department of Corrections. Judge Chamberlain granted Mr. Waldrup's motion to perfect his appeal as a poor person and Mr. Waldrup timely filed his Notice of Appeal on November 12, 2008.

On April 27, 2010, in case number WD70318, the Missouri Court of Appeals, Western District, reversed Mr. Waldrup's conviction. The Western District modified its opinion on its own motion on June 1, 2010. On August 31, 2010, this Court accepted transfer. Therefore, the Court has jurisdiction of this appeal. Mo. Const. Art. V, § 10; Rule 83.04.

[1] All statutory citations are to Missouri Revised Statutes 2000 unless otherwise indicated.

STATEMENT OF FACTS

This is Mr. Waldrup's direct appeal following his conviction after a jury trial for one count of possession of a controlled substance in violation of § 195.202 RSMo. (L.F. 7, 80[2]). Mr. Waldrup was charged with possession of crack cocaine following the stop of a vehicle in which he was a passenger at a "driver's license checkpoint." (Tr. 12, 15, 19, 20; L.F. 7).

Mr. Waldrup filed a motion to suppress the physical items seized from him during the checkpoint stop and any testimony regarding such evidence[3]. (L.F. 21-26). Prior to trial, the court held a hearing on Mr. Waldrup's Motions to Suppress, which it ultimately denied. (Tr. 11, 88).

At the suppression hearing, Missouri State Highway Patrol (MSHP) Trooper Seth Isringhausen testified that on November 9, 2006, he was present at a driver's license spot-check that had been setup on a north-bound exit ramp from Interstate 35 to Parvin Road. (Tr. 12). Several state troopers and Kansas City police officers were also there. (Tr. 33). Marked police vehicles were present, but their

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[2] The Record on Appeal is cited as "L.F.," for legal file, and "Tr.," for trial and sentencing transcript.

[3] Mr. Waldrup filed two additional motions to suppress alleging violations of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966). (L.F. 27-30, 31-33).

emergency flashing lights were not activated. (Tr. 34). Trooper Isringhausen and Trooper Primm, who was working with him, were both in uniform. (Tr. 34).

Trooper Isringhausen testified that:

> The purpose of the driver's license checkpoint, there are several, but basically you pick areas and we target unlicensed drivers and people with no insurance, people with criminal activity and areas that can create high accidents, high incidents for crime and citizen complaints, things like that.

(Tr. 28). The procedures for the driver's license checkpoint were determined by MSHP Order 64-02-0958, an MSHP policy that covers checkpoints, spot checks and roadblocks, and "comes from the very top." (Tr. 28-30, Ex. 1, 2[4]). There is also a "county level" policy which establishes the exact locations in which the enforcement checkpoints will conducted. (Tr. 31-32). The order contains general policy and procedure and the county level policy is specific about the exact locations of available checkpoints for a county, and what the troopers can and cannot do. (Tr. 30, 31). However, both the MSHP General Order and the policy for Clay County are silent on whether (or in what circumstances) an officer can

[4] The MSHP general order and the policy for Clay County were admitted as Exhibits 1 and 2 at the Suppression hearing. Undersigned counsel requested that the State file these exhibits with the Court pursuant to Rule 81.12(e).

"run" a computer check of the license of any driver, or just visually inspect the driver's license without "running" it through the database. (Ex. 1, 2).

The MSHP order provides that "Officers may establish enforcement checkpoints to:

a. reduce property damage, injuries, and deaths caused by unqualified or unsafe drivers and defective equipment on motor vehicles.

b. combat other violations of law which have a significant adverse effect on the health or safety of the traveling public."

(Ex. 1, 2). The order specifically prohibits drug interdiction checkpoints, "pursuant to the United States Supreme Court decision in Indianapolis v. Edmund." (Ex. 1).

The location of I-35 and Parvin Road is indicated as an approved location for a driver's license checkpoint for Clay County in the MSHP's policy. (Tr. 31). That location is used so much that the public, or "the locals" are aware of what is going on during a checkpoint. (Tr. 35-36). When officers conduct a checkpoint at this location, they check every car that comes through either direction. (Tr. 213). Normally, the officers check the license of only the driver, though they check passenger's licenses "if the situation calls for it." (Tr. 36). The officers will usually look at their driver's licenses, "talk to them for just a moment and send them on their way." (Tr. 36).

At the checkpoint set up on November 9, 2006, at 3:30. p.m., Trooper Isringhausen's "attention [was] drawn," to a 1988 Blue Chevy Camaro about 50 to 100 feet away while he was operating the driver's license checkpoint because the passenger was reaching for something or stuffing something down around his feet. (Tr. 12-13, 38). The trooper had a clear line of sight to the vehicle. (Tr. 38). Trooper Isringhausen believed "that is not normal." (Tr. 13).

As the blue Camaro moved up in line at the checkpoint, Trooper Isringhausen spoke to another MSHP trooper, Trooper Primm. (Tr. 14). Both officers were out of their vehicles and were on foot. (Tr. 38). Trooper Primm had seen the same thing and Trooper Isringhausen told him, "We need to check this vehicle and make sure that he doesn't have a weapon or means to hurt somebody." (Tr. 14, 39). There is a stop sign at the end of the exit ramp, so cars "are going to have to stop anyway." (Tr. 15).

