

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1224

BOB L. BROWN

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF PUBLIC SAFETY,
LICENSE CONTROL AND DRIVER IMPROVEMENT DIVISION

Judgment rendered JUN - 1 2012

Appealed from the
18th Judicial District Court
in and for the Parish of West Baton Rouge, Louisiana
Trial Court No. 39,017
Honorable J. Robin Free, Judge

GLYNN J. DELATTE, JR.
BATON ROUGE, LA

BRANDEE KETCHUM
BATON ROUGE, LA

ATTORNEYS FOR
PLAINTIFF-APPELLEE
BOB L. BROWN

ATTORNEY FOR
DEFENDANT-APPELLANT
STATE OF LOUISIANA,
DEPARTMENT OF PUBLIC
SAFETY, OFFICE OF MOTOR
VEHICLES

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

The Louisiana Department of Public Safety and Corrections, Office of Motor Vehicles ("DPS"), appeals from a judgment that recalled the suspension of plaintiff's, Bob L. Brown's, driving privileges. We reverse and reinstate the administrative law judge's decision that upheld the suspension by the DPS.

FACTS

On or about April 17, 2010, a marked DWI checkpoint was set up and operated by the West Baton Rouge Parish Sheriff's office, with the assistance of Trooper Jason Doiron of the Louisiana State Police. The plaintiff, Mr. Brown, a domiciliary of Houston, Texas, was stopped at the checkpoint around 1:20 a.m., and subsequently arrested by the Louisiana State Police for operation of a vehicle while intoxicated, a violation of La. R.S. 14:98. The DPS subsequently suspended Mr. Brown's Louisiana driving privileges in accordance with La. R.S. 32:661-668 (the "Informed Consent Law"), due to the fact that blood alcohol results collected at the scene indicated a blood alcohol concentration over the legal limit.

Mr. Brown contested the suspension of his Louisiana driving privileges, and a hearing was held at the Division of Administrative Law on October 4, 2010. After taking the matter under advisement, the administrative law judge ("ALJ") purportedly held that the DPS did not have to establish that the checkpoint was valid and affirmed the suspension.¹ Mr. Brown thereafter filed a petition on December 13, 2010, seeking judicial review in the 18th Judicial District Court.

The district court set the hearing on Mr. Brown's Petition for Judicial Review for February 17, 2011;² the trial of this matter later resumed on March 24, 2011. In connection with his Petition for Judicial Review, Mr. Brown argued that the DPS

¹ A transcript of the administrative hearing, captioned, **Department of Public Safety and Corrections in the Matter of Bob L. Brown**, Docket No. 2010-4864-PS, is contained within the record as "Exhibit P-1." The transcript reflects that at the conclusion of the hearing the ALJ took the matter under advisement and promised to issue a written decision as soon as possible. The decision of the ALJ is not found within the record.

² After hearing the testimony of several witnesses, the district court recessed the matter until March 24, 2011, to allow Mr. Brown an opportunity to obtain the transcripts from the administrative hearing.

improperly suspended his driving privileges because the DPS did not offer sufficient proof to sustain the suspension. Specifically, Mr. Brown argued that the DPS failed to provide sufficient evidence of compliance by the West Baton Rouge Parish Sheriff's office with the guidelines established by the Louisiana Supreme Court in **State v. Jackson**,³ in its operation of a DWI checkpoint. As a result, Mr. Brown argued, the stop was illegal, and the suspension of his license was invalid. Mr. Brown also argued the stop was invalid because the checkpoint had terminated prior to his entry into the checkpoint zone. At the conclusion of the hearing, the district court, for reasons orally assigned, ordered that Mr. Brown's suspension be set aside and his license reinstated.

The DPS filed a motion on March 21, 2011, requesting that the district court provide written findings of fact and reasons for its judgment. The district court, in a judgment signed on May 19, 2011, recalled the suspension of Mr. Brown's license. In written reasons for judgment subsequently issued on June 6, 2011, the district court adopted the arguments made by counsel for Mr. Brown and made a factual finding that the checkpoint at issue was being dismantled prior to Mr. Brown's entry into same. Accordingly, the district court found that the State was required to have probable cause in order to stop Mr. Brown. Concluding that no probable cause existed, the district court held that the stop of Mr. Brown had been improper.

From this judgment, the DPS has appealed.

ISSUES PRESENTED FOR REVIEW

In connection with its appeal in this matter, the DPS presents the following issues for review and disposition by this court:

1. Whether the district court erred in holding that the DPS bears the burden of proof under **State v. Jackson** regarding the constitutionality of a law enforcement sobriety checkpoint in order to sustain suspensive action under Louisiana's Implied Consent Law?⁴

³ **State v. Jackson**, 2000-0158 (La. 7/6/00), 764 So.2d 64.

