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NOV 17 2011  
DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY M. CHRISTOPHERSON DEPUTY

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA  
APPELLATE DIVISION**

**PEOPLE OF THE STATE OF  
CALIFORNIA,**  
  
Plaintiff and Respondent,  
  
v.  
  
Defendant and Appellant.

No. 1-11-AP-  
Trial Ct. No. C107

**ORDER**

This appeal came on for hearing and was heard and submitted on August 19, 2011.  
Appellant contends that the DUI checkpoint was not constitutionally valid under *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321 because the San Jose Police Department did not use a neutral formula to determine which vehicles to stop and therefore did not limit the discretion of officers in the field. Appellant asserts that the use of "flushing," allowing

1 vehicles to go through the DUI checkpoint without being  
2 stopped, resulted in the use of a non-neutral formula.

3 "In reviewing the denial of a motion to suppress  
4 evidence, [the court] view[s] the record in the light most  
5 favorable to the trial court's ruling and defer[s] to its  
6 findings of historical fact, whether express or implied, if  
7 they are supported by substantial evidence." (*People v.*  
8 *Miranda* (1993) 17 Cal.App.4th 917, 922, citing *People v.*  
9 *Williams* (1988) 45 Cal.3d 1268, 1301.) Then, the reviewing  
10 court independently decides what legal principles are  
11 relevant, applies them to the facts, and "determine[s] as a  
12 matter of law whether there has been an unreasonable search  
13 and/or seizure." (*Ibid.*)

14 An appellate court's review of a trial court's ruling  
15 on a motion to suppress is governed by well-settled  
16 principles. In ruling on such a motion, the trial  
17 court (1) finds the historical facts, (2) selects the  
18 applicable rule of law, and (3) applies the latter to  
19 the former to determine whether the rule of law as  
20 applied to the established facts is or is not violated.  
21 The trial court's resolution of each of these inquiries  
22 is, of course, subject to appellate review. The  
23 court's resolution of the first inquiry, which involves  
24 questions of fact, is reviewed under the deferential  
25 substantial-evidence standard. Its decision on the  
26 second, which is a pure question of law, is scrutinized  
27 under the standard of independent review. Finally, its  
28 ruling on the third, which is a mixed fact-law question  
that is however predominantly one of law, is also  
subject to independent review.

(*People v. Alvarez* (1996) 14 Cal.4th 155, 182, internal  
citations and quotation marks omitted.)

Under Penal Code section 1538.5, a defendant may move for  
the suppression of evidence for a violation of the Fourth  
Amendment. "Pursuant to article I, section 28, of the  
California Constitution, a trial court may exclude evidence

1 under Penal Code section 1538.5 only if exclusion is mandated  
2 by the federal Constitution." (*People v. Banks* (1993)  
3 6 Cal.4th 926, 934, citing *In re Lance W.* (1985) 37 Cal.3d  
4 873, 896.) The Fourth Amendment to the United States  
5 Constitution prohibits "unreasonable searches and seizures."  
6 "The touchstone for all issues under the Fourth Amendment and  
7 article I, section 13 of the California Constitution is  
8 reasonableness." (*People v. Banks, supra*, 6 Cal.4th at p.936,  
9 quoting *Ingersoll v. Palmer, supra*, 43 Cal.3d at p. 1329.)  
10 "The Fourth Amendment, of course, 'applies to all seizures of  
11 the person, including seizures that involve only a brief  
12 detention short of traditional arrest.'" (*Brown v. Texas*  
13 (1979) 443 U.S. 47, 50, quoting *David v. Mississippi* (1969)  
14 394 U.S. 721.) A detention at a sobriety checkpoint is a  
15 seizure for purposes of Fourth Amendment analysis. (*Mich.*  
16 *Dep't of State Police v. Sitz* (1990) 496 U.S. 444, 450; see  
17 *People v. Banks, supra*, 6 Cal.4th at p. 934.) In *Brown v.*  
18 *Texas, supra*, 443 U.S. at pp. 50-51, the United States Supreme  
19 Court held that under the federal Constitution, to determine  
20 whether a seizure or a detention is justified, the court  
21 "balances the public interest served by the seizure, the  
22 degree to which the seizure advances the public interest and  
23 the severity of the interference with individual liberty."  
24 (*People v. Banks, supra*, 6 Cal.4th at p. 936, citing *Brown v.*  
25 *Texas, supra*, 443 U.S. at pp. 50-51.) The three-pronged  
26 balancing test set forth in *Brown v. Texas, supra*, is used to  
27 determine the reasonableness of a sobriety checkpoint. (*Mich.*  
28 *Dep't of State Police v. Sitz, supra*, 496 U.S. at p. 455.)

