No. 28A21 DISTRICT 11A

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

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 v. ) From Harnett County

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DESHANDRA VACHELLE COBB )

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**Defendant-Appellee’s New Brief**

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**Defendant-Appellee’s New Brief**

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# Issue Presented

***Brown v. Texas’s* balancing test is a “delicate mechanism” for weighing the public’s interest in a vehicle checkpoint against the individual’s right to security and privacy in determining whether the checkpoint is reasonable under the Fourth Amendment. Here, the trial court completely failed to address the first *Brown* factor, insufficiently addressed the second, made troubling findings on the third, and did none of the “delicate” balancing required by *Brown*. The Court of Appeals remanded the case for the trial court to fully address *Brown*. Was this error?**

# Introduction

This case is all about the standard of review. A majority of the Court of Appeals concluded the findings of fact made by the trial court were insufficient to show the court properly considered and balanced the factors set out by the Supreme Court in in *Brown v. Texas*, 443 U.S. 47 (1979), for determining whether a suspicionless vehicle checkpoint is reasonable under the Fourth Amendment. The dissent believed the court’s findings were good enough. The majority is right. This Court should affirm.

A checkpoint’s constitutionality is judged by assigning appropriate weight to, and then balancing, three factors: “‘the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.’” *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) (quoting *Brown*, 443 U.S. at 51).

*Brown’s* balancing test is a “delicate mechanism,” *Lopez Lopez v. Aran*, 844 F.2d 898, 908 (1st Cir. 1988), for weighing “these competing considerations,” *Brown*, 443 U.S. at 51. Given the nuanced nature of the analysis, the Court of Appeals routinely remands checkpoint cases where the trial court fails to adequately address each *Brown* factor and fails to set out its reasoning in support of its decision. *E.g., State v. Ashworth*, 248 N.C. App. 649 (2016); *State v. McDonald*, 239 N.C. App. 559 (2015); *State v. Veazey*, 191 N.C. App. 181 (2008); *State v. Rose*, 170 N.C. App. 284 (2005).

That’s exactly what happened here. Applying clear and established rules, the Court of Appeals first recognized that, although the trial court properly found checking for unlicensed or impaired drivers was a legitimate purpose for conducting *a* checkpoint, the trial court failed to take the next analytical step to determine the importance of the State’s interest in operating this particular checkpoint. *State v. Cobb*, No. COA19-681, slip op. at 14 (2020) (Brook, J., with McGee, C.J., concurring) (*Majority*).

The Court also saw the trial court hadn’t addressed several factors the Supreme Court, this Court, and the Court of Appeals have previously emphasized as critical to evaluating *Brown’s* second factor: whether the checkpoint was appropriately tailored to achieve its purpose. The trial court, for example, never made any findings as to why this rural intersection was chosen for the location of this checkpoint; it made no findings as to why nearly two hours in the middle of the night was the right time to run this checkpoint; and it made no findings as to whether this time was chosen beforehand by a supervisor rather than a field officer. *Id*. at 15.

Because the trial court entirely failed to address the first *Brown* factor, and was silent on several key considerations regarding the second factor, the Court of Appeals concluded the trial court failed to “adequately weigh the three *Brown* factors” and assess whether “the public interest in this checkpoint outweighed its infringement on Defendant’s Fourth Amendment privacy interests.” *Id*. at 13. Accordingly, the Court of Appeals vacated the trial court’s suppression order and remanded the case for the trial court to conduct the delicate balancing mandated by *Brown* and to make sufficient findings to “explain” its reasoning. *Id*. at 16 (citation and quotation marks omitted).

There’s nothing anomalous about that decision. The Court couldn’t tell—in the absence of findings on critical issues—why the trial court did what it did. Rather than stepping in to supply its own findings from the evidence, the Court simply remanded the case so the trial court could set out its reasoning in more complete and comprehensive findings. This Court should affirm the Court of Appeals’ prudent approach to “assur[ing] that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” *Brown*, 443 U.S. at 51.

# Procedural History

 After being arrested at a highway patrol checkpoint on 28 August 2016, Ms Cobb was charged by citation with driving while impaired and reckless driving. (R p 2). On 11 October 2018, Ms Cobb pled guilty to DWI in Harnett County District Court, and the State dismissed the reckless driving charge. (R pp 2, 10). She then noticed appeal to superior court. (R p 14).

On 6 February 2019, Ms Cobb filed a motion to suppress, arguing the checkpoint was unconstitutional. (R p 16). The motion was heard on 11 February 2019 by Superior Court Judge Claire Hill. (T p 1). The trial court denied the motion from the bench that same day and entered its written order on 3 March 2019. (T p 34; R pp 22, 23). After the court orally denied her motion, Ms Cobb again pled guilty to DWI. (T p 36; R p 22). The court sentenced Ms Cobb to 60 days imprisonment and suspended the sentence for 12 months of unsupervised probation. (R p 32). Ms Cobb appealed. (R p 36).

On 31 December 2020, a majority of the Court of Appeals vacated the trial court’s order denying the motion to suppress and remanded the matter for further proceedings. *Majority*, at 1, 19 (*Majority*). Dissenting, Judge (now Chief Judge) Donna Stroud would have affirmed the trial court’s order. *Cobb*, slip op. at 1 (Stroud, J., dissenting) (*Dissent*). Based on Judge Stroud’s dissent, the State noticed appeal to this Court on 4 February 2021.

# Grounds for Appellate Review

The State appeals as a matter of right from a divided panel of the Court of Appeals. N.C.G.S. § 7A-30(2) (2021).

# Facts

*The State’s evidence at the suppression hearing*

As the trial court noted at the time of the suppression hearing, almost “two and a half years ha[d] passed” since the operation of the checkpoint at issue in this case. (T p 34). This noteworthy gap in time affected the memory of the State’s sole witness, Highway Patrol Sergeant John Bobbitt. He couldn’t recall many of the events central to determining the constitutionality of the checkpoint. When Sgt Bobbitt could remember, his testimony was often speculative, self-contradictory, or incomplete.

Sgt Bobbitt’s testimony, which spanned less than 20 pages in the transcript,[[1]](#footnote-1) focused on three main topics: the information in the Checking Station Authorization form,[[2]](#footnote-2) also called a HP-14, for the checkpoint challenged in this case; the decision-making process behind the checkpoint; and the implementation of the checkpoint.

1. *Checking station authorization form*

Sgt Bobbitt prepared the authorization form. (T p 5). Some of the necessary information was provided; some of it was not. Sgt Bobbitt checked the box indicating the checkpoint was to be a “Standard Checking Station,” meaning it was generally for “Chapter 20 enforcement.” (R p 21). Sgt Bobbitt typed into the space provided that the purpose of the checkpoint was, more specifically, “at a minimum, [to] check[] each driver stopped for a valid driver’s license and evidence of impairment.” (R p 21; T p 6).

Sgt Bobbitt chose the location. (T pp 12, 22). He decided the checkpoint should be conducted at the intersection of state highways NC 24 and NC 27 in Harnett County. (R p 21; T p 5). He’d set up checkpoints at this location four or five times in the past.[[3]](#footnote-3) (T pp 17-18). Sgt Bobbitt described the location as a rural area in Johnsonville, where the two highways make a “T intersection.” (T p 7). All three roads converging at the intersection are two-lane roads. (T p 7). The intersection is about seven miles from the Lee County line, and about 10 miles from both the Cumberland and Moore County lines. (T p 11). The intersection also “drops” into NC 87, which leads to Fayetteville and Fort Bragg. (T p 23).

Sgt Bobbitt chose the time. (T p 22). According to the authorization form, the checkpoint was supposed to run from 12:15 am to 2:00 am on 28 August 2016. (R p 21). Sgt Bobbitt signed the form and dated it 28 August 2016—presumably sometime during the 15 minutes before the checkpoint started. (R p 21).

At the top of the authorization form, it states: “All Checking Stations shall be conducted in accordance with NCSHP Directive K.04 (Checking Stations).” (R p 21). A copy of the directive wasn’t introduced at the suppression hearing; Sgt Bobbitt didn’t mention the directive in his testimony; and he didn’t testify as to whether the checkpoint, as conducted, complied with the directive. Near the bottom of the form is a box labeled“Additional Specific Checking Station Instructions or Information.” (R p 21). In this box is typed: “B823, B824, B837, B838, B839, B843, B844.” (R p 21). Nothing was said at the suppression hearing explaining these “[s]pecific instructions” for the NC 24/27 checkpoint.

Sgt Bobbitt left blank the space for identifying the troopers “authorized” to conduct the checkpoint. (R p 21). He also left blank the space for indicating the “minimum number” of troopers required to be present during the operation of the checkpoint. (R p 21).

1. *Sgt Bobbitt’s decision-making*

Sgt Bobbitt was “in charge of everything with this checkpoint.”[[4]](#footnote-4) (T p 17). Although he couldn’t “recall” having a prior conversation with his supervisor, First Sergeant Coleman, about the checkpoint, he “most likely” had one. (T pp 17, 22). It was Sgt Bobbitt, however, who “ultimately made the decision” regarding the location and time of the checkpoint. (T p 22). Indeed, he believed he didn’t need to get prior authorization from his supervisor for the checkpoint: “You know, we’re supervisors. We have the authority to have checkpoints, you know, where we deem we need to have them. You know, it’s just a part of being a supervisor.” (T p 21).

