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## The Validity of Sobriety Roadblocks in Pennsylvania

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1989]

## Recent Developments

### THE VALIDITY OF SOBRIETY ROADBLOCKS IN PENNSYLVANIA

#### I. INTRODUCTION

In the 1987 case of *Commonwealth v. Tarbert*,<sup>1</sup> the Supreme Court of Pennsylvania considered the validity of systematic roadblocks for the detection of drunk drivers, commonly referred to as "sobriety roadblocks".<sup>2</sup> A plurality held that the use of sobriety roadblocks was unlawful for want of specific statutory authorization.<sup>3</sup> The court split, however, on the validity of such roadblocks under the Pennsylvania Constitution.<sup>4</sup> In 1985, the Pennsylvania Motor Vehicle Code was amended to authorize the use of sobriety roadblocks;<sup>5</sup> however, since the incidents at issue in *Tarbert* occurred in 1983 and 1984, the court

1. 517 Pa. 277, 535 A.2d 1035 (1987).

2. A sobriety roadblock is a temporary checkpoint where police officers systematically stop automobiles in order to determine whether the drivers are under the influence of alcohol. See generally 4 W. LAFAVE, SEARCH AND SEIZURE § 10.8, at 69-70 (2d ed. 1987) (discussed in *Tarbert*). For a discussion of the characteristics of a standard sobriety roadblock, see *infra* notes 41-43 and accompanying text.

3. *Tarbert*, 517 Pa. at 297, 535 A.2d at 1045. For a discussion of the plurality opinion, see *infra* notes 30-56 and accompanying text.

4. Chief Justice Nix wrote the opinion announcing the judgment of the court in which Justice Flaherty concurred. *Tarbert*, 517 Pa. at 298, 535 A.2d at 1045. Justices Zappala and Papadakos both filed separate concurring opinions. *Id.* Justice Larsen filed a dissenting opinion. *Id.* Former Justice Hutchinson did not participate in the decision of the case. *Id.* For a summary of these opinions, see *infra* note 8.

5. The Pennsylvania Motor Vehicle Code now provides:

Whenever a police officer is engaged in a systematic program of checking vehicles or has articulable and reasonable grounds to suspect a violation of this title, he may stop a vehicle, upon a request on signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this code.

75 PA. CONS. STAT. ANN. § 6308(b) (Purdon Supp. 1989) (emphasis added) (amending 75 PA. CONS. STAT. ANN. § 6308(b) (Purdon Supp. 1985)).

The previous, applicable section of the Pennsylvania Motor Vehicle Code stated:

When a police officer has articulable and reasonable grounds to suspect a violation of this title, he may stop a vehicle, upon request on signal, for the purpose of inspecting the vehicle as to its equipment and operation, or vehicle identification number, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 PA. CONS. STAT. ANN. § 6308(b) (Purdon Supp. 1985), amended by 75 PA. CONS. STAT. ANN. § 6308(b) (Purdon Supp. 1989).

construed a predecessor statute. The purpose of this article is to alert attorneys to arguments with which to attack the constitutionality of sobriety roadblocks.

There are two ways that the issue of the validity of sobriety roadblocks could arise. First, the statute authorizing sobriety roadblocks could be challenged as per se invalid under the Pennsylvania Constitution. Based upon the success of such challenges in other states,<sup>6</sup> and upon *Tarbert*, it is probable that the statute authorizing the use of sobriety roadblocks would be upheld.<sup>7</sup> Second, the issue could arise through

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6. Only three states have held sobriety roadblocks unconstitutional per se. See *State v. Smith*, 674 P.2d 569 (Okla. Ct. App. 1984); *State v. Boyanovsky*, 304 Or. 131, 743 P.2d 711 (1987); *City of Seattle v. Mesiani*, 110 Wash. 2d 454, 755 P.2d 775 (1988) (en banc).

