UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

TERRENCE BRESSI, Plaintiff, vs. MICHAEL FORD, ERIC O'DELL, GEORGE TRAVIOLIA, RICHARD SAUNDERS, and JOSEPH DELGADO, Defendants.	No. CV 04-264 TUC-AWT **ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiff Terrence Bressi brings this action against Defendants, individual officers of the Tohono O'odham Police Department ("TOPD"), alleging violations of his civil rights. Now pending before the Court are the parties' cross-motions for summary judgment filed September 6, 2011. For the reasons set forth below, Plaintiff's motion for summary judgment is denied, and Defendants' motion for summary judgment is denied in part and granted in part.

I. Background and Procedural History

On December 20, 2002, TOPD officers stopped Plaintiff Terrence Bressi at a roadblock on State Route 86 ("SR 86"), a state highway crossing through the Tohono O'odham Nation over which the State of Arizona retained law enforcement jurisdiction. Plaintiff insisted that the stop was unconstitutional and refused to produce his identification to the officers, who then arrested him and cited him for violations of

Arizona law: Ariz. Rev. Stat. § 28-1595(B) (failure to provide driver license or evidence of identity) and Ariz. Rev. Stat. § 28-622(A) (failure to comply with police officer). The Pima County Justice Court dismissed without prejudice the county attorney's complaint against Plaintiff on these charges because a copy of the citation did not reach the court in time. The county prosecutor re-filed the complaint against Bressi, but that complaint was dismissed after the prosecution was unable to produce records the court ordered.

Plaintiff filed this action against Defendants pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), alleging that the checkpoint stop violated his Fourth Amendment rights and his right to privacy under Art. 2, § 8 of the Arizona Constitution. Plaintiff also brought a malicious prosecution claim against the United States under the Federal Tort Claims Act ("FTCA"). Plaintiff requested injunctive relief from future roadblocks, in addition to monetary damages. Defendants Ford, O'Dell, and Traviolia were at the checkpoint when Bressi was stopped; Defendant Saunders was acting police chief at the time and is alleged to have ordered the checkpoint. Defendant Delgado is the current TOPD chief.

On January 7, 2005, this Court dismissed Plaintiff's FTCA claim against the United States. On September 27, 2005, this Court dismissed Plaintiff's § 1983 claims relating to the organization and operation of the roadblock, holding that Defendants were entitled to tribal sovereign immunity because the roadblock was operated purely under color of tribal law. In a subsequent order, this Court granted Defendants' motion for summary judgment as to Plaintiff's remaining claims.

Plaintiff appealed to the Ninth Circuit Court of Appeals. The Court of Appeals affirmed this Court's dismissal of the FTCA and *Bivens* claims, as well as the grant of summary judgment in favor of Defendants on the § 1983 claims relating to Plaintiff's arrest and citation. *Bressi v. Ford,* 575 F.3d 891, 900 (9th Cir. 2009). It reversed the dismissal of Plaintiff's § 1983 claims relating to the operation of the roadblock, concluding that Defendants' actions "established, beyond any dispute of fact, that the roadblock functioned not merely as a tribal exercise, but also as an instrument for the

enforcement of state law." *Id.* at 897. As such, Defendants were required to operate the roadblock in keeping with the constitutional requirements set by the Supreme Court for suspicionless stops, and they could be held individually liable under § 1983 if their operation of the roadblock violated Plaintiff's clearly-established constitutional rights. *Id.* The Ninth Circuit therefore remanded for further proceedings on whether the roadblock satisfied constitutional requirements and whether any Defendant is entitled to qualified immunity.[1] *Id.* ("We leave to the district court to address in the first instance any claims of qualified immunity that may be asserted by any of the Officers with regard to the roadblock."). Similarly, it reversed the dismissal of Plaintiff's claim for injunctive relief and remanded to give Plaintiff "the opportunity to demonstrate . . . a constitutional violation." *Id.* at 897 n.7.