Sgt Bobbitt didn’t remember having a “meeting” with other troopers to discuss the checkpoint. (T p 16). If such a meeting did occur, it was “most likely probably” in a local restaurant while sitting around with other troopers. (T p 16). “Most likely” Sgt Bobbitt made the decision to do the checkpoint while he was out “riding around” with “the guys.” (T p 21).

Sgt Bobbitt couldn’t remember when he made that decision. (T p 13). Nor could he remember how long it was between the time he decided to do the checkpoint and the time he completed the authorization form. (T pp 21, 13). Nor, moreover, could he recall where he filled it out. (T p 15). He might’ve done it in his patrol car. (T p 15). Or he might’ve done it at the office. (T p 15).

When asked if he remembered how much time elapsed between “the time [he] decided to do this checkpoint [and] the time that the officers assembled at the checkpoint,” Sgt Bobbitt responded:

I couldn’t give you an exact time. I’m not sure. We may have been—sometimes we will start off on the northern part of the county, which is Angier. When we do these things, pick your time, and we’ll be there for a little bit, go somewhere else, and then we’ll say, Let’s go over here. We want to make sure we hit, you know, another side of the county.

(T p 18).

When asked why he chose “that particular roadway,” Sgt Bobbitt answered:

It’s a safe area for that amount of troopers to get out at one time to check driver’s licenses. It’s an area that is—it needs to be worked more often and we check when we—it’s an area four. It’s a rural part of the county. That’s just one place that it is pretty good for us to get out and have a lot of—you know, a place to put our cars, plus other vehicles; other cars.

(T p 10).

Sgt Bobbitt didn’t explain why or in what way the area “need[ed] to be worked more often” or whether the need related to checking for valid drivers’ licenses or impaired driving—the stated purposes of the checkpoint. (R p 21). Moreover, although Sgt Bobbitt testified the NC 24/27 intersection can be “heavily traveled” during daytime hours, he didn’t testify about the amount of traffic between 12:15 am and 2:00 am—the period he chose for the checkpoint. (T p 23). Nor did he testify unlicensed or impaired drivers were a problem in that area during those hours.

Although Sgt Bobbitt picked the time, he couldn’t explain “why this specific time of night was chosen.” (T p 20). He could only speculate that there might’ve been another checkpoint earlier that night in another part of the county, and that he might’ve set the NC 24/27 checkpoint to begin at the conclusion of the earlier checkpoint. (T p 20). But he couldn’t remember if there had actually been another checkpoint earlier that night. (T p 20).

There was a state-wide enforcement “campaign” or “blitz” that weekend. (T p 21). The purpose of the campaign was to have the highway patrol out as “scenery” on the roads. (T p 22). While there was a checkpoint in a nearby county that was part of the blitz, there was no testimony the NC 24/27 checkpoint was associated with the campaign. (T p 22).

1. *Sgt Bobbitt’s conducting the checkpoint*

Sgt Bobbitt “fill[ed] out the form. That’s when [he] told the guys, Let’s go over here.” (T p 17). In addition to authorizing the checkpoint, Sgt Bobbitt supervised it. (T p 6). His supervisor wasn’t present at the checkpoint, and Sgt Bobbitt never talked to him that night. (T pp 15, 23).

The posted speed limit in the area is 45 mph. (T p 9). If drivers were going the speed limit, Sgt Bobbitt believed they had “sufficient line of sight” to see the checkpoint and stop safely at the intersection. (T p 9).

Sgt Bobbitt gave conflicting testimony about the volume of traffic at the checkpoint: At first, he said there was “not a lot of traffic going through.” (T p 10). Two pages later he said the traffic didn’t back up an “extreme amount.” (T p 12). Then he testified there was “a bunch of traffic” that night—“enough to keep [them] busy.” (T p 20). In the very next sentence, however, he reversed his position again, saying the “traffic volume was light.” (T p 20).

There were “no signs or anything” alerting motorists they were approaching a checkpoint. (T p 9). But at the checkpoint, there were two patrol cars with their blue lights on. (T p 10). Eight troopers, including Sgt Bobbitt, manned the checkpoint. (T p 9). They were all in full uniform. (T p 9). And they were all wearing reflective vests and carrying flashlights. (T p 9).

Sgt Bobbitt and the other troopers followed the “plan” set out in the authorization form for operating the checkpoint. (T p 22). The “pattern” for screening cars was to “stop[] all vehicles.” (T p 10). Sgt Bobbitt didn’t recall having to deviate from that pattern. (T p 10).

Sgt Bobbitt was not asked about, and thus he didn’t testify to, the length of time motorists waited to get to the checkpoint. However, once motorists reached the checkpoint, the typical interaction with a trooper lasted “a minute or less.” (T p 12). Drivers would stop and roll down their window, and troopers would ask them for their driver’s license and registration. (T p 11). “[A]fter” drivers “present[ed]” their documentation, troopers were free to ask further “questions or whatever.” (T p 11). If drivers were having trouble finding their license and registration, troopers “would look” for additional violations. (T p 11). Drivers could be cited for “a bunch of things.” (T p 19).

In addition to authorizing and supervising the checkpoint, Sgt Bobbitt was “actually one of the officers in the field participating in this checking station”: “[He] was out, campaign hat on, flashlight, reflectorizor vest on.” (T p 18). He was there “[k]ind of assessing the situation,” deciding “whether or not [a motorist] go[es] here or [a motorist] go[es] through.” (T p 19). He stopped cars and “talked to people,” but as a supervisor, he didn’t write any tickets. (T p 18). If a violation “c[a]me[] up,” he would have one of his “subordinates” come and “take over.” (T p 18).

The State didn’t present any evidence regarding how many vehicles were screened at the checkpoint that night. And Sgt Bobbitt couldn’t recall how many tickets were issued. (T p 19).

*The trial court’s suppression order*

 Based on the State’s evidence, the trial court found as fact:

4. That on or about August 28, 2016 the SHP was operating a checking station on or about NC 24 at NC 27 a public street or highway located in Harnett County, North Carolina.

5. Sergeant John Bobbitt with the SHP was the supervisor in charge of the above-referenced checking station.

6. This matter was heard on or about February 11, 2019 and approximately two and a half years after the date of this offense.

. . . .

8. Sgt Bobbitt completed the HP-14 which is the SHP Checking Station Authorization form.

9. Ser. Bobbitt signed as the “authorizing supervisor signature” on the above-referenced form.

10. The above-referenced form complied with the statutory and other regulatory requirements regarding checking stations.

11. Sergeant Bobbitt testified that this location was not located far from NC 87 and that he chose the location.

12. Checking stations had been previously conducted at this location approximately 4-5 times.

13. There was no argument by the defendant that the purpose of the checking station was unreasonable or otherwise not a permitted primary pragmatic purpose.

14. Sgt Bobbitt did not recall the specific discussion that was had regarding setting up this checking station due to the lapse of time.

15. Sgt. Bobbitt was the supervisor of the checking station and did participate in the checking station. Four other troopers participated in the checkpoint.

16. The public concern addressed with this particular checking station was the public safety in confirming motorists were in compliance and not violating any Chapter 20 Motor Vehicle Violation.

17. This purpose was noted on the HP-14 which was admitted into evidence that noted that this was a Standard Checking Station for Chapter 20 enforcement to include, at a minimum, checking each driver stopped for a valid driver’s license and evidence of impairment. The time of the operation of the station was 12:15 am to 2:00 am.

18. The checking station as it was operated advanced the public concern and was reasonable.

19. The seizure was short in time for most drivers with since most drivers were stopped for less than one minute.

20. At least two SHP vehicles with blue lights were on at all times during the time that the checking station was authorized.

21. The checking station was not multi-agency in that only the SHP were at the checking station.

22. At least six (6) members of the SHP were present at this checking station.

23. The participating members were wearing their SHP uniforms with reflective vests and utility flashlights.

24. The checking station could be observed from any direction of approach from one-tenth up to one-half a mile and there was adequate time to observe the checking station and come to a stop when a motorist was traveling at the posted speed limit.

25. The location of this checking station was a short distance to Highway 87 and three county lines making it a major thoroughfare into and out of the county. The road is heavily travelled at times. The location was approximately 7 miles from Lee County line, 10 miles from Moore County line and 10 miles from Cumberland County line.

26. The checking station plan was followed.

27. Traffic did back up some but not extreme and every vehicle that approached this checking station was checked.

28. If drivers had their driver’s license and registration the stop lasted one minute or less.

(R pp 23-25).

Relying on these factual determinations, the trial court concluded as a matter of law:

1. The plan was reasonable and the checking station did not violate the Defendant’s U.S. or N.C. constitutional rights.

2. The checking station as it was operated advanced the public concern and was reasonable.

3. Enforcement of the motor vehicle laws is a legitimate public purpose and promotes public safety.

4. The short amount of time that the checking station potentially interfered with an individual’s liberty was not significant.

(R p 25).