Nineteen jurisdictions have upheld sobriety roadblocks. See *Stark v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984); *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984); *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987); *State v. Abelson*, 485 So. 2d 861 (Fla. Dist. Ct. App. 1986); *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (1984); *People v. Bartley*, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 475 U.S. 1068 (1986); *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986), *cert. denied*, 481 U.S. 1014 (1987); *State v. Riley*, 377 N.W.2d 242 (Iowa Ct. App. 1985); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983); *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. Ct. App. 1983), *cert. denied*, 465 U.S. 1105 (1984); *State v. Cloukey*, 486 A.2d 143 (Me. 1985); *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984); *Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102 (1985); *Opinion of the Justices*, 128 N.H. 14, 509 A.2d 744 (1986); *State v. Coccomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980); *City of Las Cruces v. Betancourt*, 105 N.M. 655, 735 P.2d 1161 (Ct. App. 1987); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984); *State v. Gaines*, 16 Ohio App. 3d 168, 474 N.E.2d 1219 (1984); *Lowe v. Commonwealth*, 230 Va. 346, 337 S.E.2d 273 (1985), *cert. denied*, 475 U.S. 1084 (1986).

Some jurisdictions have held sobriety roadblocks invalid because particular circumstances of the stops were such that the court could not conclude that the roadblock under review was a reasonable seizure. See *Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983); *State v. Jones*, 483 So. 2d 433 (Fla. 1986); *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988); *State v. McLaughlin*, 471 N.E.2d 1123 (Ind. 1984); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983); *State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985); *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986); *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985); *State v. Egan*, 213 N.J. Super. 133, 516 A.2d 1115 (1986); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976); *Webb v. State*, 695 S.W.2d 676 (Tex. Ct. App. 1985); *State v. Martin*, 145 Vt. 562, 496 A.2d 442 (1985).

7. In *Tarbert*, four Pennsylvania Supreme Court Justices, Chief Justice Nix, and Justices McDermott, Papadakos, and Larsen, concluded that sobriety roadblocks were valid under the Pennsylvania Constitution. *Tarbert*, 517 Pa. at 298, 535 A.2d at 1045. Justice Flaherty concurred in the outcome but did not file an opinion. *Id.* Justice Zappala concluded that sobriety roadblocks were unconstitutional under the Pennsylvania Constitution. *Id.* Former Justice Hutchinson did not participate in the decision of the case. *Id.* Since the personnel of the Pennsylvania Supreme Court has not changed since *Tarbert*, there still remains a four justice majority in favor of upholding sobriety roadblocks. For a summary of the views of the justices in *Tarbert*, see *infra* note 8.

Furthermore, in a recent opinion, the Pennsylvania Superior Court held

a challenge on state constitutional grounds to the validity of the use of sobriety roadblocks in the particular case. *Tarbert* provides useful guidelines for examining this question because four justices filed opinions discussing the validity of systematic roadblocks.<sup>8</sup> This article will analyze *Tarbert*<sup>9</sup> and will present a structured analysis of state constitutional arguments<sup>10</sup> with an emphasis on defending a client who is charged with driving under the influence of alcohol as a result of being stopped at a sobriety roadblock.<sup>11</sup>

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that the use of sobriety roadblocks after the effective date of the 1985 amendment to the Pennsylvania Motor Vehicle Code did not violate the Pennsylvania constitutional prohibition against unreasonable searches and seizures. *Commonwealth v. Fiorretti*, 371 Pa. Super. 535, 542-50, 538 A.2d 570, 573-78 (1988). For a discussion of the *Fiorretti* case, see *infra* note 21 and accompanying text. See also *State v. Henderson*, 114 Idaho 293, 295 n.2, 756 P.2d 1057, 1066-67 n.2 (1988) (Walters, J., dissenting) (noting that Pennsylvania Supreme Court in *Tarbert* upheld use of sobriety roadblocks).

Finally, a majority of jurisdictions which have addressed the issue of sobriety roadblocks hold that sobriety roadblocks are constitutionally permissible. For a list of these jurisdictions, see *supra* note 6.

