

# CHECKPOINTS AFTER STATE V. ROSE; HOW TO SUPPRESS A DWI ARREST THAT ORIGINATES AS A STOP AT A CHECKPOINT

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## I. Introduction

In recent years police checkpoints have become a common method of searching out potentially impaired drivers. As a result, many DWI's or other arrests resulting from checkpoints may land on your desk on a regular basis. This paper will describe the various requirements that police officers must satisfy when organizing and conducting a checkpoint since the seminal decision of State v. Rose. By vigorously interrogating the officers regarding these requirements and moving to suppress any evidence obtained from a checkpoint stop that failed to satisfy these requirements you can help to insure that your client receives the best possible result.

## II. The Right to Turn Around

Perhaps the most natural response a person can have when faced with an impending checkpoint is to simply turn around. Unfortunately, the North Carolina Supreme Court has held that police officers at a checkpoint "may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away."<sup>1</sup>

Despite this holding there are several possible ways to defend your clients conduct if he or she is stopped for turning away from a DWI checkpoint. The first, (and usually best) defense is that the Defendant did not know that the police activity ahead was a DWI checkpoint (because they couldn't read the signs, thought it was an accident etc.) If this is the case the Defendant is not "within" the perimeters of the DWI check point. Language in the Foreman decision supports this, defining "the area in which checks are conducted [to] include the area within which drivers **may become aware of its presence by observation of any sign marking or giving notice of the checkpoint.**"<sup>2</sup> Therefore, in these situations you should ask your client if he knew that a DWI checkpoint was ahead, whether any signs were posted to warn about the DWI checkpoint and if signs were posted if they were clearly visible.

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<sup>1</sup> State v. Foreman, 351 N.C. 627, 633, 527 S.E.2d 921, 925 (2000).

<sup>2</sup> *Id.*

Another possible defense in this situation is to argue that the stop was not justified according to the totality of the circumstances. The Foreman court stated that “an officer, **in light of and pursuant to the totality of the circumstances** or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away.<sup>3</sup> According to this holding, **an officer is only permitted to pursue and stop a vehicle that has turned away from a checkpoint if the totality of the circumstances suggests that pursuing and stopping the vehicle is necessary.** In these situations it is important to talk to your client and find out the facts of the situation. Did your client always turn on that road? Was your client slowly proceeding in the left hand lane before turning or did they quickly veer from the right to the left lane to quickly turn (as the driver did in Foreman). If the totality of the circumstances do not suggest that the driver should be followed and stopped, it may be possible to suppress the results of the stop. Note however that the court in Foreman clearly stated that a police officer may follow and stop any vehicles that attempt to avoid the checkpoint if this policy is listed explicitly in the checkpoint plan.<sup>4</sup>

Finally, it is possible to argue that this decision should not be considered binding precedent because it was fundamentally mistaken and unnecessary to the resolution of the question in issue. In Foreman, after turning away from the DWI checkpoint the driver quickly pulled into a driveway, turned off her lights, and crouched down to hide from the cops.<sup>5</sup> The Court of Appeals found that this behavior (a) didn’t constitute a “seizure” by the officer because the driver stopped her own car and (b) provided a reasonable and articulable suspicion of criminal activity to justify a stop. The Supreme Court affirmed this, and then went on to “modify” the decision to expressly allow officers to pursue and detain individuals who attempted to “avoid” the DWI checkpoint. This question was not central to the appeal and thus should be treated as dicta. Additionally, even if the decision is considered binding, the strong concurrence of Justice Frye provides a reason to change the law. In his concurrence Chief Justice Frye differentiates permission to follow a vehicle from permission to stop that vehicle writing,

Reasonable and articulable suspicion is necessary for an investigatory stop, but unnecessary to justify following a vehicle. While mere avoidance of a DWI checkpoint may prompt law enforcement officers to follow a vehicle, it does not, alone, give rise to a reasonable and articulable suspicion of criminal activity.<sup>6</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Under this standard, a police officer would have to observe some other behavior of the defendant who turned to avoid a checkpoint in order to form the reasonable and articulable suspicion of criminal activity necessary to stop the vehicle.

