NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA,
Appellant,

v.

LISA RIZZO,
Appellee,

Appeal No. 11-00076APANO
UCN: 522011AP000076XXXXCR

And

EMIL FERMENT,
Appellee.

Appeal No. 11-00075APANO
UCN: 522011AP000075XXXXCR

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Opinion filed September 13, 2012.

Appeal from Order Granting Defendants' Motion to Suppress entered by the Pinellas County Court
County Judge William H. Overton

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Office of the State Attorney
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ORDER AND OPINION

MEYER, Judge.

THIS MATTER is before the Court on the State of Florida's appeal from the lower court's order granting the Appellees' (Defendants') motions to suppress. Appellant argues that the trial court erred in ruling that the DUI checkpoint which led to the arrest

argues that the trial court erred in ruling that the DUI checkpoint which led to the arrest of the Appellees constituted illegal searches and seizures. As the cases captioned above stem from the operation of the same checkpoint and were jointly heard by the trial court, this court previously entered an order consolidating them for purposes of appeal. We affirm the order of the trial court finding the checkpoint to be an unconstitutional law enforcement action for the reasons stated below. [1]

BACKGROUND

During the early morning hours of October 9, 2010, the St. Petersburg Beach Police Department conducted a "Comprehensive Roadside Safety Checkpoint" (hereinafter "the checkpoint"). The checkpoint at issue in this case was a law enforcement operation referred to commonly as a "DUI roadblock". During the course of the checkpoint in the case at bar law enforcement officers stopped motor vehicles on a public roadway and directed the drivers of the vehicles to pull over into a nearby church parking lot. The vehicles and motorists were at that point briefly detained for further investigation. Appellees were detained in this fashion and both were eventually arrested for "driving under the influence" based on evidence obtained as a direct result of the checkpoint stops.

Through separate motions to suppress, Appellees challenged the constitutional validity of the checkpoint and argued that all evidence obtained as a result of its operation should be suppressed. The motions were consolidated and an evidentiary hearing was held. Following the hearing, the court rendered a lengthy order containing an expansive analysis of the law governing roadside checkpoints as well as detailed factual findings

[1] As we are upholding the trial court's ruling granting the motions to suppress we find it unnecessary to address the additional arguments raised by Appellees through cross appeal. The portions of the trial court's order challenged in the cross appeals are affirmed without further comment.

concerning the planning and operation of the checkpoint at issue.

Following the hearing on the motions to suppress, the trial court found that the checkpoint was conducted pursuant to a written plan entitled "Low Power Comprehensive Roadside Safety Checkpoint" A copy of this document (hereinafter "the plan") was provided to the trial court as evidence during the hearing. From the testimony and evidence presented at the hearing the trial court also determined that the law enforcement officer who created the plan also acted as the "Officer in Charge" of the checkpoint.

The plan called for the checkpoint to operate from midnight until 3:00 a.m. The plan covered many additional operational details including the duties of the various law enforcement personnel operating the checkpoint. The provision of the plan most critical to the determination of the issue on appeal, however, concerned the procedure to be employed in selecting the individual vehicles to be detained during the operation of the checkpoint.

While the written plan established scenarios whereby every 5th vehicle and then every 10th vehicle would be stopped depending on conditions, this selection pattern was never followed during the actual operation of the checkpoint. The officer in charge, immediately prior to the commencement of operation of the checkpoint, exercised the discretion granted to him in the written plan and orally directed that every vehicle travelling north on the public road would be stopped and checked. This "every vehicle" procedure was followed throughout the operation of the checkpoint.

In its written order, the court summed up that the fatal constitutional flaw with the checkpoint was that the written operational plan "*allowed* the officer in charge to alter

the detention pattern, on the fly, *during* checkpoint operations."

ANALYSIS

Appellant does not challenge the lower court's factual findings but appeals the legal conclusions drawn from those facts. The lower court's determination that the checkpoint "fails to pass constitutional muster" is subject to *de novo* review. *See Ornelas v. United States,* 517 U.S. 690 (1996).