8. For a concise summary of the views of the justices, see *Fiorretti*, 371 Pa. Super. at 543 n.12, 538 A.2d at 574 n.12. Chief Justice Nix, writing the plurality opinion in *Tarbert*, concluded that sobriety roadblocks, conducted within prescribed guidelines, do not violate a driver's right of freedom from unreasonable searches and seizures under the Pennsylvania Constitution. *Tarbert*, 517 Pa. at 293, 535 A.2d at 1043. However, Chief Justice Nix's opinion rested upon the finding that the police exceeded their authority in conducting the roadblocks prior to the August 19, 1985, amendment to the Motor Vehicle Code. *Id.* at 297, 535 A.2d at 1045 (Flaherty, J., concurring in result). Justice Flaherty concurred in the result without writing an opinion. *Id.* at 298, 535 A.2d at 1045 (Flaherty, J. concurring in result). Justice Papadakos concurred in the result based upon Chief Justice Nix's analysis of the 1983 statute. *Id.* at 301-02, 535 A.2d at 1047 (Papadakos, J., concurring). Justice Papadakos agreed that roadblocks were constitutional as long as they were conducted within well-defined parameters. *Id.* at 301, 535 A.2d at 1047 (Papadakos, J., concurring). Justice Zappala concurred in the result on the grounds that sobriety roadblocks were unconstitutional if conducted without probable cause. *Id.* at 301, 535 A.2d at 1045 (Zappala, J., concurring). Justice Larsen dissented on the grounds that the roadblocks were acceptable as a reasonable exercise of the police power under the 1983 statute. *Id.* at 302, 535 A.2d at 1047 (Larsen, J., dissenting). By implication, it is reasonable to conclude that Justice Larsen agrees with the plurality that sobriety roadblocks are constitutionally valid. See *Fiorretti*, 371 Pa. Super. at 543 n.12, 538 A.2d 570, 574 n.12. For a discussion of Chief Justice Nix's views, see *infra* notes 30-56 and accompanying text. For a discussion of Justice Papadakos' views, see *infra* notes 57-59 and accompanying text. For a discussion of Justice Zappala's views, see *infra* notes 60-74 and accompanying text.

9. For a discussion of the arguments set forth in *Tarbert*, see *infra* notes 12-25 and accompanying text.

10. For a discussion of the arguments with which to defend a client who is charged with driving under the influence of alcohol, see *infra* notes 75-79 and accompanying text.

11. The Pennsylvania Vehicle Code states:

A person shall not drive, operate or be in actual physical control of the movement of any vehicle while: (1) under the influence of alcohol which renders the person incapable of safe driving; (2) under the influ-

## II. BACKGROUND

To be valid under the Pennsylvania Constitution,<sup>12</sup> a sobriety roadblock cannot violate the prohibition against unreasonable searches and seizures.<sup>13</sup> The language of the Pennsylvania constitutional prohibition against unreasonable searches and seizures is substantially similar to the fourth amendment of the Federal Constitution.<sup>14</sup> It is well established, however, that the federal constitutional provisions provide a minimal guarantee; a state has the power to grant more protection than that provided by the Federal Constitution.<sup>15</sup> Yet cases analyzing state constitutional provisions rely on federal precedents to shape their interpretations.<sup>16</sup> Under both federal and Pennsylvania law, for exam-

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ence of any controlled substance . . . to a degree which renders the person incapable of safe driving; (3) under the combined influence of alcohol and any controlled substance which renders the person incapable of safe driving; or (4) the amount of alcohol by weight in the blood of the person is 0.10% or greater.

75 PA. CONS. STAT. ANN. § 3731(a) (Purdon Supp. 1989).

12. This article discusses the validity of sobriety roadblocks under the Pennsylvania Constitution. For a discussion of the validity of sobriety roadblocks under the Federal Constitution, see Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457 (1983).

13. PA. CONST. art. I, § 8. The Pennsylvania Constitution states: The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

*Id.*

14. For the text of the fourth amendment, see *infra* note 18.

15. See *Tarbert*, 517 Pa. at 283, 535 A.2d at 1037. Chief Justice Nix stated: "This Court has not hesitated to interpret the Pennsylvania Constitution as affording greater protection to defendants than the federal Constitution." *Id.*, 535 A.2d at 1038 (citing *Commonwealth v. Sell*, 504 Pa. 46, 470 A.2d 457 (1983)).

16. *Id.* The *Tarbert* court recognized that federal fourth amendment interpretations are instructive where those decisions are found to be "logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees." *Id.* (quoting Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)). See also *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987) (interpreting California Constitution more expansively than Federal Constitution); *People v. John BB.*, 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982) (interpreting New York Constitution more expansively than Federal Constitution).