When the Camaro reached the officers in the line of cars, Trooper Isringhausen approached the driver of the vehicle, Gerald L. Shields, who produced a Kansas driver's license. (Tr. 15, 39). "At that point," Trooper Isringhausen, "ran standard checks on his driver's license, which came back that he

was suspended[5]." (Tr. 16). Trooper Isringhausen testified that it was standard procedure when officers discover a driver with a suspended license at a driver's license spot-check to issue the driver a citation and park the car nearby so that officers do not have to tow it. (Tr. 16). The driver usually then calls someone for a ride. (Tr. 16).

Trooper Isringhausen issued Mr. Shields a citation. (Tr. 16, 17). He was not placed in restraints. (Tr. 18). The car was left at the scene. (Tr. 52).

At the same time Trooper Isringhausen checked Mr. Shields' license and issued him a citation, Trooper Primm approached the passenger side and had the front-seat passenger, Mr. Waldrup, get out of the car. (Tr. 16-17, 39). Trooper Isringhausen's sergeant was also assisting with the stop. (Tr. 33). The purpose of having Mr. Waldrup step out of the car was to check for weapons. (Tr. 37). Trooper Primm then conducted a "Terry frisk for weapons just to make sure that whatever was going on in the vehicle, whatever he was reaching for or stuffing or hiding wasn't, in fact, a weapon." (Tr. 17). He did not find any weapons after searching Mr. Waldrup. (Tr. 40). After completing his check of the driver and

[5] Trooper Isringhausen did not explain why he chose to "run" a computer check on Mr. Shields' driver's license, given that the officers usually look at the driver's license, "talk to them for just a moment and send them on their way." (Tr. 36, 319).

issuing him a citation, Trooper Isringhausen then "took over" from Trooper Primm and began to check Mr. Waldrup's information. (Tr. 18, 217). Mr. Waldrup did not have identification with him but he verbally gave Trooper Primm identifying information that the trooper wrote down, including his name, birth date and social security number. (Tr. 18, 59). Trooper Isringhausen then conducted a radio check of the information provided by Mr. Waldrup, which revealed that he had outstanding warrants. (Tr. 18).

Trooper Isringhausen testified that "at that point," he made the decision to arrest Mr. Waldrup, and he was not free to go. (Tr. 40, 45). He placed Mr. Waldrup under arrest, handcuffed him, and searched him. (Tr. 19). During the search, Trooper Isringhausen found a white rock in Mr. Waldrup's shoe underneath the shoe cushion that appeared to be a controlled substance. (Tr. 20, 42).

Trooper Isringhausen also testified during the trial. (Tr. 211). He said that he turned his attention to Mr. Waldrup and ran a radio check of his identifying information after he had already issued a citation to Mr. Shield. (Tr. 217). He also clarified that when he first saw whom he later identified as Mr. Waldrup, he saw him "lean forward," but he didn't know what Mr. Waldrup was doing when he leaned forward. (Tr. 234).

At trial, Trooper Isringhausen also further detailed his interactions with drivers at a "driver's license checkpoint:"

> Most individuals that come through the checkpoint, we may have a 15 second conversation. Hi, my name is Trooper Isringhausen with the Highway Patrol. We're doing a driver's license checkpoint to make sure everyone's being safe and having a driver's license. Do you have your license on you? Yes, sir, I do. They show it to you. All right, sir, have a nice day. That's what the usual contact would be like.

(Tr. 247).

Trial counsel objected at trial to any testimony from Trooper Isringhausen that he found contraband while searching Mr. Waldrup, and objected to introduction of the apparent crack cocaine rock into evidence. (Tr. 219-220, 222, 226-227). The trial court overruled the objections. (Tr. 220, 223, 228).

Trooper Gregory Primm also testified at the suppression hearing and at trial. (Tr. 55, 252). At the suppression hearing, he said that he first saw the vehicle in which Mr. Waldrup was riding as a passenger at about 3:30 to 4:00 p.m. (Tr. 56). The vehicle was about 50 yards from his location. (Tr. 66). No other officers were between the car and him at that time. (Tr. 66). His attention was drawn to Mr. Waldrup because:

> As the vehicle approached our location for the checkpoint, we saw the defendant look at us, his eyes opened wide, his mouth kind of hung open as if he was surprised with our presence and concerned with our

> presence, which is not a reaction that is typical of the innocent motoring public that I come in contact with. After that, he went down into the floorboard, and that was also a movement that is not consistent with the innocent motoring public that I come in contact with.

(Tr. 57). "From an officer's safety standpoint," he was concerned that he could either be trying to retrieve or conceal a weapon or conceal something he did not want law enforcement to be aware of. (Tr. 57).

Trooper Primm immediately notified Trooper Isringhausen, advised him of what he had seen, and told him to be on the alert, because "that was not normal." (Tr. 58). Trooper Isringhausen contacted the driver, and Trooper Primm contacted Mr. Waldrup, who was in the front passenger seat. (Tr. 57, 58). He asked him to step out of the vehicle, then he conducted a "Terry frisk," pat-down search to ensure that Mr. Waldrup did not have any weapons. (Tr. 59).

