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1 FOR PUBLICATION

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4 **IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

7 Plaintiff,

8 vs.

9 **STEPHEN J. NUTTING,**

10 Defendant.

) **TRAFFIC CASE NO. 10-00940**
) Citation No. 75354
)
)
)

) **DECISION DENYING
DEFENDANT'S
MOTION TO SUPPRESS/DISMISS**

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13 **I. INTRODUCTION**

14 **THIS MATTER** came before the Court on November 8, 2010 at 1:30 p.m. in Courtroom 220A
15 on Defendant Stephen J. Nutting's ("Defendant") Motion to Suppress/Dismiss. Assistant Attorney
16 General Benjamin K. Petersburg appeared on behalf of the Commonwealth ("Government"). Attorney
17 Sheila N. Trianni appeared on behalf of Defendant. In his Motion to Dismiss, Defendant asks this Court
18 to find that the planning and operation of the sobriety checkpoint of April 30, 2010 as it relates to
19 Defendant's rights and liberties was constitutionally infirm in that: (1) the Government failed to comply
20 with standard operating procedures ("SOP") when administering the sobriety checkpoint on April 30,
21 2010; and (2) the greeting officer improperly exerted discretion over Defendant in violation of
22 Defendant's rights.

23
AGO
S. Trianni, Esq.
Law Revision
Judges/Justices

1 Having considered the arguments of counsel, the materials submitted and the applicable law, the
2 Court announced its decision DENYING Defendant's Motion to Suppress/Dismiss at the November 22,
3 2010, hearing. The Court now issues its written decision in support of its order **DENYING** the motion.
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5 **II. PROCEDURAL HISTORY**

6 On April 30, 2010 at approximately 10:04 p.m., Officer Tarimai Yangetmai ("Officer
7 Yangetmai") was acting as a greeter at a DPS Sobriety Checkpoint on Beach Road, Susupe located on
8 the northbound outer lane in front of the Multi-Purpose building. *See* Def's Mot. to Dismiss, Ex. Nos. 3
9 and 7; Testimony of Officer Yangetmai. Officer Yangetmai greeted Defendant after he had been
10 flagged into the checkpoint funnel by another officer. *Id.* Officer Yangetmai approached the driver's
11 side window of Defendant's vehicle, and while greeting the operator, he detected the strong odor of
12 alcohol coming from inside the car. He also noticed an opened container of alcoholic beverage in the
13 center cup holder of the vehicle. Officer Yangetmai asked the Defendant if he had drank any alcoholic
14 beverages that evening, and Defendant replied "Yes." The officer then detected the strong odor of
15 alcoholic beverages coming from the operator's exhaled breath. Officer Yangetmai then ordered
16 Defendant to turn off his vehicle, and to step out of the vehicle. He escorted the Defendant to the
17 shoulder of the road to begin the DUI process. Another officer drove Defendant's vehicle out of the
18 funnel and parked it at the nearby parking lot.

19 During the DUI processing, Officer Yangetmai asked Defendant a series of questions including
20 where he had come from, where he was headed to, and what he had been drinking earlier that evening.
21 He also asked what kind of alcoholic beverages Defendant drank and the amount he drank. During this
22 interview process, the officer noticed Defendant still had the strong odor of alcoholic beverages from his
23 exhaled breath, and that he had a flushed face and bloodshot eyes. Based upon Defendant's responses
24 and the officer's observations, Officer Yangetmai proceeded to administer a field sobriety test (FST),

1 which Defendant refused to partake in claiming that he had sustained a tennis injury a few weeks prior.
2 Defendant was then arrested for the charges of reckless driving and driving under the influence of
3 alcohol. After placing Defendant under arrest, Officer Yangetmai read and explained the implied
4 consent form to the Defendant who then refused to give a breath sample for the breathalyzer test. The
5 officer then continued to fill out various other forms.

6 While filling out the traffic citation, Officer Yangetmai remembered seeing an open container of
7 alcohol in Defendant's car. That container was later identified as a 15.2 fl. oz. bottle of Grosch
8 Premium Lager containing about $\frac{3}{4}$ of an inch of alcoholic beverage.

