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ROADBLOCKS: THE STORY OF STATE V. KIRK

Featuring

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And

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Program description

DWI roadblocks are now part of American culture and drunk driving folklore...but it was not always that way. Find out how New Jersey led the way in the constitutional establishment of DWI road blocks in The Story of State v. Kirk.

I. Introduction

- **State v. Kirk, 202 N.J. Super. 28 (App. Div. 1985)**
- **Roadblocks are well known now but how did the caselaw develop – what happened before the Kirk case?**
- **Not much caselaw before Kirk**
- **Michael Patrick King, PJAD (ret.), best known for Special Master in State v. Chun, but had a long career before Chun which has resulted in his being considered one of the leading New Jersey justices**
- **When Kirk came before the Court, Judge King was flying blind – not much federal law to rely on – relied on state law and state precedence in other states – but made it a matter of constitutional doctrine based on NJ Constitution and NJ Constitution only – several times mentioned in the opinion that it was only based on NJ Constitutional law**
- **Not much federal law at the time**

II. Federal Caselaw before Kirk

- **US v. Martinez-Fuerte, 428 US 543 (1976)**
 - **Issue where immigration officials had established a series of permanent roadblocks that were not at the border, were remote locations away from the border**
 - **Significant challenge because prior case that said random stopping of motor vehicles because possible illegal immigrants in the car was deemed unreasonable**
 - **Constitutionality or reasonableness of the roadblock permanently established on highways leading from border crossings was at issue – routinized procedure, full time staffing by immigration officials**
 - **Court held that it was reasonable because permanent, supervised by responsible personnel such that discretion by inspecting officials was limited, logically related to purpose of roadblock – on highway from border crossings**
- **Delaware v. Prouse, 440 US 648 (1979)**
 - **One of the most important 4th amendment cases relating to motor vehicles**

- **Micro-roadblock case – 1 officer conducting his own roadblock**
- **Officers without any suspicion would just stop a car to check a person’s credentials**
- **US Supreme Court held that in order to effect a MV stop in NJ an officer must have particularized suspicion – reasonable and articulable suspicion – less than probable cause but more than a hunch**
- **Low level of proof to effect a MV stop**
- **These two cases were in play when the reasonableness of a roadblock for DWI came before the NJ Supreme Court**

III. State v. Kirk

- **First issue – policy issue - was whether a roadblock for the purpose of DWI is a reasonable exercise by government**
- **Was it a reasonable exercise of government authority??**
- **Once determination of roadblock is reasonable, then deciding what should be the parameters of the roadblock – minimize inconvenience and concern of public while allowing police to accomplish their task**
- **Establishing completely new law for NJ**
- **US Supreme Court had never ruled on the reasonableness of this particular issue regarding roadblocks and DWI investigations**
- **Two parts of Kirk decision: 1) reasonableness of DWI roadblock; and 2) what do police have to do in order to make it reasonable?**
- **What is a reasonable roadblock??**
 - **Selection of roadblock cannot be left to individual discretion of the officer (which was the problem with the facts in the Kirk case, as well as in Prouse)**
 - **Need command supervision – someone fairly high up in the chain of command**
 - **Location must have scientific basis – need relationship between time and place selected and reason for roadblock – must show that location must do some good based on prior incidents, etc. – some rational relationship between drunk driving enforcement and location/time**

- **Public cannot be overly alarmed or inconvenience – need signage alerting people coming up to the roadblock, television or newspaper announcements**
- **Command authority on site to insure officers were disciplined and operating roadblock in professional manner**
- **Which vehicles were going to be stopped at roadblock – some mechanism to utilize – and then some additional suspicion police can then move that car aside for further investigation**
- **Language from case – 1984 instructions from Lieutenant in State Police for conducting DWI roadblocks:**

These instructions insured command supervisory siting and control of check points, careful procedures for moving check points, warning to motorists to allay fears of the traveler, safety of motorists, sufficient staffing to prevent undue inconvenience to motorists, and selection of sites and times designed to benefit the overall effort to cope with drunken driving. Holidays such as Memorial Day, Fourth of July, and Labor Day were targeted; site priority was recommended by the Troop Traffic Analyst and was on the basis of “areas high in alcohol-related accidents”; full reports in writing of the conduct of the road block are promptly submitted to troop *58 supervisors and commanders. Advance publicity of these efforts has been pervasive and undoubtedly has acted as a substantial deterrent to potential inebriated operators.