### III. Stationary License Checkpoints

Stationary License Checkpoints are designed to enforce the motor vehicle laws of North Carolina by checking the licenses and registrations of all persons stopped. These checkpoints are not controlled by statute but are still required to observe certain constitutional requirements that have been spelled out by the courts. The North Carolina Court of Appeals dealt with the requirements of these checkpoints most recently in State v. Rose.<sup>7</sup>

In Rose, Justin Everett Rose was stopped at a stationary license checkpoint by two officers and asked to produce his license and registration. Mr. Rose had two other individuals in the car, Mr. Wilson who was sitting in the front passenger seat and Mr. Davis who was sitting in the back seat. Mr. Rose complied with the first officer's request and produced his license and registration. While this was happening the second officer scanned the inside of the car and noticed that Mr. Davis "looked nervous" and appeared to be trying to hide a green bookbag from view by covering it with his legs (Mr. Davis is a parapalegic). The officer asked what was in the bag and was told that it contained dirty clothes. The officer then asked Mr. Davis to open the bag and when he did the officer saw what appeared to be marijuana inside a garbage bag. The officers arrested Mr. Rose, Mr. Davis and Mr. Wilson and subsequently found approximately one and a half pounds of marijuana and a loaded .38 caliber revolver in the bag. In the trial court Mr. Rose moved to suppress the evidence seized incident to the checkpoint stop. This motion was denied and Mr. Rose appealed to the Court of Appeals which ultimately overturned the trial court and allowed Mr. Rose's motion to suppress.

In issuing their decision the Court of Appeals noted that:

This is not a case in which all of the evidence suggests that the checkpoint was for the constitutional purpose of examining licenses and registrations... The evidence that was presented would support a finding that the programmatic purpose--to the extent one existed at all--may well have been general crime detection with an emphasis on narcotics interdiction.<sup>8</sup>

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<sup>7</sup> State v. Rose, 612 S.E.2d 336, 342 (N.C. App. 2005).

<sup>8</sup> *Id.* at 340.

State v. Rose therefore highlights the important constitutional requirement that **all stationary license checkpoints have a valid “programmatic purpose.”** The Court of Appeals has stressed, however, that a trial court may not "simply accept the State's invocation" of a proper purpose, but instead must "carr[y] out a close review of the scheme at issue."<sup>9</sup> In Rose, the court found that even though the stated purpose of the checkpoint was to check licenses and registrations, the checkpoint was truly being used for narcotics interdiction.

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<sup>9</sup> Ferguson v. City of Charleston, 532 U.S. 67, 81, 121 S.Ct. 1281, 1290, 149 L.Ed.2d 205, 218 (2001).

In making this determination the court looked at a number of factors. First, there was no evidence that police in this area of the city were having trouble with unlicensed drivers; however, there was evidence that the area had problems with drug trafficking. Second, the officers were unable to explain why a second officer was necessary to check licenses and registrations. It seemed to the court that the only purpose for the second officer was to scan the car for purposes of "general crime prevention" a purpose the courts have expressly found unconstitutional.<sup>10</sup> And finally, the checkpoint was set up "on the fly" by officers without any specific goal or plan in mind. The majority of these officers were in narcotics enforcement, leading the courts to assume that this was the purpose in setting up the checkpoint. The Court found that even if the checkpoint was set up for the permissible purpose of checking licenses this would not save the checkpoint from being ruled illegal. As the Court explained, "[i]f this were the case ..., law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."<sup>11</sup>

Even if the checkpoint is set up for a permissible programmatic purpose there is still a possibility that it constitutes an invalid checkpoint. According to the U.S. Supreme Court "even if a checkpoint is for one of the permissible purposes, "[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances."<sup>12</sup> This determination of reasonableness looks at three things "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty."<sup>13</sup>

Based on this, when your client is stopped at a Stationary License Checkpoint you should go through a two step process to determine if the

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<sup>10</sup> See City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S.Ct. 447, 451, 148 L.Ed.2d 333, 340 (2000) ("We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.")

<sup>11</sup> State v. Rose, 612 S.E.2d 336, 340 (N.C. App. 2005) *citing* Edmond, 531 U.S. at 46.

<sup>12</sup> Illinois v. Lidster, 540 U.S. 419, 421, 124 S.Ct. 885, 888, 157 L.Ed.2d 843, 849 (2004); *see also* United States v. Huguenin, 154 F.3d 547 (6th Cir.1998) (holding that a DUI checkpoint, which is a permissible purpose for a checkpoint under *Sitz*, was unreasonable in how it was conducted and, therefore, unconstitutional).

<sup>13</sup> Lidster, 540 U.S. at 427

checkpoint was valid. First, you should look at the “primary programmatic purpose” of the checkpoint. This purpose should be formulated at the programmatic level, meaning it should not rely upon the subjective purpose of the officers at the scene but instead should be based upon the purpose formulated by the person or persons organizing the checkpoint. Remember, the purpose for a checkpoint cannot be general law enforcement such as searching for drugs or stopping people to determine if they have outstanding warrants against them. You should also look at what departments the officers at the checkpoint work in. Are they all in drug enforcement? Do they all work vice? What about the area? Is it known for drug activity? Prostitution? Is it in the “bad part of town”? Near a local bar? A yes to any of these questions could make it difficult for the state to satisfy its burden of proof that the checkpoint was set up for a valid purpose.

