

3/9

NO. 34864

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

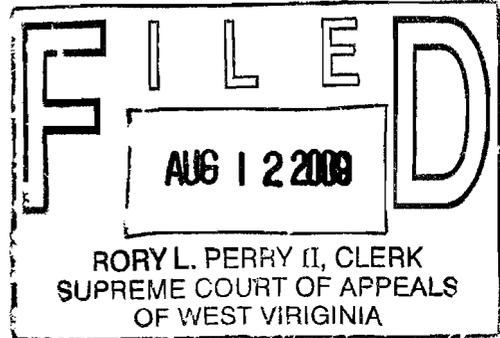
DEBBIE L. ULLOM,

Appellee,

v.

JOSEPH CICCHIRILLO, COMMISSIONER
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Appellant.



REPLY BRIEF OF APPELLANT

Respectfully submitted,

JOSEPH CICCHIRILLO, COMMISSIONER
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

SCOTT E. JOHNSON (WVSB# 6335)
ASSISTANT ATTORNEY GENERAL
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
304-558-2522

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	2
1. The Community Caretaker Doctrine Applies To This Case	2
2. The Community Caretaker Doctrine Justified	
Trooper Busick’s Conduct	4
3. The Authority The Appellee Relies On Does Not Support Her Position	10
III. CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>Alabama v. White</i> , 496 U.S. 325 (1990)	10
<i>Anchorage v. Cook</i> , 598 P.2d 939 (Alaska 1979)	6, 7
<i>Beckford v. United States</i> , 950 F. Supp. 4 (D.D.C. 1997)	8
<i>Cady v. Dombrowski</i> , 413 U.S. 433 (1973)	1, 3, 12
<i>Brigham City v. Stuart</i> , 547 U.S. 398 (2006)	2
<i>Cf. State v. Richardson</i> , 501 N.W.2d 495 (Iowa 1993)	5
<i>City of Madison v. Engle</i> , 763 N.W.2d 249 (Wis. Ct. App. 2008)	8
<i>Clower v. D.M.V.</i> , ____ W. Va. ____, 678 S.E.2d 41 (2009)	11
<i>Commonwealth v. Leonard</i> , 663 N.E.2d 828 (Mass. 1996)	8
<i>Fleck v. Anchorage</i> , No. A-10100, 2008 WL 3876463 (Alaska Ct. App. Aug. 20, 2008)	8
<i>Flippo v. West Virginia</i> , 528 U.S. 11 (1999)	4
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	5
<i>Isert v. Ford Motor Co.</i> , No. 3:01CV-258-S, 2003 WL 21496962 (W.D. Ky. June 26, 2003)	6
<i>Johnson v. United States</i> , 333 U.S. 10 (1948)	9
<i>Kozak v. Commissioner of Public Safety</i> , 359 N.W.2d 625 (Minn. Ct. App. 1984) ...	5, 8
<i>Morfin v. State</i> , 34 S.W.3d 664 (Tex. App.2000)	7
<i>People v. Weaver</i> , 29 P.3d 103 (Cal. 2001)	7
<i>Phillips v. Peddle</i> , 7 Fed. Appx. 175, 178 (4th Cir. 2001)	3
<i>R. v. Wilson</i> , [1990] 1 S.C.R. 1291	12
<i>South Dakota v. Opperman</i> , 428 U.S. 364 (1976)	1