While the United States Supreme Court has never had occasion to determine whether the fourth amendment of the Federal Constitution would permit sobriety roadblocks, the Court has discussed roadblocks in other contexts. See *Delaware v. Prouse*, 440 U.S. 648 (1979) (random automobile stops are invalid under fourth amendment unless officer has reasonable articulable suspicion that motorist has violated law); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (warrantless stops at permanent checkpoints for purpose of discovering immigration law violations are valid under fourth amendment); *United States v.*

ple, an automobile stop and the detention of its occupants is considered a seizure.<sup>17</sup> Under both federal and Pennsylvania law, a search and seizure must be reasonable.<sup>18</sup> The traditional interpretation of the fourth amendment is that in order to stop and search an automobile, the police either must have a warrant or must have a reasonable suspicion or probable cause.<sup>19</sup> A sobriety roadblock, by definition, is conducted without either reasonable suspicion or probable cause that a particular motorist is driving under the influence of alcohol. Therefore, the issue presented in sobriety roadblock cases is whether the use of such roadblocks is justified as an exception to the warrant requirement, requiring neither reasonable suspicion nor probable cause.<sup>20</sup>

In addition to being susceptible to constitutional challenge, sobriety roadblocks can be challenged on the grounds that the police lack statutory authorization to conduct such roadblocks. This argument is no longer effective in Pennsylvania because roadblocks are clearly authorized today.<sup>21</sup> In a state without explicit statutory authorization for sobriety roadblocks, however, this should be the first argument for the defense.<sup>22</sup>

The statutory authorization and state constitutional arguments converged in *Tarbert*.<sup>23</sup> In the lower court decision, a panel of the Superior Court of Pennsylvania held that a sobriety roadblock violated the search and seizure provision of the Pennsylvania Constitution.<sup>24</sup> In *Commonwealth v. Dannaker*,<sup>25</sup> a different panel of the Superior Court held that the Motor Vehicle Code in force at the time the roadblock took place did not authorize the use of sobriety roadblocks. These two cases were consolidated for appeal to the Supreme Court of Pennsylvania in *Tarbert*.

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Brignoni-Ponce, 422 U.S. 873 (1975) (border-patrol stops made without probable cause to believe occupants violated immigration laws are invalid under fourth amendment).

17. *Tarbert*, 517 Pa. at 284, 535 A.2d at 1038. See also *Delaware v. Prouse*, 440 U.S. 648 (1979); *Commonwealth v. Swanger*, 435 Pa. 107, 307 A.2d 875 (1973).

18. The fourth amendment to the Federal Constitution guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . ." U.S. CONST. amend. IV. For the text of article I, § 8 of the Pennsylvania Constitution, see *supra* note 13.

19. See *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

20. See *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).

21. 75 PA. CONS. STAT. ANN. § 6308(b) (Purdon Supp. 1989). For the text of § 6308(b), see *supra* note 5. See also *Commonwealth v. Fioretti*, 371 Pa. Super. 535, 542, 538 A.2d 570, 579-80 (1988) (section 6308(b) of Pennsylvania Motor Vehicle Code authorizes police to conduct systematic stops without individualized suspicion of illegal activity at sobriety checkpoint roadblocks).

22. See, e.g., *Henderson*, 114 Idaho at 294-95, 756 P.2d at 1058-59.

23. *Tarbert*, 517 Pa. at 279-81, 535 A.2d at 1036-37.

24. 348 Pa. Super. 306, 502 A.2d 221 (1985), *aff'd on other grounds*, 517 Pa. 277, 535 A.2d at 1035 (1987).

25. 352 Pa. Super. 611, 505 A.2d 1030 (1985), *aff'd on other grounds*, 517 Pa. 277, 535 A.2d 1035 (1987).

## III. ANALYSIS

In *Tarbert*, the Pennsylvania Supreme Court considered the validity of sobriety roadblocks on two separate grounds.<sup>26</sup> First, the court considered whether such roadblocks were constitutional under the Pennsylvania Constitution.<sup>27</sup> Second, the court considered whether such roadblocks were authorized by the Pennsylvania General Assembly.<sup>28</sup> The statutory authorization issue is moot today because the Pennsylvania Motor Vehicle Code has been amended to explicitly authorize roadblocks.<sup>29</sup> Therefore, this article will discuss the plurality opinion and concurring opinions on the constitutional issue only.

## A. Chief Justice Nix's View: Plurality Opinion

Chief Justice Nix, writing for the plurality, stated that the constitutionality of a sobriety roadblock must be determined by balancing the intrusion on the individual's privacy interest against the promotion of a legitimate governmental interest.<sup>30</sup> The advantage of a balancing test, according to Chief Justice Nix, is that it eliminates the requirement of probable cause in "an instance where such a requirement would be totally inadequate in protecting the welfare of the public."<sup>31</sup> Moreover, Chief Justice Nix stated that the approach was especially justified because the Pennsylvania Supreme Court had recently approved this approach for determining reasonableness in a sniff-search case by a narcotics detection canine.<sup>32</sup>

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26. *Tarbert*, 517 Pa. at 279-97, 535 A.2d at 1035-45.

