

3-27-19
Office of Admin

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA T Kupec

q Morrissett/Janet James

JERRY W. STIRE,

Petitioner,

v.

Civil Action No. 18-P-103-3

Judge James A. Matish

**PAT S. REED, Commissioner,
West Virginia Division of
Motor Vehicles,**

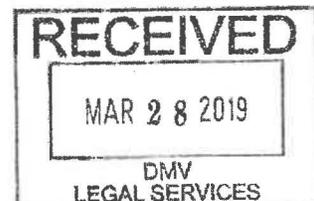
Respondent.

**ORDER GRANTING PETITION FOR APPEAL
AND REVERSING FINAL ORDER**

Pending before the Court is Petitioner's Petition for Review of Final Order, filed by counsel Thomas W. Kupec on June 21, 2018. Respondent filed, by counsel Janet James, a Notice of Special Appearance and Motion to Dismiss Petition for Review of Final Order.

A hearing was held in this matter on July 5, 2018, at which time the Court granted counsel for the Respondent additional time to review the Petition for Review of Final Order and Motion to Stay Revocation, as she alleged the Respondent had not properly been served. Another hearing was held on July 24, 2018, whereupon the Court heard testimony of the Petitioner regarding his motion to stay the entry of the Order of Revocation entered against him by the Office of Administrative Hearings on May 30, 2018. The Court determined that Petitioner had a substantial chance of prevailing on the merits, and that he would be irreparably harmed if a Stay was not entered. Therefore, the Court ordered a Stay of the Revocation for 150 days.

Another hearing was held in this matter on November 30, 2018, at which the Court ordered the parties to correct errors in the designation of the record from the administrative



proceedings below. A hearing was then held on March 1, 2019, at which the Court heard oral arguments on this matter.

After hearing arguments and reviewing the parties' submissions, the court file, and pertinent legal authority, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. At approximately 12:40 a.m. on June 12, 2014, Officer J.S. Billie of the Shinnston Police Department entered the parking lot of the Subway restaurant located at the southern corporate limits of Shinnston, West Virginia.
2. Several minutes later, Officer Billie heard a car door open, and observed Petitioner exiting the driver's side door of a vehicle in the parking lot of the nearby 7-Eleven convenience store, which is outside the corporate limits of Shinnston.
3. Officer Billie claimed to have seen Petitioner stumble into the side of the motor vehicle, "paw at the air," and stagger while walking into the 7-Eleven store.
4. Officer Billie then exited his vehicle and walked into the 7-Eleven, where he saw Petitioner speaking with the store clerk.
5. Officer Billie introduced himself to Petitioner, and claims that Petitioner smelled like alcohol, had bloodshot eyes, and had slurred speech. Officer Billie asked Petitioner if he had consumed alcohol that night, and whether he had driven to the 7-Eleven. Petitioner then replied that Officer Billie had not seen him drive, and was outside of his jurisdiction. Officer Billie then told Petitioner that according to West Virginia Code § 17C-5-2, he could approach a driver anywhere in the state of West Virginia.¹

¹ § 17C-5-2 prohibits driving under the influence anywhere in the state, but does not say that any law enforcement officer is permitted to arrest someone for driving under the influence anywhere in the state.

6. Petitioner agreed to a field sobriety test, which Officer Billie conducted inside the 7-Eleven. However, Petitioner refused a preliminary breath test. Based on the field sobriety test and Petitioner's refusal of a preliminary breath test, Officer Billie then arrested Petitioner for driving under the influence. Petitioner also refused a secondary chemical test. Petitioner signed an implied consent form acknowledging that he understood that his license could be revoked for refusing the secondary chemical test.
7. While at the jail, Officer Billie did a post-arrest interview with Petitioner. Petitioner denied being under the influence of alcohol, controlled substances, or drugs, but refused to sign the interview.
8. The criminal charges against Petitioner for driving under the influence, case number 14-M-1499, were dismissed in the Magistrate Court of Harrison County, West Virginia, by order dated October 2, 2014.
9. On July 1, 2014, the DMV revoked Petitioner's driving privileges for driving under the influence (hereinafter "DUI") and for refusing to submit to a secondary chemical test.
10. Petitioner timely requested an administrative hearing from the Office of Administrative Hearings (hereinafter "OAH"). The OAH hearing was held on March 24, 2015. The arresting officer testified at the hearing.
11. The OAH entered a Final Order on May 31, 2018, upholding the DMV's revocation of Petitioner's driving privileges for DUI and refusal to submit to a secondary chemical test.²

