IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

WILLIAM MICHAEL CALHOUN,
Defendant-Appellant.

Supreme Court Case No.: CRA13-024
Superior Court Case No.: CM0352-12

OPINION

Cite as: 2014 Guam 26

Appeal from the Superior Court of Guam
Argued and submitted on April 30, 2014
Father Duenas Memorial School Phoenix Center
Mangilao, Guam

Appearing for Defendant-Appellant:
F. Randall Cunliffe, *Esq.*
Cunliffe & Cook, P.C.
210 Archbishop Flores St., Ste. 200
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:
Brian D. Gallagher, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
590 S. Marine Corps. Drive, Ste. 706
Tamuning, GU 96913

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendant-Appellant William Michael Calhoun challenges the denial of his motion to suppress evidence gathered at a sobriety checkpoint. He was charged with driving under the influence and driving with a blood alcohol level in excess of 0.08%.

[2] On appeal, Calhoun argues that the sobriety checkpoint was conducted in violation of the Fourth Amendment of the United States Constitution, because the Guam Police Department ("GPD") failed to adhere to the requirements of GPD's Traffic Investigation Section ("TIS") 91-45 sobriety checkpoint guidelines. The People argue to the contrary.

[3] We hold that the trial court erroneously denied Calhoun's motion to suppress because the People failed to establish that the planned sobriety checkpoint was approved by supervisory law enforcement personnel rather than officers in the field or conducted in substantial compliance with TIS 91-45, as required by the Fourth Amendment. We reverse the trial court's decision and order.

I. FACTUAL AND PROCEDURAL BACKGROUND

[4] One evening, at approximately 9:50 p.m., Calhoun was driving his vehicle when he was stopped at a sobriety checkpoint conducted by the Guam Police Department on Route 1, near the Department of Public Works in Upper Tumon. Officers noticed that Calhoun's breath smelled strongly of alcohol. When asked whether he had anything to drink, Calhoun responded that he had three beers. Calhoun failed the field sobriety tests administered by the officers, and a breath test subsequently showed that his blood alcohol concentration ("BAC") was 0.194%. As a result, Calhoun was charged with operating a vehicle while intoxicated, as a misdemeanor, and

operating a vehicle with a BAC of 0.08% or more, as a misdemeanor. Calhoun then moved to suppress the evidence of his intoxication, alleging that the checkpoint violated the Fourth Amendment of the U.S. Constitution.

[5] During the hearing on Calhoun's motion, GPD Officer Santo Tomas testified about the planning and operation of the sobriety checkpoint at which Calhoun was stopped. He testified that the checkpoint was scheduled by Sergeant R.J. Santos of the Highway Patrol Division "and whoever his bosses are at the time." Transcript ("Tr.") at 27 (Hr'g Mot. Suppress, Jan. 9, 2013). Officer Santo Tomas added that the checkpoint began operations after the setup was completed. Public notice of the checkpoint was given a few days earlier through a media release by GPD's Public Information Officer.

[6] Following the suppression hearing, the trial court denied Calhoun's motion. Calhoun then sought to plead guilty to one charge of Driving While Under the Influence, while preserving his right to appeal the trial court's denial of his motion to suppress, in accordance with 8 GCA § 130.15(e).[1] The trial court then issued a Certificate of Probable Cause. This appeal ensued.

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a judgment of conviction upon a plea of guilty or nolo contendere under 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-163 (2014)), 7 GCA § 3108(a) (2005), and 8 GCA § 130.15(e) (2005).

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[1] Section 130.15(e) provides that an appeal may be taken by the defendant:

> From a judgment of conviction upon a plea of guilty or nolo contendere, where the defendant has filed with the trial court a written statement, executed under oath of penalty of perjury showing reasonable constitutional, jurisdictional or other grounds going to the legality of any proceedings held in this case under § 65.15(c) of [the Criminal Procedure] Code and the trial court has executed and filed a certificate of probable cause for such appeal . . . .

