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NO. 34864

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DEBBIE L. ULLOM
Petitioner Below,

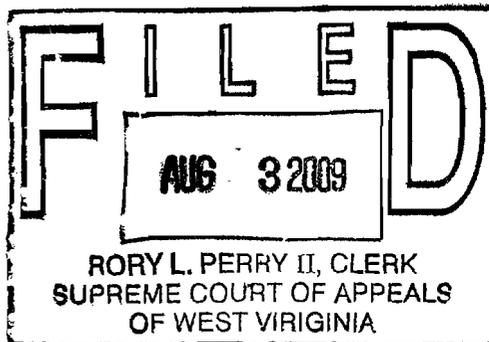
Appellee,

v

JOSEPH CICCHIRILLO, COMMISSIONER
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES

Respondent Below,

Appellant



BRIEF OF APPELLEE

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DEBBIE L. ULLOM
Petitioner Below,

Appellee,

v

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

Appellant

BRIEF OF APPELLEE

PROCEEDINGS BELOW

The appellee was arrested on June 26, 2006, and charged with driving under the influence, first offense. The appellee's driver's license was revoked for a period of six (6) months by a letter received from the Division of Motor Vehicles (hereinafter, "DMV") dated July 13, 2006. Appellee, by counsel, timely requested a hearing from the DMV. On September 28, 2006, the Division of Motor Vehicles conducted a hearing on the issue of appellee's driver's license. As a result of the hearing, appellee's driver's license was revoked for a period of six (6) months by Order of the Commissioner dated December 18, 2006. The appellee filed an appeal with the Circuit Court of Marshall County, West Virginia and a hearing was held on September 7, 2007. The Circuit Court entered an Order on November 8, 2008, reversing the decision rendered by the Division of Motor Vehicles and reinstating appellee's driving privileges fully.

STATEMENT OF THE FACTS OF THE CASE

On June 26, 2007, at approximately 8:27 p.m., Trooper R. J. Busick (hereinafter, "Busick"), of the West Virginia State Police, was on patrol approximately one (1) mile from Number 2 Ridge, at the Golden Ridge Intersection in Marshall County, West Virginia. He observed a white Subaru pulled off the paved roadway into the established entrance to a private lane leading through a field. The vehicle had its engine off and its parking lights on. There were no signs of damage to the vehicle, no signs that the vehicle was disabled, and no signals of distress from the driver, e.g. nothing attached to the vehicle or no one attempting to wave down a passerby. Nevertheless, Busick pulled his cruiser off the roadway and parked behind the white Subaru blocking it in.

The driver of the vehicle was identified as the appellee, Debbie L. Ullom (hereinafter, "Ullom"). Upon approaching the vehicle and speaking with Ullom, Busick noticed that Ullom's eyes were bloodshot and glassy, that her speech was slurred, her motor skills were unsteady, and noted an odor of an alcoholic beverage. Upon asking her to exit her vehicle, Busick noted that Ullom was unsteady. Busick administered the standardized battery of field sobriety tests, of which Ullom failed all three (3). Busick then placed Ullom under arrest and transported her to the Marshall County Sheriff's Department.

The Commissioner revoked Ullom's driver's license after a hearing held on September 28, 2006. The Circuit Court of Marshall County, West Virginia, reversed the Commissioner's Order mainly on the grounds that Busick lacked any reason to investigate Ullom's situation. The Court also afforded substantial weight to Ullom's acquittal under *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001).

STANDARD OF REVIEW

When the issues on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, the standard of review to apply is a *de novo* standard. *Clower v. West Virginia Division of Motor Vehicles*, 678 S.E.2d 41, 2009 W. Va. LEXIS 39 (2009)(citing *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)).

In cases where the circuit court has amended the result before the administrative agency, the Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*. *Id.* (quoting *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)). Further, evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong. *Id.* (quoting *Francis O. Day Co., Inc. V. Director, Division of Environmental Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994)).