<i>Stahlecker v. Ford Motor Co.</i> , 667 N.W.2d 244 (Neb. 2003)	7
<i>State ex rel. Appleby v. Recht</i> , 213 W. Va. 503, 583 S.E.2d 800 (2002)	4
<i>State ex rel. Hill v. Smith</i> , 172 W. Va. 413, 305 S.E.2d 771 (1983)	9
<i>State v. Boblick</i> , 93 P.3d 775 (N.M. Ct. App. 2004)	6
<i>State v. Boswell</i> , 170 W. Va. 433, 294 S.E.2d 287 (1982)	1
<i>State v. Burgess</i> , 657 A.2d 202 (Vt. 1995)	12
<i>State v. Diloreto</i> , 850 A.2d 1226 (N.J. 2004)	9
<i>State v. Guthrie</i> , 205 W. Va. 326, 518 S.E.2d 83 (1999)	4
<i>State v. Jestice</i> , 861 A.2d 1060 (Vt. 2004)	12, 13
<i>State v. Kiesecker</i> , No. 19173-7-III, 2001 WL 695526 (Wash. Ct. App. June 21, 2001)	8, 10
<i>State v. Kramer</i> , 750 N.W.2d 941 (Wis. Ct. App. 2008), aff'd, 759 N.W.2d 598 (Wis. 2009)	1, 9
<i>State v. Kramer</i> , 759 N.W.2d 598 (Wis. 2009)	4, 7, 10
<i>State v. Mireles</i> , 991 P.2d 878 (Idaho Ct. App. 1999)	1
<i>State v. Thayer</i> , No. 2667, 1990 WL 125704 (Ohio Ct. App. Aug. 31, 1990)	8, 10
<i>State v. Walters</i> , 934 P.2d 282 (N.M. Ct. App. 1996)	1
<i>United States v. Clayborne</i> , 584 F.2d 346 (10th Cir. 1978)	8
<i>United States v. Lott</i> , 870 F.2d 778 (1st Cir. 1989)	10, 11
<i>United States v. Samuels</i> , No. 406CR250, 2007 WL 420199 (S.D. Ga. Feb. 5, 2007)	8
<i>Vause v. Vause Farm Equip. Co.</i> , 63 S.E.2d 173 (N.C.1951)	6
<i>Wagner v. Hedrick</i> , 181 W. Va. 482, 383 S.E.2d 286 (1989)	1, 2, 3
<i>Williams v. State</i> , 962 A.2d 210, 218 n. 31 (Del. Super. Ct. 2008)	11

<i>In re Young</i> , No. 52731-2-I, 2007 WL 1464410 (Wash. Ct. App. May 21, 2007), <i>review</i> <i>denied</i> , 180 P.3d 785 (Wash. 2009)	7
--	---

STATUTES

U.S. Const. Art. VI, cl. 2	3
W. Va. Const. Art. I, § 1	4

MISCELLANEOUS

<i>Academy Entry Standards</i> , W. Va. C.S.R. § 149-2-8.3.h	1
American Heart Association, [http://www.americanheart.org/presenter.jhtml?identifier=4741]	6
<i>Paul C. Redrup</i> , Comment, <i>When Law Enforcement and Medicine Overlap: The Community Caretaker Exception and the Right to Refuse Medical Treatment</i> , [38 U. Tol. L. Rev.] 741, (2007)	3
Debra Livingston, <i>Police, Community Caretaking, and the Fourth Amendment</i> , 1998 [U. Chi. Legal F.] 261	8, 9
Lisa Carroll, <i>Acute Medicine</i> 181 (2007)	6
Reactive Hypoglycemia, Symptoms, Diabetes and Diet, http://www.reactivehypoglycemia.net/severe-hypoglycemia.html . See also http://www.reactivehypoglycemia.net/hypoglycemia-coma.htm	6
Steven L. Bricker, et al., <i>Oral Diagnosis, Oral Medicine and Treatment Planning</i> (2d ed. 1988)	6
United States Department of Health and Human Services, (National Heart Lung and Blood Institute), <i>Frequently Asked Questions About Heart Attack</i> , http://www.nhlbi.nih.gov/actintime/faq/faq.htm	6
United States Library of Medicine & National Institutes Health, <i>Window for Stroke Treatment Opens Wider</i> , http://www.nlm.nih.gov/medlineplus/news/fullstory_84886.html	6
Wayne R. LaFave, <i>Search and Seizure</i> (4th ed. 2004)	3, 5
Wayne R. LaFave, <i>Search and Seizure</i> (4th ed. 2004)	3, 5

NO. 34864

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DEBBIE L. ULLOM,

Appellee,

v.