It is well settled law that the action of law enforcement officers in stopping a motorist during the course of a DUI roadblock or checkpoint constitutes a seizure subject to Fourth Amendment analysis. *State v. Jones,* 483 So.2d 433, 435 (Fla. 1986). As the potential for abusive infringement of core constitutional rights is very high in a scenario where law enforcement is permitted to detain citizens based on **no suspicion,** the courts have developed stringent criteria to analyze the legal validity of checkpoints. Every checkpoint is subject to this level of scrutiny and not merely deemed to be constitutionally acceptable because it is labeled as a "checkpoint". *See id.*

In this vein, the Florida Supreme Court has determined that it "is essential that a written set of uniform guidelines be issued before a roadblock can be utilized." *Id.* at 438. Further the Court has stated and reiterated that "roadblocks stand or fall based on some set of neutral criteria governing the officers in the field" and that requiring a written uniform plan works to combat the fear of what can flow from allowing law enforcement "***unbridled discretion***" in the field. *Id.* (emphasis added)*; see also Campbell v. State,* 679 So.2d 1168, 1170 (Fla. 1996). These cases also stress that the Fourth Amendment requires that checkpoints "must be carried out pursuant to a plan embodying ***explicit, neutral limitations*** on the conduct of individual officers. *Id.* (citing *Brown v. Texas,* 443

U.S. 47, 51, 52 (1979), emphasis added). The written plan required for a valid checkpoint should cover in detail several critical areas including "(1) the selection of vehicles, (2) detention techniques, (3) duty assignments, and (4) the disposition of vehicles." *Jones,* 483 So.2d at 438. The primary issue in the case at bar is the validity of the portion of the written checkpoint plan dealing with the selection of vehicles.

The district court's application of the *Jones* and *Campbell* criteria in *Guy v. State,* is most helpful in deciding the matter currently before this court. 993 So.2d 77 (Fla. 2d DCA 2008). Although Appellant attempts to distinguish *Guy,* a plain reading of the opinion reveals that it is squarely on point with the cases on appeal. While the *Guy* court discusses other problems with the checkpoint at issue in that case, the opinion expressly states that the vehicle selection procedure in the written plan ran "afoul of the ***mandate*** in *Jones* and *Campbell". Id.* at 79. That mandate requires that the vehicle selection procedure contained in the written plan be governed by neutral criteria which limits [sic.] the conduct of individual officers. *Id.*

In addition to this stand-alone determination that the vehicle selection procedure in the written plan does not comply with the *Jones* and *Campbell* mandate, the rule that a flawed vehicle selection procedure requires a checkpoint to fail constitutional muster can be found in the language used by the court in the concluding paragraph of the opinion. That portion of the opinion reads, "because the State did not show that the operational plan sufficiently limited the discretion of the officers as to the selection of vehicles ***and, to a lesser extent***, the testimony showed that the officers did not strictly adhere to the written plan, we reverse the order denying the motion to suppress." *Id.* at 80. A plain reading of this opinion which is binding on this court demonstrates that a vehicle

selection procedure contained in a written plan which gives officers unbridled discretion is in and of itself fatal to the validity of the entire checkpoint.

Contrary to the thrust of Appellant's argument, the binding authority is clear that a checkpoint can fall based solely on the details of the *written* plan which controls the checkpoint. The appellant cites language from *Jones* asking the court to view "each set of guidelines as a whole when determining the plan's sufficiency". *Jones,* 483 So.2d at 438. To take this language from *Jones* to create some sort of absolute totality of the circumstances or balancing test in checkpoint cases is not a logical interpretation of the controlling precedent. When confronted with the plain language of a written plan which expressly gives unbridled discretion to law enforcement on the critical issue of deciding which vehicles and motorists to stop during the operation of a checkpoint, *Jones, Campbell* and *Guy* all require the invalidation of that checkpoint on Fourth Amendment grounds.

A more cogent interpretation of the *Jones* language relied on by Appellant and cited in the preceding paragraph would be that some suspect portions of a written plan may be rehabilitated or cured by other portions of that same written plan. An example of this would be a vehicle selection procedure incompletely described in the beginning of the written plan which is then set forth in more complete detail later on in the written plan. If under such a scenario reading the two portions together reveals that the selection procedure is based on neutral criteria and does not give the officers unbridled discretion, then that element of the plan would not run afoul of the *Jones/Campbell* mandate. *See Guy,* 993 So.2d at 79.

In the instant case there is no logical interpretation of the vehicle selection procedure contained in the written plan which could lead to a determination that it does not give "unbridled discretion" to officers in determining which motorists to detain. The vehicle selection provision which caused the checkpoint in *Guy* to be struck down by the district court is very similar to the vehicle selection provision of the written plan at issue in this case. The vehicle selection provision at issue in *Guy* reads as follows:

> Every vehicle will enter a designated checkpoint site. If a traffic back-up occurs that would not facilitate a minimal detainment, a contingency plan of either stopping the checkpoint until traffic does facilitate a minimal detainment or a systemic selection of vehicles **to include every X# vehicle will enter the checkpoint [sic]. This will be determined by the Event Commander/ Checkpoint Supervisor.**

Id. (emphasis added).