8 GCA § 130.15(e) (2005).

III. STANDARD OF REVIEW

[8] "Where a defendant's motion to suppress is grounded on a Fourth Amendment violation, the issue of the lawfulness of the search or seizure is reviewed *de novo*." *People v. Camacho*, 2004 Guam 6 ¶ 13 (citing *People v. Chargualaf*, 2001 Guam 1 ¶ 12). Regarding the factual findings, however, the findings of fact relied on by the trial judge in drawing legal conclusions are reviewed for clear error, and the facts are construed in a light most favorable to the party prevailing at the trial level. *Id.* (quoting *People v. Johnson*, 1997 Guam 9 ¶ 3). "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake." *Id.* (quoting *Yang v. Hong*, 1998 Guam 9 ¶ 7).

[9] At the trial court level, "[t]he defendant bears the burden of proof when a search or seizure is conducted pursuant to a warrant; however, the People bear the burden of proof when a warrantless search or seizure occurs." *People v. Santos*, 1999 Guam 1 ¶ 51. As such, because the seizure occurred at a checkpoint and without a warrant, the People had the burden of proof at the suppression hearing.

IV. ANALYSIS

[10] Calhoun argues that the trial court erred in failing to suppress evidence obtained from the sobriety checkpoint because the sobriety checkpoint was unconstitutional.[2] *See* Appellant's Br. at 8-9 (Mar. 5, 2014). However, before we address the constitutionality of the sobriety

[2] This opinion addresses only the initial stop at the checkpoint and the associated preliminary questioning and observation by officers. The "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976)).

checkpoint operation itself, we must first examine the constitutionality of the TIS 91-45 sobriety checkpoint guidelines adopted by GPD.[3]

A. Whether the TIS 91-45 Sobriety Checkpoint Guidelines are Constitutional

1. Constitutional principles of searches and seizures at sobriety checkpoints

[11] We begin with basic principles of search and seizure jurisprudence common to the Fourth Amendment.[4] The Fourth Amendment "protects against unreasonable searches and seizures and is made applicable to Guam via section 1421b(c) of the Organic Act of Guam." *Chargualaf*, 2001 Guam 1 ¶ 14 (citing *Johnson*, 1997 Guam 9 ¶ 4).

[12] A seizure occurs under the Fourth Amendment whenever a motorist is stopped by an agent of the government, even when the stop occurs at a sobriety checkpoint. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (checkpoints are "seizures" within the meaning of the Fourth Amendment of the Constitution). "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular government invasion of a citizen's personal security.'" *Chargualaf*, 2001 Guam 1 ¶ 14 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977)). Reasonableness "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Mimms*, 434 U.S. at 109 (citation and internal quotation marks omitted).

[13] When evaluating the reasonableness of a seizure at a sobriety checkpoint, the U.S. Supreme Court applies the following three-prong balancing test: (1) "the gravity of the public

[3] The parties in this case do not dispute that TIS 91-45 serves as GPD's sobriety checkpoint guidelines. *See* RA, tab 19 at 2-5 (Opp'n Mot. Suppress, Dec. 10, 2012) (arguing that GPD followed the guidelines set forth in TIS 91-45); RA, tab 17 at 2 (Mem. L. Supp. Mot. Suppress, Nov. 23, 2012).

[4] The Fourth Amendment provides in relevant 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. The Organic Act of Guam contains identical language. *See* 48 U.S.C.A. § 1421b(c).

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." *Brown v. Texas*, 443 U.S. 47, 51 (1979). In applying this test, the Supreme Court held that brief, suspicionless seizures at checkpoints for the purpose of combating drunk driving do not violate the Fourth Amendment. *Sitz*, 496 U.S. at 451-55; *see also Commonwealth v. Yastrop*, 768 A.2d 318, 321 (Pa. 2001); *State v. Downey*, 945 S.W.2d 102, 108 (Tenn. 1997) ("A majority of state courts have followed the [*Brown*] balancing analysis and have concluded that roadblocks may survive constitutional scrutiny if they are operated under guidelines which minimize intrusiveness and limit officers' discretion.").