27. *Id.* at 281-94, 535 A.2d at 1037-43.

28. *Id.* at 294-97, 535 A.2d at 1043-45.

29. For the text of the current version of § 6308(b) of the Pennsylvania Motor Vehicle Code, see *supra* note 5.

30. *Tarbert*, 517 Pa. at 285-87, 535 A.2d at 1039. Chief Justice Nix noted that this balancing-of-interests approach was first utilized for determining fourth amendment "reasonableness" in *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Tarbert*, 517 Pa. at 285, 535 A.2d at 1039. In assessing the reasonableness of the governmental intrusion, the *Camara* Court considered "the strength of the public interest in effectively combatting the problem, and the ability to achieve acceptable results by other means, weighed against the extent of the invasion of the citizen's privacy." *Id.* at 285-86, 535 A.2d at 1039 (quoting *Camara*, 387 U.S. at 537).

31. *Tarbert*, 517 Pa. at 286 n.1, 535 A.2d at 1039 n.1. Chief Justice Nix noted that highway fatality statistics establish that an automobile used improperly is a deadly instrument. *Id.* "To continue this carnage by insistence upon a standard which is obviously inappropriate to address the need would put an absurd gloss on Article I, section 8 of our constitution." *Id.*

32. *Id.* at 286, 535 A.2d at 1039 (citing *Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987)). In *Johnston* the court held valid a warrantless "sniff-search" by a narcotics detection canine in a building where police suspected that illegal drugs were being stored. *Johnston*, 515 Pa. at 462-65, 530 A.2d at 78-79. The *Johnston* court noted that the procedure's intrusiveness was minimal where the police had articulable and reasonable grounds for suspicion. *Id.* at 466, 530 A.2d at 80.

As further support for the application of a balancing test in the case of sobriety roadblocks, Chief Justice Nix relied on the reasoning of the United States Supreme Court in the case of *United States v. Martinez-Fuerte*.<sup>33</sup> In *Martinez-Fuerte*, the Court upheld the constitutionality of systematic roadblocks conducted by the Border Patrol for the purpose of apprehending illegal aliens.<sup>34</sup>

Chief Justice Nix noted that in *Martinez-Fuerte* the United States Supreme Court analyzed the intrusiveness of a roadblock in terms of both a subjective and an objective standard.<sup>35</sup> The subjective intrusion in *Martinez-Fuerte* on lawful travelers was considered slight in comparison to that of a random roving patrol using discretionary stops.<sup>36</sup> Moreover, any objective intrusion was limited because the detention was brief and the occupants and the vehicle were subjected only to a visual inspection.<sup>37</sup> Chief Justice Nix suggested that this same analysis was applicable to sobriety roadblocks.<sup>38</sup>

Chief Justice Nix also relied on *Martinez-Fuerte* to reject the argument that routine checkpoints need always be judicially authorized by a warrant.<sup>39</sup> The Court in *Martinez-Fuerte* stated that the traditional purposes served by a warrant were inapplicable in the case of Border Patrol stops.<sup>40</sup> Chief Justice Nix accepted this rationale without explanation.

Chief Justice Nix described the standard sobriety roadblock in terms of characteristic features, as set forth by Professor Wayne LaFave.<sup>41</sup> The presence of these characteristic attributes can increase the subjective and objective reasonableness of a roadblock.<sup>42</sup> The characteristic attributes are: 1) the location and the time of the roadblock's operation are determined by administrative officers; 2) the officers do not attempt to secure prior judicial approval for location or conduct beforehand; 3) advance warning is provided by a sign indicating that the motorist is about to be stopped and suggesting the nature of the stop; 4) the site is marked by flashing lights, police vehicles and uniformed police; 5) a neutral formulae is used for conducting the stop; 6) where traffic poses safety problems, the officers wave backed-up traffic; 7) after

33. 428 U.S. 543 (1976).

34. *Id.* at 551-53. The routine stops in *Martinez-Fuerte*, like the sobriety roadblocks in *Tarbert*, were conducted without warrants and without individualized suspicion. *Id.*

35. *Tarbert*, 517 Pa. at 288-89, 535 A.2d at 1040. See also *Martinez-Fuerte*, 428 U.S. at 560-64.