As he was conducting the pat-down search he was explaining to Mr. Waldrup what he was doing and why he was doing the search. (Tr. 40, 59). He was asking Mr. Waldrup questions about who he was, if he knew the driver, and "questions of that nature." (Tr. 59). After the pat-down of Mr. Waldrup, when no weapons had been found, he then asked for Mr. Waldrup's name, date of birth and social security number, and wrote that information down. (Tr. 59). However, he

did not run a radio computer check of his information at that time. (Tr. 59-60, 67). Trooper Primm then stayed with Mr. Waldrup outside of the vehicle because he "wasn't certain at that point that he was no longer a threat to his safety or our own. So I remained with him outside of the vehicle and spoke with him." (Tr. 60).

Trooper Primm gave Trooper Isringhausen Mr. Waldrup's name, date of birth and social security number, and Mr. Waldrup was arrested "within a ten minute time frame." (Tr. 59-60, 61, 67). Trooper Primm testified that once the officers learned that Mr. Waldrup had outstanding warrants, he was not free to leave. (Tr. 64). The vehicle was searched after Mr. Waldrup was arrested for the warrants and after Mr. Waldrup had personally been searched. (Tr. 65).

Trooper Primm also testified at trial. (Tr. 252). He confirmed that at a driver's license checkpoint, he introduces himself, asks the driver for his or her driver's license, and then releases the driver when he or she provides the license. (Tr. 254). The purpose of the checkpoint is to "ensure that [drivers] are qualified to be driving on the highways." (Tr. 254). Trooper Primm testified that once the car in which Mr. Waldrup was a passenger had been stopped, "Trooper Isringhausen made contact with driver, I made with the passenger. I asked him to exit the vehicle, I wanted to pat him down for weapons." (Tr. 259).

Trial counsel also objected at trial to any testimony from Trooper Primm that he discovered what he considered to be crack cocaine. (Tr. 262-263). The court denied the objection, but granted a continuing objection. (Tr. 263).

At trial, MSHP criminalist James Burgio testified that he received the purported crack cocaine seized from Mr. Waldrup in a sealed container several months after it was recovered. (Tr. 281, 292). He tested a small portion of the substance and determined that it contained cocaine base. (Tr. 286). Trial counsel objected to any testimony from Mr. Burgio's regarding the crack cocaine, and asked for a continuing objection. (Tr. 283). The court denied the objection but granted counsel's request for a continuing objection. (Tr. 283). The purported crack cocaine was admitted into evidence. (Tr. 225-227).

Mr. Waldrup testified at trial. (Tr. 312). He stated that in November of 2006, he was living in Lawrence, Kansas. (Tr. 313). He met Mr. Shields when he moved to Lawrence in 1998 or 1999. (Tr. 313). On November 9, 2009, Mr. Waldrup paid Mr. Shields to give him a ride from Lawrence to I-35 and Parvin Road, where Mr. Waldrup was to meet a friend. (Tr. 313-314).

Prior to being stopped by the police on the Parvin Road exit from I-35, Mr. Waldrup had been sleeping. (Tr. 314). Mr. Shields woke him up and alerted him to the fact that police officers were there. (Tr. 327). When he awoke, he grabbed his right shoe from the console of the car and started to put it on. (Tr. 316). He did

not have on his right shoe because he had fractures in his foot as a result of an accident in 2006, and it was uncomfortable to wear a shoe. (Tr. 317).

An officer knocked on his car window; another officer was already talking to Mr. Shields. (Tr. 317). The officer asked him to step out of the car, told him he had to search him, and escorted him to the back of a patrol car. (Tr. 318). Trooper Primm asked him for his identification information, which he provided. (Tr. 319). The officers radioed in his information and determined that he had outstanding warrants. (Tr. 319-320). Mr. Waldrup did not know that he had warrants. (Tr. 320). After Trooper Isringhausen found the rock in his shoe, he asked Mr. Waldrup what he had to say about it, and he replied, "Nothing." (Tr. 320-321).

The jury found Mr. Waldrup guilty of one count of Possession of a Controlled Substance. (L.F. 58). In Mr. Waldrup's motion for new trial, trial counsel raised as allegations of error the trial court's denial of Mr. Waldrup's motions to suppress, the admission of the crack cocaine into evidence, and its rulings on her objections to the testimony and physical evidence regarding the crack cocaine. (L.F. 63-70). The court denied the motion. (Tr. 374).

On November 6, 2008, following a sentencing hearing, the Honorable David P. Chamberlain entered judgment on the verdict and sentenced Mr. Waldrup as a prior and persistent offender to 12 years' imprisonment in the Missouri Department of Corrections. Judge Chamberlain granted Mr. Waldrup's motion to perfect his

appeal as a poor person and Mr. Waldrup timely filed his Notice of Appeal on November 12, 2008.

Mr. Waldrup first appealed to the Western District Court of Appeals, which reversed Mr. Waldrup's conviction and remanded the case to the circuit court for further proceedings. Respondent ultimately moved for transfer to this Court, and the Court sustained the motion on August 31, 2010. This appeal follows.

