

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0112

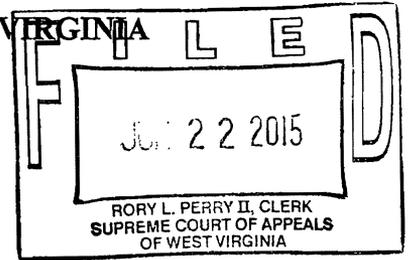
STATE OF WEST VIRGINIA,

Petitioner,

v.

MATTHEW FEICHT,

Respondent.



RESPONDENT'S BRIEF

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I.

STATEMENT OF THE CASE

The Petitioner was arrested for driving a vehicle with a suspended license due to a past DUI conviction. He was also drinking at the time of his arrest and was eventually convicted of DUI (2nd). However, driving suspended and while intoxicated is not his issue on appeal. The Petitioner is challenging the stop of his vehicle, asserting that the arresting officer had no reasonable, articulable suspicion to pull him over. He also asserts that the State failed to prove that the warrantless stop was justified at a suppression hearing in Magistrate Court.

However, the stop was justified under the community caretaker doctrine adopted by the Supreme Court. A domestic battery had just occurred and the potentially dangerous suspect was on the loose in the neighborhood. It was in the middle of the night (approximately 3:00 a.m.) and the Petitioner was the only vehicle in the area at the time. The only reason the Petitioner was stopped was so the officer could inquire if he had seen the battery suspect. It was at that time, Petitioner was discovered to be intoxicated and driving without an active license.

Furthermore, sufficient evidence was introduced at the suppression hearing that justified why the officer stopped Petitioner. Even though the arresting officer did not testify at the hearing, his reason for the stop was brought to light by the Petitioner himself while cross-examining another officer. Thus, Petitioner's conviction should be upheld.

II.

SUMMARY OF THE ARGUMENT

First, the community caretaker doctrine gives officers the ability to take action to ensure the safety and welfare of the community at large. It serves as an exception to the warrant requirement. In this case, the community caretaker doctrine applied to the stop of the

Petitioner's vehicle without a warrant. The officer's only purpose for stopping Petitioner was to ask him if he had seen a potentially dangerous suspect who was on the loose in the area. This inquiry by the officer served to protect the public by potentially aiding the officer in apprehending the suspect.

Second, sufficient evidence was introduced at the suppression hearing to demonstrate why Petitioner was stopped, i.e., to inquire if he had seen the suspect on the loose. Though the arresting officer himself did not testify at the hearing, the Petitioner elicited testimony from a different officer, Oziemblowski, that explained the arresting officer's actions. Initially, the Petitioner objected to Oziemblowski's description of the arresting officers reasoning on the basis of hearsay. But, not soon after, Petitioner himself questioned Oziemblowski about the arresting officer's reasoning to prove the truth of the matter asserted. In other words, Petitioner objected to the Oziemblowski's hearsay, then turned around and elicited the same hearsay from Oziemblowski. Thus, Petitioner waived his objection and the testimony was admissible.

Finally, much of this analysis was not used by the lower court in arriving at its decision. This analysis is first discussed in this appeal based on the facts in the record as applied to the relevant law. This approach is lawful because the Supreme Court has long said that it may affirm a judgment from a lower court when it appears that the judgment is correct from the facts in the record, regardless of the lower court's basis for its judgment.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is ripe for decision by memorandum opinion as the law contemplated within Petitioner's Assignments of Error is well settled. Oral Argument is unnecessary in this matter, as the case is adequately presented by the briefs and appendix. The decision process would not be

aided by oral argument. However, if the Court deems oral argument to be necessary, it would be appropriate for Rule 19 argument.

IV.

ARGUMENT

A. AS A MATTER OF LAW, THE CIRCUIT COURT'S ORDER AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS WAS PLAIN ERROR — THE STATE FAILED TO SATISFY ITS BURDENS AT THE MOTION HEARINGS.

Despite Petitioner's contention, sufficient and admissible evidence was introduced at the suppression hearing to satisfy the burden of proof.

Pursuant to Syllabus Point 3 of *State v. Smith*, "Where a party objects to incompetent evidence, *but subsequently introduces the same evidence*, he is deemed to have waived his objection...." Syl. Pt. 3, 178 W. Va. 104, 358 S.E.2d 188 (1987). (emphasis added)

Under the current facts, Petitioner argues that the State introduced evidence from only Officer Oziemblowski at the suppression hearing. Petitioner argues that Oziemblowski did not perform the traffic stop that is the heart of his appeal; and therefore, could not offer sufficient testimony to as to why Petitioner was actually stopped:

10. The State failed to put forth any evidence at the November 12, 2013 motion hearing, and called (over Petitioner's objection) (A.R. 15) Oziemblowsky as its only witness at the January 27, 2014 motion hearing – an officer who did not observe Petitioner driving, who did not observe the traffic stop and who arrived on scene after the stop had been completed. (A.R. 52-53)

Petitioner's Brief, Pg. 11.