 Finding no Fourth Amendment violation, the trial court denied Ms Cobb’s motion to suppress. (R p 25). Notifying the court of her intent to appeal its decision, (T pp 40-41; R p 28), Ms Cobb pled guilty to misdemeanor DWI, (T p 38; R p 26). Ms Cobb subsequently appealed. (R p 36).

*The Court of Appeals’ split decision*

 Ms Cobb’s principal argument[[5]](#footnote-5) before the Court of Appeals challenged the constitutionality of the checkpoint under *Brown v. Texas*:

The checkpoint leading to Ms. Cobb’s arrest was unconstitutional. It was set up on an officer’s whim in a location and at a time chosen for no particular reason. Sergeant Bobbitt had too much discretion in that he both ordered and participated in the checkpoint and did not have to consult with anyone else to set it up. And the officers conducting the checkpoint had unfettered discretion in deciding upon what further investigation to conduct with drivers passing through the checkpoint.

(Def’s COA Br p 9). Ms Cobb accordingly asked the Court of Appeals to reverse the trial court’s denial of her motion to suppress. (Def’s COA Br pp 9, 20).

A majority of the Court shared Ms Cobb’s concerns. Relying on *Brown* to orient its analysis, the Court identified troubling gaps in the trial court’s reasoning. Although the trial court determined the checkpoint had a legitimate purpose in checking for unlicensed or impaired drivers, the Court of Appeals observed none of the trial court’s findings of fact addressed *Brown’s* first factor regarding the importance of the public’s interest as it related to the specific NC 24/27 checkpoint. *Majority*, at 14. The trial court had, as prior courts warned, mistakenly “collapsed” these two separate analyses into one. *Id*. at 9, 13-14.

The Court of Appeals also found problems with the trial court’s analysis of *Brown’s* second prong: whether the NC 24/27 checkpoint was appropriately tailored to achieve its purpose of preventing unlicensed or impaired driving. None of the trial court’s findings, the Court of Appeals observed, addressed why that specific intersection was chosen for the checkpoint, why 12:15 am to 2:00 am was chosen as the time for the checkpoint, or whether these decisions were “predetermined” by a supervisor. *Id*. at 14-15.

Finally, although the Court of Appeals believed the trial court had adequately addressed *Brown’s* third factor (the severity of the checkpoint’s interference with individual liberty), the Court nonetheless concluded the trial court’s incomplete analysis of the first and second factors prevented it from properly weighing and balancing all three factors together. *Id*. at 15-16. Despite these defects, however, the Court’s didn’t mechanically reverse the trial court’s suppression order. The Court, instead, tailored its relief to address the problems it saw in the trial court’s order. Because the trial court’s analysis of the first two *Brown* factors was either missing or incomplete, the Court of Appeals vacated the suppression order and remanded the case so the trial court could make additional findings and conclusions to explain its reasoning under *Brown*. *Id*. at 16.

According to the dissent, the trial court’s order was good enough. The trial court’s findings that the purpose of the checkpoint was “to check for ‘a valid driver’s license and evidence of impairment,’” and that “‘[t]he checking station as it was operated advanced the public concern,’” showed the trial court “t[ook] into consideration ‘the gravity of the public interest served by the checkpoint’” under *Brown’s* first factor. *Dissent*, at 5. The dissent further believed the trial court adequately addressed whether the checkpoint was appropriately tailored to its purpose (*Brown’s* second factor) because the court made findings about the “factors Sgt. Bobbitt considered” when planning the checkpoint, including the amount of traffic; the intersection’s proximity to main roads and counties; the checkpoint’s visibility; officer and motorist safety; and the checkpoint’s start and end times. *Id*. at 6. Finally, the dissent agreed with the majority that the trial court properly addressed *Brown’s* third factor regarding the checkpoint’s intrusion on individual liberty and privacy. *Id*. at 7-8. Accordingly, the dissent believed “the trial court made sufficient findings and properly weighed the *Brown* factors.” *Id*. at 8. The dissent would’ve thus affirmed the trial court’s denial of Ms Cobb’s motion to suppress. *Id*.

# Standard of Review

On appeal from a trial court’s suppression order, the scope of review is limited to determining whether the court’s findings of fact are supported by the evidence and, in turn, whether those findings support the trial court’s conclusions of law. *State v. Cooke*, 306 N.C. 132, 134 (1982). To enable this review, the trial court’s findings should be sufficient to resolve the “issues of fact” on the constitutional claim raised at the suppression hearing. *State v. Salinas*, 366 N.C. 119, 124 (2012). The trial court’s conclusions of law should likewise be “legal[ly] accura[te]” and “reflect a correct application of law to the facts found.” *State v. Garcia*, 358 N.C. 382, 391 (2004) (cleaned up).

Given “the trial court’s institutional advantages in the fact-finding process,” *State v. Bartlett*, 368 N.C. 309, 313 (2015), the appellate court treats the trial court’s factual findings as binding so long as they are supported by competent evidence—even if the record also contains evidence that would support different findings, *State v. Brewington*, 352 N.C. 489, 498 (2000); *In re Trogdon*, 330 N.C. 143, 147 (1991). Unchallenged findings are presumed to be supported by competent evidence, and they’re likewise deemed binding on appeal. *State v. Baker*, 312 N.C. 34, 37 (1984).

However, “[t]he legal significance of the findings of fact made by the trial court is a question of law for th[e] [reviewing court] to decide.” *State v. Payne*, 327 N.C. 194, 209 (1990). Accordingly, the trial court’s conclusions of law in its suppression order are “reviewed de novo and are subject to full review.” *State v. Biber*, 365 N.C. 162, 168 (2011). Under this standard, the appellate court considers the constitutional question anew and freely substitutes its own conclusion for the conclusion of the trial court. *State v. Williams*, 362 N.C. 628, 632-33 (2008). The “[r]easonableness” of a search or seizure under the Fourth Amendment is, of course, a question of law, reviewed de novo on appeal. *United States v. Carter*, 139 F.3d 424, 426 (4th Cir. 1998); *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996) (reasonableness of warrantless searches and seizures “should be reviewed de novo on appeal”).

Sometimes the trial court’s suppression order contains defects making it impossible for “the reviewing court to apply the correct legal standard.” *Salinas*, 366 N.C. at 124. The court may fail to make all the findings it needs to make to address the questions raised by the applicable law. *E.g., Salinas*, 366 N.C. at 124 (“[T]he superior court’s order does not contain sufficient findings of fact to which this Court can apply the reasonable suspicion standard.”). Sometimes the trial court makes findings based on an incorrect understanding of the law. *E.g., Helms v. Rea*, 282 N.C. 610, 620 (1973) (trial court’s “misapprehension of the applicable law” “unavoidably affected” court’s findings). And sometimes the court’s findings don’t clearly “reveal the extent” to which it considered a material issue. *E.g., State v. McKinney*, 361 N.C. 53, 63 (2006) (“None of these findings indicates whether the trial court would have found the evidence seized pursuant to the warrant admissible even if the tainted evidence had been excised from the warrant application.”).

In these circumstances, the “standard of review compels” the reviewing court to remand the case to the trial court. *Id*. at 57. Because trial courts are better “position[ed]” to handle the kinds of “fact-specific assessments and inquiries” involved in suppression cases, *State v. Buchanan*, 353 N.C. 332, 342 (2001), reviewing courts consider remanding the case to the trial court “more appropriate” than engaging in “unilateral appellate court determination[s],” *McKinney*, 361 N.C. at 64. Remanding the case allows the trial court to reconsider “the evidence . . . in its true legal light,” *Helms*, 282 N.C. at 620, and then “appl[y] [the] facts to fact-dependent legal standards,” *McKinney*, 361 N.C. at 65 (citation and quotation marks omitted).

# Argument

## The trial court didn’t make any findings on the importance of the State’s interest in the checkpoint. The court didn’t make any findings about why or when Sgt Bobbitt chose the location and time of the checkpoint. And the trial court found Sgt Bobbitt approved his own checkpoint and then actively participated in it—a finding that weighs heavily against the reasonableness of the checkpoint.

### When individualized suspicion isn’t the basis of a seizure, the Fourth Amendment demands other safeguards to be interposed between the field officer’s discretion and the citizen’s rights to liberty and privacy.

The Fourth Amendment prohibits “unreasonable” searches and seizures. U.S. Const. amend. IV. The “essential purpose” of the Fourth Amendment “is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions.” *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (cleaned up). The constitution’s insistence on reasonableness typically translates into a requirement that a search or seizure be justified by “some quantum of individualized suspicion” of wrongdoing. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

There are, however, exceptions to the “usual rule” requiring individualized suspicion. *Edmond*, 531 U.S. at 37. Vehicle checkpoints are one of them. *Illinois v. Lidster*, 540 U.S. 419, 424 (2004); *Edmond*, 531 U.S. at 41. In this context, individualized suspicion is replaced with “other safeguards . . . to assure that the individual’s reasonable expectation of privacy is not subject to the discretion of the official in the field.” *Prouse*, 440 U.S. at 655 (citation and quotation marks omitted).