⁴ The Implied Consent Law (La. R.S. 32:667 and 668) referred to in **Butler v. Department of Public Safety and Corrections**, 609 So.2d 790, 792 (La. 1992) is also referred to as the Informed Consent Law (La. R.S. 32:661-668). See **Flynn v. State, Department of Public Safety & Correction**, 608 So.2d 994, 995 (La. 1992).

2. Whether the district court manifestly erred in holding the local law enforcement sobriety checkpoint at issue had terminated prior to Mr. Brown's entrance into the checkpoint area?

STANDARD OF REVIEW

The Informed Consent Law, La. R.S. 32:661-668, "addresses the testing of persons suspected of operating motor vehicles and motor powered watercraft while under the influence of alcoholic beverages or controlled dangerous substances" and provides sanctions for persons who refuse to submit to a chemical test for intoxication or who submit to a chemical test, the results of which are presumptive of intoxication. **Flynn v. State, Department of Public Safety & Correction**, 608 So.2d 994, 995 (La. 1992), quoting **Boe v. State**, 558 So.2d 1333, 1335 (La. App. 4 Cir. 1990). The statutes also provide the administrative procedures for sanctioning such persons and for review of such decisions. **Id.**

Pursuant to La. R.S. 32:667, law enforcement officers⁵ are authorized to seize the driver's license and issue a temporary receipt when a person has been arrested for DWI and either refuses a chemical test or takes a test which results in a finding of a blood alcohol level presumptive of intoxication. A person whose license has been so suspended may request an administrative hearing to determine: whether the law enforcement officer had reasonable grounds to believe that the person who had been driving was under the influence of either alcoholic beverages or illegal controlled dangerous substances; whether the individual was placed under arrest; whether the officer warned the individual as provided in La. R.S. 32:661(C);⁶ and, in the case of submittal, whether

⁵ Pursuant to La. R.S. 32:5(A), [a]ll law enforcement officers of this state or of any political subdivision thereof invested by law with authority to direct, control, or regulate traffic are authorized to enforce the provisions of this Chapter and regulations of the department and the commissioner adopted pursuant hereto, within their respective territorial jurisdictions, except as otherwise provided by law of this Chapter. Additionally, La. R.S. §32:666(A)(1)(a)(ii) provides that "law enforcement officer" as used in this Section "shall include but not be limited to any commissioned local or state police officer, wildlife enforcement agent, sheriff, deputy sheriff, marshal, deputy marshal, or state park warden.

⁶ Pursuant to La. R.S. 32:661(C), a law enforcement officer, prior to requesting that individual submit to a chemical test, shall first read to the person a standardized form approved by DPS. Said form must inform the individual of his **Miranda** rights; of the consequences of both refusal to submit to a chemical test and submission to the test; and of the name and employing agency of all of the officers involved. In addition, the arresting officer shall, after reading said form, request the arrested person to sign the form or certify that the arrestee was advised of the information contained in the form and that the person was unable or unwilling to sign the form.

the individual voluntarily submitted to the chemical test and whether the test resulted in a finding of a blood alcohol level presumptive of intoxication. La. R.S. 32:668(A).

When the driver requests a hearing, the state must prove the officer had reasonable grounds to believe the person had been driving a motor vehicle upon the public highways while under the influence of alcohol, that the person was placed under arrest and advised by the officer as provided in La. R.S. 32:661, and that the driver refused to submit to the test on request (or that he voluntarily submitted to the chemical test and the blood alcohol reading was in excess of the statutory limit). See La. R.S. 32:668(A); **Millen v. State, Department of Public Safety and Corrections**, 2007-0845, p. 5 (La. App. 1 Cir. 12/21/07), 978 So.2d 957, 961. As set forth in R.S. 32:668(A), the hearing shall be conducted in the same manner and under the same conditions as provided in La. R.S. 32:414.⁷ **Spreadbury v. State, Department of Public Safety**, 1999-0233, pp. 5-6 (La. App. 1 Cir. 11/5/99), 745 So.2d 1204, 1207-1208.

After departmental remedies have been exhausted, the driver has the right to file a petition for judicial review. See La. R.S. 32:668(C); **Millen**, 2007-0845 at p. 5, 978 So.2d at 961. On such review, the district court is required to conduct a trial *de novo* to determine the propriety of the suspension. **Id.**, citing **Flynn**, 608 So.2d at 995-996. Such a trial is a civil action amenable to all of the ordinary rules of procedure and proof. **Id.**, citing **Meyer v. State, Department of Public Safety License Control and Driver Improvement Division**, 312 So.2d 289, 292 (La. 1975). Further, the fact that this is an action for judicial review of a decision resulting from an administrative hearing does not change the burden of proof placed by law on the plaintiff. **Id.**