DISCUSSION

The sole issue before this Court is whether the evidence obtained against Ullom should have been suppressed as the product of an unreasonable search and seizure under the Fourth Amendment to the United States Constitution, and Section 6, Article III of the West Virginia Constitution. Appellant is asking the Court to adopt acceptance of what is known around the United States as a “community caretaker” exception to the search and seizure protections of the Fourth Amendment. The fact that appellant wants an “exception” made to allow intrusion into a citizen’s personal affairs is sufficient grounds in and of itself to cause any logical person to give pause for serious scrutiny of the request. In essence, the Court is being asked to reward law enforcement personnel for setting

aside Fourth Amendment protections when such officers self-determine that they are justified in doing so for the public interest and consequently discover potentially incriminating evidence. This is an extremely slippery slope that leads directly to the potential for serious erosion of privacy rights and to the continued attenuation of individual freedoms in this modern era of our society. The amicus brief cites various statistics of such assists in an effort to justify the adoption of this exception. But perhaps most poignant is that the referenced assists were all made without the benefit of such an exception to the Fourth Amendment, showing that an exception is unnecessary to the successful execution of this function of public service.

However, before the Court can determine whether or not to apply a community caretaker exception to the Fourth Amendment, and Section 6, Article III of the West Virginia Constitution, it first needs to determine if the Fourth Amendment and Section 6, Article III apply at all. The Fourth Amendment provides that “the right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated” (2009).¹ Thus the Fourth Amendment is only violated if there is a seizure, and then only if that seizure is unreasonable. *Gomez v. Turner*, 672 F.2d 134,139 (D.C. Cir.1982). Therefore, the first thing that needs to be determined is whether or not the was a seizure.

Did a seizure occur?

The Fourth Amendment requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (citing *Davis v.*

¹ The language of the Fourth Amendment is not meaningfully distinct from the Section 6, Article III of the West Virginia Constitution. They are traditionally construed in harmony with the each other. *State v. Duvernoy*, 156 W. Va. 578, 582, 195 S.E.2d 631, 634 (1973).

Mississippi, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968)). However, “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or shows of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Terry v. Ohio*, 392 U.S. at 19.

This Court has recognized that there are three basic types of encounters between police officer and individuals, each of them having a distinct ramification or legal consequence under the Fourth Amendment and Section 6 of Article III. *State v. Todd Andrew H.*, 196 W. Va. 615, 619, 474 S.E.2d 545, 549. The first is a consensual encounter in which an individual agrees to speak to police officers. This contact may be initiated by the police without any objective level of suspicion and does not, without more, amount to a “seizure” implicating either Section 6 of Article III or the Fourth Amendment. *Id.*

The second type of encounter, based upon principles enunciated in *Terry v. Ohio*, involves a limited investigative stop. In *Terry*, the Supreme Court held that certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. *Id.* The third type of police-citizen encounter is an arrest – plainly a Section 6, Article III “seizure” that must be based upon probable cause. *Id.*

When looking at the types of encounters put forth by Justice Cleckley in *Todd Andrew H.*, only the second and third types of encounters are considered seizures and therefore must be reasonable under the Fourth Amendment and Section 6, Article III. The appellant argues that the encounter between Busick and Ullom was consensual, and thus not subject to Fourth Amendment requirements, however, the appellee contends that the encounter is of the second variety which requires some particularized and objective justification for its initiation.

The Supreme Court stated in *United States v. Mendenhall*, that a person is seized only when, by means of physical force or show of authority, his freedom of movement is restrained. 446 U.S. 544, 553 (1980). Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. *Id.* As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. *Id.* at 554. The Court concluded by holding that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Id.*

In the instant matter, Ullom was legally parked on the side of the road when Busick pulled in behind her with his cruiser, blocking Ullom from being able to move her vehicle. Such a "show of authority" is enough to cause a reasonable person to believe that they are not free to leave. In *Rios v. State*, 975 So.2d 488, 490-491 (Fla. App. 2007), the Court held that blocking a person's path or otherwise restraining movement is one indication that a stop has occurred. *See also Alvarez v. State*, 515 So.2d 286, 290 (Fla. 4th DCA 1987) (partially blocking suspect's sole exit from train compartment was one factor indicating that a detention had occurred); *United States v. Bowles*, 625 F.2d 526, 532 (5th Cir. 1980) (Fourth Amendment seizure occurred when officer ran past suspect, held out credentials, and turned to face him, thus blocking his path); *State v. Livingston*, 681 So.2d 762, 763-64 (Fla. 2d DCA 1996) (that officers did not block suspect's path was one factor in court's conclusions that the contact was a consensual encounter); *State v. Mitchell*, 638 So.2d 1015, 1016 (Fla. 2d DCA 1994) ("An officer may address questions to anyone on the street, and unless the officer

attempts to prevent the citizen from exercising his right to walk away, such questioning will usually constitute a consensual encounter rather than a stop.”).