POINT ON APPEAL

THE TRIAL COURT CLEARLY ERRED AND ABUSED ITS DISCRETION IN OVERRULING MR. WALDRUP'S MOTION TO SUPPRESS AND IN OVERRULING HIS OBJECTIONS AT TRIAL TO A) THE ADMISSION INTO EVIDENCE OF STATE'S EXHIBITS 2 AND 3, AN EVIDENCE BAG AND CRACK COCAINE; AND B) THE TESTIMONY OF TROOPER ISRINGHAUSEN, TROOPER PRIMM AND CRIMINALIST JAMES BURGIO REGARDING THE DISCOVERY, SEIZURE AND TESTING OF THE CRACK COCAINE, BECAUSE THIS EVIDENCE WAS OBTAINED AS THE RESULT OF MR. WALDRUP'S UNLAWFUL SEIZURE, IN VIOLATION OF MR. WALDRUP'S RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 15 OF THE MISSOURI CONSTITUTION, IN THAT ONCE TROOPER ISRINGHAUSEN ISSUED A TICKET TO THE DRIVER AND RELEASED HIM, THE PURPOSE OF THE CHECKPOINT STOP HAD BEEN FULLY EFFECTUATED, AND MR. WALDRUP'S CONTINUED DETENTION AND THE SUBSEQUENT COMPUTER CHECK OF HIS IDENTIFICATION WERE NOT JUSTIFIED BY CONSENT, PROBABLE CAUSE, OR CONCERNS FOR OFFICER SAFETY.

City of Indianapolis v. Edmond, 531 U.S. 32 (U.S. 2000);

State v. Maginnis, 150 S.W.3d 117 (Mo. App. W.D. 2004)

Florida v. Bostick, 501 U.S. 429 (1991);

Terry v. Ohio, 392 U.S. 1 (1968);

U.S. Const., Amend. IV, V and XIV; and

Mo. Const. Art. I, §§ 10, 15.

ARGUMENT ON APPEAL

THE TRIAL COURT CLEARLY ERRED AND ABUSED ITS DISCRETION IN OVERRULING MR. WALDRUP'S MOTION TO SUPPRESS AND IN OVERRULING HIS OBJECTIONS AT TRIAL TO A) THE ADMISSION INTO EVIDENCE OF STATE'S EXHIBITS 2 AND 3, AN EVIDENCE BAG AND CRACK COCAINE; AND B) THE TESTIMONY OF TROOPER ISRINGHAUSEN, TROOPER PRIMM AND CRIMINALIST JAMES BURGIO REGARDING THE DISCOVERY, SEIZURE AND TESTING OF THE CRACK COCAINE, BECAUSE THIS EVIDENCE WAS OBTAINED AS THE RESULT OF MR. WALDRUP'S UNLAWFUL SEIZURE, IN VIOLATION OF MR. WALDRUP'S RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 15 OF THE MISSOURI CONSTITUTION, IN THAT ONCE TROOPER ISRINGHAUSEN ISSUED A TICKET TO THE DRIVER AND RELEASED HIM, THE PURPOSE OF THE CHECKPOINT STOP HAD BEEN FULLY EFFECTUATED, AND MR. WALDRUP'S CONTINUED DETENTION AND THE SUBSEQUENT COMPUTER CHECK OF HIS IDENTIFICATION WERE NOT JUSTIFIED BY CONSENT, PROBABLE CAUSE, OR CONCERNS FOR OFFICER SAFETY.

Standard of Review

At a hearing on a motion to suppress and ultimately at trial, the State has the burden to justify a warrantless search and seizure. ***State v. Deck***, 994 S.W.2d 527, 534 (Mo. 1999) (citing ***State v. Villa-Perez***, 835 S.W.2d 897, 902 (Mo. banc 1992)). In reviewing the trial court's ruling on the matter, this Court considers the record made at the suppression hearing as well as the evidence introduced at trial. ***Id.*** at 534 (internal citations omitted).

In reviewing a trial court's ruling on a motion to suppress, there must be "substantial evidence" to support the ruling. ***State v. Gaw,*** 285 S.W.3d 318, 319-320 (Mo. banc 2009) (quoting ***State v. Rousan***, 961 S.W.2d 831, 845 (Mo. banc 1998)). The facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded. ***Id.*** (internal citations omitted). Deference is given to the trial court's superior opportunity to determine the credibility of witnesses. ***Id.*** (quoting ***Rousan***, 961 S.W.2d at 845). However, while this Court gives deference to the trial court's factual findings, it reviews questions of law ***de novo***. ***Id.*** Whether the Fourth Amendment has been violated is an issue of law that this Court reviews ***de novo***. ***State v. Brand***, 309 S.W.3d 887, 892 (Mo. App. W.D. 2010).

Discussion

Because checkpoint traffic stops are by definition random and do not require officers to have even the reasonable suspicion of a ***Terry***[6] stop, this Court should strictly scrutinize any stop that goes beyond the stated purpose of a given roadblock: in this case, ostensibly checking a ***driver*** for a valid driver's license. Here, even if the officers were entitled to conduct a brief pat-down search for weapons when they saw the passenger, Mr. Waldrup, lean forward, the officers were not justified in further detaining him and running a check of his identification once no weapons were found and once the driver had been issued a citation for a suspended license and released. Since the crack cocaine and related trial testimony were obtained as a result of Mr. Waldrup's illegal seizure, the trial court erred in denying the motion to suppress this evidence and in admitting it over objection at trial.

