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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DARRELL ODELL DURHAM, Defendant and Appellant.	B285138 (Los Angeles County Super. Ct. No. YA094178)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Reversed and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Darrell Odell Durham appeals from the judgment following his plea of no contest to a charge of driving with a blood alcohol level of 0.08 percent or higher within 10 years of a conviction for felony driving under the influence or vehicular manslaughter. Defendant argues that the prosecution failed to establish that his detention at a sobriety checkpoint complied with the Fourth Amendment of the United States Constitution and that the evidence obtained pursuant to that detention should have been excluded. We agree with defendant and reverse the judgment.

BACKGROUND

1. Underlying Facts and Charges

On February 20, 2016, Officer Trevor Clark of the California Highway Patrol (CHP) was assisting members of the Gardena Police Department in inspecting motorists at a sobriety checkpoint near the intersection of Rosecrans Avenue and Normandie Avenue in Gardena. At around 1:24 a.m., defendant entered the checkpoint in his Chevy Tahoe and Clark stopped him. Defendant rolled down his window and Clark observed an open wine cooler, smelled alcohol, and noticed that defendant's eyes were red and watery. Defendant told Clark he had drunk two glasses of wine. Clark moved his finger back and forth and noted that defendant could not smoothly follow the movement with his eyes. Clark escorted defendant to an area where Gardena police officers could perform a field sobriety test.

Defendant was charged in an information with one count of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)) (count one) and one count of driving with a blood alcohol content of 0.08 percent or greater (*id.*, § 23152, subd. (b)) (count 2), both within 10 years of a conviction for felony driving under

the influence or vehicular manslaughter. (*Id.*, § 23550.5, subd. (a).) The information alleged that defendant had been convicted of a prior serious and/or violent felony (Pen. Code, §§ 667, subd. (d), 1170.12, subd. (b)), and had served a prior prison term (*id.*, § 667.5, subd. (b)).

2. Defendant's Motion to Suppress

Defendant moved under Penal Code section 1538.5 to suppress all evidence obtained as a result of his detention at the sobriety checkpoint, asserting that the checkpoint was not constitutional. At the hearing on the motion, the prosecution called Officer Toshio Hirai of the Gardena Police Department's traffic bureau. Hirai had been with the department for 11 years. Hirai testified that he had undergone internal training in setting up sobriety checkpoints and had taken a course on the subject the previous year. He had been involved in approximately 10 checkpoints as an officer and had set up four of those checkpoints.

Officer Hirai explained that the planning for a checkpoint takes place long before the checkpoint is set up. The department sends out press releases about the checkpoint and contacts businesses within the area of the checkpoint. Hirai stated that his supervisor, Sergeant Thompson, makes the decision as to where the checkpoint will be set up and for how long.

Officer Hirai said he was familiar with checkpoints in the area of Rosecrans and Normandie in Gardena. He stated that "[w]e actually have a diagram that we follow where we actually lay out cone patterns in a specific way." The checkpoint would have signs identifying the checkpoint, an escape route for drivers who wished to avoid the checkpoint, and an area away from the

street "to keep our employees and other parties that we're talking to and investigating safe."

The prosecution introduced a document that Officer Hirai identified as a diagram he had used to set up a checkpoint at Rosecrans and Normandie, as well as an expanded version of the same diagram. He explained that the diagram would be used more than once because the layout of the area did not change. The diagram indicated the placement of personnel, signs, cones, floodlights, the field sobriety test location, the command post, and other elements of the checkpoint.

The prosecution asked, "With regard to the D.U.I. checkpoints, is there generally an action plan that's followed?" Officer Hirai said yes, stating that the action plan "gives direction to the officers that will be working the checkpoint, telling them exactly what our procedures will be, what they have to do at the checkpoint line." The plan gave guidance as to how long officers should detain motorists.

Officer Hirai stated that usually every car that comes through a checkpoint is stopped, but depending on traffic the sergeant at his discretion may direct the officers to stop every fifth or 10th car.

The prosecution presented Officer Hirai with a report of traffic collisions at major intersections, including Rosecrans and Normandie. The court sustained defense's counsel's objection for lack of foundation and struck Hirai's testimony regarding the report.