[14] A central concern in balancing the *Brown* factors is "assur[ing] that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown*, 443 U.S. at 51. To this end, the Fourth Amendment requires that "a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995)); *see also Brown*, 443 U.S. at 51 ("[A] seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual . . . ."). Otherwise, "the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

[15] Here, because the arrest was made at a sobriety checkpoint (as opposed to a search based on an individualized suspicion of wrongdoing), we apply the *Brown* balancing test to determine whether TIS 91-45 contains explicit, neutral limitations on the conduct of officers at the checkpoint location. *See Downey*, 945 S.W.2d at 108.

2. Applying the *Brown* balancing test

a. First prong: Government's interest in preventing accidents caused by drunk drivers

[16] With regard to the first prong, the gravity of the public concerns served by the seizure, the Supreme Court has recognized that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Sitz*, 496 U.S. at 451. The Guam Legislature shared this same concern, as evidenced by the passage of the Safe Streets Act. *See* Guam Pub. L. 22-20:02 (June 22, 1993); *see also* 16 GCA § 18101 *et seq.* The preamble to the legislation states:

> Section 1. Legislative statement. In recent years, traffic accidents involving motorists driving under the influence of alcohol have risen alarmingly despite previous legislative efforts to curb the problem. The Legislature finds that a revised implied consent law and tougher penalties are needed. This Act shall be called the "Safe Streets Act."

P.L. 22-20:02. The Acting Governor of Guam at the time also expressed concerns over Guam's drunk driving problems in his letter to the Legislature regarding Public Law 22-20:02. *See* Letter from Hon. Frank F. Blas, Acting Governor of Guam, to Hon. Joe T. San Agustin, Speaker of Guam Legislature (June 22, 1993).

[17] We recognize that there exists a strong public interest in reducing the accidents caused by drunk drivers, and find that the first factor weighs in favor of sobriety checkpoints.

b. Second prong: Effectiveness of sobriety checkpoints

[18] Turning to the second prong of the *Brown* test, the degree to which the seizure advances the public interest, the Supreme Court in *Sitz* stated that this prong "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public

danger." 496 U.S. at 453. Instead, "the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id.* at 453-54. Here, GPD's Highway Patrol Division, having primary jurisdiction over the investigation of traffic violations,[5] is well equipped to determine which method is most effective when apprehending drunk drivers. Further, sobriety checkpoint operations are to be examined on a case-by-case basis in order to determine the reasonableness of each checkpoint. *See Commonwealth v. Buchanon*, 122 S.W.3d 565, 571 (Ky. 2003) (stating that sobriety checkpoint "guidelines are to be applied on a case-by-case basis in order to determine the reasonableness of each roadblock").

c. Third prong: Level of intrusion on an individual's privacy

[19] As to the third prong, the severity of the interference with individual liberty, the Supreme Court has stated that states may develop "methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Prouse*, 440 U.S. at 663. One case that provides a helpful framework for analyzing the constitutional validity of sobriety checkpoints is the California Supreme Court case of *Ingersoll v. Palmer*, 743 P.2d 1299 (1987).

[5] Title 10 GCA § 77201 provides:

> There is established as a permanent division within the Guam Police Department the Guam Highway Patrol. The Guam Highway Patrol shall have primary jurisdiction over the enforcement of all laws on Guam pertaining to vehicular traffic on Guam's roads and highways that are currently enforced by the Guam Police Department, including the Vehicular Code of Guam, all traffic safety laws currently enforced by the Guam Police Department, and the investigation of traffic accidents and violations. This shall not be construed as to transfer authority for enforcement as currently resides with the Department of Revenue and Taxation. The Guam Highway Patrol shall include all personnel, jurisdiction, equipment and function currently assigned to the Traffic Division of the Guam Police Department, which shall be merged into the Guam Highway Patrol. Nothing in this Section or Chapter shall be construed as in any way limiting the police powers of members of the Guam Highway Patrol in the investigation of any other crimes on Guam, or the powers of any member of the Guam Highway Patrol to effect any arrest or any exercise any normal power of any police officer on Guam, nor is the ability of any police officer on Guam to enforce traffic or other laws on the roads of highways of Guam to be construed as diminished.