The strength of those safeguards is analyzed in a two-part test: First, the checkpoint must have a “licit” or legitimate “programmatic purpose”—that is, the primary purpose of the checkpoint must be divorced from the general interest in “uncover[ing] evidence of ordinary criminal wrongdoing.” *Edmond*, 531 U.S. at 47, 46, 42; *Martinez-Fuerte*, 428 U.S. at 562 (describing purpose of border patrol checkpoints as “legitimate”). Pertinent here, legitimate programmatic purposes include checking for valid drivers’ licenses and evidence of impairment. *See, e.g., Prouse*, 440 U.S. at 663 (suggesting “roadblock-type stops” checking for license and registration would comply with Fourth Amendment); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding suspicionless sobriety checkpoint).[[6]](#footnote-6)

A legitimate programmatic purpose, however, doesn’t render the checkpoint “automatically, or even presumptively, constitutional.” *Lidster*, 540 U.S. at 426. Instead, to be constitutional, the checkpoint must be “judge[d]” reasonable in light of the “individual circumstances” in which it’s conducted. *Id*.

This reasonableness determination requires the balancing of the public’s interest against the individual’s right to privacy and security. *Brown*, 443 U.S. at 50; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). In doing this balancing, the court weighs: (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.’” *Lidster*, 540 U.S. at 427 (quoting *Brown*, 443 U.S. at 51); *see also Sitz*, 496 U.S. at 450 (confirming *Brown’s* “balancing analysis” as the proper framework for deciding constitutionality of vehicle checkpoints). The court’s analysis under *Brown* should account for only those “factors that are not susceptible to the distortion of hindsight,” and are thus “open to post-stop review.” *Martinez-Fuerte*, 428 U.S. at 565.

Under *Brown’s* first factor, once the court identifies the primary programmatic purpose, it must assess the importance (or strength or magnitude) of the State’s interest in the specific checkpoint being challenged. *E.g., Lidster*, 540 U.S. at 427 (checkpoint designed to “help find the perpetrator of a specific and known crime” had “grave” purpose); *Martinez-Fuerte*, 428 U.S. at 557 (government’s “need” to conduct border patrol checkpoints considered “great”); *but see Prouse*, 440 U.S. at 658 (although state had “vital interest” in enforcing license and registration requirements, that interest wasn’t sufficient to justify suspicionless roving “spot checks”). The importance of the State’s interest is often gauged by examining empirical evidence, typically in the form of statistical data. *E.g., Sitz*, 496 U.S. at 451 (referring to “statistical” information about “the magnitude of the drunken driving problem” to “confirm” “anecdotal” reports).

*Brown’s* second factor, sometimes called the “effectiveness” prong of the test, addresses the degree to which the checkpoint actually advances the State’s interest. *Sitz*, 496 U.S. at 453. In assessing this factor, the court considers whether officers “appropriately tailored” their checkpoint to “fit” its underlying need. *Lidster*, 540 U.S. at 427. Without tailoring, “it is possible that a roadblock purportedly established [for a legitimate purpose] would be located and conducted in such a way as to facilitate the detection of crimes unrelated to [the checkpoint’s stated purposes].” 5 Wayne R. LaFave, *Search and Seizure* § 10.8(a), at 347-48 (4th ed. 2004).

In determining whether a checkpoint is appropriately tailored or effective, courts have considered:

1. Whether the State provided any empirical data concerning the success rate of the checkpoint. *See Sitz*, 496 U.S. at 454-55 (number of violations found divided by number of vehicles stopped); *see also Martinez-Fuerte*, 428 U.S. at 554 (reviewing “effectiveness” of checkpoint in terms of statistical data).
2. Whether the checkpoint was set up on a whim. *Compare State v. Rose*, 170 N.C. App. 284, 294 (2005) (expressing concern whether checkpoint was appropriately tailored where it was “spontaneous,” “not planned,” and officers would “throw up” a checkpoint “whenever they felt like it”), *with State v. Townsend*, 236 N.C. App. 456, 468 (2014) (sobriety checkpoint planned almost a year beforehand based on resource availability).
3. Whether the State offered a reason for why the particular road or intersection was selected for the checkpoint. *See Lidster*, 540 U.S. at 427 (checkpoint designed to gather information about hit-and-run accident was set up “on the same highway near the location of the accident”).
4. Whether the checkpoint had a “predetermined starting or ending time.” *State v. Veazey*, 191 N.C. App. 181, 191 (2008).
5. Whether the State offered a reason for why the specific time span was chosen. *See Lidster*, 540 U.S. at 427 (checkpoint was conducted at same time of night as accident being investigated).
6. Whether the questions posed to drivers were aimed at gathering information relevant to the primary purpose of the checkpoint. *Lidster*, 540 U.S. at 427 (officers limited questions to drivers at checkpoint to whether they had information about hit-and-run accident).

As for *Brown’s* third factor—the severity of the checkpoint’s interference with individual liberty and privacy—courts have largely focused on the limitations imposed on the officer’s discretion in conducting the checkpoint. *Martinez-Fuerte*, 428 U.S. at 559. To properly channel officer discretion, the checkpoint “must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.” *Brown*, 443 U.S. at 51.

In determining the severity of a checkpoint’s intrusion on individual liberty and privacy, courts consider circumstances relating to both the checkpoint’s “objective intrusion” and its “subjective intrusion.” *Sitz*, 496 U.S. at 452; *United States v. Huguenin*, 154 F.3d 547, 552 (6th Cir. 1998). These considerations include:

1. Whether field officers received prior authorization from their supervisor to conduct the checkpoint. *State v. Mitchell*, 358 N.C. 63, 68 (2004).
2. Whether the checkpoint’s location and plan were selected by a supervisor instead of a field officer. *Sitz*, 496 U.S. at 453; *United States v. Ortiz*, 422 U.S. 891, 894 (1975).
3. Whether the field officers were “supervised by nonfield officials.” *United States v. McFayden*, 865 F.2d 1306, 1313 (D.C. Cir. 1989).
4. The “degree of interference with legitimate traffic.” *Martinez-Fuerte*, 428 U.S. at 558.
5. The “duration” of the seizure and the “intensity of the investigation” associated with the stop. *Sitz*, 496 U.S. at 452.
6. The number of questions asked and whether they were “aimed solely” at accomplishing the mission of the checkpoint. *Huguenin*, 154 F.3d at 560 (citation and quotation marks omitted).
7. Whether the State provided any prior “publicity” of the checkpoint. *Sitz*, 496 U.S. at 447; *Huguenin*, 154 F.3d at 559.
8. Whether motorists had “notice” of an approaching checkpoint. *Huguenin*, 154 F.3d at 561.
9. Whether motorists could “see visible signs of the officers’ authority.” *Ortiz*, 422 U.S. at 895; *Martinez-Fuerte*, 428 U.S. at 565.
10. Whether field officers “systematically” stopped every vehicle or stopped vehicles pursuant to a set pattern. *Lidster*, 540 U.S. at 428.

If, after “balancing these competing considerations,” the court isn’t “assure[d]” the individual’s security and privacy interests are adequately protected against “arbitrary invasions solely at the unfettered discretion of officers in the field,” then the checkpoint is unreasonable and, consequently, unconstitutional. *Brown*, 443 U.S. at 51.

### The trial court made no findings on the first *Brown* factor, incomplete findings on the second factor, and troubling findings on the third factor.

1. The trial court made no findings concerning the importance of the State’s interest in the NC 24/27 checkpoint.

With respect to the State’s interest in, and the purpose of, the NC 24/27 checkpoint, the trial court found:

16. The public concern addressed with this particular checking station was the public safety in confirming motorists were in compliance and not violating any Chapter 20 Motor Vehicle Violation.

17. This purpose was noted on the HP-14 which was admitted into evidence that noted that this was a Standard Checking Station for Chapter 20 enforcement to include, at a minimum, checking each driver stopped for a valid driver’s license and evidence of impairment. . . .

18. The checking station as it was operated advanced the public concern and was reasonable.[[7]](#footnote-7)

(R p 24). The court also concluded as a matter of law that “[e]nforcement of the motor vehicle laws is a legitimate public purpose and promotes public safety.” (R p 25).

As the Court of Appeals concluded, none of these factual determinations address *Brown’s* first factor concerning the gravity or importance of the State’s interest in the NC 24/27 checkpoint. *Majority*, at 13-14. To be sure, the trial court found the State’s interest in the checkpoint was the “public concern” in ensuring compliance with Chapter 20. But recognizing the *existence* of a “public concern” in connection with a checkpoint says nothing about the *magnitude* of that concern. *See Rose*, 170 N.C. App. at 294 (“[*Brown’s* first] factor is addressed by first identifying the primary programmatic purpose as required by *Edmond* and then assessing the importance of the particular stop to the public.”); *e.g., McDonald*, 239 N.C. App. at 570 (“With regard to the first prong of the *Brown* test, the trial court made no findings concerning the gravity of the public concerns served by the Checkpoint. While . . . checking for driver’s license and vehicle registration violations is a permissible purpose for the operation of a checkpoint, the identification of such a purpose does not exempt the trial court from determining the gravity of the public concern actually furthered under the circumstances surrounding the specific checkpoint being challenged.”).