1 In *Ingersoll v. Palmer, supra*, the seminal California  
2 Supreme Court case about sobriety checkpoints, the Court  
3 applied the three-pronged balancing test of *Brown v. Texas,*  
4 *supra*, and held, "California constitutional principles are  
5 based on the same considerations, i.e., balancing the  
6 governmental interests served against the intrusiveness of the  
7 detention." (43 Cal.3d at p. 1329.) In *Ingersoll*, the Court  
8 considered the validity of a Burlingame sobriety checkpoint  
9 conducted on El Camino Real. (*Id.* at pp. 1325-1326.) The  
10 Burlingame Police Department had established a manual to  
11 govern checkpoint operations. (*Id.* at p. 1326.) "The manual  
12 covered legal considerations, including the Attorney General's  
13 guidelines; a cost analysis; factors affecting location  
14 selection; required personnel and equipment; training and  
15 briefing of checkpoint personnel; press relations and  
16 publicity; as well as procedures for a follow-up evaluation."  
17 (*Ibid.*) The Court found the checkpoint constitutional.  
18 Examining the first two factors from *Brown v. Texas, supra*, -  
19 the public interest served by the seizure and the degree to  
20 which the seizure advances the public interest - the Court  
21 analogized sobriety checkpoints to airport searches and  
22 opined:

23 While the label "administrative search" is open to  
24 some criticism in application to either the airport  
25 search or the sobriety checkpoint stop, both,  
26 although they operate mechanically as a search or  
27 inspection for the violation of law, actually serve a  
28 primary and overriding regulatory purpose of  
promoting public safety. Their primary purpose is to  
prevent and deter conduct injurious to persons and  
property; they are not conventional criminal searches  
and seizures. The fact that sobriety checkpoint stops  
will lead to the detection of some individuals

1 involved in criminal conduct does not alter the  
2 fundamental regulatory character of the screening  
procedure.

3 (*Id.* at pp. 1331-1332.) The Court found that deterring drunk  
4 driving and identifying and removing drunk drivers from the  
5 roadways undeniably serves a highly important governmental  
6 interest and sobriety checkpoints advance this interest. (*Id.*  
7 at pp. 1338-1341.)

8 Examining the third balancing factor from *Brown v. Texas*,  
9 *supra*, - intrusiveness on individual liberties - the  
10 California Supreme Court highlighted eight factors to  
11 consider:

- 12 1) decision making at the supervisory level;
- 13 2) limits on discretion of field officers;
- 14 3) maintenance of safety conditions;
- 15 4) reasonable locations;
- 16 5) time and duration;
- 17 6) indicia of official nature of roadblock;
- 18 7) length and nature of detention; and
- 19 8) advance publicity.

20 (*Ingersoll v. Palmer, supra*, 43 Cal.3d at pp. 1341-1347.) In  
21 reference to the second factor, limits on discretion of field  
22 officers, the Court stated:

23 A related concern is that motorists should not be  
24 subject to the unbridled discretion of the officer in  
the field as to who is to be stopped. Instead, a neutral  
25 formula such as every driver or every third, fifth or  
tenth driver should be employed. To permit an officer to  
26 determine to stop any particular driver or car when  
there is no legitimate basis for the determination would  
be to sanction the kind of unconstrained and  
27 standardless discretion which the United States Supreme  
Court sought to circumscribe in its decisions in *Prouse*,  
28 *supra*, 440 U.S. 648, *Almeida-Sanchez, supra*, 413 U.S.

1 266, and *Camara, supra*, 387 U.S. 523. In all the  
2 checkpoint programs at issue here, neutral mathematical  
selection criteria were used.

3 (*Id.* at p. 1342.) Later, in *People v. Banks, supra*, 6 Cal.4th  
4 at p. 949, the California Supreme Court held that the  
5 operation of a sobriety checkpoint conducted in the absence of  
6 advance publicity, but otherwise in conformance with the  
7 guidelines the Court established in *Ingersoll*, does not result  
8 in an unreasonable seizure within the meaning of the Fourth  
9 Amendment to the United States Constitution. *Ingersoll* created  
10 "factors important in assessing intrusiveness" or "functional  
11 guidelines" culled from case law and not bright-line rules or  
12 requirements. (*Ingersoll v. Palmer, supra*, 43 Cal.3d at  
13 p. 1341.)

14 The practice of "flushing" itself is not  
15 unconstitutional. Indeed, when discussing the safety factor,  
16 the Court in *Ingersoll* highlighted the potential need for such  
17 a practice:

18 The checkpoint should be operated only when traffic  
19 volume allows the operation to be conducted safely.  
20 Screening procedures may at times be altered consistent  
21 with traffic volume, such that, for example, every car  
22 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.

23 (*Ingersoll v. Palmer, supra*, 43 Cal.3d at p. 1343.)

24 In this case, the San Jose Police Department originally  
25 implemented a neutral formula at the sobriety checkpoint at  
26 Capitol Expressway and Vista Park on April 17 through  
27 April 18, 2010. Officer Jeffrey testified that the line  
28 officers were instructed to stop every vehicle. The line

1 officers in the field had no discretion whether to stop a  
2 particular vehicle. *Ingersoll* specifically notes that stopping  
3 every vehicle is a neutral formula that, when considered with  
4 all the other factors, is reasonable. At this checkpoint, only  
5 Sergeant Steve Angel, an officer at the supervisory level, had  
6 discretion to flush the line and allow cars to go through the  
7 checkpoint without being stopped and screened.