⁷ An administrative hearing requested pursuant to La. R.S. 32:667 and 668 falls under the Administrative Procedure Act ("APA"), La. R.S. 49:950 et seq. **Spreadbury**, 1999-0233 at p. 6, 745 So.2d at 1208. However, where specific procedures already exist and are inconsistent with the provisions of the APA, the specific rules apply. **Flynn**, 608 So.2d at 996 n. 4. As noted by the supreme court in **Flynn**, the Informed Consent Law provides that judicial review **at the trial court level** shall be *de novo*, La. R.S. 32:414(F)(4), and, thus, the provisions of the APA would not apply to judicial review in the trial court. **Spreadbury**, 1999-0233 at p. 6, 745 So.2d at 1208 n.5, citing **Flynn**, 608 So.2d at 996 n. 4 (bold emphasis and italics in original).

DISCUSSION AND ANALYSIS

Burden of establishing constitutionality of DWI checkpoint

The initial issue raised by the DPS is whether the district court erred in holding that DPS bears the burden of proving whether a DWI checkpoint conducted by a local law enforcement agency was operating "within the bounds of the law."⁸

DPS argues that it is legislatively mandated, pursuant to the Informed Consent Law (La. R.S. 32:661 *et seq.*), to suspend the driver's license or Louisiana driving privileges of licensees who commit certain crimes involving the use of a motor vehicle, or who fail to comply with traffic regulations created by the legislature and/or local governments. La. R.S. 32:667(A)(1).

The Louisiana Supreme Court in its opinion in **State v. Jackson**, 2000-0015 (La. 7/6/00), 764 So.2d 64, analyzed the constitutionality of automobile checkpoints that were used to enforce compliance with proof of insurance statutes. Realizing that automobile checkpoints can serve multiple purposes, and the impossibility of distinguishing the constitutionality of one kind of checkpoint from another, the court concluded that a consistent approach to automobile checkpoints, regardless of which laws they are designed to enforce, can be implemented that withstands scrutiny under the Louisiana Constitution. **Jackson**, 2000-0015 at pp. 8-9, 764 So.2d at 70. In **Jackson**, the court set forth guidelines for evaluating whether a checkpoint's intrusiveness will withstand constitutional muster under the Fourth Amendment and Louisiana's Article I, § 5:

- (1) the location, time and duration of a checkpoint, and other regulations for operation of the checkpoint, preferably in written form, established by supervisory or other administrative personnel rather than the field officers implementing the checkpoint;
- (2) advance warning to the approaching motorist with signs, flares and other indications to warn of the impending stop in a safe manner and to provide notice of its official nature as a police checkpoint;

⁸ In its brief to this court, DPS notes that prior to presenting its case in chief, DPS specifically requested a ruling from the district court as to which party bore the burden of proof as to the constitutionality of a DWI checkpoint. When the district court subsequently determined that it was incumbent upon DPS to prove that a checkpoint was conducted "within the bounds of the law," DPS noticed in open court its intent to appeal from the ruling of the district court. Subsequently, DPS filed a written motion requesting that the district court provide written findings of fact and reasons for judgment in accordance with La. Code Civ. P. art. 1917(A). The district court failed to address this issue in its written reasons.

- (3) detention of the motorist for a minimal length of time; and
- (4) use of a systematic nonrandom criteria for stopping motorists.

In evaluating a checkpoint under this test, the guiding principle must be that the procedures utilized curtail the unbridled discretion of the officer in the field. **State v. Jackson**, 2000-0015, p. 11 (La. 7/6/00), 764 So.2d 64, 72-73.⁹

In the district court, DPS called as its first witness, Detective Christian R. Conaway of the West Baton Rouge Sheriff's office ("WBRSO"). Detective Conaway testified that he had been employed with the WBRSO since February of 1994, and that he was the officer in charge of a DWI checkpoint conducted by the WBRSO on April 17, 2010.

Detective Conaway also testified that he established the location, time, and duration of the checkpoint. Notice of a checkpoint "somewhere in West Baton Rouge Parish" on April 17, 2010, was publicly promulgated through a notice published in the parish newspaper, the Westside Journal, on Thursday, April 15, 2010, a copy of which was introduced into evidence, and an announcement televised on WBRZ television in Baton Rouge.

Also introduced into evidence were documents identified by Detective Conaway as an operational plan indicating a checkpoint would be conducted at the intersection of La. Hwy. 1 and La. Hwy. 988 from 2300 to 0230 hours. Ten law enforcement officers from the WBRSO and Louisiana State Police worked the checkpoint. Detective Conaway testified that a marked police unit with its headlights and a spotlight illuminating "two huge orange signs" advised motorists of a "DWI Checkpoint Ahead." These signs were placed on the highway median and the shoulder of the roadway approximately 500 feet before the first traffic cones that forced motorists to merge into the northbound right traffic lane. In the northbound right traffic lane, six or seven officers were spaced in a

⁹ The language of the guidelines set forth by the court in **Jackson** was later codified in La. R.S. 32:295.4, the seat belt and motor vehicle liability security checkpoint statute. See **State v. Pulliam**, 2005-534, p. 13 (La. App. 3 Cir. 12/30/05), 920 So.2d 900, 908-909.

line so as to systematically stop and detain for 3-5 seconds each car passing through the checkpoint.