The second step in this two step process is to challenge the reasonableness of the checkpoint. Once the state has established there is a compelling need for a checkpoint to accomplish a specific programmatic purpose the state must then prove “the degree to which the checkpoint advances [the stated] public interest.”<sup>14</sup> To determine whether a checkpoint is reasonably “advances its stated purpose” you should first ask if there was a written plan for the checkpoint. If there was, you should ask the officer or supervisor who created the plan why they thought that the specific checkpoint in the specific area was the best means of enforcing that plan. If there is not a plan created by a supervisor you should question all of the officers at the scene and ask them why they chose that specific location. If the officers simply decided to “throw up a checkpoint” or give reasons justifying the checkpoint that are not reasonably related to the programmatic purpose the checkpoint is likely unreasonable. In Rose, the Court showed a clear preference that these checkpoints be tailored to the checkpoint’s purpose by a supervisory official. The court worried that,

[w]ithout tailoring, it is possible that a roadblock purportedly established to check licenses would be located and conducted in such a way as to facilitate the detection of crimes unrelated to licensing. That risk can be minimized by a requirement that the location of such a roadblock be determined by a supervisory official, considering where license and registration checks would likely be effective.<sup>15</sup>

For example, if police officers set up a checkpoint on a one way street outside of a bar and fail to follow the statutory requirements for a DWI checkpoint because the checkpoint is a “license and registration” checkpoint you could ask if that street had a particular problem with unlicensed drivers. More likely, you would find out that the officers set up the checkpoint to catch drunk drivers. Alternatively, you may want to ask an officer why they had drug sniffing dogs or drug enforcement officers present if the stated purpose of a checkpoint is to

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<sup>14</sup> *Id.*

<sup>15</sup> State v. Rose, 612 S.E.2d 336, 343 (N.C. App. 2005).

check licenses. Remember Rose, clearly states that it is the **states burden to prove both the programmatic purpose and reasonableness of a checkpoint.**<sup>16</sup> It is vitally important to force the State to satisfy this burden.

## IV.DWICheckpoints

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<sup>16</sup> *Id.* at 340.

There are two common types of checkpoints used by police. The first which have been detailed above are stationary license checkpoints. The other are specifically mandated DWI checkpoints that are set up for the sole purpose of detecting intoxicated drivers. North Carolina has codified the requirements for these checkpoints in N.C. Gen. Stat. § 20-16.3A.<sup>17</sup> **The State has the burden of proving that the checkpoint stop meets all of the requirements of this statute** (and thus passes constitutional muster), because the stop is being affected without a warrant.<sup>18</sup> This burden can often be difficult to meet so it is important that you force the state to prove each and every requirement of this statute even if it seems at first glance that the state has meet its burden.

The detection of intoxicated drivers has been deemed a constitutionally permissible purpose to enact a checkpoint.<sup>19</sup> However, the United States Supreme Court has held that,

even if a checkpoint is for one of the permissible purposes, [t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.<sup>20</sup>

To judge the reasonableness of the stop the court employs a test designed to “balance... the public's interest [against] an individual's privacy interest.”<sup>21</sup> The Court's decision reaffirmed the Brown “three part balancing test” for determining reasonableness.<sup>22</sup> This test looks at “[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty.”<sup>23</sup> The North Carolina statute has codified this three part test in N.C. Gen. Stat. § 20-16.3A.

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<sup>17</sup> N.C. Gen. Stat. § 20-16.3A (Note: this statute has been deemed constitutional by the U.S. Supreme Court as well as the North Carolina Courts. See Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990); State v. Barnes, 123 N.C. App. 144, 472 S.E.2d 784 (1996)).

<sup>18</sup> State v. Williams, 42 N.C. App. 662, 257 S.E.2d 457 (1979).

<sup>19</sup> Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990)

<sup>20</sup> State v. Rose, 612 S.E.2d 336, 342 (N.C. App. 2005) *citing* Illinois v. Lidster, 540 U.S. 419, 426 (2004).

<sup>21</sup> Brown v. Texas, 443 U.S. 47 (1979).

<sup>22</sup> State v. Rose, 612 S.E.2d 336, 342 (N.C. App. 2005) *citing* Illinois v. Lidster, 540 U.S. 419, 426 (2004).

<sup>23</sup> Lidster, 540 U.S. at 427.