9 Defendant was subsequently charged with violating 9 CMC § 5853(c) (the Open Container Act),
10 9 CMC § 7104(a) (Reckless Driving), 9 CMC § 7105(A)(2) (Driving Under the Influence of Alcohol),
11 and 9 CMC § 7106(c) (Refusal to Submit to a Breath Test). The Government subsequently dismissed
12 the Reckless Driving and DUI charges. All that remains now is one charge of Refusal to Submit to a
13 Breath Test and one charge of having an open container.

14 15 **III. DISCUSSION**

16 The question of whether a DUI roadblock is *per se* unconstitutional pursuant to the United States
17 Constitution was addressed by the United States Supreme Court in *Michigan Dep't. of State Police v.*
18 *Sitz*, and is not presently before this Court. *Michigan Dep't. of State Police v. Sitz*, 496 U.S. 444 (1990).
19 However, it is important to note that the *Sitz* Court acknowledged that a roadblock was a seizure under
20 the Fourth Amendment of the U.S. Constitution and thus, it focused its examination on whether such a
21 seizure was unreasonable. In examining whether a DUI roadblock was an unreasonable seizure, the
22 Court utilized a three-pronged balancing test derived from its decision in *Brown v. Texas*, 443 U.S. 47
23 (1979). The United States Supreme Court "balanced the state's interest in preventing accidents caused
24 by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of

1 intrusion on an individual's privacy caused by the checkpoints." *Sitz*, at 449. The Court concluded that
2 "the balance of the State's interest in preventing drunken driving, the extent to which this system can
3 reasonably said to advance that interest, and the degree of intrusion upon individual motorists who are
4 briefly stopped, weighs in favor of the state program." *Id.* at 455.

5 Here in the Commonwealth of the Northern Mariana Islands, the stop of the Defendant's vehicle
6 was a seizure under the Fourth and Fourteenth Amendments to the United States Constitution¹ and under
7 article 1, section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands. *United*
8 *States v. Cuyson*, 3 CR 712 (Dist. Ct. 1989). Since the seizure was made without a warrant, it is the
9 Commonwealth's burden to prove the seizure was reasonable. *Commonwealth v. Sablan*, Crim. Case
10 No. 94-035 (N.M.I. Super. Ct. Nov. 1, 1994) (Decision and Order on Defendant's Motion to Suppress
11 Evidence at 11). In this case, the CNMI Department of Public Safety has a standard operating procedure
12 approved in 1994 that governs sobriety checkpoint operations. (Def's Mot. to Suppress/Dismiss, Ex. 1)
13 The SOP defines the purpose, objective, policy, criteria and procedure for the construction and operation
14 of all sobriety checkpoints. *Id.* The SOP includes the sobriety checkpoint operations and planning
15 guide. *Id.* This Court concludes that DUI roadblocks are constitutional and a necessary tool for law
16 enforcement and deterrence. In conjunction with the overwhelming number of jurisdictions in support
17 of DUI roadblocks, this Court believes that systematic, nondiscriminatory, nonarbitrary roadblocks for
18 the purpose of detecting drunken drivers, conducted in compliance with DPS guidelines are
19 constitutional. Keeping these general principles in mind, the Court will now address the merits of
20 Defendant's Motion to Dismiss.

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23 ¹ Covenant Section 501(a) provides that these two provisions of the United States Constitution are applicable within the
24 Northern Mariana Islands "as if the Northern Mariana Islands were one of the several States." COVENANT TO ESTABLISH A
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48
U.S.C. § 1801.

1 In his Motion, Defendant cites a number of cases for the proposition that it is not enough for
2 police officers to substantially comply with written guidelines, but instead argues that police officers
3 must strictly comply with such guidelines. However, the Court finds that the cases cited by Defendant
4 are both factually and legally distinguishable from the present case.