We are satisfied that if these procedures are carefully followed, any constitutional objections will be overcome. We cannot condone the investigative type of road block we have seen in the case before us, set up by an officer in the field, obviously at a random time and location, for no specific duration, inadequately manned, and not designed for any particular preventative purpose, other than to pull drivers over to see what might turn up in the way of alcohol or drug-related criminal activity, and perhaps some regulatory violations. This is where we draw the line between rational law enforcement and random seizures based on “luck and hunch” alone

[State v. Kirk, 202 NJ Super at 57.]

- **Practices recommended by State Police weighed heavily for Justice King from procedural standpoint – roadblocks are reasonable provided that you follow these steps**

Roadblocks:

The Story of State v. Kirk

- **Roadblock as seizure – must balance public interest with reasonableness of government actions – US Supreme Court said this was a seizure in dicta in Martinez Fuerte – but implicit in NJ Constitution based on Kirk case**

IV. US Supreme Court Cases After Kirk

- **Brower v. County of Inyo, 489 US 592 (1989) – tragic case – young fellow in a chase with police in CA, police unable to stop; police set up roadblock calculated to end chase: tractor trailer in middle of road, set up around a curve in the road so that defendant could not see it, and shined police lights in driver’s face; vehicle crashes into truck and driver killed; federal civil rights case**
 - **If activities of police implicate 4th Amendment issues then must act reasonably, if not then police are not guided by 4th amendment – so was there a 4th Amendment issue here?**
 - **If a roadblock does not constitute a roadblock under 4th Amendment then not an issue but if roadblock is a seizure then 4th Amendment is implicated**
 - **Whether or not the police acted reasonably is a jury question/issue of fact**
 - **So court’s obligation here was only to determine whether 4th Amendment is implicated**
 - **Court ruled that a roadblock is a seizure within the 4th Amendment, which requires the police to act reasonably**
 - **This concept was part of prior cases but this particular case set it out very specifically and clearly**
- **Michigan Dept of State Police v. Sitz, 496 US 444 (1990)**
 - **US Supreme Court weighs in on whether roadblock for DWI is reasonable under 4th Amendment**
 - **May not have effected NJ law because Kirk was decided based on NJ Constitution solely**
 - **Had US Supreme Court ruled that DWI roadblocks were unconstitutional, then most likely have been the end of roadblocks in NJ as well**
 - **Justice Rehnquist – US Supreme Court had the advantage of several state court rulings on this issue**
 - **Court held that DWI roadblocks are reasonable under 4th Amendment**
 - **Parameters of what is considered reasonable – similar to Kirk – demands on NJ police set up in**

- Kirk were much greater than those demands set on police in general by the Sitz case**
 - **This case came down 5 years after Kirk**
 - **Statistics involved in roadblocks show they do not really give a high return on investment – but more of a deterrent value, as opposed to increased arrests of drunk drivers**
 - **Police may arrest more drunk drivers by being on the street and on patrol, as opposed to roadblock situations**

V. The Application of the Kirk Guidelines in NJ

- **After Kirk defense attorneys were challenging roadblocks on motions to suppress by going through each category in Kirk to insure that the police were acting appropriately**
 - **Police are having trouble figuring out how to do the roadblocks correctly**
- **State v. Egan, 213 NJ Super 133 (App. Div. 1986)**
 - **Millburn police – 2 police officers and 1 Sgt set up a roadblock**