Plaintiff filed his Fourth Amended Complaint on May 17, 2011, and now moves for summary judgment. Defendants also move for summary judgment, on the grounds that none of the Defendants violated Plaintiff's constitutional rights; that if they did, they are entitled to qualified immunity; and that the claim for injunctive relief is moot.[2]

II. Legal Standard

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, when all the pleadings and evidence are viewed in the light most favorable to the non-moving party. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Eisenberg v. Ins. Co. of N. Am.,* 815 F.2d 1285, 1289 (9th Cir. 1987). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the

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[1] The Ninth Circuit noted that "[t]here are . . . questions of fact concerning instructions that may or may not have governed operation of the roadblock." 575 F.3d at 897.

[2] The parties agree that Defendant O'Dell is entitled to summary judgment as a result of the Ninth Circuit's opinion in this case. Accordingly, the Court will grant summary judgment in his favor.

entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The party opposing summary judgment may not rest upon mere allegations or denials in his pleading, but must set forth specific facts that show a genuine issue for trial, supported by sufficient evidence "that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *Marceau v. Int'l Bhd. of Elec. Workers, Local 1269,* 618 F. Supp.2d 1127, 1139-40 (D. Ariz. 2009).

III. Discussion

There is a two-step analysis applicable to Fourth Amendment checkpoint cases. *United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009); *United States v. Faulkner*, 450 F.3d 466, 470 (9th Cir. 2006). First, the court must determine whether the primary purpose of the checkpoint was to advance the general interest in crime control. If so, the stop is *per se* invalid under the Fourth Amendment. *See Illinois v. Lidster*, 540 U.S. 419, 426 (2004) (describing this as a "presumptive rule of unconstitutionality"); *Fraire*, 575 F.3d at 932. If the checkpoint is not *per se* invalid as a crime control device, the second step is to judge the checkpoint's reasonableness on the basis of the individual circumstances, balancing the competing interests at stake and the effectiveness of the program. *Id.*

A. Primary Purpose

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Supreme Court held that a checkpoint that is operated for the primary purpose of general crime control is constitutionally invalid. To determine the primary purpose of a checkpoint program, "we examine the available evidence . . . ." *Id.* at 46. "[T]he purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers at the scene." *Id.* A suspicionless checkpoint "must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." *City of Indianapolis v. Edmond*, 183 F.3d 659, 665 (7th Cir. 1999), *aff'd*, 531 U.S. 32.

1. Plaintiff's Motion for Summary Judgment

Plaintiff argues that summary judgment in his favor is warranted because the uncontested facts and Defendants' own statements show that the checkpoint was conducted for the primary purpose of general crime control within a known smuggling corridor. Specifically, he relies on the facts that: Defendants conducted criminal wants and warrants checks on stopped motorists; Customs and Border Patrol agents were present and active at the roadblock; a law enforcement canine was present at the roadblock; Defendant Traviolia stated that he asked stopped motorists to consent to trunk searches because SR 86 is notorious for alien and dope smuggling; and Traviolia also stated that he was sure other officers asked motorists for consent to have their trunks searched.

These facts do not definitively establish that the primary purpose of the checkpoint was general crime control. In *Faulkner*, the Ninth Circuit considered evidence that a park checkpoint was set up in response to complaints of criminal activity and that the ranger posted there sometimes asked visitors for consent to inspect their coolers. It held that these facts were "not sufficient to invoke *Edmond*'s application." 450 F.3d at 471. The court reasoned that "while one of the [checkpoint's] purposes may have been to advance a general interest in crime control, it was not the primary purpose." *Id*. The facts Plaintiff identifies in support of his summary judgment motion are similarly suggestive of a crime control function, but insufficient to establish as an uncontroverted fact that crime control was the *primary* purpose of the checkpoint.

Plaintiff also relies on two documents in the record: (1) An arrest report authored by TOPD Officer Romero stating that the December 20, 2002, roadblock was a "checkpoint to locate intoxicated drivers, stolen vehicles, undocumented alien smuggling, and drug contraband"; and (2) a TOPD memorandum describing the operations plan for a May 4, 2000, checkpoint (the "Shonk Memorandum"), which indicated that the primary purpose of that roadblock was to control stolen vehicle, drug and smuggling activity, and which directed officers to question drivers about drugs and illegal immigrants. When deposed, Chief Saunders stated that on December 20, 2002, the Shonk Memorandum

would still have reflected the TOPD's practice to follow at checkpoints. Defendants do not dispute that these statements were actually made, but they contest their significance. They note that Lt. Ford, who actually planned and oversaw the checkpoint, did not think the Shonk Memorandum was policy, and that Officer Romero referred to the same checkpoint as a "sobriety checkpoint" in a different incident report. Inasmuch as the statements of Defendant Saunders and Officer Romero contradict Plaintiff's evidence, a material factual dispute as to the primary purpose of the checkpoint remains.