No right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. ***Terry v. Ohio,*** 392 U.S. 1, 8-9 (1968) (internal

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[6] ***Terry v. Ohio***, 392 U.S. 1 (1968).

quotation omitted). Thus, the Fourth Amendment[7] requires that searches and seizures be reasonable. ***City of Indianapolis v. Edmond***, 531 U.S. 32, 37 (U.S. 2000).

Ordinarily, a search or seizure is unreasonable in the absence of individualized suspicion of wrongdoing. ***Id***. (citing ***Chandler v. Miller***, 520 U.S. 305, 308, (1997)). However, traffic checkpoint stops are a limited exception to the general rule that a seizure must be accompanied by some measure of individualized suspicion. ***Id.*** at 41. Nevertheless, it is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. ***Id***. (citing ***Michigan Dept. of State Police v. Sitz***, 496 U.S. 444, 450 (1990)).

The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. ***Id***. at 49 (Rehnquist, J. dissenting) (citing ***United States v. Martinez-Fuerte***, 428 U.S. 543, 566-567 (1976)). Roadblock seizures are consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of

[7] Missouri's constitutional protections against unreasonable search and seizure (Art. 1, § 15) are coextensive with those of the Fourth Amendment. ***State v. Rushing***, 935 S.W.2d 30, 34 (Mo. banc 1996).

individual officers." ***Id***. (quoting ***Brown v. Texas***, 443 U.S. 47, 51, (1979)). Any further detention must be based on consent or probable cause. ***Id.*** (quoting ***United States v. Brignoni-Ponce,*** 422 U.S. 873, 882 (1975)).

The primary purposes of the checkpoint stop in this case were complete once Trooper Isringhausen wrote the driver a ticket and released him. Any further detention of Mr. Waldrup after that was in violation of his Constitutional rights against unreasonable searches and seizures, because the officer's concerns for safety had been dispelled, the contact was not consensual, and the officers lacked probable cause or even a reasonable, particularized suspicion based on articulable facts that Mr. Waldrup had committed or was committing a crime, as follows:

Purpose of Stop Was Effectuated When Driver Was Given Citation

Mr. Waldrup's continued detention after Mr. Shields was written a ticket was not justified because roadblock seizures are consistent with the Fourth Amendment only if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." ***Edmond***, 531 U.S.at 49 (Rehnquist, J. dissenting) (quoting ***Brown v. Texas***, 443 U.S. 47, 51, (1979)); ***see***

also, ***Delaware v. Prouse***, 440 U.S. 648, 663 (1979)[8] (roadblock stops of all vehicles to check for valid license may be Constitutionally-permissible, provided drivers' travel and privacy are not subject to "the unbridled discretion of police officers").

To meet Constitutional standards, there are even more stringent requirements for a roadblock or checkpoint than for a ***Terry*** stop; for example, the vehicles must be stopped on some random basis and not in a selective manner:

> The purpose of having a prescribed procedure as to which cars will be stopped is to prevent selective stopping at the roadblock on a

[8] Citing ***Prouse, Martinez-Fuerte,*** *and* ***Brown v. Texas***, ***supra***, the District of Columbia Circuit, for example, has held that three factors must be present for license-and-registration checkpoints to pass constitutional scrutiny: First, the principal purpose of such checkpoints must be vehicular regulation. Second, the checkpoints must serve to promote that purpose in a sufficiently productive fashion. Third, the checkpoints must be minimally intrusive: (1) they must be clearly visible; (2) they must be part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) they must detain drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity. ***United States v. Bowman***, 496 F.3d 685, 692 (D.C. Cir. 2007).

> discretionary basis. Such selective stopping implicates the possibility that the roadblock will be utilized to target certain drivers for no other reason than some common characteristic unrelated to the possibility of intoxication, such as age, race or condition of the vehicle. Such selectivity would have Fourth Amendment implications.

State v. Payne, 759 S.W.2d 252, 253 (Mo. App. E.D. 1988) (addressing sobriety checkpoints); ***see also***, ***State v. Welch***, 755 S.W.2d 624 (Mo. App. W.D. 1988); ***State v. Vanacker***, 759 S.W.2d 391 (Mo. App. S.D. 1988); ***Edmond, supra***. Similarly, the purpose of the checkpoint must be narrowly drawn and the primary purpose of the checkpoint must be distinct from the government's "ordinary enterprise of investigating crimes." ***Edmond, supra*** at 44.

And even after a ***Terry*** stop, Missouri law allows only limited questioning by an officer during a traffic stop. ***State v Maginnis***, 150 S.W.3d 117, 120 -121 (Mo. App. W.D. 2004). The officer may ask questions ***beyond the scope of the stop*** only if there is an objectively reasonable suspicion that the individual is involved in criminal activity. ***Id.*** (citing ***State v. Slavin***, 944 S.W.2d 314, 318 (Mo. App. W.D. 1997); ***State v. Bradshaw***, 99 S.W.3d 73, 77 (Mo. App. E.D. 2003)).