Detective Conaway testified that as the organizer of the checkpoint, he decided at 2:30 a.m. that it would no longer be safe to operate the checkpoint because officers were leaving the line to transport arrestees to the West Baton Rouge Detention Center.

DPS then called Trooper Jason Doiron, of the Louisiana State Police as its next witness. Trooper Doiron corroborated the testimony of Detective Conaway and stated that he came into contact with Mr. Brown around 1:20 a.m. as Mr. Brown's vehicle stopped directly in front of him in the checkpoint line. Trooper Doiron admitted testifying at the administrative hearing that the checkpoint "was close to being over" at the point Mr. Brown's vehicle passed through the checkpoint line.

Upon application of the **Jackson** guidelines to the facts of this case, it is clear from the foregoing testimony that DPS established the constitutionality of the DWI checkpoint at issue in this case based upon a reasonableness balancing test of the factors set forth in **Jackson**.

Termination of the DWI checkpoint

We turn now to the second issue raised by DPS, i.e., the district court's finding that the DWI checkpoint at issue had terminated prior to Mr. Brown's entrance into the checkpoint area at approximately 1:20 a.m.

On redirect examination, Detective Conaway reiterated that between 2:15 and 2:30 a.m., he decided to end the checkpoint for the reason that there were not enough officers in line to stop cars. Detective Conaway stated emphatically that the giant orange signs were still present on La. Hwy. 1 around 1:20 a.m., the time Mr. Brown was arrested. Detective Conaway testified that he personally took down the signs "well after 2:00 o'clock."

Trooper Doiron, upon cross-examination, clarified his earlier testimony to the effect that the checkpoint "was close to being over" at the point Mr. Brown's vehicle passed through the checkpoint line. Trooper Doiron testified, "I don't recall if they were picking up cones. When I said it was close to being over, the traffic was very thin, other people

had left. So, in my mind, close to being over is thinning traffic, people leaving with other people they've arrested."

On redirect examination, Trooper Doiron confirmed that he did not see anyone picking up cones at the checkpoint that evening, nor did he see anyone removing the sign at the conclusion of the checkpoint.

In responding to questions from the court, Trooper Doiron stated that the intoxilyzer machine was at the checkpoint, but denied hearing anyone talk about "wrapping up" or concluding their operations at the checkpoint. Trooper Doiron reiterated his previous testimony that he did not see anyone picking up any cones or signs at the conclusion of the checkpoint.

On direct examination, Mr. Brown testified that as he approached the checkpoint, he could see "a whole lot of lights flashing" nearly three quarters of a mile in front of him. Mr. Brown claimed that as he got closer, there were no other cars on the road, he saw no signs, and the lights had died down. Mr. Brown stated that he was travelling in the left lane of the roadway when an officer standing on the side of the road flagged him over to the right-side of the roadway. Mr. Brown further stated that there were several other officers standing alongside the roadway talking, while a female officer was picking up traffic cones.

According to Mr. Brown, the officer that flagged him over came around to the passenger side of his vehicle and asked whether he had been drinking. Mr. Brown replied that he had consumed "four, maybe six beers" that evening. At that point, the officer directed him to pull into the parking lot where he was administered an intoxilyzer test that had been set up in a trailer. Mr. Brown admitted that upon failing the intoxilyzer test, he was taken to the parish prison in a state police vehicle.

In connection with DPS's rebuttal, Detective Conaway testified that he had been responsible for taking down the two huge orange checkpoint signs. According to Detective Conaway, the checkpoint signs and the traffic cones were stored in the trailer with the intoxilyzer machine. Detective Conaway testified that when he ultimately

decided to end the checkpoint, the trailer containing the intoxilyzer machine was hooked up to a truck, and the trailer was used to pick up the signs and traffic cones.

After a thorough examination of the record in this matter, and in particular the testimony adduced at trial, we find no evidence, other than Mr. Brown's self-serving testimony, to support the district court's finding that the DWI checkpoint had terminated prior to Mr. Brown's entrance into the checkpoint zone. For this reason, the decision of the district court must be reversed.

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed and remanded with an order directing the district court to reinstate the suspension of Mr. Brown's driving privileges ordered by the administrative law judge. All costs associated with this appeal shall be assessed against the plaintiff, Bob L. Brown.

REVERSED AND REMANDED.