We find the roadblock here in question deficient under the foregoing criteria. That Sergeant Barber was the ranking supervisory authority in charge of the police department at that particular time does not constitute the requisite “participation of command or supervisory authority” in selecting the time and place of the roadblock. We described this participation by high level administrative officials as “an essential constitutional ingredient and necessary to satisfy the objection that the traveller not be ‘subject to the discretion of the official in the field.’ ” *Id.* at 43, 493 A.2d 1271. Nor do we find in the record the data necessary to demonstrate a “rational basis for deploying this type of intrusive law enforcement technique.” *Id.* at 56, 493 A.2d 1271. Moreover, nothing in the record supports**1117 the conclusion that the site of the roadblock was “a dangerous alcohol or accident-prone stretch of roadway.” *Id.* at 48, 493 A.2d 1271. All that appears is that during the two year period prior to the roadblock there had been a total of 197 accidents on the “whole stretch of the road.” Of these, only five were alcohol-related. Finally, the proofs nowhere address the question of whether the roadblock was in fact “reasonably efficacious” in the accomplishment of law enforcement goals. For all that appears, greater success might have been attained at that time had the officers assigned to the roadblock devoted themselves to customary methods of traffic surveillance.

[State v. Egan, 213 NJ Super at 136]

- **It took a while for the police to figure out what they were expected to do under the Kirk guidelines**
- **Unclear how popular roadblocks are with the police – not many cases coming in anymore – question whether it is a financial/economic issue or whether the efficiency in arresting drunk drivers**

- **Mid 1980s-1990s when most cases came out – high priority to combat DWI cases – the judiciary had indicated that eradicating drunk driving was highest priority of judiciary itself – political activity with various groups (MADD) – drunk driving was high profile law enforcement role**
- **Prior federal grant money used by local police to fund roadblocks; question whether the money is still there; trend now is to reduce size of police departments – do more with less – maybe this is why roadblocks are a victim of the times**
- **State v. Weber, 220 NJ Super 420 (App. Div. 1987)**
 - **Defendant in Weber went through stop sign at roadblock gave police reasonable and articulable suspicion to stop vehicle for motor vehicle violation**
 - **Did not reach merits of roadblock because alternate basis to stop vehicle**
- **State v. Barcia, 235 NJ Super 311 (Law Div. 1989)**
 - **Opinion written by Judge Napolitano, J.S.C. – says what he means and means what he says**
 - **Police in Bergen County with supervision of Bergen County Prosecutor's Office and Ft. Lee Police set up roadblock at worse place on earth – the George Washington Bridge during late stage of rush hour on a Friday**
 - **Moderately successful roadblock**
 - **Inconvenience to people in the area was unbelievable**
 - **Opinion mentioned that there were 1 million people stopped in traffic for 4 hours as a result of this roadblock**
 - **Only 9 arrests were made**
 - **This was a grossly unreasonable exercise by the police**
 - **In terms of 4th Amendment and Article 1, Paragraph 7 of NJ Constitution – only type of search that is prohibited is an unreasonable search – not only that conduct of police was reasonable at inception but must be carried out reasonably as well**
 - **The inconvenience of 1 million people was the unreasonable part of this case**

- **Since this case the State of NJ has never lost a roadblock case – police seemed to have finally caught on to how to properly set up and execute a road block**
- **Actions of police must be reasonable at inception as well as how they carry out their jobs. Example:**
 - **State v. Ravotto, 169 NJ 227 (2001) – case where police wanted to take blood from a person arrested for drunk driving, police held down defendant – court held unreasonable**
 - **State v. Fanelle, 385 NJ Super 518 (2006) – police have no knock warrant and begin warrant by throwing bomb into apartment; defendant was not there; the App Div held that the use of a flash-bang device was unreasonable**
- **State v. Mazurek, 237 NJ Super 231 (App Div 1989)**
 - **First time we see a challenge to the roadblock and the police have all the data in order**
 - **Police followed all Kirk guidelines perfectly**
 - **Police finally had a road map on how to do roadblocks properly**
- **State v. DeCamera, 237 NJ Super 380 (App Div 1989)**
 - **Case involved slight adjustment to reasonableness requirement**
 - **Judge King was no specific when stated “advanced publicity” in Kirk – assumed press release, etc.**
 - **For this case, advanced publicity is not necessarily a newspaper ad – other ways to publicize in advance**
 - **Question whether advance notice would just make people go around the roadblock as opposed to deterring people from drunk driving – diminish the value of the roadblock**
- **State v. Hester, 245 NJ Super 75 (1990)**
 - **“evader cases”**
 - **Defendant saw roadblock and made a u-turn and police went after him**
 - **Question of reasonableness of motor vehicle stop – sustained by Appellate Division**
- **State v. Badessa, 373 NJ Super 84 (App Div 2004)**