While the cases cited above deal mainly with encounters on foot, several courts have held the same way when dealing with officers blocking the path of vehicles. In *State v. Lewis*, 179 Ohio App.3d 159, 2008-Ohio-5805 (2008), the officer blocked a vehicle in a private driveway and prevented the vehicle from leaving. The Court held that blocking the path of a vehicle to prevent the vehicle and its occupants from leaving a private drive was a seizure and should have been supported with a reasonable articulable suspicion. In *State v. Chapman*, 495 A.2d 314 (Me 1985), the officer followed a vehicle into a gas station parking lot blocking the vehicle in a parking space and blocking any movement. The Court held that the officer’s initial confrontation with the defendant, after positioning the police car so as to prevent any movement of the truck, was a “*Terry-type*” investigatory stop. *Id.* at 316.

In *State v. Justice*, 861 A.2d 1060 (Vt. 2004), the officer encountered a vehicle parked in a parking lot at 2:00 in the morning. The officer, pulled his police cruiser nose-to-nose to the car, leaving his engine running and headlights on. *Id.* at 1061. The officer testified that his cruiser “was essentially blocking the exit.” *Id.* The officer then approached the vehicle and ultimately arrested the defendant for possession of cocaine. *Id.* In deciding the case the Court stated that the police need not force or signal a vehicle to the side of the road to effect a stop of persons in the vehicle. *Id.* at 1062 (*quoting State v. Burgess*, 657 A.2d 202, 203 (1995)). Courts have long held that a show of authority tending to inhibit a suspect’s departure from the scene is sufficient to constitute a stop, even though the vehicle is already stopped at the time of an approach by police. *Id.* While merely approaching a person seated in a parked car does not, in and of itself, constitute a seizure, “activity

which inhibits a person's freedom of movement does." *Id.* (quoting *State v. Burgess*, 657 A.2d at 203). The Court ultimately held that under the facts of this case a seizure occurred because the officer exhibited a show of authority tending to inhibit defendant from breaking off the encounter. *Id.* at 1063. See also *People v. Cascio*, 932 P.2d 1381, 1386 (Colo. 1997) (position of patrol car relative to motorist's car is important consideration in determining whether a seizure exists; if police car wholly blocks motorist's ability to leave, courts have held that reasonable person would not feel free to leave).

Several other courts have held that an officer's merely pulling in behind someone with the emergency lights on while not even blocking the other vehicle constitutes a seizure. See *State v. Broom*, App. No. 22468, 2008-Ohio-5160 (Ohio 2nd Dist. Ct. App. 2008); *State v. Cosby*, App. No. 22293, 2008-Ohio-3862 (Ohio 2nd Dist. Ct. App. 2008); *People v. Miller*, 2008-MI-1117.212 (Mich. Ct. App. 2008); *Commonwealth v. Krisko*, 884 A.2d 296 (Pa. Super. 2005); *Brooks v. State*, 745 So.2d 1113 (Fla. 1st DCA 1999); *Hrezo v. State*, 780 So.2d 194 (Fla. Dist. 2 App. 2001); *State v. Burgess*, 657 A.2d 202 (1995); *State v. Walp*, 672 P.2d 374 (Or. App. 1983); *State v. Stroud*, 634 P.2d 316 (Wash. App. 1981); *Lawson v. State*, 707 A.2d 947 (Md. App. 1998); *State v. Schmidt*, 47 P.3d 1271 (Idaho App. 2002); *State v. Indvik*, 382 N.W.2d 623 (N.D. 1986).

All of these cases stand for the proposition that when an officer pulls up behind someone who is legally parked on the side of the road, especially when blocking the egress of that vehicle, the individual has been seized for the purposes of the Fourth Amendment. Even one of the cases cited by appellant supports this proposition. In *Erickson v. Commissioner of Public Safety*, 415 N.W.2d 698 (Minn. Ct. App. 1987), the officers blocked the exit of a motel parking lot in which the defendant was parked in preventing him from leaving the scene. Even while holding that under the

facts of that specific case a seizure did not occur, the Court agreed that the blocking of a car by police officers can constitute a seizure. *Id* at 701. *See also United States v. Kerr*, 817 F.2d 1384, 1386-87 (9th Cir. 1987)(officer who pulled into and blocked defendant's one-lane driveway as defendant was pulling out seized the defendant).