2. Defendants' Motion for Summary Judgment

Defendants also move for summary judgment, arguing that "all of the existing evidence in this case is that the checkpoint was for sobriety, licenses, and registrations." The evidence that Defendants refer to consists primarily of their own affidavit and deposition testimony regarding the purpose of the checkpoint. Defendants are unable to produce the written operational plan that Lt. Ford created for the December 20, 2002 checkpoint, which described the overall objectives of the checkpoint and was distributed to the Defendant officers.

Plaintiff has identified portions of the evidentiary record that contradict Defendants' statements. In addition to the evidence referenced in his own motion for summary judgment, Plaintiff points to parts of his affidavit and deposition where he recounted that Defendant Ford told him the checkpoint was operated by a "joint task force," and that Defendant Traviolia told him he had to provide identification because the area was known for smuggling drugs and illegal immigrants.

On the whole, Plaintiff has identified "material evidence that shows another programmatic purpose" for the checkpoint. *Collins v. Ainsworth*, 382 F.3d 529, 543-544 (5th Cir. 2004) (denying defendants' motion for summary judgment despite Sheriff's statements that checkpoints were set up to advance facially valid purpose). Taking the facts in the light most favorable to Plaintiff, a reasonable trier of fact could find that the primary purpose of the checkpoint was general crime control.

3. Qualified Immunity

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Defendants are not entitled to qualified immunity with regard to Plaintiff's claim that they operated the checkpoint for the primary purpose of general crime control. The right not to be stopped at a general crime control checkpoint was clearly established at the time of the roadblock operation. *Edmond*, 531 U.S. at 46; *Lidster*, 540 U.S. at 426.

B. Reasonableness

1. Plaintiff's Motion for Summary Judgment

Plaintiff argues that even if the checkpoint had a primary purpose distinguishable from general crime control, it was still unconstitutional because its operation was unreasonable in light of the circumstances. *See Faulkner,* 450 F.3d at 470. The reasonableness of a seizure is determined by weighing: (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. *Id.* at 472 (citing *Brown v. Texas*, 443 U.S. 47, 50 (1979)); *see also Fraire*, 575 F.3d at 934. The degree to which a checkpoint seizure advances the public interest is "measured by the relationship of the checkpoint to its objective, rather than by any measurable results or by any results period." *Fraire*, 575 F.3d at 934 (citing *Faulkner*, 450 F.3d at 472)). The severity of a checkpoint's interference with individual liberty is gauged by: (1) "the objective intrusion, measured by the duration of the seizure and the intensity of the investigation"; and (2) the "subjective intrusion, measured by the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Id.* A court may also consider the following non-exclusive factors to determine whether a checkpoint is reasonable: (1) whether all vehicles are stopped; (2) whether the officers exercise discretion over the checkpoint's operation; (3) whether the checkpoint is well identified; and (4) whether the stop involves a minimal intrusion. *United States v. Hawkins*, 249 F.3d 867, 873 (9th Cir.

2001).

Some of the above-listed factors weigh in favor of a determination that the checkpoint was reasonable, while other factors weigh towards a determination that the checkpoint was unreasonable. Assuming that the purpose of the checkpoint was in fact to conduct sobriety, license, and registration checks, the gravity of the public concern served weighs in favor of the checkpoint's reasonableness. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449-51 (1990); *Edmond*, 531 U.S. at 39 (citing *Delaware v. Prouse*, 440 U.S. 648, 658 (1979)). The Supreme Court has indicated that a roadblock-style checkpoint like this one, where all drivers are stopped and briefly questioned, is a "reasonably efficient" tool for advancing the public interests underlying sobriety and license checks. *See Sitz*, 496 U.S. at 454-55; *Edmond*, 531 U.S. at 39; *Prouse*, 440 U.S. at 658. All motorists were stopped so long as traffic was not backed up; the location of the checkpoint was fixed; it was identified by traffic cones and "checkpoint ahead" signs placed 1/4 mile prior to the stop sign; the checkpoint was lit; and the officers were in uniform – all indications of reasonableness. *Hawkins*, 249 F.3d at 874; *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *Sitz*, 496 U.S. at 453; *Faulkner*, 450 F.3d at 474. "The subjective intrusion resulting from this stop was therefore indistinguishable from that of other checkpoint stops that have been found to be reasonable under the Fourth Amendment." *Hawkins*, 249 F.3d at 874.

