

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 34864

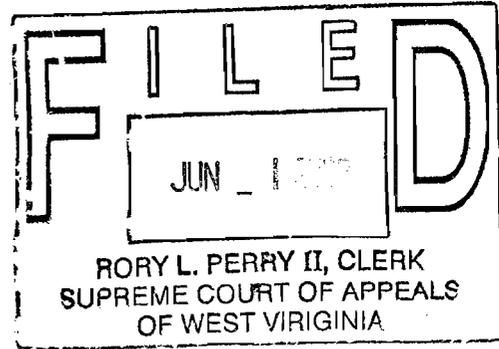
DEBBIE L. ULLOM,

Appellee,

v.

JOSEPH CICCHIRILLO, COMMISSIONER,  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Appellant.



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BRIEF *AMICUS CURIAE* OF THE  
WEST VIRGINIA TROOPERS' ASSOCIATION, INC.  
IN SUPPORT OF THE APPELLANT

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Respectfully submitted by:

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## I. INTRODUCTION

The West Virginia Troopers Association [hereinafter "WVTA"] respectfully submits the following brief in support of the position of the Appellant Joseph Cicchirillo, Commissioner, West Virginia Division of Motor Vehicles.

West Virginia State Troopers, like all law enforcement officers, have many duties and responsibilities in addition to those of criminal investigation. Occasionally, when performing one or more of these other duties and responsibilities, a law enforcement officer will unintentionally or inadvertently discover criminal conduct which will justify a search, seizure, and/or arrest. One of these additional duties and responsibilities of a law enforcement officer, which is indeed recognized in the law, is that of community caretaker. In reaching its decision, the circuit court, below, basically eradicates the community caretaker doctrine from the law. This seriously affects how Troopers, whose duties put them in the forefront of community caretaker situations, will be able to respond and fulfill all of their duties and responsibilities. At the very least, the circuit court has misconstrued the duties and responsibilities of law enforcement officers with the result of creating undue confusion and difficulties for all law enforcement officers seeking to lawfully fulfill their duties and responsibilities.

## II. NATURE OF THE CASE AND STATEMENT OF FACTS

During the early evening of June 21, 2006, at approximately 8:30 p.m., West Virginia State Trooper R.J. Busick was on road patrol. While driving his cruiser in an isolated area (approximately one mile from Number 2 Ridge at the Golden Ridge Intersection in

Marshall County), in an area where no service stations or houses were located, he observed a parked or stopped car (a white Subaru) with its lights on but without its engine running. The vehicle was in an unusual location, with its front end parked in a lane leading to a field, but in which the lane had a chain going across it preventing further travel. The lane had trees and plants on both sides further obscuring the lane. Without exiting his vehicle, Trooper Busick could not observe anyone around the vehicle.

Having witnessed the above, Trooper Busick reasonably decided to stop to do a road safety check in order to see if there was any problem or if there was any occupant of the car who might need assistance. After he stopped his car, Trooper Busick walked to the parked or stopped car; whereupon he discovered the Appellee, Deborah Ullom, in what appeared to be an inebriated condition. She had glassy and bloodshot eyes, slurred speech, and smelled of alcohol. These classic signs of intoxication convinced Trooper Busick to arrest the Appellee for driving under the influence.

Trooper Busick properly filed the appropriate paperwork with the Division of Motor Vehicles. Consistent with applicable law, the DMV held a hearing during which the only witness was Trooper Busick. As a result of the testimony and evidence received at the hearing, the DMV revoked the Appellee's license. However, on appeal, the circuit court reversed the revocation. The court concluded that Trooper Busick had no reasonable suspicion to suspect criminal activity and to stop the Appellee on the night of her arrest, and that, therefore, the evidence of intoxication could not be used by the DMV.

### III. ARGUMENT

#### A. The Circuit Court's Decision Ignores a Law Enforcement Officer's Role as a Community Caretaker and Significantly and Adversely Affects Valid Law Enforcement Duties.

Both this Court and the United States Supreme Court have decided cases which establish that the circuit court's decision was wrong. This Court in *State v. Boswell*, 170 W. Va. 433, 440, 294 S.E.2d 287, 293-94 (1982), stated that "[m]any activities unrelated to criminal investigations bring legitimate interplay between law enforcement officials and the public-such as traffic control, accident investigation, and health and rescue missions. Such situations can be distinguished from those where the initial police encounter is directed at investigating criminal activity." (Footnote omitted). Later, in *Wagner v. Hedrick*, 181 W. Va. 482, 489, 383 S.E.2d 286, 293 (1989), this Court observed:

The more typical Fourth Amendment case involves a search that is initiated for the purposes of obtaining evidence of criminal activity. Certainly, however, we recognize that there are numerous instances in which the nature of a police officer's duty requires that he engage in searches for reasons other than obtaining evidence of criminal activity.

"The policeman, as a jack-of-all-emergencies, has `complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses;' by default or design he is also expected to `aid individuals who are in danger of physical harm,' `assist those who cannot care for themselves,' and `provide other services on an emergency basis.' If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court."