8       Although the formula was to stop every car, not every car  
9 was stopped at this checkpoint. In fact, as Officer Jeffrey  
10 testified, between 9:00 p.m. and 3:00 a.m. when the checkpoint  
11 was conducted, 1,430 cars went through the checkpoint but 157  
12 were not stopped. Therefore, the police did not follow the  
13 neutral formula of stopping every car. Under *Ingersoll* itself,  
14 a police department may, consistent with the Constitution,  
15 depart from the original neutral formula and implement a  
16 different neutral formula during the course of a checkpoint  
17 when safety measures require it. Yet, in this case, the People  
18 did not present any evidence about the reasons the 157  
19 vehicles were not stopped even though the line officers were  
20 required to stop every vehicle. Officer Jeffrey testified  
21 that, typically, the sergeant only allows cars to go through  
22 without being stopped, "flushes the line," when there are  
23 safety issues such as backed-up traffic. Officer Jeffrey  
24 testified that the line officers did not have discretion to  
25 decide whether a certain vehicle should be stopped, only the  
26 sergeant could decide to flush the line because of traffic  
27 congestion or other safety issues and the policy of the  
28 department is for the sergeant to flush the line for safety or

1 emergency reasons. Nevertheless, Officer Jeffrey did not know  
2 why 157 vehicles were not stopped in this case. Officer  
3 Jeffrey testified that Sergeant Angel was the person who  
4 authorized those vehicles to go through unscreened and he,  
5 Officer Jeffrey, was not aware of Sergeant Angel's reasons for  
6 allowing them through the checkpoint. More importantly,  
7 Sergeant Angel did not testify.

8       The evidence unquestionably demonstrated that it is the  
9 policy of the San Jose Police Department for the supervising  
10 officer, in this case a sergeant, to allow vehicles to go  
11 through a DUI checkpoint when there are safety or emergency  
12 concerns that require it. Nonetheless, the People did not  
13 present any evidence that the sergeant followed the policy of  
14 the department in this case. Without any evidence in support  
15 of such a conclusion, this Court cannot speculate as to why  
16 some of the vehicles were not stopped. Essentially, the People  
17 failed to meet their burden of proof.

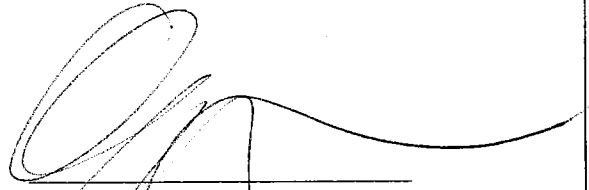
18       The use of a neutral formula is an extremely important  
19 *Ingersoll* factor because it ensures that a checkpoint is  
20 utilized for the regulatory purpose by which it is justified.  
21 Because the People failed to prove that the police followed a  
22 neutral formula at the checkpoint, they failed to demonstrate  
23 that the detention was reasonable under the Fourth Amendment  
24 of the United States Constitution as described in *Ingersoll v.*  
25 *Palmer, supra*, and under the balancing test set forth in *Brown*  
26 *v. Texas, supra*.

27       Accordingly, the trial court is ordered to vacate  
28 appellant's plea of no contest and its order denying the

1 motion to suppress and enter a new order granting appellant's  
2 motion to suppress.


3 IT IS SO ORDERED.

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5 DATED: 11/16/11



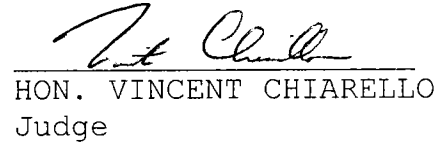
HON. JACQUELINE DUONG  
Presiding Judge

7  
8 DATED: 11/19/11  
9 *WZ*



HON. CARRIE ZEPEDA  
Judge

10  
11 DATED: 11/16/11

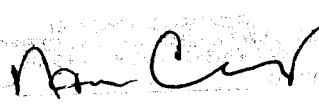


HON. VINCENT CHIARELLO  
Judge

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ATTORNEY GENERAL'S OFFICE

NOV 18 2011



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA  
191 N. First Street  
San Jose, CA 95113-1090

TO: Nicholas G. Emanuel  
Nicholas G. Emanuel Law Offices  
125 S. Market Street Suite 1200  
San Jose, CA 95113

RE: People Vs  
Case Nbr: 1-11-7

**PROOF OF SERVICE**

Order granting appellant's motion to suppress.

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

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Parties/Attorneys of Record:

CC: San Jose Facility- Criminal

Laura Isabel Aizpuru-Sutton, District Attorney - Santa Clara  
70 West Hedding, West Wing, 6th Floor, San Jose, CA 95110

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 11-18-11. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Norma Christopherson, Deputy