The parties''briefs do not identify the average wait-time in line at the roadblock, Plaintiff's actual wait time in line, the average duration of each motorist's contact with police, or the average duration of a consensual trunk search. *Cf. Lidster*, 540 U.S. at 427 (stops interfered only minimally with liberty where checkpoint required only a brief wait in line and contact with police lasted only a few seconds); *Sitz*, 496 U.S. at 448 (upholding checkpoint where police contact lasted 25 seconds); *Faulkner*, 450 F.3d at 473 (upholding checkpoint stop lasting 20 seconds). The wants and warrants checks took one to three minutes, so the duration of those seizures caused only a minimal interference with liberty, suggesting reasonableness. *See Martinez-Fuerte*, 428 U.S. at 547 (upholding

police contact of three to five minutes).

On the other hand, the objective intrusiveness of the checkpoint was heightened by the TOPD's practice of continuing to detain stopped motorists to conduct suspicionless records checks, even after confirming sobriety and possession of a valid license. *Cf. United States v. McCarty*, 648 F.3d 820, 832 (9th Cir. 2010) ("[T]he exemption from the warrant and probable cause requirements in . . . warrantless, suspicionless searches does not apply where the officer's purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified.") (internal citations and quotation marks omitted); *United States v. Luckett*, 484 F.2d 89, 91 (9th Cir. 1973) (where police finished ticketing jaywalker, but then "continued to detain appellee for the purpose of running a warrant check" without "reasonable grounds to be suspicious that there might be a warrant outstanding against him, this continued detention was unreasonable, and its fruits, therefore, were properly suppressed").

The alleged use of discretionary trunk searches at the roadblock also raised the level of objective intrusiveness. *See United States v. Ortiz*, 422 U.S. 891, 895 (1975) (describing intrusiveness of vehicle searches); *cf. United States v. Bulacan,* 156 F.3d 963, 970 (9th Cir. 1998). That the trunk searches were conducted consensually, however, reduced that intrusiveness. *Cf. United States v. Estrada-Rendon*, 40 F.App'x 478, 480 (9th Cir. 2002) (agent's request to search trunk at immigration checkpoint was within scope of stop because it did not cause delay of more than a minute or two). Plaintiff does not identify concrete evidence supporting his claim that the trunk searches were non-consensual. *See United States v. Ramirez-Jimenez*, 967 F.2d 1321, 1324 (9th Cir. 1992) (consent to search was voluntary despite coercive environment of border checkpoint).

Plaintiff's primary argument is that the checkpoint was unreasonable because officers exercised excessive discretion over its location and operation. He specifically relies on the fact that there were no published department guidelines for checkpoints, and that TOPD officers had discretion over conducting wants and warrants checks and

pursuing consensual trunk searches. Plaintiff also notes that officers had the discretion to allow some drivers to pass through the checkpoint without stopping if traffic became congested. A checkpoint is unreasonable if officers exercise excessive discretion in its operation. *Hawkins,* 249 F.3d at 874 (judicial review is available for claims that officers exercised unreasonable discretion in operating checkpoint); *see also State ex rel. Ekstrom v. Justice Court of Ariz. in and for Kingman Precinct I*, 663 P.2d 992 (Ariz. 1983) (highway checkpoint was unreasonable because it involved a not insubstantial amount of discretionary law enforcement activity and was operated without specific directions or guidelines); *Tohono O'odham Nation v. Ahill*, CR 12-1762-88 (D. Ariz. 1989) (suggesting that the TOPD adopt checkpoint guidelines). Here, officers had discretion over checkpoint activities, but their discretion may have been limited by the operational plan and the fixed location of the checkpoint. This factor suggests, to some extent, that the checkpoint was unreasonable.