Officer Hirai stated that an advance press release was circulated regarding the particular checkpoint. The prosecution introduced a document that Hirai identified as a "generic press

release" that his department used to inform the public of upcoming sobriety checkpoints.

At various points during Officer Hirai's testimony, defense counsel objected that Hirai did not work at the particular checkpoint at issue and lacked foundation to discuss it. The court overruled these objections, at one point stating that the officer's lack of being present at the checkpoint went to the weight of his testimony, but not its admissibility.

On cross-examination, Officer Hirai stated that he was not present at the sobriety checkpoint at issue, never observed the checkpoint, and had no involvement in the writing of an action plan and procedures related to that checkpoint. He did not know if the diagrams he had identified were used to set up the checkpoint. But he said Sergeant Thompson was at the checkpoint, and the sergeant "also has to do that same duty as I do."

The prosecution then called Officer Clark. Clark stated that neither he nor his agency were involved in setting the checkpoint up. Clark testified to the facts leading to defendant's arrest, described above.

Defendant presented no witnesses or evidence. Defense counsel argued that Officer Hirai, having no personal knowledge of the checkpoint at issue, could not provide evidence of its constitutionality.

The court denied the motion to suppress. Citing Evidence Code section 1105, pertaining to evidence of habit and custom, the court found that "the fact that the Gardena Police Department uses a specific plan each time [it] engages in one of these checkpoints" suggested that the department was following the plan in this case.

3. Plea and Sentencing

Following the denial of his motion to suppress, defendant pleaded no contest to count two. The court dismissed count one pursuant to the plea negotiation and struck the prior strike on motion of the prosecution. The court suspended imposition of sentence and granted probation for three years, on condition that defendant spend two years in a residential sober living program. The court awarded credits and assessed fines and fees.

Defendant timely appealed.[1]

DISCUSSION

1. Applicable Law

"[The Fourth Amendment] provides, in pertinent part: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .' (U.S. Const., Amend. IV.) State and local law enforcement officials are subject to the requirements of the Fourth Amendment based upon the operation of the due process clause of the Fourteenth Amendment to the United States Constitution. [Citations.] The detention incident to the operation of sobriety 'checkpoints' . . . constitutes a 'seizure' within the meaning of the Fourth Amendment." (*People v. Banks* (1993) 6 Cal.4th 926, 934 (*Banks*).) A defendant may move under Penal Code section 1538.5 to exclude evidence obtained at a sobriety checkpoint in violation of the Fourth Amendment. (*Banks, supra*, at p. 934.)

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[1] A defendant may appeal from the judgment following a plea of guilty or no contest if the appeal is based on "[t]he denial of a motion to suppress evidence under Penal Code section 1538.5." (Cal. Rules of Court, rule 8.304(b)(4)(A).)

In *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1325 (*Ingersoll*), our Supreme Court held that "within certain limitations a sobriety checkpoint may be operated in a manner consistent with the federal and state Constitutions." The court identified eight guidelines for determining whether a sobriety checkpoint comports with the Fourth Amendment: "(1) Whether the decision to establish a sobriety checkpoint, the selection of the site, and the procedures for the operation of the checkpoint are made and established by supervisory law enforcement personnel; [¶] (2) Whether motorists are stopped according to a neutral formula, such as every third, fifth or tenth driver; [¶] (3) Whether adequate safety precautions are taken, such as proper lighting, warning signs, and signals, and whether clearly identifiable official vehicles and personnel are used; [¶] (4) Whether the location of the checkpoint was determined by a policymaking official, and was reasonable, i.e., on a road having a high incidence of alcohol-related accidents or arrests; [¶] (5) Whether the time the checkpoint was conducted and its duration reflect 'good judgment' on the part of law enforcement officials; [¶] (6) Whether the checkpoint exhibits sufficient indicia of its official nature (to reassure motorists of the authorized nature of the stop); [¶] (7) Whether the average length and nature of the detention is minimized; and [¶] (8) Whether the checkpoint is preceded by publicity." (*Banks, supra*, 6 Cal.4th at pp. 936-937, citing *Ingersoll, supra*, at pp. 1341-1347.) The prosecution bears the burden of establishing that a checkpoint meets the *Ingersoll* requirements. (*People v. Alvarado* (2011) 193 Cal.App.4th Supp. 13, 15 (*Alvarado*); see *People v. Williams* (1999) 20 Cal.4th 119, 136 [upon prima facie showing that police acted without warrant,

prosecution has burden to prove lawful justification for search or seizure].)