The appellant provides several other cases, including one from this Court, *State v. Boswell*, 170 W. Va. 433, 294 S.E.2d 287 (1982), which they assert stand for the proposition that an individual is not seized when a police officer approaches and questions the driver of a parked car. *See also State v. Phipps*, No. 2006-P-0098, 2007WL2164528 (Ohio Ct. App. 1992); *State v. Jordan*, 839 P2d 38 (Id. Ct. App. 1992); *State v. Culbertson*, No. 2008CA38, 2009WL1111258 (Ohio Ct. App. April 24, 2009). However, all of those cases and the cases cited therein involved situations where the officers were parked a distance away from the parked vehicle and approached the vehicle on foot. In the instant matter Ullom was legally parked off of the side of the road and Busick blocked her car with his cruiser and then approached her vehicle. Clearly a reasonable person would not have felt free to leave in that situation.

Given the fact that Ullom was legally parked off the side of the road, and given the fact that Busick positioned his cruiser in such a manner as to block Ullom's vehicle, and in light of all of the caselaw cited *supra*, it is clear that a seizure occurred, therefore we must look to see if it was justified by some particularized and objective justification under the Fourth Amendment.

Was the seizure reasonable?

Ullom contends that the appellant has failed to show the circuit court's error with regard to the community caretaker exception as the appellant is unable to provide any binding authority from this Court to suggest this state has previously adopted a community caretaker exception to the Fourth

Amendment. Appellant erroneously relies on *Wagner v. Hedrick*, 181 W.Va. 482, 383 S.E.2d 286 (1989) as creating this exception. Appellee fails to see how appellant reaches this conclusion other than through radically loose interpretation. *Wagner* fails to even remotely parallel the facts in the instant case and, as such, even if this Court somehow found it an appropriate authority to consider, the facts here would never arise to the level of those in *Wagner* and it would ultimately be inappropriate to allow that standard to prevail in this matter. Absent a prior adoption of community caretaker, appellant's argument must, of necessity, fail as it relates to showing error on the part of the circuit court. Assuming, *arguendo*, that this Court would be inclined to consider implementation of a community caretaker exception and to apply same to this case, the appellant's arguments must still fail in regards to Ullom.

The community caretaker exception is, in essence, a function of law enforcement personnel in which they provide help to those in need of some manner of assistance outside of a criminal investigative function. A description of those functions comes from *Wagner* quoting LaFave's treatise on the 4th amendment. The Court focused on officers providing assistance to those in danger of physical harm, those unable to care for themselves, or those in situations that require emergency assistance of an officer. All of these scenarios contemplate an individual outside of his or her normal scope of circumstances who is truly in need of assistance, not individuals going through the motions of an ordinary daily life.

While there is ample caselaw to consider from around the country - and even from the influential Newfoundland and Labrador reporter - on the issue of the community caretaker exception, the reality is that the scenarios at issue therein involve a potential emergency situation in which the

failure to immediately act may lead to some manner of preventable harm. The United States 1st

Circuit Court of Appeals has stated:

Cases employing the "community caretaker" exception uniformly deal with situations where there is concern for the public safety due to the potential for danger to people or property. See, e.g., *Cady*, 413 U.S. 433, 93 S.Ct. 2523 (policeman was hospitalized following an accident; other police officers feared that his revolver, which was not on him and which might be in his car, could cause harm); *United States v. Singer*, 687 F.2d 1135, 1144 (8th Cir.1982) (upholding the warrantless search of a vacant house in which a burglary was presently suspected to be occurring), adopted in relevant part on reh'g en banc, 710 F.2d 431, 432 (1983); *United States v. Markland*, 635 F.2d 174 (2d Cir.1980) (recovery and inspection of packages with unknown contents following automobile accident), cert. denied, 451 U.S. 991, 101 S.Ct. 2332, 68 L.Ed.2d 851 (1981); *United States v. Newbourn*, 600 F.2d 452 (4th Cir.1979) (upholding, under *Cady*, the warrantless search of a car trunk for which there existed probable cause to suspect it contained weapons following arrest of defendants); *United States v. Miller*, 589 F.2d 1117 (1st Cir.1978) (upholding search of abandoned boat for purposes of securing property and checking for possible injured persons), cert. denied, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979); *United States v. Nord*, 586 F.2d 1288 (8th Cir.1978) (police in investigating report that defendant had missed work and was intoxicated in his apartment entered apartment without a warrant).