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

Appellant.

REPLY BRIEF OF APPELLANT

I.

INTRODUCTION

This Court has, as has the United States Supreme Court, recognized that police officers' duties entail more than crime prevention and investigation. *See, e.g., State v. Boswell*, 170 W. Va. 433, 440, 294 S.E.2d 287, 293-94 (1982); *Wagner v. Hedrick*, 181 W. Va. 482, 489, 383 S.E.2d 286, 293 (1989), *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).¹ Indeed it is beyond cavil that “[t]he public has a substantial need for and interest in encouraging police to offer help when faced with situations like the officer faced here.” *State v. Kramer*, 750 N.W.2d 941, 947 (Wis. Ct. App. 2008), *aff'd*, 759 N.W.2d 598 (Wis. 2009). Thus, courts are “loathe to discourage community caretaker stops[.]” *State v. Walters*, 934 P.2d 282, 288 (N.M. Ct. App. 1996). *Accord State v. Mireles*, 991 P.2d 878, 882 (Idaho Ct. App. 1999). The Appellee, however,

¹Providing emergency assistance is a module of required police training for West Virginia law enforcement officers. *Academy Entry Standards*, W. Va. C.S.R. § 149-2-8.3.h.

chooses to flagrantly disregard the search and seizure law of this State and the United States Supreme Court and to eviscerate the authority of police to act outside of the traditional criminal law and within the confines of the Fourth Amendment. It is an unjustifiably miserly reading of the Fourth Amendment—unsupported by its text, history, policy, or judicial construction—to say that the Fourth Amendment only allows the police to pick up the pieces of a catastrophe rather than to prevent it. *Cf. Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (“The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.”). Thus, the circuit court’s decision should be reversed.

II.

ARGUMENT

1. The Community Caretaker Doctrine applies to this case.

The Appellee contends that this Court has not adopted the Community Caretaker rule and that “[a]bsent a prior adoption of community caretaker, appellant’s arguments must, of necessity fail, as it relates to showing error on the part of the circuit court.” Appellee’s Br. at 9-10. These assertions are astonishingly replete with error.

First, this Court *has* adopted the Community Caretaker doctrine. In *Wagner v. Hedrick*, 181 W. Va. 482, 489, 383 S.E.2d 286, 293 (1989), quoting 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.4(c) at 525 (2d ed. 1987) (footnotes omitted), this Court stated:

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.

Immediately after this the Court inserted a footnote (note 9) that reads,

LaFave notes that the Supreme Court has never ruled on precisely this type of search, but cites *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed.2d 706 (1973), in which the Court, “in upholding the warrantless search of a vehicle, made specific reference to the necessity for local police to engage in ‘community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.’ ” 2 LaFave, *supra* § 5.4(c), at 525 n. 32.

Wagner, 181 W. Va. at 489 n.9, 383 S.E.2d at 293 n.9 (emphasis added).

Second, even if this Court has not adopted the Community Caretaker doctrine, such an absence of the doctrine in West Virginia case law is irrelevant. Since the United States Supreme Court has recognized the Community Caretaker doctrine in *Cady*, see, e.g., Paul C. Redrup, Comment, *When Law Enforcement and Medicine Overlap: The Community Caretaker Exception and the Right to Refuse Medical Treatment*, 38 U. TOL. L. REV. 741, 743 (2007) (“the community caretaker exception . . . was created in 1973 in *Cady v. Dombrowski*.”); *id.* at 747 (“In *Cady v. Dombrowski*, the Court created the community caretaker exception, which allows the use of evidence, seized without a warrant, if it was discovered by police officers acting outside their traditional law enforcement role.”); *Phillips v. Peddle*, 7 Fed. Appx. 175, 178 (4th Cir. 2001) (citing *Cady*) (“The United States Supreme Court . . . [has] recognized that a police officer serving as a community caretaker to protect persons and property is constitutionally permitted to make searches and seizures without a warrant.”); there is no need for this Court to “adopt” the doctrine—it is part of the Fourth Amendment under *Cady* and is, therefore, applicable here by virtue of the national Supremacy Clauses of both the United States and West Virginia Constitutions. U.S. Const.