In this case, the scope of the stop went beyond even the stated purpose of the checkpoint, let alone a reasonable and articulable suspicion of criminal activity

justifying a ***Terry*** stop. As Trooper Isringhausen testified to, the officers do not normally even run a check of the driver's license:

> Most individuals that come through the checkpoint, we may have a 15 second conversation. Hi, my name is Trooper Isringhausen with the Highway Patrol. We're doing a driver's license checkpoint to make sure everyone's being safe and having a driver's license. Do you have your license on you? Yes, sir, I do. They show it to you. All right, sir, have a nice day. That's what the usual contact would be like.

(Tr. 247). However, obviously Mr. Shields received differential treatment from the "usual contact," because after Mr. Shields produced his driver's license, Trooper Isringhausen promptly chose to radio and check it, instead of releasing him and telling him to "have a nice day." (Tr. 15-18). The lack of guidelines in the MSHP order and county policy improperly allowed gave the troopers "unbridled discretion" to decide when and if to run a computer check of a driver's license. ***See***, ***Prouse, supra*** at 661 ("standardless and unconstrained" spot check of motorist's driver's license is unconstitutional) (Ex. 1, 2).

Moreover, Trooper Primm continued to question Mr. Waldrup, asking him questions about who he was, if he knew the driver, and "questions of that nature." (Tr. 59). Such questions were unrelated to the ostensible purpose of the stop: to check the driver for a valid driver's license. (Tr. 28). That during the "usual

contact," officers would not do a computer check of the license, but the troopers chose to do so once they saw Mr. Waldrup lean forward suggests that the roadblock was a ruse and pretext for discovery evidence of drugs or other illegal activity, and not for the stated purpose of determining whether drivers had a valid license. ***See***, ***State v. David***, 13 S.W.3d 308, 312 (Mo. App. W.D. 2000) (arrest may not be used as a pretext to search for evidence); ***King v. State***, 839 S.W.2d 709, 713 (Mo. App. W.D. 1992); ***cf., Edmond, supra*** at (primary purpose of checkpoint cannot be discovery and interdiction of illegal narcotics).

Here, not only did the troopers treat the stop of Mr. Shields' vehicle selectively by choosing to do a radio check of Mr. Shields' license, they continued to detain Mr. Waldrup without any reason related to the purpose of the stop, once its stated purpose was effectuated and Mr. Shields was issued a citation and released. ***See, Maginnis, supra***. Trooper Isringhausen testified at trial that he turned his attention to Mr. Waldrup only after he had already determined the driver, Mr. Shields, did not have a valid license and after he had issued Mr. Shields a citation. (Tr. 217). Mr. Shields was not further detained or taken into custody. (Tr. 17). At that point, the stated purpose for the roadblock was effectuated and Mr. Waldrup should have been released.

Continued Detention of Mr. Waldrup Was Not Justified by Officer Safety Concerns

The stop of Mr. Shields' vehicle in this case was not a ***Terry*** stop. In ***Terry***, the United States Supreme Court held that a brief investigative stop may be conducted where an officer has a "reasonable suspicion" based on "specific and articulable facts" that illegal activity has occurred or is occurring. ***State v. Pike***, 162 S.W.3d 464, 472 (Mo. banc 2005) (quoting ***Terry***, 392 U.S. 1). But the stop of Mr. Shields' vehicle in this case was not because of the officers' reasonable suspicion based on "specific and articulable facts" that illegal activity had occurred or was occurring. The officers stopped the car because of the driver's license checkpoint. (Tr. 12, 14, 57). They were stopping ***every*** car that came off of the freeway ramp. (Tr. 14, 213). Only after Mr. Shields' car came off the freeway onto the exit ramp and was in line for the checkpoint did the officers notice Mr. Waldrup reach toward the floorboard; the decision to stop the vehicle had already occurred because the checkpoint had already been set up at that exit ramp. (Tr. 14, 57).

As the vehicle approached the checkpoint, when Mr. Waldrup reached forward, neither officer had a reasonable suspicion, based on specific and articulable facts, that illegal activity had occurred or was occurring; they were concerned about officer safety. (Tr. 14, 37, 39, 52-53, 57, 58-59, 60, 257-258).

Accordingly they decided to conduct – and did conduct -- a brief, ***Terry***-type pat-down for weapons. (Tr. 17, 237).

While it does not appear that the United States Supreme Court or this Court has directly addressed whether officers may conduct a ***Terry***-type pat-down search for weapons during a traffic checkpoint stop, it is reasonable to conclude that the scope of such a search for weapons, if permissible, would be at least as restrictive as a ***Terry*** frisk, since a traffic checkpoint stop is not even based on an individualized suspicion of wrongdoing. And precisely because a ***Terry*** stop has a limited scope, the police have a correspondingly limited authority to conduct searches during such a stop. ***State v. Courtney***, 102 S.W.3d 81, 87 (Mo. App. W.D. 2003) (internal citation omitted). Accordingly, they may not search beyond what is necessary to protect themselves from harm. ***Id.***

Once a valid ***Terry*** stop has been made, police may pat a suspect's outer clothing if they have a reasonable, particularized suspicion that the suspect is armed. ***Id.*** The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. ***Id.*** (quoting, ***Adams v. Williams***, 407 U.S. 143, 146 (1972)).