36. *Tarbert*, 517 Pa. at 288-89, 535 A.2d at 1040 (citing *Martinez-Fuerte*, 428 U.S. at 558).

37. *Id.* at 288, 535 A.2d at 1040 (citing *Martinez-Fuerte*, 428 U.S. at 558).

38. *Id.* at 289, 535 A.2d at 1040.

39. *Id.*, 535 A.2d at 1041.

40. See *Martinez-Fuerte*, 428 U.S. at 564-66.

41. See 4 W. LAFAVE, *supra* note 2, § 10.8(d), at 69-70 (quoting Note, *supra* note 12, at 1460-63).

42. *Tarbert*, 517 Pa. at 290, 535 A.2d at 1041.



stopping a vehicle, the officer attempts to detect whether the motorist is driving under the influence of alcohol; and 8) the motorist is usually waived through or directed to a secondary area for further observation.<sup>43</sup>

The plurality concluded that sobriety roadblocks, which possess the above described attributes, satisfy the Pennsylvania Constitution.<sup>44</sup> The test for determining whether a sobriety roadblock passes constitutional muster is the *Martinez-Fuerte* balancing test.<sup>45</sup> In *Martinez-Fuerte*, the balancing equation involved the governmental interest in preventing aliens from entering the country weighed against the constitutional guarantee of privacy.<sup>46</sup> In *Tarbert*, the equation involved the state's interest in detecting drunk driving against the constitutional guarantee of privacy.<sup>47</sup> In *Martinez-Fuerte*, the United States Supreme Court emphasized that in balancing, the constitutional guarantee of privacy must be given great weight.<sup>48</sup> Yet the governmental interest in *Martinez-Fuerte* still outweighed the privacy interest.<sup>49</sup> Chief Justice Nix concluded that the state's compelling interest in detecting and preventing drunk driving is even stronger than the governmental interest in *Martinez-Fuerte*.<sup>50</sup> Moreover, this compelling interest cannot adequately be handled by "traditional" law enforcement procedures because of the scope of the problem and the difficulty of detection.<sup>51</sup> Chief Justice Nix therefore concluded that the standard sobriety roadblock is constitutionally permissible.

Chief Justice Nix offered guidelines for sobriety roadblocks which, if followed, would reduce the intrusiveness of the roadblock and would increase the likelihood that the roadblock would be valid.<sup>52</sup> First, the checkpoint should involve only a momentary stop so that an officer can

43. *Id.* See also *Commonwealth v. Leninsky*, 360 Pa. Super. 49, 64-65, 519 A.2d 984, 992-93 (1986) (held that degree of discretion possessed by field officers rendered procedures in sobriety checkpoint constitutionally infirm).

44. *Tarbert*, 517 Pa. at 293, 535 A.2d at 1043.

45. *Id.* at 290-91, 535 A.2d 1041-42.

46. *Martinez-Fuerte*, 428 U.S. at 557-60.

47. *Tarbert*, 517 Pa. at 291, 535 A.2d at 1042.

48. *Martinez-Fuerte*, 428 U.S. at 560-62.

49. *Id.*

50. *Tarbert*, 517 Pa. at 291, 535 A.2d at 1042 (drunk driving exacts terrible cost in terms of human life, injury and potential "for no reason except the transitory pleasure of the drunk") (citing *Commonwealth v. Lutz*, 508 Pa. 297, 313, 495 A.2d 928, 936 (1985); *Commonwealth v. Mikulan*, 504 Pa. 244, 249, 470 A.2d 1339, 1341 (1983) (800 killed and 19,499 seriously injured in alcohol-related traffic accidents in Pennsylvania during 1981); *Commonwealth v. Leninsky*, 369 Pa. Super. 49, 58, 519 A.2d 984, 989 (1986) (950 killed in alcohol-related traffic accidents in Pennsylvania during 1981)).

Chief Justice Nix stated that the governmental interest in stopping illegal immigration is primarily economic in nature. *Tarbert*, 517 Pa. at 291, 535 A.2d at 1042.

51. *Tarbert*, 517 Pa. at 291, 535 A.2d at 1042.