Art. VI, cl. 2; W. Va. Const. Art. I, § 1; *Flippo v. West Virginia*, 528 U.S. 11, 14 (1999) (per curiam) (a state court cannot ignore a United States Supreme Court opinion construing the Fourth Amendment); *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 514, 583 S.E.2d 800, 811 (2002) (per curiam) (a state court cannot read a federal constitutional amendment to provide greater protections than the United States Supreme Court has read the amendment to provide).

Finally, the Appellee concedes that this Court generally follows decisions of the United States Supreme Court concerning the Fourth Amendment when it has interpreted Article III, § 6 of the West Virginia Constitution. Appellee's Br. at 4 n.1. Following *Cady* and applying it in this case is neither novel nor neoteric nor unjustified. See *State v. Guthrie*, 205 W. Va. 326, 343 n.25, 518 S.E.2d 83, 100 n.25 (1999) ("We do not view the principle of law articulated in this decision as totally new law. Our holding simply clarifies an existing principle of federal law. The decision previously reached by this Court in *Bradshaw* clearly foreshadowed and gave notice that *Preece* misstated the law with respect to when *Miranda* warnings are required. Therefore, we may apply our holding herein to the instant proceeding."). The decision of the circuit court should be reversed.

2. The Community Caretaker doctrine justified Trooper Busick's conduct.

The Appellee does not dispute—indeed, does not even address—the analytical approach to community caretaker articulated in *State v. Kramer*, 759 N.W.2d 598 (Wis. 2009) urged upon this Court by the Appellant. Rather, her argument focuses on the facts of this case claiming they did not constitute justification for Trooper Busick's conduct. This is an untenable position.

Reasonableness is judged based upon what the officer knew "at the moment" the

officer acted, that is “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989). Alternative explanations of facts that might cut against an officer’s view do not necessarily vitiate reasonableness. *Cf.* 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 9.5 (4th ed. 2004) (footnote omitted) (actions “consistent with innocent activity,” may, nonetheless, create “adequate suspicious circumstances to justify a temporary detention for the purpose of inquiry.”). Indeed, the Fourth Amendment permits an officer to conduct an investigatory stop in order to resolve ambiguities about what is occurring. *Cf. State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993) (per curiam) (“The principal function of an investigatory stop is to resolve the ambiguity . . .”). Indeed, the Appellee’s theory would deprive police help to those who are most in need of it and least able to call or signal for it.

While the Appellee claims hypothetically that she could have been waiting for someone to unlock the chain on the car path or that she could have stopped to urinate in the woods, Appellee’s Br. at 12, equally she could have been suffering from a serious heart attack, *Kozak v. Commissioner of Pub. Safety*, 359 N.W.2d 625, 628 (Minn. Ct. App. 1984);

Anchorage v. Cook, 598 P.2d 939, 941-42 (Alaska 1979);² or a stroke, *id.*;³ or carbon monoxide poisoning, *id.*; or an epileptic seizure, *Vause v. Vause Farm Equip. Co.*, 63 S.E.2d 173, 180 (N.C.1951);⁴ or diabetic crisis, *State v. Boblick*, 93 P.3d 775, 777 (N.M. Ct. App. 2004);⁵ a coma, *Isert v. Ford Motor Co.*, No. 3:01CV-258-S, 2003 WL 21496962, at*1