10 GCA § 77201 (2005).

[20] In *Ingersoll*, the court applied the *Brown* balancing test and concluded "that within certain limitations a sobriety checkpoint may be operated in a manner consistent with the federal and state Constitutions." *Ingersoll*, 743 P.2d at 1302, 1311-17. With regard to the first two prongs, the court determined that (1) "[d]eterring drunk driving and identifying and removing drunk drivers from the roadways undeniably serves a highly important governmental interest," and that (2) sobriety checkpoints "do advance this important public goal." *Id.* at 1311. As to the third prong,[6] the court identified and applied eight factors to serve as functional guidelines for assessing the intrusiveness of sobriety checkpoints, *see id.* at 1313-17,[7] which the court in a later case identified as follows:

> (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;
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> (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;
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> (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.

[6] The *Ingersoll* court rephrased the third prong as "the intrusiveness on individual liberties engendered by the sobriety checkpoints." 743 P.2d at 1313.

[7] The *Ingersoll* guidelines were adopted by the New Mexico Supreme Court in *Las Cruces v. Betancourt*, 735 P.2d 1161 (N.M. Ct. App. 1987), which is recognized as the leading case on checkpoints in New Mexico. *See State v. Deskins*, 673 P.2d 1174, 1185 (Kan. 1983) (examining a comparable list of factors).

People v. Banks, 863 P.2d 769, 773-74 (Cal. 1993) ("[T]he operation of a sobriety checkpoint conducted in the absence of advance publicity, but otherwise in conformance with the guidelines we established in [*Ingersoll*], does not result in an unreasonable seizure within the meaning of the Fourth Amendment to the United States Constitution." (citation omitted)). "[T]he absence of one factor . . . does not necessarily mean the checkpoint is unconstitutional." *Roelfsema v. Dep't of Motor Vehicles*, 48 Cal. Rptr. 2d 817, 820 (Ct. App. 1995) (citing *Banks*, 863 P.2d 769).

d. Applying the *Ingersoll* framework

[21] As explained below, the sobriety checkpoint guidelines contained in TIS 91-45, if implemented correctly, sufficiently minimize the intrusiveness of field officers at sobriety checkpoints and therefore satisfy the *Ingersoll* factors.

i. Decision-making at the supervisory level

[22] "The decision to establish a sobriety checkpoint, the selection of the site and the procedures for the checkpoint operation should be made and established by supervisory law enforcement personnel, and not by an officer in the field." *Ingersoll*, 743 P.2d at 1313. In *Ingersoll*, this factor was satisfied because decisions pertaining to the establishment of the checkpoint, as well as the checkpoint operational procedures, were made by "command level personnel." *Id.*

[23] TIS 91-45, which was issued on October 15, 1991, likewise satisfies this factor because it was approved by command level personnel within GPD: a Lieutenant, the Assistant Chief of Police from the Criminal Investigation Division, and the Operations Chief of the Criminal Investigation Division. *See* RA, tab 17, Ex. A at 1-7 (Mem. L. Supp. Mot. Suppress, Nov. 23, 2012).

ii. Limits on discretion of field officers

[24] The second factor requires that a neutral formula be employed to determine who should be stopped at the checkpoint. *See Ingersoll*, 743 P.2d at 1314. "[M]otorists should not be subject to the unbridled discretion of the officer in the field as to who is to be stopped. Instead, a neutral formula such as every driver or every third, fifth or tenth driver should be employed." *Id.* The checkpoint program in *Ingersoll* was found to have used "neutral mathematical selection criteria." *Id.*

[25] Similarly, TIS 91-45 requires that vehicles be stopped depending on traffic volume. RA, tab 17, Ex. A at 5 (Mem. L. Supp. Mot. Suppress). Specifically, every third vehicle will be stopped when traffic flow is slow; every fifth vehicle when traffic flow is moderate; and every tenth vehicle when traffic flow is heavy. *Id.*

[26] Calhoun, however, argues that the TIS 91-45 formula is insufficient because it fails to give any guidance for the officers on the field to determine the traffic volume. Appellant's Br. at 9. To the contrary, officers in the field must have some discretion to decide which of the neutral mathematical formulas to use in order to ensure the safety of the officers and the motorists. As the court stated in *Ingersoll*:

> Screening procedures may at times be altered consistent with traffic volume, such that, for example, every car might be stopped when traffic is light, but if traffic began to back up, a different neutral formula might be applied, such as every fifth or tenth car, or operations might be temporarily suspended until traffic volume permitted resumption of safe checkpoint operation.