52. *Id.* at 293, 535 A.2d at 1043.

make a brief, trained observation of the driver without any physical search of the vehicle.<sup>53</sup> Second, the motorist should have no unnecessary surprise; the nature of the stop should be made known in advance by some type of sign or warning.<sup>54</sup> Finally, the police officers conducting the roadblocks should work under prescribed standards so as to curtail the possibility of arbitrary treatment of motorists.<sup>55</sup> A sobriety roadblock conducted substantially in compliance with Chief Justice Nix's guidelines satisfies the search and seizure provision of the Pennsylvania Constitution.<sup>56</sup>

#### B. Justice Papadakos' View: Concurring Opinion

Justice Papadakos concurred in the result of *Tarbert*, based upon the lack of statutory authorization for sobriety roadblocks.<sup>57</sup> Justice Papadakos also agreed that there is a "constitutional justification for non-discriminatory, systematic roadblocks conducted by police under well-defined parameters."<sup>58</sup> Justice Papadakos strongly contended, however, that the plurality's discussion of the constitutional issue was *obiter dictum*.<sup>59</sup>

#### C. Justice Zappala's View: Concurring Opinion

Although concurring with the plurality in the statutory resolution of the case, Justice Zappala disagreed with the determination that sobriety checkpoints are valid under the Pennsylvania Constitution.<sup>60</sup> Justice Zappala concluded that the court should follow the plain meaning of the search and seizure provision of the Pennsylvania Constitution, which requires a finding of probable cause.<sup>61</sup> He noted that while drunk driving is a "deplorable problem of our current society," the court is constrained to follow the constitution.<sup>62</sup> "[I]n essence, [the plurality opin-

53. *Id.*

54. *Id.* Chief Justice Nix stated: "To avoid unnecessary surprise to motorists, the existence of a roadblock can be so conducted as to be ascertainable from a reasonable distance or otherwise made knowable in advance." *Id.*

55. *Id.* For example, the decision to conduct a roadblock and the time and place involved should be reserved for prior administrative approval, thus removing discretion from police officers. *Id.*, 535 A.2d at 1043.

56. *Id.*

57. *Id.* at 301, 535 A.2d at 1047 (Papadakos, J., concurring).

58. *Id.* (Papadakos, J., concurring).

59. *Id.* at 302, 535 A.2d at 1047 (Papadakos, J., concurring). "[W]hen a case raises constitutional and non-constitutional issues, we should not reach the constitutional issues if the case can properly be decided on non-constitutional grounds." *Id.* at 301-02, 535 A.2d at 1047 (Papadakos, J., concurring) (citations omitted).

60. *Id.* at 298, 535 A.2d at 1045 (Zappala, J., concurring).

61. *Id.* at 301, 535 A.2d at 1047 (Zappala, J., concurring). Article I, section 8 states that no search or seizure may be conducted "without probable cause." *Id.* at 299, 535 A.2d at 1046 (Zappala, J., concurring).

62. *Id.* (Zappala, J., concurring).

ion] destroys [the] constitutionally guaranteed protections to effect a solution to a social problem."<sup>63</sup> Justice Zappala concurred in the result, however, only because the decision rested on the lack of statutory authorization to conduct sobriety roadblocks.<sup>64</sup>

Justice Zappala disagreed with the plurality's conclusion that the Supreme Court of Pennsylvania had previously employed the balancing test in a sniff-search case, *Commonwealth v. Johnston*.<sup>65</sup> Instead, Justice Zappala found that the court's previous decision rested upon a determination of probable cause.<sup>66</sup> Justice Zappala suggested instead that the *Johnston* opinion adopted the dissent of Justice Brennan of the United States Supreme Court in *United States v. Place*.<sup>67</sup> According to Justice Brennan's dissent in *Place*, a balancing of the competing interests is only appropriate in a *Terry* stop and frisk situation.<sup>68</sup>

The standard to be applied, according to Justice Zappala, is at least a "reasonable suspicion."<sup>69</sup> Without at least a reasonable suspicion, an individual's personal liberties would be subject to a standard lower than that used in a *Terry* situation.<sup>70</sup> "Thus, while the required end is admirable, the means employed does not justify that end."<sup>71</sup>

Justice Zappala further disagreed with the plurality's reliance on *Martinez-Fuerte*.<sup>72</sup> He asserted that the governmental purposes at issue in *Martinez-Fuerte* and the present case were clearly different; one case

63. *Id.* (Zappala, J., concurring).

64. *Id.* (Zappala, J., concurring). Thus, Justice Zappala asserted that the plurality opinion is only an advisory opinion on the constitutionality issue. *Id.* (Zappala, J., concurring).

