

[J-96-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 14 WAP 2011
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered May 11, 2010 at No. 860
	:	WDA 2009, affirming the Order of the
v.	:	Court of Common Pleas of Forest County
	:	dated April 24, 2009 at No. CP-27-CR-
	:	0000095-2007.
JOHN M. MARCONI,	:	
	:	996 A.2d 1070 (Pa.Super. 2010)
Appellee	:	
	:	ARGUED: October 19, 2011

DISSENTING OPINION

MR. JUSTICE McCAFFERY

DECIDED: JANUARY 22, 2013

I respectfully dissent because I conclude that the operation of a DUI checkpoint is within the scope of a sheriff's authority to stop, detain, and arrest a person who violates the Vehicle Code,¹ thereby breaching the peace, in the sheriff's presence. In my view, this conclusion flows directly from the law enforcement authority of a sheriff under the common law, as interpreted by our precedent, most relevantly Commonwealth v. Leet, 641 A.2d 299 (Pa. 1994), and Commonwealth of Pennsylvania, Department of Transportation v. Kline, 741 A.2d 1281 (Pa. 1999).²

¹ Act of June 17, 1976, P.L. 162, No. 81, as amended, 75 Pa.C.S. §§ 101 et seq.

² Throughout this dissenting opinion, the word "sheriff" can mean a deputy sheriff or a sheriff.

In Leet, a sheriff stopped a vehicle driven by the defendant-appellee after the sheriff observed the vehicle pass a line of traffic stopped in a no-passing zone. In the ensuing interaction, the sheriff determined that the defendant-appellee's license to drive had been suspended, noticed an open can of beer on the front seat, and also found controlled substances in the vehicle. The defendant-appellee ultimately was charged with several violations of the Vehicle Code as well as drug-related offenses. Before the trial court, he moved to suppress all the physical evidence obtained as a result of his stop and detention by the sheriff. The suppression court granted the defendant-appellee's motion, concluding that the sheriff lacked the authority to stop a vehicle for a traffic violation. See Leet, supra at 300-01. The Superior Court affirmed the suppression order, holding that a sheriff does not have authority to enforce the Vehicle Code or make warrantless arrests for violations thereof, even those that occur in the sheriff's presence. In reaching this holding, the Superior Court relied on several Vehicle Code provisions vesting enforcement authority specifically and explicitly in police officers. For example, 75 Pa.C.S. § 6308(a) provides, in relevant part, that "[t]he operator of any vehicle ... reasonably believed to have violated any provision of this title shall stop upon request or signal of any **police officer** and shall, upon request, exhibit a registration card, driver's license" (Emphasis added). From this and other similar provisions of the Vehicle Code, the Superior Court concluded that the General Assembly had explicitly vested enforcement of the Vehicle Code in police officers and not in sheriffs. The Superior Court accordingly held that a sheriff was not authorized to stop a motorist and make an arrest for a Vehicle Code violation, even when the violation was committed in the presence of the sheriff.

This Court disagreed, holding "that the common law powers of the sheriff include the power to enforce the [M]otor [V]ehicle [C]ode, and that such powers have not been

abrogated by statute or otherwise.” Leet, supra at 301. Based on an historical analysis harkening back to England before the Magna Carta, the Court concluded that sheriffs had the power, under the common law, to make arrests without warrants for felonies and for breaches of the peace committed in their presence. Id. at 301-03. Because the Vehicle Code contains no unequivocal abrogation of the sheriff’s common law power to arrest, we held that sheriffs retain their common law authority to make arrests for motor vehicle violations that amount to breaches of the peace committed in their presence. Id. at 303. The power to arrest, moreover, “subsumes the power to stop, detain, and investigate a motorist who breaches the peace while operating a motor vehicle in the presence of the sheriff.” Id.

In addition to the above holding, we also emphasized in Leet the need for appropriate training for sheriffs who are engaged in such law enforcement activities. Thus, we remanded the case to the trial court for a determination as to whether the sheriff who had stopped and arrested the defendant-appellee had completed appropriate law enforcement training. Id.

Our holding in Leet was subsequently clarified by our unanimous decision in Kline, supra, wherein “the Clinton County Sheriff’s Department, with assistance from five area municipal police departments, conducted a sobriety checkpoint.” Kline, supra at 1282. A sheriff stopped a vehicle driven by the Kline defendant-appellee at the checkpoint, and, upon detecting the odor of alcohol, obtained her consent to submit to field sobriety tests. Another sheriff conducted the field sobriety tests, which the defendant-appellee failed, and the sheriff then arrested her for DUI. Id. at 1282.