Nor could the trial court have made any findings on the importance of the State’s interest given the evidentiary record before it. Despite having the burden of proof in suppression hearings, *see* *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (noting, while discussing necessary quantum of evidence, “the prosecution[] [bears the] burden of proof in Fourth and Fifth Amendment suppression hearings”); *State v. Cheek*, 307 N.C. 552, 556-57 (1983) (upon the defendant’s filing a proper motion to suppress, “the burden is upon the state to demonstrate the admissibility of the challenged evidence”), and despite knowing the trial court would “obviously” consider “the gravity of the public concern” under *Brown*, (T p 24), the State failed to produce any evidence on the issue at the hearing. Moreover, in the absence of any showing by the State, the trial court couldn’t have relied on “anecdote, common sense, nor logic, in a vacuum” to find the State had carried its “burden of proof” on the issue. *Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016). However “conceptually plausible” it may be that the strength of the State’s interest in the NC 24/27 checkpoint is constitutionally sufficient, the State must still “substantiate it,” *Doe*, 842 F.3d at 846, and the trial court must still make findings showing it properly assigned weight to the State’s interest, *see* *Lopez Lopez*, 844 F.2d at 908 (when “weigh[ing] the public interest against an individual’s right to freedom” under *Brown*, “avoirdupois merits consideration”).

Finally, the court’s finding that the checkpoint has a proper purpose doesn’t suggest anything about the strength of the State’s interest. Indeed, without a proper programmatic purpose, there is no balancing to be done under *Brown*; the suspicionless checkpoint is automatically unreasonable. *See Edmond*, 531 U.S. at 46-47 (if checkpoint has “impermissible” purpose, Brown’s balancing test doesn’t come into play); *United States v. Fraire*, 575 F.3d 929, 933 (9th Cir. 2009) (“Because the primary purpose of the checkpoint is distinguishable from the general interest in crime control, the checkpoint is not per se unconstitutional under *Edmond*.”).

Because the test set out in *Brown* requires balancing the importance of the State interest involved against the severity of the intrusion and the effectiveness of the checkpoint, the trial court’s failure to assign weight to any one of these three factors makes the required balancing impossible. Here, therefore, the absence of any findings by the trial court addressing the gravity of the State’s interest involved in the checkpoint compels the commonsense conclusion reached by the Court of Appeals: remanding the case for further analysis under *Brown*. *See, e.g., United States v. Bowman*, 496 F.3d 685, 694 (D.C. Cir. 2007) (remanding case where trial court “made no finding” addressing factor regarding effectiveness of checkpoint).

1. The trial court’s findings show an incomplete analysis of whether the NC 24/27 checkpoint was appropriately tailored.

The trial court’s analysis of *Brown’s* second factor—whether the checkpoint was appropriately tailored to fit its stated purpose—is likewise inadequate. Pertinent to this issue, the court found:

11. Sergeant Bobbitt testified that this location was not located far from NC 87 and that he chose the location.

. . . .

14. Sgt Bobbitt did not recall the specific discussion that was had regarding setting up this checking station due to the lapse of time [between the operation of the checkpoint and the suppression hearing].

. . . .

17. . . . . The time of the operation of the station was 12:15 am to 2:00 am.

. . . .

25. The location of this checking station was a short distance to Highway 87 and three county lines making it a major thoroughfare into and out of the county. The road is heavily travelled at times. The location was approximately 7 miles from Lee County line, 10 miles from Moore County line and 10 miles from Cumberland County line.

(R p 24). The trial court further concluded “[t]he checking station as it was operated advanced the public concern [in enforcing Chapter 20 compliance] and was reasonable.” (R p 25).

 The findings made by the trial court fail to sufficiently explain whether the NC 24/27 checkpoint was “appropriately tailored.” *Lidster*, 540 U.S. at 427. First, while the court found (in findings of fact 11 and 25) the checkpoint’s location was chosen by Sgt Bobbitt and that it was located near NC 87 and within 10 miles of three counties, “making [the intersection] a major thoroughfare,” the court made no factual determination that Sgt Bobbitt chose this location *because* it was near this major thoroughfare or near neighboring counties. In short, the trial court’s findings make no causal connection. Indeed, such a determination wouldn’t be supported by the evidence. Sgt. Bobbitt mentioned the intersection’s proximity to NC 87 and three county lines when the prosecutor asked him to “describe the area where this checking station was located”—not three pages and 16 questions later when he was asked why this “particular roadway [was] chosen.” (T pp 7, 10).

 Next, in what amounts to an evidentiary finding, *Woodard v. Mordecai*, 234 N.C. 463, 470 (1951), the court recounted (in finding of fact 14) Sgt Bobbitt’s testimony that he couldn’t remember having a conversation with his supervisor about “setting up” the checkpoint. (R p 24). The court, however, made no “ultimate finding” as to whether such a conversation actually occurred. *Id*.; *see Plott v. Plott*, 313 N.C. 63, 74 (1985) (trial courts should make “specific findings of the ultimate facts established by the evidence, admissions, and stipulations that are determinative of the questions involved in the action and essential to support the conclusions of law reached”). The absence of an ultimate finding regarding prior authorization undermines the trial court’s conclusion of law that the checkpoint was reasonable. *See United States v. Montgomery*, 561 F.2d 875, 884 (D.C. Cir. 1977) (“The important point is that the stops be made in some systematic fashion, prescribed in advance by superiors.”); *Mitchell*, 358 N.C. at 68 (although not a “lynchpin[],” checkpoint was constitutional where, among other things, officer “received sufficient supervisory authority to conduct the checkpoint”).

The trial court similarly found (in finding of fact 17) that the checkpoint was operated from “12:15 am to 2:00 am.” (R p 24). The court, however, made no factual determination from the evidence why that specific time frame was chosen or whether that period was set ahead of time by a supervisor. *Veazey*, 191 N.C. App. at 191.

In short, the factual findings the trial court did make on the second *Brown* factor fail to illuminate the decision-making process—the “tailoring”—involved in the NC 24/27 checkpoint. These findings simply aren’t “sufficiently specific to enable an appellate court to review the decision and test the correctness” of the suppression order. *Quick v. Quick*, 305 N.C. 446, 451 (1982) (citing 89 C.J.S. *Trial* § 627 (1955)).

The trial court also failed to make findings concerning many of the important considerations it knew were relevant to its analysis on this factor.[[8]](#footnote-8) The court, for example, made no findings about whether the checkpoint was “spontaneously” set up “on a whim.”[[9]](#footnote-9) *Veazey*, 191 N.C. App. at 191. Moreover, although Sgt Bobbitt testified he picked the NC 24/27 intersection as the location for the checkpoint because it was a “safe place” to pull over cars and because the area “need[ed] to be worked more often,” (T p 10), the trial court didn’t make any findings on these reasons—the actual reasons given by the decision-maker as to why he chose this location for the checkpoint. *See Ortiz*, 422 U.S. at 894 (location of border patrol checkpoint was determined by “high-level” officials based on convenience, safety, and deterrence).

Nor, moreover, did the trial court make any findings regarding the success rate of the checkpoint, as the Supreme Court did in *Sitz*, 496 U.S. at 454-55, and *Martinez-Fuerte*, 428 U.S. at 554. *See also United States v. McFayden*, 865 F.2d 1306, 1313 (D.C. Cir. 1989) (examining “arrest rates” in determining license and registration checkpoint “advanced the legitimate interests it was designed to serve”).

And the court made no findings about whether the troopers were given preestablished questions designed to gather information relevant to the purpose of the checkpoint.[[10]](#footnote-10) *See Lidster*, 540 U.S. at 422, 427 (while operating checkpoint to gather information about fatal hit-and-run accident, officers handed motorists flyers and asked them “whether they had seen anything happen there the previous weekend”).

While these factors may not be “lynchpins for determining the constitutionality of a checkpoint,” they are undeniably relevant to that decision. *Mitchell*, 358 N.C. at 68. Given the trial court’s failure to address these pertinent considerations at all, plus its failure to make adequate findings on the factors it did address, the Court of Appeals correctly concluded the trial court’s analysis of *Brown’s* second factor was deficient. *Majority*, at 15, 16.

1. The trial court’s findings on Brown’s third factor are inadequate and troubling.

As for *Brown’s* third factor concerning the severity of the checkpoint’s intrusion on individual privacy and security, the trial court found:

5. Sergeant John Bobbitt with the SHP was the supervisor in charge of the [NC 24/27] checking station.

. . . .

8. Sgt Bobbitt completed the HP-14 which is the SHP Checking Station Authorization form.

9. Ser. Bobbitt signed as the “authorizing supervisor signature” on the above-referenced form.

. . . .

15. Sgt. Bobbitt was the supervisor of the checking station and did participate in the checking station. Four other troopers participated in the checkpoint.

16. The public concern addressed with this particular checking station was the public safety in confirming motorists were in compliance and not violating any Chapter 20 Motor Vehicle Violation.

17. This purpose was noted on the HP-14 which was admitted into evidence that noted that this was a Standard Checking Station for Chapter 20 enforcement to include, at a minimum, checking each driver stopped for a valid driver’s license and evidence of impairment. The time of the operation of the station was 12:15 am to 2:00 am.