65. 515 Pa. 454, 530 A.2d 74 (1987). For a discussion of the plurality's discussion of *Commonwealth v. Johnston*, see *supra* note 32 and accompanying text.

66. *Tarbert*, 517 Pa. at 298-99, 535 A.2d at 1046 (Zappala, J., concurring).

67. 462 U.S. 696 (1983). See *Tarbert*, 517 Pa. at 298, 535 A.2d at 1046 (Zappala, J., concurring). Justice Zappala stated that in *Place*, a majority of the United States Supreme Court applied a balancing test between governmental and individual interests in determining whether an unreasonable search had occurred. *Id.* (Zappala, J., concurring); see *Place*, 462 U.S. at 700-10.

68. *Tarbert*, 517 Pa. at 298-99, 535 A.2d at 1046 (Zappala, J., concurring). See *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting investigative detentions where reasonable suspicion of criminal activity exists). Justice Zappala stated: "The balancing test required under *Terry* which today is mistakenly applied to the present appeal, involves a weighing of the intrusion applied after a determination of a reasonable suspicion." *Tarbert*, 517 Pa. at 298-99, 535 A.2d at 1046 (Zappala, J., concurring).

69. *Tarbert*, 517 Pa. at 300, 535 A.2d at 1046 (Zappala, J., concurring) (citing *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969)). In *Hicks*, the Pennsylvania Supreme Court adopted a *Terry* exception to probable cause if the officer has at least a reasonable suspicion that a crime was in progress. *Id.* (Zappala, J., concurring).

70. *Id.* (Zappala, J., concurring).

71. *Id.* (Zappala, J., concurring). Justice Zappala suggested that the plurality's justification for a standard lower than reasonable suspicion is the difficulty in enforcing drunk driving laws. *Id.* (Zappala, J., concurring).

72. *Id.*, 535 A.2d at 1047 (Zappala, J., concurring).

involved preventing aliens from entering the country while the other involved detection of criminal activity.<sup>73</sup> While administrative searches in the immigration context are valid subject to reasonable implementation, searches to detect criminal activity are subject to constitutional strictures.<sup>74</sup>

#### IV. CONCLUSION

The Pennsylvania Motor Vehicle Code provision authorizes that the use of sobriety roadblocks is valid under the Pennsylvania Constitution.<sup>75</sup> This is the lesson of *Tarbert*, even though the constitutional analysis provided in that case was *obiter dictum*.<sup>76</sup> This conclusion is true, however, only as long as the sobriety roadblock at issue is conducted in accordance with the guidelines set forth in *Tarbert* by Chief Justice Nix.<sup>77</sup> Thus, there is room in any given case to argue that the roadblock was conducted in violation of the prohibition against unreasonable searches and seizures of the Pennsylvania Constitution. Usually this will mean that the motorist was subject to a prolonged stop, or that the officer made a physical search of the vehicle, or that the motorist was taken by surprise in that there was no warning or other sign indicating that a sobriety roadblock was about to take place, or that the police officers were given too much discretion in setting up and conducting the roadblock.<sup>78</sup>

Failure to meet one of these guidelines would subject a motorist to a level of subjective and objective intrusion sufficient to invalidate the use of the roadblock under the *Martinez-Fuerte* type balancing test adopted in *Tarbert*.<sup>79</sup> At that point, the state's interest in detecting and preventing drunk driving would be outweighed by the individual's privacy interest and the roadblock would constitute an "unreasonable search and seizure" under the Pennsylvania Constitution.

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73. *Id.* at 300-01, 535 A.2d at 1047 (Zappala, J., concurring).

74. *Id.* at 301, 535 A.2d at 1047 (Zappala, J., concurring).

75. For a discussion of the author's determination that sobriety roadblocks are permissible under the Pennsylvania Constitution, see *supra* note 7.

76. *Tarbert*, 517 Pa. at 301-02, 535 A.2d at 1047 (Papadakos, J., concurring).

77. For a discussion of the rationale employed by Chief Justice Nix, see *supra* notes 30-56 and accompanying text.

78. For a discussion of sobriety roadblock attributes enumerated by Chief Justice Nix, see *supra* notes 52-56 and accompanying text.

79. For a discussion of the *Martinez-Fuerte* balancing test, see *supra* notes 33-51 and accompanying text.