Although the defendant-appellee had given her consent to field sobriety tests, she refused to submit to a blood alcohol test. Therefore, the Department of Transportation notified her that her operating privilege was being suspended for one

year, pursuant to Section 1547 of the Vehicle Code. Under this section, a driver's consent to chemical alcohol testing is implied where "a **police officer** has reasonable grounds to believe the person to have been driving ... [while under the influence of alcohol]." 75 Pa.C.S. § 1547(a)(1) (emphasis added). In addition, under subsection 1547(b)(1), a person who refuses to submit to chemical testing for blood alcohol after being placed under arrest for DUI, shall have his or her operating privilege suspended for twelve months. The Kline defendant-appellee appealed the suspension of her operating privilege, challenging the sheriff's legal authority to arrest her on the grounds that the sheriff was not a "police officer" within the meaning of Section 1547. Kline, supra at 1282. The trial court sustained the defendant-appellee's challenge, finding that the sheriff had not received "the same type of training" as municipal police officers, and thus did not qualify as a "police officer" for purposes of enforcing the Vehicle Code. Id. at 1283. The Commonwealth Court affirmed.

In the Commonwealth's appeal to this Court, the sole question was whether the sheriff, who had completed not just the sheriff's basic training course but also additional training in DUI and field sobriety test administration³, "qualifie[d] as a 'police officer' for purposes of enforcing the Vehicle Code under the rationale of this Court's holding in [Leet]." Kline, supra at 1282. We concluded that, although the sheriff had not received

³ The sheriff's training in Kline was as follows. He had completed the basic training requirements for deputy sheriffs, completed a 4-day course of instruction in field sobriety testing provided by the Department of Education, and completed additional training at the Lackawanna Junior College Police Academy, involving 32 hours of instruction in motor vehicle codes, 8 hours of instruction in accident investigation, and 5 hours of instruction in DUI. The Vehicle Code and DUI training that the sheriff completed were the same course modules as required of municipal police cadets in an Act 120 certification program. Kline, supra at 1285. We concluded that this training was sufficient under Leet to confer authority on the sheriff to enforce the Vehicle Code. Kline, supra at 1285-86. Act 120 has been repealed and replaced with similar provisions found at 53 Pa.C.S. §§ 2161-71. See Kline, supra at 1282 n.1.

“the exact training as a municipal police officer,” the sheriff had completed “the same type of training that is required of police officers throughout the Commonwealth” for enforcing the Vehicle Code. Id. at 1285; see n.3. Accordingly, we held that the sheriff “was authorized to enforce the Vehicle Code,” including Section 1547(a), and thus the defendant-appellee’s arrest, which originated from a DUI checkpoint operated by sheriffs, was valid. Id. at 1286.

Several years later, in Kopko v. Miller, 892 A.2d 766, 776-77 (Pa. 2006), another case dealing with the authority of sheriffs, see infra, we summarized our holdings in Kline and Leet as follows:

[B]ecause the record in Kline established that the deputy sheriff had received the same type of training as municipal police officers did, we held that [the deputy sheriff] was authorized to enforce the Motor Vehicle Code by requesting a driver to submit to field sobriety and blood alcohol tests. As in Leet, we determined that a sheriff is empowered to make an arrest for a motor vehicle violation committed in his presence.

Kopko, supra at 776-77.

Considering the holdings of Kline and Leet together, I conclude that our precedent has established that an appropriately trained sheriff has the authority, in the context of a DUI checkpoint, to assess whether drivers are under the influence of alcohol, to ask those drivers whom he or she reasonably believes to be under the influence of alcohol to submit to field sobriety and blood alcohol tests, to administer those tests, and to arrest drivers who do not pass. While these activities constitute major aspects of the operation of a DUI checkpoint, I recognize that other activities are necessary as well, i.e., predetermining the objective standards as to which vehicles to stop; making a decision as to time and location of the checkpoint; providing warning of

the checkpoint; physically erecting the checkpoint; and momentarily stopping vehicles for a brief observation. However, I can see no reason why a sheriff who is authorized to enforce the Vehicle Code to the extent recognized in Kline would not also be authorized, if appropriately trained, to conduct these additional activities.⁴

The majority concludes that sheriffs lack authorization to conduct independently the activities required for a DUI checkpoint based on a "general understanding that express statutory authorization is required for independent investigations by sheriffs ... implicating constitutionally-protected interests of the citizenry." Majority Opinion at 7. As the majority observes, this "general understanding" derives from our holdings in Commonwealth v. Dobbins, 934 A.2d 1170 (Pa. 2007), and Kopko, 892 A.2d at 766, which concerned independent criminal investigations under, respectively, the Controlled Substance, Drug, Device and Cosmetic Act and the Wiretapping and Electronic Surveillance Act.⁵ In my view, the nature and the conduct of an investigation under these criminal statutes is far from comparable to the operation of a DUI checkpoint. Constitutional constraints, of course, cabin all investigations, whether pursued under the Controlled Substance, Drug, Device and Cosmetic Act; under the Wiretapping and Electronic Surveillance Act; or under the statutory provision permitting a DUI checkpoint.⁶ However, in addition, in the case of a DUI checkpoint, the specific

⁴ Kline clarified the training available to sheriffs for enforcement of the Vehicle Code. We concluded that the deputy sheriff in Kline "did not receive the exact same training as a municipal police officer would receive pursuant to Act 120, [but] he completed the same type of training that is required of police officers throughout the Commonwealth as required by our holding in Leet for purposes of enforcing the Vehicle Code." Kline, supra at 1285 (internal quotation marks omitted).