²Timing in responding to cardiac events is crucial. Police officers in West Virginia must be able to perform Cardiopulmonary Resuscitation and mouth to mouth resuscitation in order to be certified. W. Va. C.S.R. § 149-2-8.3.h.4 & .5. Thus, as first responders to cardiac events, police can be the first step in the sequence of emergency medical response and also summon more advanced emergency medical providers. *See, e.g.*, American Heart Association, <http://www.americanheart.org/presenter.jhtml?identifier=4741> (“A victim’s chances of survival are reduced by 7 to 10 percent with every minute that passes without CPR and defibrillation. CPR can double or triple a cardiac arrest victim’s chances of survival. Few attempts at resuscitation succeed after 10 minutes.”). *See also* United States Department of Health and Human Services, National Heart Lung and Blood Institute, Frequently Asked Questions About Heart Attack, <http://www.nhlbi.nih.gov/actintime/faq/faq.htm> (“Clot-busting drugs and other artery-opening treatments work best when given within the first hour after a heart attack starts. The first hour also is the most risky time during a heart attack—it’s when your heart might stop suddenly. Responding fast to your symptoms really increases your chance of surviving.”).

³Getting a stroke patient to an emergency room as rapidly is essential. *See, e.g.*, United States Library of Medicine & National Institutes Health, Window for Stroke Treatment Opens Wider, http://www.nlm.nih.gov/medlineplus/news/fullstory_84886.html (use of a tissue plasminogen activator in treatment of an ischemic stroke can be administered up to perhaps 4.5 hours after the event, it is most efficacious when employed within one hour of the event onset).

⁴While a single seizure is not normally life threatening in and of itself, aspiration by either oral secretions or even of dentures is an immediate life threatening danger, *see, e.g.*, STEVEN L. BRICKER, ET AL., ORAL DIAGNOSIS, ORAL MEDICINE AND TREATMENT PLANNING 336, 359 (2d ed. 1988), as is the possibility of status epilepticus—basically serial seizures. *See, e.g.*, LISA CARROLL, ACUTE MEDICINE 181 (2007).

⁵For example, “Severe Hypoglycemia is dangerous and needs to be treated by medical personnel immediately. This happens when there is very little glucose or sugar in the blood stream. Some symptoms of severe attack are unconsciousness and seizure that may lead to coma. It is therefore important to treat low blood sugar at its early stage to avoid reaching life altering and threatening severity.” Reactive Hypoglycemia, Symptoms, Diabetes and Diet, <http://www.reactivehypoglycemia.net/severe-hypoglycemia.html>. *See also* <http://www.reactivehypoglycemia.net/hypoglycemia-coma.htm> (“It is imperative that people with hypoglycemia are never left without any means of help. Quick medical help contributes greatly in the prevention of irreversible brain damage caused by sudden attacks and may help prevent permanent coma if given at the right time. As with cases like these, emergency treatments suggested by a physician should always be accessible as well as a means to contact emergency help coupled with a person who can administer treatment, or can call for help when attacks do occur and the patient is left unable to help himself.”).

(W.D. Ky. June 26, 2003), or suffering from any of a host other medical conditions “which if not quickly diagnosed and treated could result in irreparable harm or death.” *Cook*, 598 P.2d at 942. *See also Kramer*, 759 N.W.2d at 612 (“if Wagner had left the location in which Kramer was parked and Kramer had stopped due to a health problem, it may have been too late for effective assistance at some later time.”). Similarly, being parked on the side of a lonely road while darkness descends poses the danger of the occupant being left helpless if confronted by dangerous criminals. *See, e.g. Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244 (Neb. 2003) (plaintiff was abducted, raped, and murdered after being stranded on the road following a tire malfunction); *People v. Weaver*, 29 P.3d 103, 171 (Cal. 2001) (“defendant picked up a young couple stranded on the highway by car trouble, killed the young man in a sneak attack with a metal pipe, kidnaped and raped his female companion more than once (by his own admission) over the course of several hours, and then killed her as well.”); *In re Young*, No. 52731-2-I, 2007 WL 1464410, at *1 (Wash. Ct. App. May 21, 2007) (“Young offered to help two women stranded by the side of the road with a disabled car. Young suggested the women get into his van to stay warm. When the two women refused, Young grabbed one of the women, pulled out a knife, held it to her crotch, and said “he would put his knife in her vagina and slice her clear up to her stomach if they did not get in the van.”), *review denied*, 180 P.3d 785 (Wash. 2009). And, finally, an occupant of a disabled vehicle could choose to leave the car and seek assistance on foot and “[t]hat could have increased [the] risk of injury.” *Kramer*, 759 N.W.2d at 612. Thus simply because the Appellee was “not exhibiting any distress does not detract from the reasonableness . . . to approach the car and determine if assistance was required[.]” *Morfin v. State*, 34 S.W.3d 664, 667 (Tex. App.2000), or, in other words, “[t]o be valid, a welfare stop need not be in