The vehicle selection provision at issue in the case at bar and cited in the trial court's order invalidating the checkpoint reads as follows:

> Every 5th vehicle traveling north on Blind Pass Road will be checked. If the traffic volume is greater then expected, the traffic count will be adjusted to every 10th vehicle to ensure traffic safety and to avoid unnecessary motorist delays. **The Command Officer will have the sole discretion to deviate from the established Motor Vehicle Count Ratio.**

(Emphasis added.)

A comparison of the *Guy* vehicle selection procedure with the procedure contained in the written plan involved in this appeal shows striking similarity between the two. Both provisions first set out a concrete selection pattern to be followed. Following the definitive criteria of *every* vehicle (*Guy*) and every *5th* and *10th* vehicle (cases on appeal), both written plans contain open door clauses allowing the officer commanding the checkpoint to alter the selection procedure using *any* criteria that person chooses. This is the essence of unbridled discretion prohibited by the cases previously discussed.

Because the written plan at issue in this case allows for this type of unbridled discretion to be exercised by law enforcement in the vehicle selection process it cannot survive the constitutional scrutiny that must be applied.

Appellant additionally argues the checkpoint at issue in this case should be deemed constitutionally sound based on the distinctions drawn between "field officers" and "officers in charge". While these terms appear in *Jones, Campbell* and *Guy,* all of these cases make it abundantly clear that the unbridled discretion prohibition applies to ***any*** officer, be they in command or simply assisting with the road block. Just as in the case at bar, the vehicle selection provision found unconstitutional in *Guy* granted unbridled discretion to the "command" officer. 993 So.2d at 79.

Appellant argues that the "officer in charge" of the checkpoint be granted limited authority to alter a safety checkpoint if unforeseen circumstances arise. This appears to be another way of saying that the officer in charge should have the authority to exercise complete discretion in altering the vehicle selection pattern as allowed for in the written plan. Allowing the "officer in charge" to have this enhanced discretion would be completely contrary to the legal conclusion that a checkpoint must be invalidated if the written plan fails to limit officer discretion in the selection of vehicles.

Appellant also points out that in the case sub judice the officer in charge ordered that the vehicle selection pattern be modified such that every vehicle was to be stopped. Apparently this fact is relied upon by Appellant to demonstrate that in this case neutral criteria were applied to the vehicle selection process. As Appellant correctly argues, checkpoints where every vehicle is stopped have indeed been upheld. However, the critical issue in this case is not what the officers actually did in operating the checkpoint

rather it is what the written plan ***allowed*** them to do, i.e. exercise unbridled discretion in the selection of vehicles. The fact that ultimately the officers may not exercise unbridled discretion or arbitrary discretion does not control on the issue of constitutionality. *See Guy,* 993 So.2d 77.

Finally we must reject the notion that the checkpoint in this case is valid because the vehicle selection procedure was properly amended prior to the start of the checkpoint. Although the officer in charge put the "every vehicle" selection procedure into effect immediately prior to commencement of the checkpoint, this change was not reduced to writing or otherwise documented in the written plan before the checkpoint began operation. The failure to formally amend the written plan "in writing" is not a minor issue. As this opinion has already discussed, a valid written plan is required for a checkpoint to be determined valid under Fourth Amendment analysis. The following instruction from the Florida Supreme Court guides us to the conclusions we have reached today:

> The requirement of written guidelines is not merely a formality. Rather, it is the method this court and others have chosen to ensure that the police do not act with unbridled discretion in exercising the power to stop and restrain citizens who have manifested no conduct that would otherwise justify an intrusion on a citizen's liberty. In this country the police are not vested with the general authority to set up "routine" roadblocks at any time or place. Rather, law enforcement was placed on notice by our holding in *Jones* that the stopping and detaining of a citizen is a serious matter that requires particularized advance planning and direction and strict compliance thereafter.

Campbell, 679 So.2d at 1172.

CONCLUSION

Because the written plan governing the checkpoint at issue in this case failed to sufficiently limit the discretion of officers as to the procedure for the selection of vehicles

to be detained, the checkpoint was not constitutionally valid. As such, the seizure of the Appellees was illegal requiring their arrests and all evidence obtained as a result of their detention to be suppressed.

Affirmed.

Original order entered on September 13, 2012, by Circuit Judges Raymond O. Gross, L. Keith Meyer, Jr., and R. Timothy Peters.

cc: Honorable William H. Overton

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