743 P.2d at 1314. As such, TIS 91-45 provides a neutral mathematical formula that would minimize officer discretion in the field.

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iii. Maintenance of safety conditions

[27] "Primary consideration must be given to maintaining safety for motorists and officers. Proper lighting, warning signs and signals, and clearly identifiable official vehicles and personnel are necessary to minimize the risk of danger to motorists and police." *Id.* Additionally, "[t]he checkpoint should be operated only when traffic volume allows the operation to be conducted safely." *Id.*

[28] TIS 91-45 requires that checkpoints be operated with a high degree of safety assurance. Checkpoint locations must permit the safe flow of traffic and should have maximum visibility from each direction of travel. RA, tab 17, Ex. A at 3-4 (Mem. L. Supp. Mot. Suppress). Special care must also be taken to warn motorists of the checkpoint with the use of warning signs placed in advance of the checkpoint, flares, safety cones, road barriers, permanent/portable lighting, marked patrol vehicles. *Id.* at 4. Additionally, field officers are responsible for maintaining the safety and efficiency of the operations. *Id.* As such, TIS 91-45 provides adequate measures to ensure that proper safety precautions are taken at the checkpoint location.

iv. Reasonable checkpoint location

[29] "The 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." *Ingersoll*, 743 P.2d at 1314 (citing *State v. Coccomo*, 427 A.2d 131, 134 (N.J. Super. Ct. Law Div. 1980). In choosing an appropriate location, safety factors must also be considered. *Id.*

[30] TIS 91-45 satisfies this factor because it specifically requires that checkpoint locations be pre-determined and selected based upon the following criteria:

1. Alcohol/Drug related traffic experience;
2. Unusual incidence of alcohol/drug related accidents.
3. Alcohol/drug impaired driving violations.
4. Unusual number of nighttime single vehicle accidents (i.e. Auto Ran Off Roadway).

RA, tab 17, Ex. A at 3 (Mem. L. Supp. Mot. Suppress).

v. Time and duration of checkpoint

[31] The time of day that a checkpoint is conducted, as well as how long it lasts, also bear on the intrusiveness and the effectiveness of the checkpoint. *Ingersoll*, 743 P.2d at 1315. The *Ingersoll* court, however, refused to set a hard and fast rule on this factor and expected law enforcement officials "to exercise good judgment in setting times and durations, with an eye to effectiveness of the operation, and with the safety of motorists a coordinate consideration." *Id.* The U.S. Supreme Court in *Sitz* upheld the constitutionality of a sobriety checkpoint that lasted 75 minutes. 496 U.S. at 448.

[32] Here, TIS 91-45 requires that the duration of sobriety checkpoints not exceed 75 minutes. RA, tab 17, Ex. A at 6 (Mem. L. Supp. Mot. Suppress). We consider this duration to be reasonable.

vi. Indicia of official nature of checkpoint

[33] Checkpoints should be "established with high visibility, including warning signs, flashing lights, adequate lighting, police vehicles and the presence of uniformed officers" to reassure motorists that the stop is duly authorized. *Ingersoll*, 743 P.2d at 1316. These aspects evidence the official nature of the checkpoints and are critical in minimizing its intrusiveness.

[34] TIS 91-45 satisfies this factor because it requires warning signs, safety cones, flood lights, and adequate officers to operate the checkpoint. RA, tab 17, Ex. A at 4 (Mem. L. Supp.

Mot. Suppress). Additionally, TIS 91-45 requires GPD to select checkpoint locations that have maximum visibility from each direction of travel, and to use two marked vehicles to mark the beginning and end of the checkpoint. *Id.* at 3-4.

vii. Length and nature of detention

[35] The court in *Ingersoll* recognized that "[m]inimizing the average time each motorist is detained is critical both to reducing the intrusiveness of the stop on the individual driver and to maintaining safety by avoiding traffic tie-ups." 743 P.2d at 1316. The court further stated that:

> [E]ach motorist stopped should be detained only long enough for the officer to question the driver briefly and to look for signs of intoxication, such as alcohol on the breath, slurred speech, and glassy or bloodshot eyes. If the driver does not display signs of impairment, he or she should be permitted to drive on without further delay. If the officer does observe symptoms of impairment, the driver may be directed to a separate area for a roadside sobriety test. At that point, further investigation would of course be based on probable cause, and general principles of detention and arrest would apply.