response to a request for assistance.” *Fleck v. Anchorage*, No. A-10100, 2008 WL 3876463, at *2 (Alaska Ct. App. Aug. 20, 2008). Hence, given the location of the Appellee’s car, off the road where cars are not normally stopped and distant from any human habitation, as well as the dusk hour,⁶ “it was reasonable for [Trooper Busick] as a community caretaker, to at least approach the driver and ask what the problem was.” *State v. Kiesecker*, No. 19173-7-III, 2001 WL 695526, at *3 (Wash. Ct. App. June 21, 2001). See also *Commonwealth v. Leonard*, 663 N.E.2d 828, 830 (Mass. 1996) (“In our view, Trooper Ford was doing his duty as he patrolled the highway to inquire whether the driver of the automobile was ill or in some other kind of difficulty.”); *State v. Thayer*, No. 2667, 1990 WL 125704, at *3 (Ohio Ct. App. Aug. 31, 1990); *Kozak v. Commissioner of Pub. Safety*, 359 N.W.2d 625, 628 (Minn. Ct. App. 1984); *City of Madison v. Engle*, 763 N.W.2d 249 (Wis. Ct. App. 2008) (text available at 2008 WL 5336696, at *5) (“the officers could not know what [the driver’s] situation was and whether he needed assistance without more information than they had”). Against these weighty interests must be balanced the privacy interests invaded and the invasiveness of the intrusion, Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. at 309, or, in particular here: (1) the only “minimal expectation of privacy in an automobile along a public road[,]” *United States v. Clayborne*, 584 F.2d 346, 350 (10th Cir. 1978), accord *United States v. Samuels*, No. 406CR250, 2007 WL 420199, at * 2 (S.D. Ga. Feb. 5, 2007) (“‘out on the road,’ there now is at most a minimal expectation of privacy left[.]”); and, (2) the

⁶Exhibits 1 through 3 show that there were no overhead lights where the Appellee’s car was parked, and also show the forestation in that location. Such foliage had to have made the area darker. See *Beckford v. United States*, 950 F. Supp. 4, 7 (D.D.C. 1997) (“The bollard is located in an area without overhead light which, in summer time, is made darker by the foliage of surrounding trees.”).

minimally intrusive conduct of Trooper Busick in parking behind the Appellee's car (in the absence of any safer place to park) and asking if everything was alright or if she needed help.

Additionally, a particularly important point is that a community's broad acceptance of the manner in which caretaker conduct occurs factors in favor of reasonableness, Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. at 309, and, in the kind of situation here, "citizens would *want* an officer to stop and offer assistance." *Kramer*, 750 N.W.2d at 947. (emphasis in original)

Further, the rationale implicating Fourth Amendment constraints in the criminal arena does not flow into the community caretaker arena. First, a community caretaker stop does not carry with it the stigma of official opprobrium or damage personal reputation. Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. at 273. Second, a community caretaker investigation is not as intrusive as a search for contraband. *Id.* at 273-74. And, third, there are underlying motivational differences between law enforcement and community caretaker. "The law enforcement function includes conduct that is designed to detect or solve a specific crime, such as making arrests, interrogating suspects, and searching for evidence. Community caretaking, on the other hand, is based on a service notion that police serve to ensure the safety and welfare of the citizenry at large." *State v. Diloreto*, 850 A.2d 1226, 1233 (N.J. 2004) (citation omitted). When acting as law enforcers, police are engaged "in the often competitive enterprise of ferreting out crime." *State ex rel. Hill v. Smith*, 172 W. Va. 413, 416, 305 S.E.2d 771, 774 (1983) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Community caretaking is "not imbued with the adversarial spirit" that criminal investigation is and which could

lead to overzealousness and unscrupulousness law enforcement against which the Fourth Amendment is predominantly directed. *Alabama v. White*, 496 U.S. 325, 333 (1990) (Stevens, J., dissenting).