18. The checking station as it was operated advanced the public concern and was reasonable.

19. The seizure was short in time for most drivers with since most drivers were stopped for less than one minute.

20. At least two SHP vehicles with blue lights were on at all times during the time that the checking station was authorized.

22. At least six (6) members of the SHP were present at this checking station.

23. The participating members were wearing their SHP uniforms with reflective vests and utility flashlights.

24. The checking station could be observed from any direction of approach from one-tenth up to one-half a mile and there was adequate time to observe the checking station and come to a stop when a motorist was traveling at the posted speed limit.

. . . .

26. The checking station plan was followed.

27. Traffic did back up some but not extreme and every vehicle that approached this checking station was checked.

28. If drivers had their driver’s license and registration the stop lasted one minute or less.

(R pp 24-25). Based on these findings, the trial court concluded “[t]he short amount of time that the checking station potentially interfered with a[n] individual’s liberty was not significant,” and thus the checkpoint was “reasonable.” (R p 25).

As the Court of Appeals observed, these findings show the trial court addressed many of the considerations relevant to weighing the severity of the checkpoint’s intrusion. *Majority*, at 15-16. However, they also show a troubling misunderstanding of the law.

Here, the trial court found (in findings of fact 8 and 9) that Sgt Bobbitt completed and signed the checkpoint authorization form as the “‘Authorizing Supervisor.’” (R p 23 (quoting R p 21)). In addition to authorizing the checkpoint, the court found (in findings of fact 5 and 15) that Sgt Bobbitt was “the supervisor in charge” and the on-site supervisor of the checkpoint. In addition to authorizing and supervising the checkpoint, the court found (in finding of fact 15) that Sgt Bobbitt actively “participate[d]” in the checkpoint. In short, as Sgt Bobbitt described his role, he was “in charge of everything with this checkpoint.” (T p 17).

But, of course, one person being “in charge of everything”—from authorization, to supervision, to implementation—is problematic, if not fatal, under the Fourth Amendment. One of the most basic safeguards envisioned in the context of suspicionless checkpoints is preventing the person who conducts the seizure from also being the person who authorizes the seizure. *See Martinez-Fuerte*, 428 U.S. at 566 (“[A] purpose for a warrant requirement is to substitute the judgment of the magistrate for that of the searching or seizing officer. But[, with checkpoints,] the need for this is reduced when the decision to seize is not entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials.”). As *Martinez-Fuerte* suggests, allowing Sgt Bobbitt to request, authorize, and then execute the NC 24/27 checkpoint is akin to a seizing officer acting as a magistrate to approve his or her own warrant.

Such government conduct obviously “violate[s] a fundamental premise” of the Fourth Amendment. *See Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (it was “too plain for extensive discussion” that allowing state law enforcement officer to issue search warrants violated Fourth Amendment); *United States v. United States District Court*, 407 U.S. 297, 316-17 (1972) (due to their responsibilities to investigate and enforce the law, executive-branch officers “should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks”).

Here, the trial court determined the NC 24/27 checkpoint was “reasonable” under the Fourth Amendment despite making findings that set out, step by step, a practice to parallel one that violates a “fundamental premise” of the Fourth Amendment. *Coolidge*, 403 U.S. at 453; *see Huguenin*, 154 F.3d at 562 (“The discretion left to the officers in the field is evident by Officer Worley’s testimony that, while he seeks approval from the Roane County Sheriff for a given checkpoint, he designates the time and location of the checkpoint, and his requests have never been denied.”). This strongly suggests the trial court misunderstood the requirements of the Fourth Amendment when it weighed this *Brown* factor.

Accordingly, the Court of Appeals’ decision to remand this case allows the trial court to reconsider the evidence “in its true legal light.” *See Helms*, 282 N.C. at 620 (“[F]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light.” (citation and quotation marks omitted)); *e.g., Buchanan*, 353 N.C. at 339-40 (remanding case where trial court “mistakenly” applied wrong test for determining whether defendant was in custody).

But there are other problems as well. For example, *Brown* mandates that suspicionless seizures must be “carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.” *Brown*, 443 U.S. at 51; *accord Martinez-Fuerte*, 428 U.S. at 566-67 (“The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop.”). Although the trial court never describes in its findings what the “plan” was for the NC 24/27 checkpoint, the court did find (in finding of fact 17) the “purpose” behind it was to “check[] each driver stopped for a valid driver’s license and evidence of impairment.” (R p 24).

Assuming the checkpoint’s “plan” is the same as its “purpose,” the court found (in finding of fact 27) the “plan was followed.” But that’s it. From the trial court’s findings, a reviewing court doesn’t know anything more about the “plan” to stop every car other than that it was “followed.” There are no findings, for example, addressing the “specific instruct[ions]” given to the troopers on how to operate the checkpoint. *McFayden*, 865 F.2d at 1313. Nor are there findings addressing whether the troopers used “standardized” questions based on agency guidelines, or whether “[i]t was left to their discretion to decide what type of questions would be asked with no limit on invasion of privacy interests.” *Huguenin*, 154 F.3d at 562-63.

While the trial court certainly wasn’t required to make findings on every conceivable consideration, it was required to “make findings of fact sufficient to allow the reviewing court to apply the correct legal standard.” *Salinas*, 366 N.C. at 124. Here, without more detailed findings, a reviewing court simply can’t perform its core function of applying law to fact to determine whether Sgt Bobbitt used “a plan embodying explicit, neutral limitations on the conduct of individual officers,” *Brown*, 443 U.S. at 51, and whether that plan achieved the “principal protection” in the checkpoint context of “appropriate[ly] limit[ing]. . . the scope of the stop,” *Martinez-Fuerte*, 428 U.S. at 566-67. Accordingly, the Court of Appeals didn’t err by remanding the case for more findings and a more thorough analysis under *Brown*.

The trial court’s findings also fail to adequately “account [for] the overall degree of interference with legitimate traffic” caused by the checkpoint. *Martinez-Fuerte*, 428 U.S. at 558. In its sole finding on this consideration, the trial court found (in finding of fact 27) that “[t]raffic did back up some but not extreme” due to the checkpoint. This finding is inscrutable. In the absence of concrete information, a reviewing court has no way of knowing what the trial court meant by “some” amount of congestion but not an “extreme” amount. Nor could the reviewing court look past this finding to the evidence from the suppression hearing to figure out what the trial court meant. Sgt Bobbitt’s testimony is just as unspecific as the trial court’s finding. He never testified about how far cars backed up behind the checkpoint or how long motorists had to wait in line. When asked if he “recall[ed] traffic ever backing up” at the checkpoint, Sgt Bobbitt’s entire response was: “Not any extreme amount.” (T p 12).

In sum, the trial court’s findings concerning the third *Brown* factor fail to show the court properly assigned weight to the level of intrusion resulting from the checkpoint. The trial court’s findings appear to endorse—and definitely don’t disapprove of—Sgt Bobbitt’s practice of authorizing, supervising, and participating in his own checkpoints. Furthermore, the court’s findings don’t provide sufficient detail regarding the plan for the checkpoint or the checkpoint’s effect on traffic, two pivotal considerations in assessing the degree of intrusion. Consequently, the Court of Appeals didn’t err by remanding the case for the trial court to reconsider the evidence in light of a correct understanding of *Brown* and to “explain” its analysis through comprehensive findings of fact. *Majority*, at 16.

### Conclusion

The question presented by Ms Cobb’s appeal is whether the trial court properly assigned weight to and then balanced *Brown’s* factors for judging the reasonableness of the NC 24/27 checkpoint. The Court of Appeals, applying clear and well-established principles, held the trial court’s findings were inadequate to show the court properly conducted the “delicate” balancing required by *Brown*, *Lopez Lopez*, 844 F.2d at 908, and the Court accordingly remanded the case for additional findings.

The trial court’s findings fare no better in this Court. The trial court completely failed to address *Brown’s* first factor concerning the importance of the State’s interest in the NC 24/27 checkpoint. On *Brown’s* second factor, the effectiveness or tailoring prong of the test, the trial court’s findings fail to illuminate the decision-making process behind the checkpoint. And there are worrying findings and large gaps in the court’s analysis regarding the level of intrusion on personal liberty and privacy under *Brown’s* third factor. Given these deficiencies, the Court of Appeals didn’t err in concluding it simply couldn’t tell why the trial court did what it did in denying Ms Cobb’s motion to suppress. Accordingly, this Court should affirm the Court of Appeals’ decision remanding this case for further proceedings.

## The dissent’s and the State’s reasons for reversing the Court of Appeals aren’t convincing.

The dissent below would’ve concluded the trial court’s findings of facts were “sufficient” to permit review, and that the court’s findings show it properly weighed and balanced the *Brown* factors in denying Ms Cobb’s motion to suppress. *Dissent*, at 1, 8. The State echoes these conclusions. Taken together, the dissent makes, and the State carries forward, four main arguments: (1) the majority misapplied the controlling standard of review; (2) the majority erred by remanding the case because the trial court’s findings were not, as the majority claimed, insufficient to enable review of the court’s analysis under *Brown*; (3) the majority mistakenly “relied” on *State v. Veazey*, 191 N.C. App. 181 (2008), for its conclusion the trial court’s findings were “deficient”; and (4) the trial court’s unchallenged findings support its legal conclusion that the checkpoint was reasonable under the Fourth Amendment. St’s Br at 7, 7-18, 19-20, 20-23. None of these arguments are persuasive.