Oziemblowski tried to testify as to why the arresting officer stopped Petitioner, but Petitioner objected during the hearing on the basis of hearsay:

11 Did Deputy McRobie tell you anything else
12 about his stop?

13 A. I don't know.

14 Q. So what he told you about the stop was
15 that he just thought it was suspicious that he
16 was --

17 MR. SIMMS: I object, your Honor.
18 That's blatant hearsay.

Oziemblowski Testimony, Appendix, Pg. 49.

22 MR. SIMMS: It's -- the prosecuting
23 attorney is attempting to ask this officer what
24 another officer saw. That's hearsay. We can't

1 allow that.

Oziemblowski Testimony, Appendix, Pg. 49-50.

Petitioner was likely correct that Oziemblowski's testimony was hearsay. But, on cross-examination of Oziemblowski, Petitioner starts eliciting the very hearsay that he objected to a few minutes later:

1 And so you were also present -- is it not
2 your understanding, Deputy, that the entire reason
3 that Deputy McRobie stopped Mr. Feicht's vehicle
4 was to ask him if he had seen any pedestrians in
5 the area?
6 A. That is part of the reason, yes.
7 Q. Is that -- that was, indeed, Deputy
8 McRobie's entire reason, was it not?
9 A. In the testimony that I have heard from
10 the DMV hearing, that -- that is what he is saying
11 his entire reasoning is.
12 MR. SIMMS: I don't have any further
13 questions, Magistrate.

Oziemblowski Testimony, Appendix, Pg. 53.

So, it is correct that 1) the State did not call the arresting officer that pulled over Petitioner; and 2) the officer who did testify was using hearsay to explain why the arresting officer did what he did. However, after Petitioner correctly objected to this hearsay, he immediately begins eliciting the hearsay himself. Moreover, Petitioner was not doing this to further discredit the hearsay. Instead, Petitioner was actually attempting to get the evidence for the truth of the matter, i.e., why the unavailable officer pulled Petitioner over. As a result, the hearsay testimony from Oziemblowski is admissible and will serve to satisfy the State's burden of proof. (Why it satisfies the burden of proof will be briefed in the next few sections. But for the sake of this section, Oziemblowski's hearsay testimony is admissible.)

It should be noted that the lower court did not utilize the above analysis to reach its conclusion. However, the analysis should serve to uphold the lower court's decision anyway. Pursuant to *Barnett v. Wolfolk*, "this Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record,

regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.” Thus, the analysis above is correct and sufficient to uphold the conviction of the Petitioner. Syl. Pt. 3, 149 W. Va. 246, 140 S.E.2d 466 (1965).

B. THE CIRCUIT COURT IMPROPERLY CONSIDERED TRIAL TESTIMONY IN AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS.

Petitioner is correct in stating that the lower court relied on the arresting officer’s trial testimony instead of looking to the testimony from the suppression hearing. However, the analysis described above in Response to Assignment of Error No. 1 demonstrates why the testimony from the suppression hearing was sufficient despite the arresting officer being unavailable. To briefly reiterate, the officer who arrived after the Petitioner was stopped (i.e. Oziembowksi), attempted to testify why the arresting officer executed the stop. Petitioner objected that the testimony was hearsay. But then, on cross-examination of Oziembowksi, the Petitioner elicited the very hearsay testimony that he objected to. What is more, he elicited the testimony from Oziembowksi to prove the truth of the matter asserted, i.e., why the arresting officer stopped the Petitioner. As a result, Petitioner waived his hearsay objection. Therefore, the reason the arresting officer stopped Petitioner became admissible evidence. Thus, the arresting officer’s trial testimony regarding why he stopped the Petitioner is unneeded.

Again, whether the arresting officer’s reason for stopping Petitioner was lawful will be discussed in the next section. For now, the important point is that evidence of why Petitioner was stopped was introduced at the suppression hearing and was admissible.

C. EVEN IF IT WAS PROPER TO CONSIDER TRIAL TESTIMONY IN REVIEWING PETITIONER'S MOTION TO SUPPRESS, AS A MATTER OF LAW, NO REASONABLE, ARTICULABLE SUSPICION EXISTED TO JUSTIFY PETITIONER'S TRAFFIC STOP.

Evidence introduced at the suppression hearing established that the arresting officer's stop of the Petitioner was lawful under the "community caretaker doctrine". Thus, the State does not have to prove that a reasonable, articulable suspicion existed to justify the stop.

Pursuant to *Ullom v. Miller*, the Supreme Court stated that it was "necessary to establish specific requirements for applicability of the community caretaker exception to ensure that the privacy expectations of West Virginia's citizens are balanced with the immediate safety and welfare needs of motorists or the public *in situations where the immediate safety and welfare of citizens is reasonably at issue.*" 227 W. Va. 1, 12, 705 S.E.2d 111, 122 (2010) (emphasis added). The Court developed the following factors to be proved by the State in order for an encounter to fall within the doctrine:

1. Given the totality of the circumstances, a reasonable and prudent police officer would have perceived a need to promptly act in the proper discharge of his or her community caretaker duties;
2. Community caretaking must be the objectively reasonable, independent and substantial justification for the intrusion;
3. The police officer's action must be apart from the intent to arrest, or the detection, investigation, or acquisition of criminal evidence; and
4. The police officer must be able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion. *Id.*

Under the current facts, an emergency call was placed by a victim of a domestic battery. The first officer on the scene arrived and was told by the victim that the suspect had fled on foot:

11 Q. Okay. Exactly what was the nature of the
12 call?
13 A. It was a domestic dispute. I believe that
14 is was dispatched as a physical domestic dispute.
15 The male subject involved had fled the area on
16 foot. He had fled the area from Greenbag Road.
17 When officers arrived and spoke with the female
18 party --

Appendix, Pg. 46.