3. The authority the Appellee relies on does not support her position.

The Appellee first relies on *United States v. Lott*, 870 F.2d 778, 782 (1st Cir. 1989), Appellee's Br. at 11, wherein the court stated in dicta that "[c]ases 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." (emphasis in original). Public safety, though, has expanded to include concern for the health and well-being of those whose predicament pose a threat only to themselves. *See, e.g., State v. Kramer*, 759 N.W.2d 598, 605 (Wis. 2009); *State v. Kiesecker*, No. 19173-7-III, 2001 WL 695526, at *3 (Wash. Ct. App. June 21, 2001); *State v. Thayer*, No. 2667, 1990 WL 125704, at *3 (Ohio Ct. App. Aug. 31, 1990). Furthermore, *Lott* is factually distinguishable from those here.

In *Lott*, two police officers observed a car run a stop sign and also observed that a rear tail light was broken, the license plate was hanging off slightly and, the trunk was flapping. 870 F.2d at 779. When the car again failed to obey a second stop sign, the officers signaled for the car to pull over which the driver did. *Id.* Once stopped, Lott exited the car and went to the police car saying everything was alright, turned around, and drove away. *Id.* The police then again signaled the car to pull over, which it did. *Id.* The police observed that Lott's arm was bleeding profusely, although this injury did not pose any impediment to Lott's driving. *Id.* Lott and his passenger stated that Lott had been stabbed, but disagreed as to who did it. *Id.* The police then removed the bandana covering Lott's

arm over Lott's protestations and then called for an ambulance—again over Lott's objection. *Id.* at 779-80. Once the ambulance arrived, the police saw an unopened bottle of gin in the car and then searched the car, discovering unlicensed which triggered Lott's arrest. *Id.* at 80.

The issue that was fatal to Community Caretaker in *Lott* was *not* the initial stop, nor was it inquiring about the cause or nature of Lott's injury—it was that the police exceeded the scope that the Fourth Amendment permitted them in their actions. *See, e.g., Clower v. D.M.V.*, ___ W. Va. ___, ___, 678 S.E.2d 41, 47 (2009) (reasonableness of stop governed by whether the stop was justified at its inception and whether the subsequent action was reasonably related in scope to that justification). Once it became clear that Lott's injury posed no danger to the public, and that Lott refused medical care, the police no longer had a right to detain Lott—a detention that ultimately provided the opportunity for the police to search Lott's car.

Here, as in *Lott*, Trooper Busick had a right and a duty to make the initial stop. The Appellee's car was pulled off the side of the road, in a dirt lane that was not a designated, nor apparently normally used, as a parking area, in the woods, in a remote and desolate area, at dusk. Unlike the police in *Lott* though, Trooper Busick did not exceed the scope of the Community Caretaker doctrine. He simply walked up to the Appellee's car and asked the Appellee if everything was alright and if she needed assistance. At that point, while well within the Community Caretaker doctrine, Trooper Busick discerned that the Appellee displayed the physical characteristics of someone who was intoxicated. The information learned as a result of the legitimate initial stop, then, justified expanding the inquiry. *See, e.g., Williams v. State*, 962 A.2d 210, 218 n. 31 (Del. Super. Ct. 2008) (“In addition to a

mere license to investigate, if contraband as other evidence of crime is discovered incident to the law performance of an officer's duties under the community caretaker function, the officer need not ignore that which is discovered.") The Appellee then tries to musters support through two cases from Vermont, the facts in both of which stand in sharp contrast to the facts of the case sub judice.