### The majority correctly applied the standard of review.

First, both the dissent and the State claim the Court of Appeals erred by “essentially consider[ing] all of the issues *de novo*.” *Dissent*, at 1; St’s Br at 7. This contention misapprehends the governing standard of review identified by both the dissent and the State. *If*, as they claim, Ms Cobb didn’t challenge any of the trial court’s findings of fact, *Dissent*, at 2; St’s Br at 20, then the only task left for the reviewing court is to determine whether the trial court’s unchallenged findings of fact support its conclusions of law. *See State v. Cheek*, 351 N.C. 48, 63 (1999) (“Defendant has additionally failed to identify in his brief which of the trial court’s thirty-one findings of fact are not supported by the evidence. Therefore, this Court’s review of this assignment of error is limited to whether the trial court’s findings of fact support its conclusions of law.”). But, of course, “the legal significance of the findings of fact made by the trial court is a question of law,” *State v. Davis*, 305 N.C. 400, 415 (1982), and appellate courts “review questions of law de novo,” *State v. Khan*, 366 N.C. 448, 453 (2013).

Accordingly, if the dissent and the State are right that Ms Cobb didn’t contest any of the trial court’s findings, then they’re wrong in claiming the majority erred by reviewing de novo the only remaining issue of whether the trial court’s uncontested findings of fact support its conclusions of law. The premise refutes the conclusion. This confused argument should be rejected.

### The trial court’s findings of fact don’t say as much as the dissent and the State think they do.

The dissent and the State next contend the trial court’s findings of fact on the three *Brown* factors were sufficient to “allow appellate review.” *Dissent*, at 5; St’s Br at 18. Thus, they argue, there was no need to remand the case for additional findings; the Court should’ve just affirmed the trial court’s order. Contrary to the dissent and the State’s position, the trial court’s findings don’t adequately “explain” its reasoning behind its conclusion that the checkpoint was reasonable. *Majority*, at 12 (citation and quotation marks omitted).

First, the dissent and the State take issue with the Court of Appeals’ conclusion that the trial court “made no findings regarding the gravity of the public concern” involved in the NC 24/27 checkpoint. *Majority*, at 16. They believe the trial court’s two findings that “‘the purpose of the checking station was to check for ‘a valid driver’s license and evidence of impairment,’” and that the “‘checking station as it was operated advanced the public concern,’” are sufficient, when read together, to show the trial court considered the gravity of the public interest in the NC 24/27 checkpoint. *Dissent*, at 5; St’s Br at 9-10.

However, simply finding the checkpoint had a purpose and that the checkpoint advanced that purpose doesn’t translate into a finding that the purpose is “important[t],” *Brignoni-Ponce*, 422 U.S. at 881, or “grave,” *Lidster*, 540 U.S. at 427, or “great,” *Martinez-Fuerte*, 428 U.S. at 557, or “vital,” *Prouse*, 440 U.S. at 658. Nor, critically, could the trial court have made a finding in this case on the “magnitude” of the interest. *Sitz*, 496 U.S. at 451. The State presented absolutely no evidence—through Sgt Bobbitt’s testimony or otherwise—about the severity of the need to check for unlicensed or impaired drivers in the vicinity of the NC 24/27 checkpoint. Assumed common sense and anecdote can’t replace evidence. *Doe*, 842 F.3d at 846; *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (“plausible *reasons*” are no substitute for “sufficient *evidence*” (emphasis in original)).

On *Brown’s* second prong, the dissent and the State run through a list of “non-exclusive factors” for determining whether the checkpoint was appropriately tailored to fits its primary purpose. *Dissent*, at 5; St’s Br at 11. They contend the trial court made sufficient findings on some of these factors and that those findings show, among other things, the checkpoint had “predetermined” starting and ending times; and Sgt Bobbitt had valid “reasons” for picking the NC 24/27 intersection as the location for the checkpoint. St’s Br at 13, 14.

The State first contends “[t]he trial court properly considered whether the checkpoint had a predetermined starting or ending time.” St’s Br at 14. However, as the rest of that paragraph in the State’s brief tacitly acknowledges, the trial court never made a finding the checkpoint’s start and end times were “predetermined”—it only found (in finding of fact 17) the checkpoint was “operat[ed]” from “12:15 am to 2:00 am.” (R p 25). That’s a big difference.

The dissent and the State next contend the trial court’s findings regarding the location of the checkpoint are adequate to support its conclusion the checkpoint was reasonable. The dissent specifically argues:

Defendant focuses on testimony regarding the decision of the exact location for the checkpoint but overlooks the rest of the evidence. Sgt. Bobbitt testified that the place was chosen based upon traffic, a location near the county line, a clear sight distance, and a safe place for cars to be pulled off the road. The trial court’s findings address the factors Sgt. Bobbitt considered, including proximity to main roads and other counties. . . . These findings support the trial court’s conclusion that the stop was reasonable.

*Dissent*, at 6 (alteration added).

 Contrary to the dissent’s reading of Sgt Bobbitt’s testimony, he never testified that, in selecting the location of the checkpoint, he “considered” or “based” his decision on the “traffic” at the NC 24/27 intersection, the intersection’s “proximity to main roads,” or the intersection’s proximity to neighboring counties. When asked why he chose the NC 24/27 intersection, Sgt Bobbitt’s entire response was:

A. It’s a safe area for that amount of troopers to get out at one time to check driver’s licenses. It’s an area that is—it needs to be worked more often and we check when we—it’s an area four. It’s a rural part of the county. That’s just one place that it is pretty good for us to get out and have a lot of—you know, a place to put our cars, plus other vehicles; other cars.

(T p 10).

While Sgt Bobbitt mentions safety and convenience, he doesn’t list traffic, proximity to other main roads, or proximity to county lines as factors included in his decision-making. The dissent attempts to read more into Sgt Bobbitt’s testimony than is actually there, and then convert its tenuous inferences into findings of fact. This is inappropriate. Appellate courts aren’t fact-finding tribunals. *See In re C.L.H.*, 376 N.C. 614, 623 (2021) (“It is the role of the trial court and not the appellate court to make findings of fact regarding the evidence.” (cleaned up)); *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63 (1986) (“Fact finding is not a function of our appellate courts.”). This Court shouldn’t partner up with the dissent to go into the fact-finding business.

As for *Brown’s* third factor, the dissent and State contend the trial court’s findings on this issue are sufficient to show it properly considered the severity of the checkpoint’s intrusion on individual liberty and privacy. *Dissent*, at 6-7; St’s Br at 16-17. In making this argument, they both highlight the fact that Sgt Bobbitt—“not officers with ‘unrestrained discretion’”—“ordered” the checkpoint, chose its location, and supervised its operation. *Dissent*, at 6-7; St’s Br at 17.

They make the same mistake the trial court made. Sgt Bobbitt is, in this case, the perfect example of an officer with unrestrained discretion. Sgt Bobbitt’s approving his own checkpoint and then supervising and participating in it exemplifies the unconstitutional practice of allowing law enforcement officers to “be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.” *United States District Court*, 407 U.S. at 316-17; *Coolidge*, 403 U.S. at 453. Contrary to the dissent’s and State’s position, Sgt Bobbitt’s practice undermines rather than supports the trial court’s conclusion the checkpoint was reasonable. *See Martinez-Fuerte*, 428 U.S. at 566 (leaving “decision to seize” to “the officer in the field” is analogous to failing to “substitute the judgment of the magistrate for that of the searching or seizing officer”); *Huguenin*, 154 F.3d at 562 (impermissible amount of discretion was left to field officer who chose time and location of checkpoints and whose requests had never been denied).

The State next asserts: “There is no evidence showing that the troopers exercised unfettered discretion . . . in conducting the checkpoint.” St’s Br at 18. This claim isn’t supported by the record. Sgt. Bobbitt candidly testified troopers would ask “questions or whatever” after motorists provided their license and registration, and that troopers “would look” for other violations if motorists were having “trouble” finding their documentation. (T p 11). Whatever “guidelines” for conducting the checkpoint were set out on the one-sided, one-page authorization form, they didn’t prevent Sgt Bobbitt and other troopers from continuing to ask motorists unknown questions even after the purpose of the checkpoint had been accomplished. *See Huguenin*, 154 F.3d at 560 (intrusion caused by checkpoint was “unnecessarily high” where, among other things, motorists “were subjected to questioning involving more than a few brief queries necessary to effectuate the alleged purpose of the checkpoint, and the scope of the questioning was not aimed solely at ascertaining whether [a driver] was intoxicated” (citation and quotation marks omitted)).