² In a recent opinion by the West Virginia Supreme Court of Appeals, the Court noted that "extreme delay" in OAH actions have the potential to create substantial harm. *Reed v. Winesburg*, No. 17-0834, 2019 WL 1104619 (W. Va. Mar. 6, 2019). In *Winesburg*, the OAH hearing occurred almost four and a half years after the petitioner's arrest. Although *Winesburg* dealt with a delay between an arrest and a hearing, this Court notes the "extreme delay" in an issuance of a decision after the OAH hearing in this matter. The OAH's decision was not issued for over three years after the hearing was held. According to *Winesburg*, license revocations are intended to protect the public; Petitioner's revocation did not go into effect until ten days after the OAH's final order, nearly four years after the alleged offense. Such a delay appears to go against a revocation's purpose of protecting the public. However, as in

12. Petitioner alleges that the revocation of his driver's license was in error because Officer Billie was outside his jurisdiction and therefore the arrest was not lawful, Officer Billie did not see Petitioner drive or consume alcohol, Petitioner was not under the influence, and that the OAH's findings of fact are clearly wrong.
13. Respondent presents several arguments in response: that Petitioner's refusal to submit to a secondary chemical test is a sufficient independent reason for revocation; that Officer Billie was within his jurisdiction because he was outside the municipality but still in the county; that Officer Billie's belief that he had jurisdiction to investigate a DUI anywhere in the state was a reasonable mistake of law; that Officer Billie was not required to have seen Petitioner driving in order to arrest him for DUI; and that Officer Billie's encounter with Petitioner was justified under the "community caretaker" doctrine.

CONCLUSIONS OF LAW

The standard of review for circuit court's review of an administrative order is as follows:

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decisions or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted abuse of discretion.

Winesburg, Petitioner did not raise the delay as an assignment of error, and the parties have not cited any specific facts that indicate the delay was prejudicial.

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W. Virginia Human Rights Comm'n*, 172 W. Va. 627, 628, 309 S.E.2d 342, 343 (1983).

Petitioner first argues that Officer Billie was outside his jurisdiction at the 7-Eleven, and therefore the arrest was unlawful. Respondent offers several arguments for why the arrest was lawful. Respondent cites W.Va. Code § 8-14-3, which sets forth that “[i]n order to arrest for the violation of municipal ordinances and as to all matters arising within the corporate limits and coming within the scope of his official duties, the powers of any chief, policeman or sergeant shall extend anywhere within the county or counties in which the municipality is located, and any such chief, policeman or sergeant shall have the same authority of pursuit and arrest beyond his normal jurisdiction as has a sheriff.” Respondent claims that the language of § 8-14-3 gave Officer Billie the jurisdiction to make a lawful arrest at the 7-Eleven because, although he was beyond the corporate limits of the municipality, he was still in the county in which the municipality is located. However, the language of § 8-14-3 clearly refers to “all matters arising *within the corporate limits*” (emphasis added). Although extraterritorial arrests have been upheld under § 8-14-3, courts have made a clear distinction between extraterritorial arrests for offenses committed within the officer’s jurisdiction and offenses committed outside the corporate limits of a municipality. *State v. McCraine*, 214 W. Va. 188, 196, 588 S.E.2d 177, 185 (2003), overruled on other grounds by *State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014); *State ex rel. State v. Gustke*, 205 W. Va. 72, 78, 516 S.E.2d 283, 289 (1999).

In this case, Officer Billie did not arrest Petitioner because of an offense committed within Shinnston city limits. Although Officer Billie observed Petitioner from a nearby parking lot that was within the city limits, at all relevant times Petitioner was at the 7-Eleven, located

outside of Shinnston city limits. Therefore, Officer Billie did not have the jurisdiction for an extraterritorial arrest under § 8-14-3.