Here, when Trooper Isringhausen had written the driver, Mr. Shields, a citation for suspended license and released him, Mr. Waldrup was out of the vehicle. (Tr. 59). Trooper Primm had already conducted a "Terry frisk," and had

determined that he did not have a weapon. (Tr. 59). At this point, the troopers had no valid reason to believe Mr. Waldrup was armed, because he had already been frisked. Therefore, Mr. Waldrup's continued seizure beyond the scope of the checkpoint was not justified on the basis of officer safety concerns.

Mr. Waldrup's Continued Detention Was Not Consensual or Based on Probable Cause

Finally, the continued detention of Mr. Waldrup by Troopers Primm and Isringhausen beyond the scope of the purpose of the checkpoint was not justified as a consensual encounter, or because the officers developed probable cause or even reasonable suspicion to believe Mr. Waldrup had committed a crime. Therefore, once they wrote Mr. Shields a ticket and released him, and determined that Mr. Waldrup was unarmed, their continued physical restraint of him, request for identification, and computer check of that information were in violation of his Constitutional rights against unreasonable searches and seizures.

Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual and ask to examine the individual's identification-- ***as long as the police do not convey a message that compliance with their requests is required***. ***Florida v. Bostick***, 501 U.S. 429, 434-435 (1991) (emphasis added); ***State v. Dixon***, 218 S.W.3d 14, 19 (Mo. App. W.D. 2007). Moreover, an officer may not arrest a suspect for failure to identify himself if the

request for identification is not reasonably related to the circumstances justifying the stop. ***Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County***, 542 U.S. 177, 188 (2004) (holding under Nevada statute, police may require a suspect's name only, if reasonably related to the purposes of a ***Terry*** stop[9]). The Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. ***Id***. at 187. As a result, the Fourth Amendment itself cannot require a suspect to answer questions. ***Id***. Americans are not required to justify maintaining their privacy; the government is required to justify its invasion.

Consensual encounters between police and citizens do not implicate the Fourth Amendment unless and until the officer, by physical force or show of authority, restrains the person's liberty so that a reasonable person would not feel free to decline the officer's requests or terminate the encounter. ***United States v. Mendenhall***, 446 U.S. 544, 553 (1980); ***Terry***, 392 U.S. at 20 n. 16. If and when that happens, the person is "seized," and the encounter moves into the second category of an investigatory detention or "***Terry*** stop." ***Id***.

Under the Fourth Amendment, a ***Terry*** stop requires the police officer to have reasonable, articulable suspicion that criminal activity is afoot. ***United States***

[9] ***Hiibel*** expressly left open the possibility that requiring identification, in an individual case, might also violate a person's Fifth Amendment right against self-incrimination. ***Hiibel***, 542 U.S. at 191.

v. Sokolow, 490 U.S. 1, 7 (1989). It must be temporary and only long enough to effectuate its purpose, using the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. ***Florida v. Royer***, 460 U.S. 491, 500 (1983).

Here, a reasonable person in Mr. Waldrup's position would not have felt free to terminate the encounter with the troopers or decline their request for identification. He was surrounded by a significant police presence at the checkpoint. (Tr. 32-33). He had been removed from his vehicle by the police. (Tr. 58). Trooper Primm had already frisked Mr. Waldrup, and as he had conducted the pat-down search had explained to Mr. Waldrup what he was doing and why he was doing the search. (Tr. 40, 59). By his own admission, Trooper Primm continued to detain Mr. Waldrup while Trooper Isringhausen finished with the driver, asking Mr. Waldrup questions about who he was, if he knew the driver, and "questions of that nature." (Tr. 59). Common sense tells us that, as a rule, a motorist who is involuntarily stopped by a law enforcement officer will be reluctant to leave the scene until it is made clear that they are free to do so. ***State v. Davalos***, 128 S.W.3d 143, 147 (Mo. App. S.D. 2004) (citing ***State v. Taber***, 73 S.W.3d 699, 706 (Mo. App. W.D. 2002)). Considering the totality of the circumstances, a reasonable person in Mr. Waldrup's position would reasonably conclude he could not have terminated the encounter at that point and refused to

provide his identification. The contact was not consensual, and the request for Mr. Waldrup's personal information and computer check of that information constituted an unreasonable search and seizure.

Moreover, Trooper Primm's request for his identifying information – not only his name, but also his birth date and social security number –was not reasonably related to the circumstances justifying the stop. ***Hiibel, supra***. (Tr. 59, 261). The ostensible primary purpose of the checkpoint was to ensure that drivers had valid driver's licenses. (Tr. 28, 212-213). Obviously, whether a ***passenger*** does or does not have a valid license is irrelevant to the goal of "ensur[ing] that [drivers] are qualified to be driving on the highways." (Tr. 254).