5 In the Massachusetts case of *Commonwealth v. Donnelly*, 614 N.E. 2d 1018 (Mass. App. 1993),
6 an officer was given the sole discretion to decide where to set up a DUI roadblock along a six mile long
7 roadway. More important, the specific location selected by the officer was based on arrest data of
8 roadblocks that were conducted two years earlier, even though there were two recent roadblocks in the
9 same area. The more recent results were not offered into evidence as having been relied upon to show
10 prior alcohol related incidents. The Appeals Court of Massachusetts determined that the
11 Commonwealth did not justify the selected location for the DUI roadblock to show that it was based on
12 fresh, reliable information, but instead, left the choice up to the state police in their discretion. *Id.* Here,
13 this was not the case. DPS Officers selected pre-determined sobriety checkpoints based on statistical
14 summaries showing which locations had the highest related alcohol crashes and arrests from November
15 2009 to March 15, 2010. *See Commonwealth's Opp'n to Def's Motion to Dismiss*, Ex. B, pg. 2
16 (Briefing Memorandum). The Beach Road, Susupe site was selected as a sobriety checkpoint because it
17 yielded the greatest number of arrests during the previous months.

18 In *Guy v. State*, 993 So.2d 77 (Fla. App. 2008), the Florida Court of Appeal concluded that the
19 State failed to show that the checkpoint met the legal requirements to pass constitutional muster. Under
20 the officer's "Operational Plan for Low-Manpower Sobriety Checkpoint," every vehicle was to be
21 checked. *Id.* at 79. However, if a traffic backup occurred, the Event Commander/Checkpoint
22 Supervisor would develop a contingency plan either temporarily closing the checkpoint until the traffic
23 cleared or changing the number of vehicles to be stopped. *Id.* The Court concluded that this left too
24 much discretion to the officers as to the selection of vehicles and thus concluded that the checkpoint was

1 unconstitutional. *Id.* at 80. The Florida Court further noted that based on the testimony of the officers
2 involved in the checkpoint operation, there was no strict compliance with the plan, as required by their
3 prior caselaw. *Id.* at 79. For example, the officers indicated that the duty assignments in the plan were,
4 in fact, "fluid" or subject to change in the field. *Id.* Based on the officers' failure to strictly adhere to
5 the written plans, it further found the checkpoint stop unconstitutional. *Id.* at 80.

6 Here, although the Officer in Charge was given the responsibility to make a change in the
7 systematic sequence of vehicles to be stopped if traffic volume increased, DPS officers were not
8 stopping every vehicle that went through the checkpoint. Instead, officers were only stopping cars based
9 on the amount of traffic volume in that particular area. In other words, the guidelines set forth a
10 predetermined systematic approach to funneling vehicles through the checkpoint based on the volume of
11 traffic i.e. one in every three vehicles for low volume; one in every five vehicles for moderate volume;
12 and one in every ten vehicles for high volume, which the officers were required to follow. *See* Briefing
13 Memorandum at 5.

14 The Court finds that the April 30, 2010 sobriety checkpoint was constitutional since no persons
15 were singled out arbitrarily for investigation, the field officers had no discretion on whom to stop, and
16 the officers substantially complied with the SOP.

17 **A. The Sobriety Checkpoint was Constitutional Since the Government Substantially Complied**
18 **with DPS' SOP When It Administered the Checkpoint on April 30, 2010.**

19 Defendant argues that DPS officers failed to comply with guidelines governing sobriety
20 checkpoints in a number of ways. More specifically, Defendant argues that the April 30, 2010 sobriety
21 checkpoint was infirm because: (1) the SOP requires advanced planning; and (2) there was no adequate
22 notice.