Roadblocks:

The Story of State v. Kirk

- **Defendant driving and police set up roadblock and police saw defendant put on turn signal and turn down a street**
- **Police stopped him as an evader but in fact the defendant/driver lived on that street**
- **Arrested for DWI and refused to submit to breath test**
- **App Div held that there was no signage to have someone reasonably believe or warn that if they turn around then they will be considered evaders and stopped by the police**
- **App Div held that it was unreasonable for police because no reasonable and articulable suspicion that driver had violated the law because made perfectly legal turn away from roadblock**
- **Issue then was refusal – this was addressed by Supreme Court based on attenuation doctrine – NJ Supreme Court (185 NJ 303 (2005)) held that it did not matter because motion to suppress would exclude evidence that would be the basis leading to the refusal (meaning the probable cause to arrest for DWI) and therefore there was no need to address that particular aspect of the case**
- **Discussion of signage was not overturned by Supreme Court in its decision – so look at App Div decision on this particular issue – Supreme Court ruled on different grounds**
- **State v. Moskal, 246 NJ Super 12 (App Div 1991)**
- **Example of where police followed Kirk guidelines**

If the road block was established by a command or supervisory authority and was carefully targeted to a designated area at a specified time and place based on data justifying the site selection for reasons of public safety and reasonably efficacious or productive law enforcement goals, the road block will likely pass constitutional muster. Other factors which enhanced judicial approval were (1) adequate warnings to avoid frightening the traveling public, (2) advance general publicity designed to deter drunken drivers from getting in cars in the first place, and (3) officially specified neutral and courteous procedures for the intercepting officers to follow when stopping drivers

[State v. Moskal, 246 NJ Super at 15.]

- **Add to this language the signage warning not to turn off, as in Badessa and Hester**
- **Police did everything perfectly**
- **State v. Kadelak, 280 NJ Super 349 (App Div 1995)**

- **Not a DWI roadblock but one for motor vehicle inspections/emissions**
- **What makes this reasonable is the enormous amount of money from federal government that is tied to Clean Air standards**
- **State must do certain number of inspections to insure compliance with Clean Air regulations**
- **Driver was stopped for inspections turned out to be intoxicated**
- **App Div held that this was reasonable**
- **State v. Reynolds, 319 NJ Super 426 (App Div 1998)**
 - **Police did everything right**
 - **Challenge that police decided to stop every car for roadblock**
 - **App Div found that this was proper and that it did not matter if police stopped every car or every third car – the method was perfectly acceptable here**

VI. Post-Kirk US Supreme Court cases

- **City of Indianapolis v. Edmond, 531 US 32 (2000)**
 - **Roadblock for drug investigations**
 - **Court held that this was unreasonable because cannot have roadblock for general crime prevention**
 - **Contrast with drunk driving which has an immediate need for public safety**
 - **5-4 decision**
 - **State v. Flowers, 328 NJ Super 205 (App Div 2000) – came out just before Edmond case; efforts by Essex County law enforcement to deal with stolen cars; App Div found that roadblock was reasonable under NJ Constitution – question whether this case would have had a different ruling since the Edmond case was published**
- **Illinois v. Lidster, 540 US 419 (2004)**
 - **Dealt with investigation of one specific crime – a 70 year old man was the victim of a hit and run accident**
 - **Police go back 1 week later and set up informational roadblock to get information about this case**
 - **Police stop every car to get information and hand out a flier**

Roadblocks:

The Story of State v. Kirk

- **One person in roadblock is arrested for DWI**
- **Difference in this case is that the roadblock is more informational – focused on gathering information for one specific crime**
- **Court ruled this to be reasonable**

VII. Conclusion

- **Enormously important landmark decision by our court**
- **Nationally utilized by other courts, including US Supreme Court**
- **Long term impact on use of roadblocks is unclear**
- **When dealing with roadblocks as an attorney, you have to start and end with Kirk decision**