Nor did the officers learn of any additional information after Mr. Waldrup's detention that constituted probable cause or a particularized, articulable suspicion of specific criminal activity. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for the seizure. ***United States v. Sokolow***, 490 U.S. 1, 7 (1989). The officer must be able to articulate more than an "inchoate and unparticularized suspicion or "hunch" of criminal activity. ***Terry, supra***, at 27.

Trooper Primm testified that he continued to detain Mr. Waldrup after he had completed the Terry frisk, because he "wasn't certain at that point that he was

no longer a threat to his safety or our own. So I remained with him outside of the vehicle and spoke with him." (Tr. 60). This is nothing more than an inchoate hunch that Mr. Waldrup might somehow be dangerous to himself or others; it is not a reasonable, particularized suspicion based on articulable facts that a specific crime had been committed or was being committed.

Moreover, at a checkpoint stop, to justify continued detention after the purposes of the stop have been completed requires probable cause, not just reasonable suspicion. ***Edmond***, ***Brignoni-Ponce, supra.*** Probable cause exists when an officer possesses facts which would warrant a reasonable person to believe that a criminal offense has been committed by the individual to be arrested**.** ***Singleton v. State***, 120 S.W.3d 218, 222 (Mo. App. W.D. 2003) (internal citation omitted). Bare suspicion is not enough to support a finding of probable cause for a warrantless arrest. ***State v. Duncan***, 944 S.W.2d 225, 226 (Mo. App. W.D. 1997) (internal citations omitted). Trooper Primm's vague hunch that Mr. Waldrup might still somehow be dangerous despite the fact that he had no weapon is no more than a bare suspicion – unsupported by any facts – that Mr. Waldrup had committed a crime. Thus the officers had no authority to further detain Mr. Waldrup, to demand that he provide identifying information, and to run a computer check of that information. To allow the reasonable suspicion that Mr. Waldrup had a weapon to also support continued investigation of Mr. Waldrup by performance

of computer check of his identification after no weapon was found would erode Fourth Amendment protections. ***State v. Waldrup***, WD70318, ***slip op***. at 4 (Mo. App. W.D. June 1, 2010).

Because Arrest Was Invalid, Search Incident to Arrest Was Not Justified

The crack cocaine and the testimony regarding the crack cocaine were justified by the State as the result of a search of Mr. Waldrup incident to his arrest for the warrants. (Tr. 80). But because his warrantless seizure and detention violated his Constitutional rights against unreasonable searches and seizures, it was invalid. An invalid arrest transforms the search into an unlawful act. ***State v. Martin,*** 79 S.W.3d 912, 915-16 (Mo. App. W.D. 2002). Evidence confiscated from an unlawful search or seizure is inadmissible. ***Id***.

The State failed to meet its burden of proof by a preponderance of the evidence that the motion to suppress should have been overruled. ***State v. Abeln***, 136 S.W.3d 803, 807-808 (Mo. App. W.D. 2004) (internal citations omitted). The trial court's denial of Mr. Waldrup's motions to suppress and admission of the evidence and testimony regarding cocaine at trial was in error. Mr. Waldrup respectfully requests that this Court should reverse his conviction and remand his case to the trial court with directions to order the evidence and resulting testimony suppressed.

CONCLUSION

Because the scope of a checkpoint stop cannot go beyond its stated purpose and must strictly curtail the discretion of individual officers, any detention beyond the purpose of the checkpoint must be consensual or supported by probable cause. Assuming that at a checkpoint encounter, officers are authorized to conduct a ***Terry*** frisk, Mr. Waldrup's continued detention after the ***Terry*** frisk was unauthorized because the officers found no weapon. Nor was his continued involvement with the troopers a consensual encounter; a reasonable person in his position would not have felt free to leave or to decline Trooper Primm's demand for identifying information. Finally, Mr. Waldrup's detention after Mr. Shields had been issued a citation and released, and after the police determined he did not have a weapon, was not based on probable cause or even a reasonable suspicion, but only Trooper Primm's inchoate hunch that he "wasn't certain at that point that he was no longer a threat to his safety or our own."

Because Mr. Waldrup's arrest for outstanding warrants resulted from his illegal seizure, the crack cocaine recovered was not obtained incident to a lawful arrest. Evidence obtained in violation of a person's Fourth Amendment rights is inadmissible. The trial court erred in failing to suppress the evidence and testimony regarding cocaine. Mr. Waldrup respectfully requests that the Court reverse and vacate his conviction and sentence for possession of a controlled

substance and remand the case to the circuit court with instructions to order the crack cocaine and resulting testimony suppressed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, S. Kathleen Webber, hereby certify as follows:

✓ 1. The brief was completed using Microsoft Word, Office 2007, in Times New Roman, at least size 13 point font. Excluding the cover page, table of contents, table of authorities, signature block, certificate of compliance and service, and appendix, the brief contains 7,181 words, which does not exceed the word limit allowed for an appellant's brief under Rule 84.06.

✓ 2. The CD ROM disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a Symantec Endpoint Protection program, which was updated on October 11, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

✓ Two true and correct copies of the attached brief and a CD ROM disk containing a copy of this brief were mailed, postage prepaid, on October 11, 2010, to James B. Farnsworth, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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