23 In his Motion, Defendant argues that DPS did not comply with its own SOP regarding public
24 notice, which specifically provide that, "[r]ecord of those media outlets provided with a press release,

1 reference the checkpoint, will be made. The SOP requires that checkpoint information will be released
2 five (5) days prior to the target date.” See Def’s Motion to Dismiss, Ex. 1, pg. 1-11 (SOP). In addition,
3 the Memorandum dated April 27, 2010 from the Traffic Section to DPS Acting Commissioner,
4 Ambrosio T. Ogumoro, states that “[u]pon the approval of this request by the DPS Commissioner or his
5 designee, a press release to the media in reference to the checkpoints will be made three (3) to five (5)
6 days prior to the scheduled checkpoint.” See Def’s Motion to Dismiss, Ex. 2, pg. 2-2 (April 27, 2010
7 Memorandum). As such, a Public Service Announcement dated April 27, 2010, was supposedly given
8 to all media services three days prior to the April 30, 2010 DUI checkpoint. However, Defendant denies
9 that this event ever occurred. Defendant argues that none of the local newspapers had any information
10 regarding the April 30, 2010, sobriety checkpoints, and the Commonwealth failed to produce any
11 evidence to the contrary.² Assuming that no public announcement was given, the Court must determine
12 whether lack of public notice would be grounds to invalidate the sobriety checkpoint.

13 As stated earlier, the United States Supreme Court has determined that, under the federal
14 Constitution’s Fourth Amendment, the use of sobriety checkpoints is constitutional. *Sitz, supra*. After
15 the *Sitz* decision, the California Supreme Court subsequently found that advance publicity is not a
16 constitutional prerequisite to the operation of a valid sobriety checkpoint. *People v. Banks*, 863 P.2d
17 769, 770 (Cal. 1993). The presence or absence of advance publicity is irrelevant to the objective
18 intrusion occasioned by a sobriety checkpoint, and, although advance publicity of the location of a
19 checkpoint may serve to minimize the surprise or inconvenience of motorists altered by the publicity,
20 advance publicity is not a constitutional prerequisite to ensuring that the subjective intrusion involved is
21 confined to a reasonable level. *Id.*

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24 ² The Court notes that neither party addressed the possibility that the local television news station or radio stations made any announcements.

1 Moreover, the absence of advance publicity does not so lessen the deterrent effect of a sobriety
2 checkpoint as to tip the scales in favor of a detained motorist who subsequently challenges the
3 checkpoint. *Id.* A sobriety checkpoint conducted without advance publicity is unlikely to be totally
4 without deterrent effect, at least among those motorists who pass through, or by, the checkpoint. *Id.*
5 Even in the absence of advance publicity, a sobriety checkpoint has the potential of substantially
6 furthering the state’s vital interest in deterring motorists from driving “under the influence.” *Id.*

7 In *State v. Boisvert*, the Appellate Court of Connecticut upheld a traffic DUI conviction in a case
8 wherein the police conducted a sobriety checkpoint in substantial compliance with the guidelines
9 according to neutral criteria. *State v. Boisvert*, 671 A.2d 834 (1996). No persons were singled out
10 arbitrarily for investigation, and the officers in the field had no discretion whatsoever as to whom to
11 stop. *Id.* at 837. In addition, the trial court in the *Boisvert* case further determined that, “while
12 publication is usually preferred, it is not considered constitutionally necessary. *Id.* at 838, fn. 8. This
13 Court agrees.

14 While this Court believes that the public should be given adequate notice of the date and location
15 of sobriety checkpoints in the future to ensure that the goals and objectives of the Commonwealth are
16 maximized, advance public notice is not constitutionally necessary. In addition, by alerting the public
17 that the Commonwealth is taking an aggressive stance on drunk driving, more accidents can be
18 prevented. If a Public Information Officer creates a Media Memorandum, that Memorandum should be
19 distributed to the public in order to enhance the educational and deterrent value of instituting sobriety
20 checkpoints here in the CNMI.

21 **B. Defendant’s Constitutional Rights Were Not Violated When He Was Ordered Out of his**
22 **Vehicle on April 30, 2010.**

23 Defendant argues that Officer Yangetmai failed to follow SOP and violated Defendant’s rights
24 by: (1) failing to refer Defendant to a secondary checker; (2) failing to follow the precise script for

1 greeters; (3) failing to coordinate with a citer; and (4) failing to coordinate with the OIC regarding the
2 processing of Defendant for arrest. *See* Def's Motion to Dismiss at 7-9. This Court disagrees.