The first officer began searching for the suspect in the surrounding neighborhoods where the suspect was believed to have fled. *Appendix, Pg. 47, line 16.* Then, this officer stopped the Petitioner in his car to ask him if he had seen the fleeing suspect:

1 And so you were also present -- is it not
2 your understanding, Deputy, that the entire reason
3 that Deputy McRobie stopped Mr. Feicht's vehicle
4 was to ask him if he had seen any pedestrians in
5 the area?
6 A. That is part of the reason, yes.
7 Q. Is that -- that was, indeed, Deputy
8 McRobie's entire reason, was it not?
9 A. In the testimony that I have heard from
10 the DMV hearing, that -- that is what he is saying
11 his entire reasoning is.
12 MR. SIMMS: I don't have any further
13 questions, Magistrate.

Appendix, Pg. 53.

Now, to apply these facts to the elements in *Ullum*:

1. The officer who stopped Petitioner perceived the need to promptly act as a community caretaker because there was a criminal on the loose who had just committed a violent act.

The community at large was at risk with this type of individual roaming and potentially looking to commandeer a car, a house, or other shelter to avoid detection.

2. The community caretaking was objectively reasonable, independent, and substantially justified stopping the Petitioner. Again, with a violent individual roaming the darkness of the neighborhood at 3:00 a.m. (*Appendix, Pg. 25*), an objective officer would understandably stop the only car in the area (*Appendix, Pg. 32*) to seek information that could lead to apprehending the suspect.

3. The actions of the officer who stopped Petitioner were apart from intent to arrest, detect, investigate, or acquire evidence on the Petitioner. The testimony is clear that the officer stopped Petitioner for the sole purpose of asking him if he knew the whereabouts of the suspect.

(It's unclear if this factor requires intent to arrest, detect, investigate, or acquire evidence *specifically on the Petitioner* as opposed to a general intent to arrest, detect, or investigate *any crime or suspect*. The Respondent believes it makes more sense that the intent to arrest, detect, investigate, or acquire evidence must be targeted at the person being stopped, such as the Petitioner. Otherwise, an officer could never use the community caretaker doctrine because any inquiries to the public for the purpose of investigation would be barred by this factor.)

4. The officer who stopped Petitioner clearly articulated the facts to warrant stopping Petitioner. It's undisputed that there was reason to believe a violent act was committed. It's undisputed that there was a reasonable belief the suspect fled on foot. It's undisputed that it was the middle of the night and Petitioner was the only vehicle in the area where the suspect was on the loose. And, it's undisputed that the officer stopped Petitioner to ask if he had seen the suspect.

In all, the factors in support of the community caretaker doctrine are satisfied in favor of the State. The doctrine alleviated the need for the officer to have an articulable suspicion of criminal activity before stopping the Petitioner. The officer was trying to locate a potentially dangerous individual on the loose in the middle of the night under emergency circumstances. The stop of Petitioner to seek information was to the benefit of the community at risk.

Again, it must be noted that the community caretaker doctrine was not the basis of the lower court's decision to uphold the stop of Petitioner. But nevertheless, the community caretaker doctrine applies under these facts and the State may proffer the correct analysis to

justify the lower court's decision as long as it is supported by the record. See: *Barnett v. Wolfolk*, Syl. Pt. 3, 149 W. Va. 246, 140 S.E.2d 466 (1965).

D. THOUGH THERE WAS NO ISSUE OF STANDING, THE CIRCUIT COURT IMPROPERLY HELD THAT IT WAS PETITIONER'S BURDEN TO PROVE THAT HIS FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE CHALLENGED SEIZURE

This Assignment of Error is rendered inapplicable because of the new analysis undertaken in the previous three assignments. Regardless of whether the lower court was right or wrong in stating that the Petitioner had the burden of proof, the State satisfied the burden at the suppression hearing. To briefly reiterate, evidence was introduced by Petitioner showing that the officer who stopped Petitioner intended to ask him if he'd seen a suspect who committed a violent act and was on the loose. That evidence was sufficient to prove the elements of the community caretaker doctrine. And, all this evidence was brought out at the suppression hearing. Thus, there was ample law and facts to uphold the stop of Petitioner's car on the night in question and the law and facts were brought to light at the suppression hearing. Petitioner's conviction should be upheld.

V.

CONCLUSION

The Respondent respectfully requests that the Supreme Court uphold the lower court's decisions to uphold the Petitioner's Magistrate Court conviction.

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Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

CERTIFICATE OF SERVICE

I, NIC DALTON, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *RESPONDENT'S BRIEF* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 22nd day of June, 2015, addressed as follows:

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