US v. Lott, 780 F.2d 778, 782 (1st Cir. 1989)(emphasis added). See, also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973); *State v. Jones*, 937 P.2d 310 (Ariz. 1997); *State v. Fisher*, 686 P.2d 750, 763 (Ariz. 1984); *State v. Marcello*, 157 Vt. 657, 599 A.2d 357 (1991); *Provo City v. Warden*, 844 P.2d 360, 364-65 (Utah App. 1992).

Conversely, some courts have chosen to reject application of this exception under circumstances in which a reasonable interpretation of objective facts could not lead an officer to believe that assistance was necessary or desired. See, e.g., *State v. Burgess*, 163 Vt. 259, 657 A.2d 202 (1995)(lawfully parked vehicle not subject to investigation by officer); *State v. Cryan*, 727 A.2d 93 (1999)(brief delay at stoplight after light turns green not a legitimate basis for investigation). The very clear guidance from all the cases available is that the majority of states allowing a community

caretaker exception appear to construe such uninvited intrusions very narrowly. In those cases where the intrusion was upheld, again, there is near uniform finding that the circumstances, if left unattended, would lead to harm or injury to persons or property. These cases are easily distinguished from those such as the case now at bar.

Ullom's circumstances do not rise to the level of any of the scenarios found to be proper in any cases cited herein or in the opposition briefs. Indeed, Ullom was parked in a logical location - a private roadway entrance leading off the main county road. The fact that a chain was present across the roadway does nothing to enhance the appellant's argument - many private landowners elect to secure their property by use of a simple chain strung between posts. The arresting officer failed to provide any manner of evidence to establish that the scene he encountered was an emergency or otherwise indicative that the driver was in need of assistance. Ullom could well have been the landowner who was parked to gain entrance to her property. She could have been awaiting someone with a key to the locked entrance. She could have been simply parked to avail herself of a secluded area in which to urinate in the absence of other suitable locations for doing so. There were no signs of distress on her vehicle such as would be expected with a wreck. She was not displaying a white cloth, bag, or other material which is a universal sign of a request for help to a motorist disabled for any number of reasons. Simply, her car was parked at an established entrance to a private road, hardly an unusual act and hardly a situation that could be confused with a needy citizen seeking law enforcement assistance to avert a potentially threatening situation.

The case is bar is very closely paralleled by the facts in *State v. Burgess, supra*. In that case, the arresting officer, traveling southbound on a public roadway observed Burgess' car parked on the northbound side of the road in a lawful parking area, though not a designated rest area. The officer

turned and pulled in behind Burgess, activating his blue lights. Upon questioning Burgess, who advised that he had stopped to “relieve himself,” the officer detected clues which ultimately led to a DUI arrest. Vermont recognizes a community caretaker exception as established in *State v. Marcello, supra*, and *Marcello* was relied upon by the state in its argument in *Burgess*. However, the Court rejected the application of the community caretaker doctrine in *Burgess* noting that the arresting officer offered no evidence that anything appeared wrong with Burgess’ car, that there was nothing to suggest an emergency or other need for assistance, and that the location where Burgess’ car was stopped was a lawful area for stopping. Under that analysis, the Court found that the circumstances did not in any way justify application of community caretaker functions, but rather arose to an unreasonable intrusion on Burgess’ privacy.

Clearly, the prevailing guidance is that community caretaker exceptions, if permitted, need to be employed in a narrowly construed manner so as not to encourage the disregard of the 4th amendment protections. The State of West Virginia has not adopted a community caretaker exception and the matter at bar must be evaluated in that light. In such light, the standard to be considered for this detention and seizure is the basic test of finding a reasonable articulable suspicion existed that criminal activity was afoot. There was clearly no evidence of any criminal activity present to justify the arresting officer’s investigation and ultimate seizure of Ullom. Stopping one’s vehicle at an established entrance to a private road fails, in every reasonable respect, to amount a legitimate suspicion of criminal activity. Busick did not establish any evidence to suggest a crime was a consideration, a fact conceded by appellant in its brief as it specifically argues this detention was nothing more than a public safety check based on the officer’s testimony in the DMV transcript at page 9. Even if we take the analysis one step further and evaluate the situation under a community

caretaker scenario as interpreted and applied by many other jurisdictions, there is nothing to justify an investigation as there was no apparent risk of any danger to people or property that could reasonably be discerned from the circumstances present and known to the arresting officer. Again, reasonableness is the key to analyzing the officer's actions and his testimony simply does not support a legitimate finding that he could have reasonably felt there was a danger to anyone under the circumstances.