Respondent next cites *State ex rel. State v. Gustke*, in which the West Virginia Supreme Court of Appeals upheld an extraterritorial arrest for an offense observed by a municipal police officer outside of his jurisdiction. In *Gustke*, it was established that “a police officer who is without *official* authority to make an arrest may nevertheless make the arrest if the circumstances are such that a private citizen would have the right to arrest either under the common law or by virtue of statutory law.” *State ex rel. State v. Gustke*, 205 W. Va. at 78, 516 S.E.2d at 289 (emphasis in original). A private citizen may only make an arrest for a misdemeanor that constitutes a breach of the peace, such as driving under the influence. *Id.* at 80. Although the extraterritorial arrest for an extraterritorial offense was upheld in *Gustke*, the circumstances were quite different than those in the case at hand. In *Gustke*, a Parkersburg city police officer who was outside Parkersburg city limits observed a vehicle being driven erratically and weaving from lane to lane. In this case, Officer Billie observed Petitioner exit a parked vehicle that had been stationary and turned off for at least four to five minutes. At no time did Officer Billie see Petitioner driving a vehicle. Therefore, this Court finds that *Gustke* does not apply to the circumstances of this case.

Respondent’s next argument relates to Officer Billie’s misunderstanding of the language of § 17C-5-2. Respondent claims that Officer Billie’s mistaken belief that he could arrest someone for driving under the influence anywhere in West Virginia was a reasonable mistake of law, and therefore any evidence obtained because of that mistake should not be suppressed under *Heien v. North Carolina*, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014). However, the Court is not

persuaded that it was reasonable for a municipal police officer to believe he was authorized to make arrests anywhere in the state.

Respondent next correctly points out that an officer is not required to actually see someone driving to arrest them for DUI. *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375, at *3 (W. Va. Apr. 10, 2014). As long as the surrounding circumstances “indicate the vehicle could not otherwise be located where it is unless it was driven there by that person,” it is reasonable for an officer to believe that a person has been driving while under the influence. *Carte v. Cline*, 200 W. Va. 162, 167, 488 S.E.2d 437, 442 (1997). Frequently in such cases, there has been an accident or a suspect is intoxicated and inside a vehicle, often with the engine still running or the keys in the ignition. *Id.*; *Dale v. Reynolds*, 2014 WL 1407375; *Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010); *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004); *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). However, an officer need not actually observe someone behind the wheel; driving while under the influence may be inferred from other circumstances as well. *Cain v. W. Virginia Div. of Motor Vehicles*, 225 W. Va. 467 694 S.E.2d 309 (2010) (holding that there was sufficient evidence to infer that the suspect had been driving under the influence when he was passed out asleep on the ground by his car, and told the officer he was “just trying to get home.”).

In this case, Petitioner had been sitting in a vehicle for at least four to five minutes before Officer Billie noticed him getting out of the vehicle. Petitioner did not say that he was going somewhere or that he had been driving, nor did he say how long he had been at the 7-Eleven. There is no evidence in the record that the vehicle was running or that the keys were in the ignition, or that the vehicle had recently arrived. *Reed v. McGrath*, No. 15-1147, 2017 WL 227870, at *1 (W. Va. Jan. 19, 2017) (noting that there was no evidence that the petitioner’s

headlights were on, or that the engine was warm or had been running). Therefore, the facts of this case are not analogous to cases in which an officer has properly inferred from the circumstances that an individual had been driving under the influence.

The Respondent also argues that Officer Billie was justified in approaching the Petitioner under the “community caretaker” doctrine. The community caretaker doctrine recognizes that law enforcement officers have “community safety and welfare duties beyond their criminal investigatory duties.” *Ullom v. Miller*, 227 W. Va. 1, 11, 705 S.E.2d 111, 121 (2010). Under the community caretaker doctrine, an officer acting out of concern for citizens who may be in peril may initiate warrantless encounters with the public. To fall under the community caretaker exception, the State must show the following:

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. at 12.

Examples of circumstances in which “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,” and there existed a “objectively reasonable, independent and substantial justification for

the intrusion” include: the scent of gas, ammonia, and other toxic fumes emanating from a home (*State v. Deneui*, 2009 S.D. 99, ¶ 47, 775 N.W.2d 221, 241); vehicle accidents (*S. Dakota v. Opperman*, 428 U.S. 364, 369, 96 S. Ct. 3092, 3097, 49 L. Ed. 2d 1000 (1976)); an unconscious girl inside a van matching the description of a vehicle involved in the disappearance of an underage female (*United States v. Parks*, 902 F.3d 805, 809 (8th Cir. 2018)); a vehicle pulled over on the shoulder of a busy four-lane highway (*People v. McDonough*, 239 Ill. 2d 260, 273, 940 N.E.2d 1100, 1109 (2010)); a defendant who was found “slumped over the driver’s seat” within minutes of parking his car (*People v. Winchester*, 2016 IL App (4th) 140781, ¶ 57, 66 N.E.3d 601, 614); and an officer who searched a defendant’s backpack for medication while the defendant was having a seizure (*Owens v. State*, 2012 WY 14, ¶ 14, 269 P.3d 1093, 1097 (Wyo. 2012)).