In *State v. Burgess*, 657 A.2d 202 (Vt. 1995), a police officer was traveling in the afternoon and observed a car in a lawful pull-off area with its lights on and its motor running. *Id.* The officer approached asked the driver if he was having any problems. *Id.* While the driver denied any problems and that he had stopped "to relieve himself," the officer observed that the driver was intoxicated. *Id.* The Vermont Supreme Court (over Justice Dooley's dissent) found the stop was not justified under the Community Caretaker doctrine. *Id.* at 203. The facts recited are not analogous to those here.

In *Burgess*, the stop occurred in the afternoon and not a night, like here. The car was in a pull-off area where one would expect to see a car, unlike here where the car was simply pulled into a country lane. Also, the car in *Burgess* had its engine running, unlike the case here where the engine was not running. Finally, there was no indication in *Burgess* about how remote or desolate the area was where the driver pulled over, a critically important consideration. *See Cady*, 413 U.S. at 443 (discussing "nonmetropolitan jurisdictions such as those involved here"); *id.* at 447 (drawing a distinction between "a metropolitan area" and "Kewaskum, Wisconsin."); *R. v. Wilson*, [1990] 1 S.C.R. 1291, 1292 ("While these facts might not form grounds for stopping a vehicle in downtown Edmonton or Toronto, they merit consideration in the setting of a rural community."). The facts in *Burgess* are not analogous to those undisputed facts here.

The other case upon which the Appellee relies is *State v. Jestice*, 861 A.2d 1060, 1064 (Vt. 2004), a case equally distinguishable from the case at bar.

In *Jestic*, a police officer entered a trail head parking lot at approximately 2:00 a.m. and saw a couple sitting in a parked car. *Id.* at 1061. The officer approached the car after blocking the exit and subsequently observed the passenger's razor blade. *Id.* The officer asked the passenger to hand the blade over, and, when he did, the officer saw a white powder on it. *Id.* The officer asked where the rest of the cocaine was and the passenger turned it over. *Id.* On appeal, the Supreme Court found that the cocaine should have been suppressed because the stop was not justifiable as a legitimate community caretaker case. *Id.* The facts in *Jestic* are sufficiently different from those here that any reliance on *Jestic* is misplaced.

In *Jestic*, the location of the car was in a normal and recognized parking area, unlike here where the Appellee's car was simply pulled off the road in a dirt lane. Further, the parking lot in *Jestic* was only a quarter of a mile from the nearest state highway, rather than the one mile from the Appellee's car to the nearest intersection here. And, (apparently as a consequence of the parking lot being a normal area for parking), the lot was frequented by various people, so it was not unexpected that a car would be parked there at night. There is no indication in *Jestic* that the car was parked in an area obscured by trees and foliage, nor did the *Jestic* officers give any reason necessitating (nor can it be discerned from the opinion) their blocking of the entry/exit in the parking lot. Thus, the reasons that negated community caretaker in *Jestic* are not at all like those at issue here.

III.

CONCLUSION

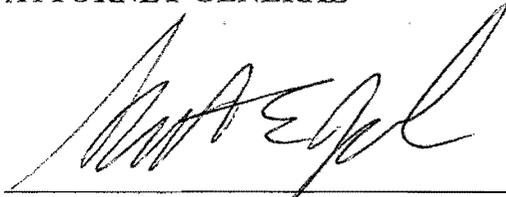
For the above reasons, the circuit court should be reversed.

Respectfully submitted,

**WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

By Counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read 'Scott E. Johnson', is written over a horizontal line.

**SCOTT E. JOHNSON (WVSB# 6335)
ASSISTANT ATTORNEY GENERAL**
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
304-558-2522

NO. 34864

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DEBBIE L. ULLOM,

Appellee,

v.

JOSEPH CICCHIRILLO, COMMISSIONER
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Appellant.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *Reply Brief of Appellant* was served via United States Mail, postage prepaid, this 12th day of August, 2009, addressed as follows:

J. Thomas Madden, Esquire
903 E. Wheeling Avenue
Glen Dale, West Virginia 26038
Telephone (304) 845-5519


SCOTT E. JOHNSON