Id.

[36] According to TIS 91-45, "[d]rivers who are not subjected to further field sobriety testing should be detained for a very short time (for example, 25 seconds)[.]" RA, tab 17, Ex. A at 6 (Mem. L. Supp. Mot. Suppress). In *Sitz*, the Supreme Court upheld the constitutionality of a sobriety checkpoint where the stops lasted an average 25 seconds. *See* 496 U.S. at 448. If a motorist displays signs of intoxication during the 25-second stop, officers are instructed to direct the motorist to a separate "safety zone," which is surrounded by safety cones and traffic flares. RA, tab 17, Ex. A at 4 (Mem. L. Supp. Mot. Suppress). Therefore, TIS 91-45 satisfies this factor.

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viii. Advanced publicity

[37] "Advance publicity is important to the maintenance of a constitutionally permissible sobriety checkpoint. Publicity both reduces the intrusiveness of the stop and increases the deterrent effect of the roadblock." *Ingersoll*, 743 P.2d at 1316.

[38] Here, TIS 91-45 satisfies this factor because it requires that adequate warning be given regarding "when and where (date and location) . . . checkpoints will be in operation. The warning shall be given at least 24 hours prior to the actual operations and should be given through GPD's Public Information Officer's media press releases." RA, tab 17, Ex. A at 4 (Mem. L. Supp. Mot. Suppress).

[39] Therefore, based on our review of TIS 91-45 and our application of the *Ingersoll* factors to the TIS 91-45 guidelines, we find that the TIS 91-45 sobriety checkpoint guidelines adopted by GPD are constitutional. We further hold that the *Ingersoll* factors are to be considered as part of a court's balancing analysis rather than as prerequisites, and that a mere violation of one factor does not automatically result in a violation of constitutional proportions, as long as GPD substantially complies with the TIS 91-45 guidelines. The TIS 91-45 guidelines are to be applied on a case-by-case basis in order to determine the reasonableness of each sobriety checkpoint.

e. Conclusion

[40] Based upon the above, we conclude that the enumerated TIS 91-45 safeguards operate to minimize the intrusiveness of sobriety checkpoints and hold that sobriety checkpoints are constitutionally permissible so long as they are established and operated in accordance with the

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TIS 91-45 guidelines.[8] We now address whether the checkpoint in this case was implemented in substantial compliance with the TIS 91-45 guidelines.

B. Whether TIS 91-45 was Properly Implemented

[41] Calhoun argues that the sobriety checkpoint in this case is unconstitutional because GPD failed to follow the TIS 91-45 guidelines. *See* Appellant's Br. at 10. We agree.

[42] As stated above, it is well-settled that for a sobriety checkpoint to pass constitutional muster, "the decision to set up a sobriety roadblock, the selection of the site and procedures for conducting it must be made and established by supervisory law enforcement personnel rather than officers in the field." *Betancourt*, 735 P.2d at 1164 (agreeing with *Ingersoll*); *see also Buchanon*, 122 S.W.3d at 571 ("[I]t is important that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law enforcement officials in a supervisory position, rather than by the officers who are out in the field."); *Ingersoll*, 743 P.2d at 1313. "This is essential to reduce the possibility of improper, unbridled discretion of the officers who meet and deal with the motoring public." *Betancourt*, 735 P.2d at 1164; *Ingersoll*, 743 P.2d at 1313 ("This requirement is important to reduce the potential for arbitrary and capricious enforcement.").

[43] "Ideally, roadblock decisions should be made by the chief of police or other high-ranking supervisory officials." *Betancourt*, 735 P.2d at 1164 (citing *Little v. State*, 479 A.2d 903 (Md. 1984)).[9] However, "[a]ny lower ranking officer who wishes to establish a roadblock should seek permission from supervisory officials." *Buchanon*, 122 S.W.3d at 571.