Nor did the guidelines stop the troopers from expanding the scope of the enforcement interaction at the discretion of the individual trooper. As Sgt Bobbitt recounted, troopers “would” look for violations other than those listed on the authorization form, not based on individualized suspicion, but based on whether the motorist had his or her documentation ready immediately upon pulling up to the awaiting trooper. *See id.* at 562-63 (officers had “excessive discretion” in conducting DUI checkpoint where, among other things, officers decided what questions to ask motorists and who to subject to more investigation based on whether the car had out-of-state tags).

In short, the lack of restraint on the troopers’ “decision to detain some individuals and to let others go [wa]s a situation that [wa]s ‘ripe for abuse.’” *Id*. at 563 (quoting *United States v. Walker*, 941 F.2d 1086, 1089 (10th Cir. 1991)). The evidence in this case shows, contrary to the dissent’s and the State’s contention, that the guidelines in this case failed to eliminate the “potential for randomly targeting individual motorists.” *Id*.

The dissent and the State argue the trial court’s findings of fact—and if not the court’s findings, then the evidence from the suppression hearing—support the conclusion the NC 24/27 checkpoint is reasonable under *Brown’s* balancing test. They are wrong; the trial court’s findings don’t support this conclusion. And because the majority understood its role wasn’t to make the findings the trial court could’ve made from the evidence but didn’t, the majority correctly remanded the case for the trial court to reconsider the evidence under *Brown* and make additional findings as necessary.

### *State v. Veazey* says more than the dissent and the State thinks it does.

Both the State and the dissent attack the majority’s use of *State v. Veazey*, 191 N.C. App. 181 (2008), in its analysis. *Dissent*, at 2-4; St’s Br at 7, 19-20. *Veazey*, they argue, doesn’t provide the right “framework” for evaluating the constitutionality of the NC 24/27 checkpoint. St’s Br at 7. This is so, they claim, because the focus of the Court’s analysis in *Veazey*, 191 N.C. App. at 190-91, was the trial court’s failure to make an “independent finding regarding the primary purpose of the checkpoint” challenged in that case. Here, in contrast, the dissent and the State point to defense counsel’s concession at the suppression hearing that the NC 24/27 checkpoint had a legitimate programmatic purpose, (T p 28), as the point of departure that clearly distinguishes this case from *Veazey*.

As the State notes in its brief, however, the Court in *Veazey* remanded the case for “other reasons” as well. St’s Br at 20. It’s those “other reasons” that are important here. To be sure, the Court in *Veazey*, 191 N.C. App. at 187, “beg[a]n [its] analysis” by discussing the checkpoint’s primary purpose, but that wasn’t also the end of the Court’s analysis. In addition to remanding the case because the trial court failed to make findings regarding the checkpoint’s primary purpose under *Lidster*, the Court also remanded the case because “the trial court did not make adequate findings on the first two *Brown* prongs,” and because the trial court’s findings failed to indicate the court “balanced” the “*Brown* factors” against each other in assessing the reasonableness of the checkpoint. *Id*. at 193, 192. Neither the dissent nor the State explain why *Veazey’s* discussion of the three *Brown* factors doesn’t provide a helpful “framework” for discussing the three *Brown* factors.

### It doesn’t matter whether Ms Cobb challenged any of the trial court’s findings of fact.

In the final section of its brief, the State alleges Ms Cobb “did not specifically challenge any of the trial court’s findings of fact as unsupported by the evidence.” St’s Br at 20. The State, however, doesn’t connect Ms Cobb’s purported failure to contest the evidentiary basis of any specific finding with a claim the majority erred in this case. The State’s free-floating argument is immaterial.

The State’s argument is immaterial because the majority didn’t base its decision to remand this case to the trial court on a conclusion that the trial court’s factual findings weren’t supported by the evidence from the suppression hearing. Indeed, the majority didn’t have to dig any deeper than the findings themselves to discover deficiencies fatal to the court’s decision to deny the motion to suppress. Irrespective of whether they’re supported by competent evidence or whether they’re uncontested, the findings of fact the trial court actually made on the *Brown* factors don’t support its ultimate conclusion the checkpoint was reasonable and thus constitutional. That’s the gist of the majority’s entire decision: the facts found by the trial court don’t allow a reviewing court to confidently see that the trial court properly assigned weight to each *Brown* factor and then balanced them on the constitutional “scale.” *Sitz*, 496 U.S. at 451.

None of the reasons offered by the dissent or the State can paper over the defects in the trial court’s findings identified by the majority. The Court of Appeals correctly vacated the suppression order and remanded the case for the trial court to reconsider the evidence and to make additional findings that “explain” its analysis under *Brown*. *Majority*, at 16. This straightforward application of the standard of review should be affirmed.

# Conclusion

The Court of Appeals correctly determined the trial court failed to make sufficient findings to support its conclusion that the checkpoint was reasonable under *Brown*. The Court, as a result, properly vacated the trial court’s suppression order and remanded the case to the trial court for further proceedings.

Respectfully submitted, this the 26th day of May, 2021.

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# Certificate of Filing and Service

 Counsel hereby certifies Ms Cobb’s appellee’s brief was filed by uploading it to the appellate division’s electronic filing website in accordance with Rule 26(a)(2).

Counsel further certifies this brief was duly served on Kindelle McCullen, Assistant Attorney General, at *KMcCullen@ncdoj.gov*, in accordance with Rule 26(c).

This the 26th day of May, 2021.

 /s/ Wyatt Orsbon

Wyatt Orsbon

Assistant Appellate Defender

No. 28A21 DISTRICT 11A

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

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 v. ) From Harnett County

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DESHANDRA VACHELLE COBB )

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**Appendix**

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App. 1 – 48 Testimony of Sgt Bobbitt 6, 10

App. 49 HP-14 Checking Station Authorization Form 6-8

App. 50 – 53 NC SHP Policy Manual, Directive K.4 (St. Exh. 1) 7, 9

1. A copy of Sgt Bobbitt’s complete testimony is appended to this brief. [↑](#footnote-ref-1)
2. A copy of the authorization form, State’s Exhibit 1, is appended to this brief. [↑](#footnote-ref-2)
3. *But see* North Carolina State Highway Patrol Policy Manual, Directive K.4, at 2 (“Checking Stations”) (Rev. 2006) [hereinafter NCSHP Directive K.4] (“The placement of checkpoints should be random or statistically indicated, and, unless statistically indicated, supervisors shall avoid placing checking stations repeatedly in the same location or proximity.”). A copy of NCSHP Directive K.4 is appended to this brief. [↑](#footnote-ref-3)
4. *But see* NCSHP Directive K.4, at 2 (“All checking stations, day or night, shall be approved, in writing, by a district supervisor or higher authority.”). [↑](#footnote-ref-4)
5. Ms Cobb also argued the trial court erred in determining the checkpoint was properly conducted pursuant to a written policy, as required by § 20-16.3A(a)(2a). (Def’s COA Br p 21). Although Ms Cobb raised the issue in her written motion to suppress, and the trial court addressed the argument in its order, the Court of Appeals held the argument was waived because defense counsel didn’t adequately argue the issue at the suppression hearing. *Majority*, at 17. The dissenting judge likewise found the argument unpreserved. *Dissent*, at 1. This issue is thus not before this Court. N.C. R. App. P. 16(b). [↑](#footnote-ref-5)
6. Here, defense counsel conceded at the suppression hearing, (T p 28), and appellate counsel acknowledged at the Court of Appeals, (Def’s COA Br pp 7-8), the checkpoint in this case had a legitimate primary purpose of checking for valid drivers’ licenses and evidence of impairment. Moreover, the Court of Appeals’ majority and dissent didn’t diverge on this issue. *See Majority*, at 13; *Dissent*, at 3-4. Accordingly, this Court isn’t confronted with the question of the legitimacy of the programmatic purpose of the NC 24/27 checkpoint. N.C. R. App. P. 16(b). [↑](#footnote-ref-6)
7. The trial court repeated finding of fact 18 verbatim as conclusion of law 2. (R p 25). [↑](#footnote-ref-7)
8. The transcript shows defense counsel gave the trial court a copy of at least the “Derrick McDonald” case. (T p 30). *See McDonald*, 239 N.C. App. at 569 (“Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.” (citation and quotation marks omitted)). [↑](#footnote-ref-8)
9. Sgt Bobbitt’s testimony would support a finding that he did, in fact, set up the checkpoint on a whim. He didn’t believe he needed prior authorization to do the checkpoint, and he couldn’t specifically remember ever having a conversation with his supervisor about setting up the NC 24/27 checkpoint. (T p 21). He also couldn’t remember when he made the decision to do the checkpoint, but it was probably while he was out “riding around” with “the guys.” (T p 21). The timing of Sgt Bobbitt’s completion of the authorization form also strongly suggests his decision to run the checkpoint was spontaneous: He signed and dated the authorization form 28 August 2016, and he set the checkpoint to begin just 15 minutes into that day. Sgt Bobbitt thus filled out the form (1) during the first 15 minutes of 28 August 2016, (2) while the checkpoint was being conducted, or (3) after the checkpoint was concluded. None of these options suggest much, if any, forethought. [↑](#footnote-ref-9)
10. Indeed, Sgt Bobbit testified the troopers he supervised were free to ask motorists “questions or whatever” after they presented their license and registration. (T p 11). [↑](#footnote-ref-10)