*Id.*, 383 S.E.2d at 293 (quoting 2 LAFAYETTE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 5.4(c) at 525 (2d ed. 1987) (footnotes omitted.)).

The United States Supreme Court explained in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973):

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Consistent with the above principles, every State Trooper in West Virginia is committed to preserving the safety and security of the citizens of West Virginia and those who visit this State. Every Trooper is charged with the mission of, among other things, ensuring the safety of motorists operating on the State's streets and highways. W. Va. State Police Annual Report (2007) pg. 4. And, motorist assistance is a large part of what the State Police do.

The State Police is divided into three Divisions, Executive Services, Staff Services, and Field Operations. The Field Operations Division is the operational and largest division in the state police and provide necessary police functions to the citizens of West Virginia. Troopers function 24 hours a day in 7 field troops with 65 detachments. *Id.* pg. 7. In 2007, Troop 1 (the Troop covering Marshall County) had 3754 motorist assists, which was more than its felony arrests, misdemeanor arrests, and DUIs. Troop 2 had 1826 motorist assists, Troop 3 had 1844 motorist assists, Troop 4 had 4171, Troop 5 had 1918, Troop 6 had 2694, and Troop 7 had 2483. *Id.* pgs. 12-18. Every one of the motorist assists represent a citizen who was not left stranded on the side of the road, a motorist who was not left to fend for

themselves, and/or a motorist who wasn't hit by a another car trying to fix a flat tire.

Additionally, in the present case the Appellee argued at the DMV hearing that Trooper Busick jumped the gun. But the legal question is not whether there could be more justification, but only whether there was enough justification, i.e., "Did Trooper Busick act reasonably under all of the circumstances known to him?". While the facts known to Trooper Busick may not have *conclusively* shown something was wrong, that is not the standard; they certainly gave him enough reason to stop and to check with the occupant to see if there were any problems. Police officers do not have the benefit of clairvoyance or ESP. In a situation such as that confronting Trooper Busick, a myriad of reasonably possible occurrences exist: it was quite possible that the occupant of the car was suffering from a medical injury or illness--such as a heart attack, stroke, diabetic seizure, an adverse reaction to medication, or overcome by fumes from an improperly installed or maintained exhaust system--or that the occupant had been the victim of a rape or other criminal attack.

As cautioned by the court in *State v. Ramthun*, 1992 WL 50204, at \* 2 (Wis. App. Jan. 29, 1992) (Nettesheim, J.):

We are sometimes prone to subject all police actions to legal tests and standards. However, many actions of police officers are not related to the detection or investigation of crime . . . . The day-to-day activities of police officers necessarily bring them in contact with the citizenry in circumstances which are not governed (and should not be governed) by technical legal tests. . . .

**. . . When a police officer operates under such justification, any evidence in plain view which the officer inadvertently discovers may properly form the basis for further official action. . . . Such plain view evidence includes matters and things suggested by all the human senses, including smell. . . .**

(Emphases added; citations omitted).

Similarly, as recognized by the court in *State v. Alexander*, 721 A.2d 275, 280 (Md. App. 1998):

Whether labeled a “community caretaking function” or not, one such duty [of the police] is to aid persons in apparent need of assistance. If when glancing through the window of a home from the public sidewalk, for instance, the police see an elderly man clutch his chest and fall to the floor or even if they only see a prostrate figure already on the floor, their duty is to respond promptly to a possible medical emergency. **Undue concern with Fourth Amendment niceties could yield a dead victim who might otherwise have survived.**

(Emphasis added).

Indeed, “[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. . . . People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response.” *Wayne v. U.S.*, 318 F.2d 205, 212 (D.C. Cir. 1963).

#### IV. CONCLUSION

In this case, the circuit court disregarded these important non-law enforcement functions and in doing so ignored the law set forth in decisions such as *Boswell*, *Wagner*, and *Cady*. The circuit court basically eradicated the community caretaker function of law enforcement officers from the law. This seriously affects how Troopers, whose duties put them in the forefront of community caretaker situations, will be able to respond and fulfill all of their duties and responsibilities. At the very least, the circuit court has misconstrued the duties and responsibilities of law enforcement officers with the result of creating undue

confusion and difficulties for all law enforcement officers seeking to lawfully fulfill their duties and responsibilities. Accordingly, the circuit court decision should be reversed.

WEST VIRGINIA TROOPERS'  
ASSOCIATION, INC.

By Counsel



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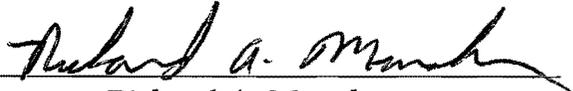
CERTIFICATE OF SERVICE

I, Richard A. Monahan, do hereby certify that true and exact copies of the foregoing "*Brief Amicus Curiae* of the West Virginia Troopers' Association, Inc. in Support of the Appellant" were served upon:

Scott E. Johnson  
Assistant Attorney General  
Office of the Attorney General  
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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 1st day of June, 2009.

  
Richard A. Monahan