3 First, Defendant argues that Officer Yangetmai failed to comply with the DPS SOP and violated
4 Defendant's rights when he failed to refer Defendant to a secondary checker. Defendant argues that the
5 SOP clearly mandates that if an officer wishes to conduct further investigations, he or she should direct
6 the driver to a secondary checker. (Def's Motion to Dismiss, Ex. 1, pgs. 1-10 (SOP)). However, the
7 Briefing Memorandum given to the officers on April 30, 2010, at 6:00 p.m. provide that if further
8 investigation is warranted, the driver should be directed to a secondary checker *or* zone of safety. *See*
9 Def's Motion to Dismiss, Ex. 4, pgs. 4-5 (Briefing Memorandum) (emphasis added).

10 In the present action, Officer Yangetmai made the determination that further investigation was
11 warranted and directed Defendant to the safety zone. Once there, Officer Yangetmai continued with his
12 DUI investigation. Officer Yangetmai had the discretion to direct Defendant to a secondary checker or
13 to a zone of safety. The Court does not find that it was unreasonable for Officer Yangetmai to direct
14 Defendant to a zone of safety pursuant to the Briefing Memorandum that was given to him earlier that
15 evening. In addition, every arrest that was made that night was performed by the same officer who
16 greeted the driver. Defendant was not singled out by this greeting officer; he was handled in the same
17 manner as all other operators subjected to the checkpoint. Therefore, the Court finds that Officer
18 Yangetmai did comply with the Briefing Memorandum when he escorted Defendant to the safety zone
19 in order to conduct field sobriety tests after determining that further investigation was warranted.

20 Defendant argues that Officer Yangetmai failed to comply with the SOP by failing to ask
21 Defendant follow up questions prior to ordering Defendant out of his vehicle. More specifically,
22 Defendant argues that the officer should have asked him how much he had to drink and when he
23 consumed those drinks prior to being ordered out of the car. The Government on the other hand
24 contends that Officer Yangetmai already had reasonable suspicion to believe that Defendant was driving

1 under the influence of alcohol prior to ordering him out of his vehicle. (Commonwealth's Opp'n to
2 Def's Motion to Dismiss at 6).

3 It is undisputed that the SOP and Briefing Memorandum provide that the officer greeting the
4 driver must state:

5 "Good Morning/Afternoon/Evening, this is a CNMI Law Enforcement Sobriety Checkpoint. I
6 am Officer (Name). The purpose of this Sobriety Checkpoint is to detect, deter and apprehend
7 impaired drivers on the highway. Have you consumed any alcoholic beverages or taken any
8 drugs today?" If the answer is "Yes", ask how much and when. At this point, depending on the
9 answers and other circumstances, the greeting officer should decide if further investigation is
10 warranted. See Def's Motion to Dismiss, Ex. No. 1, Pg 1-9 (SOP) and Ex. No. 4, Pg 4-5)
11 (Briefing Memorandum).

12 In the present case, Officer Yangetmai greeted Defendant as he did any other driver and asked
13 Defendant if he had consumed any alcoholic beverages that evening. When Defendant responded in the
14 affirmative, Officer Yangetmai observed that Defendant had a strong odor of alcohol coming from his
15 exhaled breath, had a flushed face, and had bloodshot eyes. Officer Yangetmai further observed a 15.2
16 fl. oz. bottle of Grolsch Premium Lager located in Defendant's center console. Based on these
17 observations, Officer Yangetmai ordered Defendant out of his vehicle. Thus, the issue at this point is
18 whether or not Officer Yangetmai had a reasonable suspicion that Defendant was driving in violation of
19 the CNMI's DUI law to justify ordering the Defendant out of his vehicle without asking the follow up
20 questions of "how much and when." The long standing search and seizure principle first enunciated in
21 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968) states that the temporary seizure of a person for a brief
22 investigation is constitutionally permissible as long as there are circumstances which, although not
23 amounting to probable cause essential for a traditional arrest, are sufficient when judged against an
24 objective standard to support a reasonable suspicion that "criminal activity may be afoot." 392 U.S. at
30.