⁵ Respectively 35 P.S. §§ 780-101 - 780-144 and 18 Pa.C.S. §§ 5703-5728.

⁶ The mere fact that a DUI checkpoint implicates constitutionally protected interests does not move a checkpoint outside the limits of a sheriff's authority. An arrest (...continued)

parameters have been defined and delineated in detail by this Court, reserving little to the discretion of the law enforcement personnel conducting the checkpoint. See Commonwealth v. Worthy, 95 A.2d 720, 725 (Pa. 2008); Commonwealth v. Blouse, 611 A.2d 1177, 1180 (Pa. 1992); Commonwealth v. Tarbert, 535 A.2d 1035, 1042 (Pa. 1987) (plurality). Specifically, with regard to DUI checkpoints, this Court has set forth the following requirements: the vehicle stops must be brief, with no physical search, but only a trained observation; warning of the checkpoint must be provided; the determination as to which vehicles to stop must be based on administratively pre-fixed, objective standards, not the unfettered discretion of the law enforcement agents in the field; decisions as to time and place, or even whether to hold a checkpoint, are matters reserved for prior administrative approval; choice of time and place for the checkpoint must be based on local experience as to where and when intoxicated drivers are likely to be traveling. See Worthy, supra; Blouse, supra; Tarbert, supra.

In my view, this strict judicial delineation of and limitation on the conduct of a DUI checkpoint severely constrains the applicability of the general rule set forth in Dobbins and Kopko to the instant case. While I acknowledge that a DUI checkpoint is a type of investigation, it is a systematic, controlled-step-by-controlled-step, highly regulated investigation, of very different character from the more open and varied, lengthier, less defined investigations contemplated under the Controlled Substance, Drug, Device and Cosmetic Act or the Wiretapping and Electronic Surveillance Act. I conclude that a DUI checkpoint investigation is more akin to the type of investigation that we considered in Leet and concluded was within the authority of a sheriff. Specifically, in Leet, supra at

(continued...)

obviously implicates constitutionally protected interests, but there is no dispute that, under defined circumstances, a sheriff has the authority to make an arrest. See Kline, supra, and Leet, supra.

303, we held that a sheriff's power to arrest "subsumes the power to stop, detain, and **investigate** a motorist who breaches the peace while operating a motor vehicle in the presence of the sheriff." (emphasis added). A motorist under the influence of alcohol who drives a vehicle into a DUI checkpoint has, in fact, breached the peace while operating his or her motor vehicle in the presence of the law enforcement agents conducting the checkpoint, and those law enforcement agents -- be they police officers or sheriffs -- should have the authority to investigate the breach pursuant to our prior decisional law.

While I do not dispute the majority's conclusion that sheriffs are not police officers under the Vehicle Code, I also agree with Mr. Justice Eakin that certain of our decisions have considered sheriffs as police officers for one purpose and not for another. Majority Opinion at 10, 14; Concurring Opinion at 1, (Eakin, J). As examples of specific purposes for which we **have** considered sheriffs as police officers, one need look no further than Leet and Kline wherein, as discussed above, we concluded that sheriffs had the authority to enforce specific provisions of the Vehicle Code despite the apparently exclusionary statutory text specifically granting such authority to police officers.

In sum, based on our holdings in Kline and Leet, I would hold that if sheriffs are appropriately trained, they have the authority to operate DUI checkpoints independently and fully. In my view, the majority's conclusion that sheriffs do not have authority to conduct DUI checkpoints -- regardless of how well they are trained and regardless of whether, under Kline and Leet, they would have qualified as "police officers" for specific enforcement of the Vehicle Code -- is inconsistent with our reasonable and logical holdings in these precedents.⁷ Accordingly, I must respectfully dissent.

⁷ I agree with and want to underscore Mr. Justice Eakin's observation that "the actual responsibilities of the sheriff in Forest County may be quite distinct from the role of the sheriff in Allegheny or Philadelphia Counties." Concurring Opinion at 2 n.1 (Eakin, J). (...continued)

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Furthermore, I agree that the "absence of a significant police presence in parts of our Commonwealth such as Forest County makes it inviting for the sheriff to consider filling the void." Id. at 1. One important void is the conduct of DUI checkpoints. See Tarbert, supra at 1042 (discussing DUI checkpoints as a law enforcement procedure, similar to, but more effective than, roving patrols in achieving the goal of removing drunk drivers from the roadways). I cannot conclude that the General Assembly intended that those counties without a significant police presence should be precluded from filling that void.