"In reviewing an order denying a motion to suppress pursuant to Penal Code section 1538.5, we 'uphold those factual findings of the trial court that are supported by substantial evidence.' [Citation.] We independently review the question whether the challenged search conformed to constitutional standards of reasonableness. [Citation.] Our review is governed by federal constitutional standards." (*People v. Williams* (2017) 15 Cal.App.5th 111, 120.)

2. Analysis

Defendant asserts that the prosecution did not meet its burden to establish the constitutionality of the sobriety checkpoint. We agree. The evidence was insufficient to satisfy the fourth and fifth *Ingersoll* guidelines (reasonable location and time/duration).

a. Reasonable location

The record does not contain sufficient evidence that the checkpoint complied with the fourth *Ingersoll* guideline, that is, that it was set up at a reasonable location selected by policy-making officials. In *Ingersoll*, the court explained that "[t]he location of checkpoints should be determined by policy-making officials rather than by officers in the field. The sites chosen should be those which will be most effective in achieving the governmental interest; i.e., on roads having a high incidence of alcohol related accidents and/or arrests. [Citation.] Safety factors must also be considered in choosing an appropriate location." (*Ingersoll, supra*, 43 Cal.3d at p. 1343.)

Here, Officer Hirai testified that the location of the checkpoint was selected by his supervisor, Sergeant Thompson.

As quoted above, *Ingersoll* requires that "policy-making officials" rather than "officers in the field" determine the location of checkpoints but does not require the "policy-making officials" to be "command level personnel." While Thompson was Hirai's supervisor, and a sergeant, there was no evidence that he was a "policy-making official."

Even if Sergeant Thompson was a policy-making official, the prosecution failed to introduce evidence as to why Thompson chose that particular location. The court sustained an objection to the report of traffic accidents near the location of the checkpoint and struck all testimony regarding the report for lack of foundation. Apart from the report, there was no evidence that the intersection had "a high incidence of alcohol related accidents and/or arrests" (*Ingersoll, supra*, 43 Cal.3d at p. 1343) or that there was any other reason the location was selected. And there was no evidence offered at all as to "[s]afety factors . . . considered in choosing [the] location." (*Ibid.*)

Officer Hirai testified that the location had been used before, but this sheds no light on the reasons the location had originally been selected or whether those reasons would satisfy constitutional scrutiny. (See *Alvarado, supra*, 193 Cal.App.4th Supp. at p. 18 [evidence that a site previously had been used for checkpoints insufficient to establish compliance with fourth *Ingersoll* guideline in absence of "evidence that the intersection at issue had a high incidence of alcohol-related accidents"].) Thus, there was no evidence from which the trial court could determine that the fourth *Ingersoll* guideline had been satisfied.

b. Time and duration

The record also was insufficient to determine if the checkpoint complied with the fifth *Ingersoll* guideline, which

requires that law enforcement officials "exercise good judgment in setting times and durations" for checkpoints "with an eye to effectiveness of the operation, and with the safety of motorists a coordinate consideration." (*Ingersoll, supra*, 43 Cal.3d 1321, 1345.) "The time of day that a checkpoint is established and how long it lasts . . . bear on its intrusiveness as well as its effectiveness." (*Ibid.*) Here, the record reflects that the checkpoint was operating at around 1:00 a.m., but no evidence was adduced as to the total duration of the checkpoint, nor even what the duration of such checkpoints was in general. Thus there was no evidence from which the court could assess whether the time and duration of the checkpoint indicated "good judgment" on the part of the law enforcement officials. (*Ibid.*)