2. Qualified Immunity

Defendants are entitled to qualified immunity with regard to Plaintiff's claim that they operated the checkpoint in an unreasonable manner. As discussed above, several of the factors enumerated in *Faulkner* and *Hawkins* suggest that the checkpoint was reasonable. Although it is clear that the Fourth Amendment requires some checks on officer discretion, it is not clearly established to what extent that discretion must be constrained. *Ekstrom,* on which Plaintiff relies, predates the Supreme Court's decisions in *Sitz* and *Edmond*, and involved more discretionary law enforcement activity than the facts presented here. *See Ekstrom*, 663 P.2d at 993 (describing roadblock checkpoint set up at discretion of lone police officer and operated without instructions or set procedure).

The Supreme Court has not clarified the extent to which police officers can discretionarily expand the scope of a traffic or sobriety stop. *See Edmond*, 531 U.S. at 47 n.2; *cf. Anobile v. Pelligrino*, 303 F.3d 107, 122-23 (2d Cir. 2002). Although some case law suggests that it is unreasonable to expand a sobriety checkpoint to include discretionary but suspicionless wants and warrants checks, this is not a clearly-established

rule. *Compare Luckett*, 484 F.2d at 91, *and McCarty*, 648 F.3d at 832, *with United States v. Diaz-Castaneda*, 494 F.3d 1146, 1153 (9th Cir. 2007). A reasonable officer could have believed that he was not violating Plaintiff's Fourth Amendment rights. *Saucier v. Katz,* 533 U.S. 194, 202 (2001).

C. Injunctive Relief

Defendants argue that Plaintiff's claim for injunctive relief should be dismissed as moot. Since the initiation of this lawsuit, the TOPD has published written checkpoint policy guidelines that constrain officer discretion and address most of the concerns Plaintiff raises in this lawsuit. The guidelines do not specifically address two of the discretionary practices Plaintiff challenges: consensual trunk searches and warrant checks. TOPD Chief Delgado stated that wants and warrants checks are still conducted at checkpoints according to officer discretion. In light of these uncontested facts, the publication of the guidelines does not render Plaintiff's claim moot.

Plaintiff's claim is also not moot based on Chief Delgado's suggestion that the TOPD will voluntarily cease conducting checkpoints on SR 86 for the time being. There is no indication that the cessation of checkpoints on SR 86 is permanent; although Delgado does not currently contemplate future checkpoints, he may request one at any time. *See City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983) (Chief of Police's prohibition on chokeholds did not render case seeking injunction against use of chokeholds moot). A party alleging mootness as the result of voluntary cessation "bears a 'heavy burden' in seeking dismissal . . . [and] must show that it is 'absolutely clear' that the allegedly wrongful behavior will not recur if the lawsuit is dismissed." *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009) (quoting *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189 (2000)). Defendants have not met their "heavy burden" here. Their motion for summary judgment as to Plaintiff's injunctive claim is denied.

VII. CONCLUSION

Defendants are entitled to qualified immunity as to the reasonableness of the checkpoint, but they are not entitled to qualified immunity as to the claim that the primary

purpose of the checkpoint was general crime control. Genuine disputes of material fact relating to the primary purpose of the checkpoint remain. Plaintiff's claim for injunctive relief is not moot.

Accordingly, **IT IS ORDERED:**

(1) Plaintiff's Motion for Summary Judgment (Doc. 186) is **DENIED**.

(2) Defendants' Motion for Summary Judgment (Doc. 187) is **GRANTED** with respect to Defendant O'Dell.

(3) With respect to the remaining Defendants, their Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part, as follows:

(a) The Motion is **GRANTED** with respect to whether the checkpoint was operated in a reasonable manner, based on qualified immunity.[3]

(b) The Motion is **DENIED** with respect to Plaintiff's claim based on the primary purpose of the checkpoint.

(c) The Motion is **DENIED** with respect to Plaintiff's claim for injunctive relief.

DATED this 23rd day of January, 2012.

A. Wallace Tashima
United States Circuit Judge
Sitting by Designation

[3] The grant to Defendants of qualified immunity applies only to Plaintiff's claim for damages on the reasonable operation claim.