25 Although Officer Yangetmai failed to ask Defendant the follow up questions while Defendant
26 was still in his vehicle, both the SOP and Briefing Memorandum state that, "[a]t this point, depending on

1 the answers *and other circumstances*, the greeting officer should decide if further investigation is
2 warranted. *See* Def’s Motion to Dismiss, Ex. No. 4, Pg 4-5 (Briefing Memorandum) (emphasis added).

3 This Court believes that this provision for “other circumstances” gives the officer the discretion
4 to determine whether further investigation is warranted based not only on the answers to his or her
5 questions, but also on other circumstances surrounding the case, *i.e.* his or her observations. Here,
6 Officer Yangetmai determined that further investigation was warranted not only on Defendant’s
7 affirmation that he had been drinking, but also because of his observations.

8 In *People v. Rister*, 803 P.2d 483, 484 (Colo. 1990), the Colorado Supreme Court noted that
9 during a stop, “[a] trooper will be alert for any articulable conditions normally associated with persons
10 driving under the influence. These conditions would include, but not be limited to, odor of alcoholic
11 beverage about the driver, slurred speech, flushed appearance, disorderly or unusual conduct, visual
12 disorder and/or lack of muscular coordination. In the event any condition or combination of conditions
13 exist which give the trooper probable cause to believe the driver may be under the influence of alcohol,
14 the driver may then be requested to perform certain psychomotor coordination tests and/or submit to a
15 chemical test of either his blood or breath. If sufficient evidence of intoxication is then developed, the
16 driver will be arrested.” *Id.*

17 Here, Officer Yangetmai had reasonable suspicion to believe that Defendant was operating a
18 vehicle while under the influence of alcohol. Defendant admitted to having consumed alcohol earlier
19 that evening, smelled of alcohol, had a flushed face and bloodshot eyes. In addition, there was an
20 opened container of alcohol in the center cup holder of his vehicle. While these factors taken by
21 themselves might not have amounted to the reasonable suspicion necessary to order Defendant out of his
22 car, their combined presence taken together with the officer’s training and experience gave Officer
23 Yangetmai reasonable suspicion to order Defendant out of his car without further inquiry into how many
24 drinks he had consumed that evening.

1 Moreover, after Defendant was escorted to the zone of the safety and prior to being place under
2 arrest, Officer Yangetmai asked Defendant follow up questions including where he was coming from,
3 where he was going, what kind of alcoholic beverages he had consumed, how many alcoholic beverages
4 he had consumed, and what time he had consumed those alcoholic beverages. *See* Def's Mot. to
5 Dismiss, Ex. 7; Testimony of Officer Yangetmai. Based on Defendant's responses to Officer
6 Yangetmai's questions, the officer determined that a FST was proper. When Defendant refused to
7 submit to the test, Defendant was arrested by the same officer. Although Defendant's answers could
8 have dispelled Officer Yangetmai's suspicions, they did not, and Officer Yangetmai finished conducting
9 the rest of the DUI processing pursuant to DPS' procedures.

10 Notwithstanding Defendant's argument, the Court believes that Officer Yangetmai had sufficient
11 reasonable suspicion to order Defendant out of his car and then to question Defendant about his alcohol
12 consumption that evening. The Court does not find that Officer Yangetmai's failure to ask Defendant
13 how much he had to drink and when prior to ordering him out of his vehicle was *per se* unreasonable or
14 in violation of Defendant's constitutional rights warranting a suppression of all evidence stemming from
15 the checkpoint.

16 The Court further finds that Defendant's final arguments that Officer Yangetmai violated SOP by
17 failing to coordinate with a citer and failing to coordinate with the OIC regarding the processing of
18 Defendant for arrest are without merit.

19 **IV. CONCLUSION**

20 For the reasons stated above, the Court **DENIES** Defendant's Motion to Suppress/Dismiss.

21 **SO ORDERED this 18th day of January, 2011.**

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23 
24 **RAMONA V. MANGLONA, Associate Judge**