c. Habit and custom evidence

As to the other *Ingersoll* guidelines, Officer Hirai's testimony appears to have touched on them all to some degree. However, it is undisputed that Hirai did not organize, observe, or otherwise have personal knowledge of the checkpoint where defendant was stopped. Instead, Hirai testified as to his knowledge of how other checkpoints with which he had been involved had been set up. The trial court found this evidence both admissible and dispositive under Evidence Code section 1105, which states "[a]ny otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." In other words, because Hirai testified that some checkpoints with which he had been involved had been set up in a particular way, the court presumed

the checkpoint at issue here had been set up in the same way. We disagree with the trial court's conclusion.[2]

"Custom or habit involves a consistent, semiautomatic response to a repeated situation." (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926 (*Bowen*).) Evidence Code section 1105 concerns both the habits of individuals and " 'the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual.' " (*People v. Memro* (1985) 38 Cal.3d 658, 681, fn. 22 (*Memro*), overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)[3] Evidence of habit or custom usually comes from the opinion of someone familiar with the conduct in question or from evidence of specific instances of behavior. (1 Witkin, Cal. Evidence (5th ed. 2012) Circumstantial Evidence, § 74, p. 458; see *Memro, supra*, at p. 681 [" 'Habit' or 'custom' is often established by evidence of repeated instances of similar conduct." (Fn. omitted.)].) "Testimony that an act occurred, based on the witness' knowledge that the performance of that act is part of an invariable and long-continued business custom or habit, is treated as though the

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[2] We reject the Attorney General's argument that defendant forfeited his challenge to the court's ruling under Evidence Code section 1105 by not objecting on that ground below. Defendant's counsel objected multiple times to the admission of Officer Hirai's testimony on the basis that Hirai had no personal knowledge of the checkpoint at issue and argued that the evidence was insufficient to establish the checkpoint's constitutionality. Defendant is entitled to raise those issues on appeal.

[3] *Memro* defined "habit" as applying to individuals and "custom" as applying to groups or organizations. (*Memro, supra*, 38 Cal.3d at p. 681, fn. 22.)

performance of the act itself is within the personal knowledge of the witness." (*Kiernan v. Union Bank* (1976) 55 Cal.App.3d 111, 116 (*Kiernan*).)

Officer Hirai's testimony provided no basis to determine that the procedures he described were "invariable and long-continued." (*Kiernan, supra*, 55 Cal.App.3d at p. 116.) He did not testify that the practices he described were uniform across the 10 checkpoints in which he was personally involved; for example, it was unstated how frequently CHP or another law enforcement agency participated, and it was unclear how many of the checkpoints were at Rosecrans and Normandie as opposed to another location. Hirai also did not testify as to how long the practices he described had been in existence throughout the department, or how proximate in time the checkpoints in which he had participated were to the checkpoint at issue. Thus the court could not reasonably determine if the practices were long-standing or whether Hirai's personal experience with checkpoints was stale and did not match current practices. (See *Webb v. Van Noort* (1966) 239 Cal.App.2d 472, 478 [evidence of past conduct establishing a habit "must not be too remote in time or space from the time and place" of the conduct allegedly in conformance with that habit].)

At oral argument, counsel for respondent expressed concern that this court would impose new "burdens" on law enforcement agencies that employ sobriety checkpoints. We wish to emphasize that we are imposing no requirements beyond the guidelines set out in *Ingersoll*.

In sum, the evidence presented here was insufficient to establish that the sobriety checkpoint at Rosecrans and Normandie on the night of February 20, 2016, satisfied the fourth

and fifth *Ingersoll* guidelines (reasonable location and time/duration). In so holding we do not suggest that the checkpoint here was in fact not constitutional, only that the prosecution did not introduce sufficient evidence to support the trial court's determination that it was.

DISPOSITION

The judgment and the order denying appellant's motion to suppress are reversed and the cause remanded to the superior court. That court is directed to vacate the no contest plea if defendant moves to withdraw the plea within 30 days after the remittitur is issued. If defendant does not move to vacate the plea, the superior court is directed to reinstate the original judgment.

HALL, J.*

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.