Ullom's scenario is perfectly illustrative of the need for caution in adopting a community caretaker exception in West Virginia. Her situation is entirely dissimilar from those upheld in other states, and is consistent with those in which the application was rejected. If this Court were to allow the detention and investigation in this case to stand, it would be manifestly demonstrating the danger of authorizing privacy intrusions by the police by permitting a totally unfounded stop like this to serve as the basis for an arrest. Under no conceivable standard of reasonableness could the arresting officer have logically concluded that Ullom, or other people or property, would be in danger of harm or in need of some other manner of assistance. The circumstances were totally benign, there was no suggestion that a problem was afoot, and the arresting officer conceded that there was absolutely no indication of criminal activity. Therefore, the seizure of Ullom was not reasonable and violates the protections of the Fourth Amendment and Section 6 of Article III. A ruling against Ullom in this case represents the worst possible step in the direction of deprivation of individual freedoms that the Fourth Amendment is designed to protect.

The Circuit Court did not err in applying *Choma*

Appellant argues that the circuit court committed error when it applied the *Choma* standard even though that evidence was not presented before the Commissioner. This argument appears to

be misplaced. The circuit court utilized one short paragraph out of a ten page opinion to address *Choma*. The balance of the order was used to reach the court's ultimate conclusion before the *Choma* considerations were even discussed, making it clear to appellee that the circuit court reached its decision on the strength of the merits of her appellate argument. The circuit court's additional commentary on *Choma* appears to have been nothing more than an additional piece of supportive caselaw. In fact, taking *Choma* to the roots of its purpose, one can understand why the circuit court included a reference in its order. Effectively, this Court's consideration of the issues at hand, as well as the circuit court's consideration of these issues, is a part of the administrative license hearing process, albeit removed from the administrative agency that began these proceedings. At some point in the administrative process of seeking revocation of Ullom's license, Ullom was acquitted of the criminal charges that began this sequence of events. The circuit court, having become aware of the acquittal, apparently felt that it was appropriate to consider that outcome as yet another justification for its order reversing Ullom's license suspension, a decision that the circuit court had already reached based on the facts of the case. Appellee is unaware of any prohibition against a court in this state from acting on its own volition to apply what is believed to be a correct interpretation of standing legal authority to a case pending before it. While the evidence of Ullom's acquittal was not presented during the initial administrative license hearing, it nonetheless arose during the course of the administrative process that was still in effect before the circuit court. While appellee can understand appellant's basis for raising this issue, appellee fails to see that it is in any way dispositive of the issues at bar before this Court. This case will turn on the Court's conclusions regarding the Fourth Amendment, not the propriety of applying *Choma* to Ullom's initial appeal.

CONCLUSION

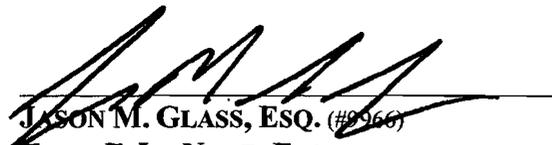
In light of the foregoing arguments, the appellee respectfully requests that this Honorable Court find that the circuit court did not err, in ruling that Ullom was unreasonably seized as Busick had no particularized and objective justification to encounter Ullom. As such, this Court must reject the appellant's arguments in favor of suspension of her license, even if it chooses to adopt a community caretaker exception in our state.

Respectfully Submitted,

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NO. 34864

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DEBBIE L. ULLOM
Petitioner Below,

Appellee,

v

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

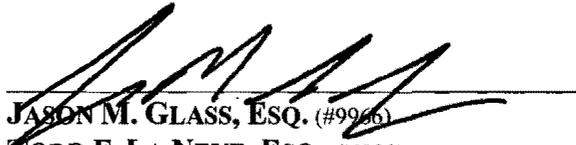
Appellant

CERTIFICATE OF SERVICE

I, Jason M. Glass, counsel for appellee, do hereby certify that the foregoing **Brief of Appellee** was served upon appellant by United States First Class Mail, return receipt requested, this 31st day of July, 2009, addressed as follows:

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