[8] Although we hold that the TIS 91-45 sobriety checkpoint guidelines are constitutional, we agree with the trial court that because the guidelines were issued over twenty years ago, GPD should consider updating them. *See* RA, tab 23 at 14-15 (Dec. & Order, Mar. 1, 2013).

[9] As stated in *Ingersoll*:

[44] The trial court found that, "[w]hile Defendant argues at one point that there was no approval by the Assistant Chief of Police (ACOP), it is clear from officer testimony that there was such approval." RA, tab 23 at 2 n.1 (Dec. & Order, Mar. 1, 2013) (citing Tr. (Hr'g Mot. Suppress)). However, a review of the record reveals that it is unclear whether the ACOP or any other high-ranking GPD official authorized or was involved in the planning stages of the checkpoint operation in this case. Officer Santo Tomas testified that the checkpoint was scheduled by Sergeant R.J. Santos of the Highway Patrol Division "and whoever his bosses are at the time." *See* Tr. at 27 (Hr'g Mot. Suppress); Tr. at 8 (Hr'g Mot. Suppress) (a pre-checkpoint briefing was then conducted by Officer Santo Tomas and Sergeant Santos). The record, however, does not reveal who Sergeant Santos's "bosses" were at the time of the checkpoint operation or that these "bosses" made the decisions surrounding the establishment of the checkpoint. Additionally, a sergeant is not a high-ranking official for purposes of approving sobriety checkpoints. *See, e.g.*, *Downey*, 945 S.W.2d at 110-12 (a sobriety checkpoint, which was planned and set up by a lieutenant of the Tennessee Highway Patrol, was deemed unconstitutional because it was not approved by a supervisory official).

Several out-of-state decisions are in accord on this point. Sobriety checkpoints have been upheld in a variety of situations in which the chief commanding officer of a law enforcement agency has drawn up a comprehensive procedures document (in some cases reviewed by other officials) or where the regulations were promulgated by supervisory personnel. *People v. Scott*, 473 N.E.2d 1 (N.Y. 1984) (program set up by county sheriff); *State v. Superior Court In & For Cnty. of Pima*, 691 P.2d 1073 (Ariz. 1985) (commander of traffic enforcement division issued detailed command directive); *Little v. State*, 479 A.2d 903 (Md. 1984) (regulations reviewed by Superintendent of State Police, the Governor and the Attorney General); *State v. Coccomo*, 427 A.2d 131 (N.J. Super. Ct. Law Div. 1980) (township police chief adopted regulations approved by state Attorney General); *State v. Golden*, 318 S.E.2d 693 (Ga. Ct. App. 1984) (roadblock set up by supervising DUI task force project coordinator); *State v. Deskins*, 673 P.2d 1174 (Kan. 1983) (roadblock a joint effort of several law enforcement agencies, and all personnel briefed by supervisory officers).

743 P.2d at 1314.

[45] The importance of obtaining approval from high-ranking officials is to ensure that proper measures are taken to prevent the field officers' unfettered discretion at the checkpoint. Although Sergeant Santos might have been authorized to conduct the checkpoint operation by a high-ranking, command level position at GPD at the time, the record does not establish whether he received proper authorization to conduct the checkpoint operation. Therefore, because the People failed to prove that the checkpoint was authorized by a high-ranking, supervisory official, we hold that the trial court erred in finding that the checkpoint was constitutional. *See Santos*, 1999 Guam 1 ¶ 51.

V. CONCLUSION

[46] For the foregoing reasons, we hold that the checkpoint set up by the Guam Police Department was unconstitutional under the Fourth Amendment because the People failed to establish that the sobriety checkpoint was planned by supervisory level personnel. As such, the trial court erroneously denied Calhoun's motion to suppress, and any evidence seized from the checkpoint should be suppressed. Accordingly, we **REVERSE** the trial court's denial of Calhoun's motion to suppress and **REMAND** this case to the trial court for further proceedings not inconsistent with this opinion.

Original Signed By: F. Philip Carbullido

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Chief Justice