N.C. Gen. Stat. § 20-16.3A explicitly addresses the “grave public concern of intoxicated drivers” by setting up three requirements for DWI checkpoints. First, the statute requires that the law enforcement agency “develop a systematic plan that takes into account (a) the likelihood of detecting impaired drivers (b) traffic conditions (c) [the] number of vehicles to be stopped, and (d) the convenience of the motoring public.”<sup>24</sup> This reflects the second prong of the Brown test because it shows “the degree to which the seizure advances the public interest” in preventing intoxicated driving. These checkpoints cannot just be thrown up randomly by officers but must instead be specifically tailored to accomplish the purpose for which they are created. In State v. Rose, the North Carolina Court of Appeals held that a checkpoint fails to satisfy this requirement when it is “spontaneous,” when there is “no evidence why that stretch of road was picked,” and when “a roadblock purportedly established [for one purpose] would be located and conducted in such a way as to facilitate the detection of crimes unrelated to [that purpose]”<sup>25</sup> According to the Court in Rose, “that risk can be minimized by a requirement that the location of such a roadblock be determined by a supervisory official, considering where ... checks would likely be effective.”<sup>26</sup>

Therefore, as a defense attorney you should force the State to prove that the specific plan for the DWI checkpoint was specifically tailored to prevent intoxicated drivers and was not aimed at some other purpose (such as searching for narcotics in a known “high crime” area or setting up a “license check” outside of a bar). Some good questions to ask include, why did you pick that street? Have there been many alcohol related accidents there? Why did you pick that time etc.

Next the statute requires that the plan “designates in advance the pattern both for stopping vehicles and for requesting drivers that are stopped to submit to alcohol screening tests.”<sup>27</sup> According to the statute “the plan may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, **but no individual officer may be given discretion as to which vehicle is stopped, or of the vehicles stopped, which driver is requested to submit to an alcohol screening test.**” (emphasis added).<sup>28</sup>

North Carolina Courts have generally interpreted this clause to mean that the plan must have a method that individual officers must follow to determine who to stop and whether to administer a roadside sobriety test to the stopped driver.<sup>29</sup>

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<sup>24</sup> N.C. Gen. Stat. § 20-16.3A(1)

<sup>25</sup> See State v. Rose, 612 S.E.2d 336, 342 (N.C. App. 2005)

<sup>26</sup> *Id.*

<sup>27</sup> N.C. Gen. Stat. § 20-16.3A(2).

<sup>28</sup> *Id.*

driver.<sup>29</sup> **It is no longer enough for the state to prove that the plan mandated the officers to stop every car!** According to Rose,

Whether the police stop every automobile is merely one factor in evaluating the reasonableness of a checkpoint: while stopping every car does eliminate discretion as to who the officers stop, it does not eliminate the discretion as to the officers' conduct during the stop. The issue is not just who is stopped, but what the field officers choose to do after the stop.<sup>30</sup>

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<sup>29</sup> See e.g. State v. Colbert, 146 N.C.App. 506, 553 S.E.2d 221 (2001); State v. Barnes, 123 N.C.App. 144, 472 S.E.2d 784 (1996).

<sup>30</sup> See Rose, 612 S.E.2d at 343.

Therefore, the plan must specify in detail what steps an officer must take before administering any further sobriety testing at a checkpoint. An example of a plan that satisfies this requirement would state the following, "the Officer stopping the vehicle, in every case will perform only the following screening: (1.) Request the driver to produce a driver's license. (2.) Observe the driver's eyes for signs of impairment. (3.) Engage the driver in conversation to determine if the driver has an odor of alcohol on his or her breath or if his or her speech pattern indicates possible impairment. (4.) Observe the driver's clothing."<sup>31</sup>

Therefore, as a practical matter you should always require the State to produce evidence that a plan was in place that laid out specific steps that an officer was required to follow to determine who was stopped and whether a driver should be asked to submit to further sobriety tests. If the officer testifies that they could stop anyone they liked and were simply told to perform further tests if the driver seemed to be intoxicated this would be an indication that the individual officer was given too much discretion at the scene.

The final requirement is that the plan "marks the area in which the checks are conducted to advise the public that an authorized impaired driving check is being made." This requirement is obvious but still may be difficult for the state to prove. It is always possible that the officers on the scene forgot or otherwise failed to post a sign informing drivers that a DWI check was ahead. If this is the case, a motion to suppress should be granted.

## V. CONCLUSION

Before State v. Rose, courts in North Carolina would often simply "rubber stamp" police checkpoints so long as they stopped every vehicle or included within their purposes one valid purpose. However, Rose represents a tightening of constitutional requirements and a substantial increase in the amount of judicial scrutiny of police checkpoints. This case forces the State to prove that the checkpoint was created for a valid programmatic purpose, that the officers at the scene did not have unfettered discretion but were under some supervisory control, and that the placement and methodology of the checkpoint was reasonably related to the purpose of the checkpoint. It is essential to remember that **Rose stresses that checkpoints are presumptively unreasonable and that the state must prove all of these elements to overcome this presumption of unreasonableness.** This means that Rose provides you as a defense attorney with many tools to challenge a DWI or arrest that is the result of a stationary license check or DWI checkpoint. Using these tools you can achieve these best results to keep you and your clients happy.

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<sup>31</sup> See *Colbert* 146 N.C. App at 510, 553 S.E.2d 224.