In contrast, “the community caretaker exception does not apply unless the officers’ actions in question are ‘totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.’” *United States v. Gordon*, 339 F. Supp. 3d 647, 663 (E.D. Mich. 2018) (internal citations omitted). At the OAH hearing, Officer Billie testified that he “felt like [he] needed to approach the [Petitioner] at that point in time,” and that one of the first things he said to Petitioner was, “have you been consuming alcohol tonight?” The only thing Officer Billie observed before approaching Petitioner was Petitioner stumbling and “pawing at the air.” Officer Billie did not testify that he thought Petitioner was in immediate peril or having a medical emergency, nor do the circumstances appear that “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.” *Ullom v. Miller*, 227 W. Va. at 12, 705 S.E.2d at 121. Officer Billie’s actions instead seem to be more directed towards “the intent to arrest, or the

detection, investigation, or acquisition of criminal evidence.” *Id.* Officer Billie’s actions and testimony indicate that he was investigating a possible DUI, rather than acting out of fear for Petitioner’s safety and welfare.

Additionally, at the March 1, 2019 hearing before this Court, counsel for Respondent admitted that Officer Billie acted on a hunch. In *State v. Dunbar*, 229 W. Va. 293, 728 S.E.2d 539 (2012), the West Virginia Supreme Court of Appeals held that “[a] ‘hunch’ falls far short of the ‘articulable reasonable suspicion’ standard that an officer must demonstrate to prolong a traffic stop.” While *State v. Dunbar* dealt with whether a prolonged traffic stop was justifiable, the “articulable reasonable suspicion” standard is similar to the community caretaker doctrine’s requirement that an officer be able to “articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion.” *Ullom v. Miller*, 227 W. Va. at 12, 705 S.E.2d at 121. Therefore, considering Officer Billie’s reasons for approaching Petitioner, Respondent’s community caretaker argument also fails.

Respondent points out that regardless of the revocation for DUI, refusal to submit to a secondary chemical test is, on its own, sufficient reason to justify a revocation under § 17C-5-4. However, § 17C-5-4 also provides that a secondary chemical test is “incidental to a lawful arrest.” For the aforementioned reasons, the Court has determined that Petitioner’s was not a lawful arrest; therefore, the refusal to submit to a secondary chemical test may not be a basis for the revocation of Petitioner’s driver’s license.

ORDER

For the foregoing reasons, it is therefore **ORDERED** that Petitioner’s “Petition for Review of Final Order” is hereby **GRANTED**. It is further **ORDERED** that the OAH’s Final

Order should be and hereby is **REVERSED** in its entirety and Petitioner's driving privileges be reinstated.

The Clerk of this Court is directed to send certified copies of this Order to the following:

Thomas W. Kupec
Kupec & Associates, PLLC
228 Court Street
Clarksburg, West Virginia 26301

Patrick Morrissey, Attorney General
Janet James, Assistant Attorney General
DMV – Office of the Attorney General
P.O. Box 17200
Charleston, West Virginia 25317

Office of Administrative Hearings
300 Capitol Street, 10th Floor
Charleston, West Virginia 25301

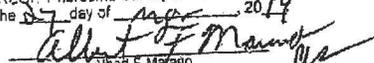
ENTER:

03/27/19 

Judge James A. Matish

STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, TO-WIT:
I, Albert F. Marano, Clerk of the 15th Judicial Circuit and the
18th Family Court Circuit of Harrison County, West Virginia, hereby
certify the foregoing to be a true copy of the ORDER entered in the
above styled action on the 27 day of Mar, 2019

IN TESTIMONY WHEREOF I hereunto set my hand and affix the
Seal of this Court this the 27 day of Mar, 2019


Albert F. Marano
15th Judicial Circuit & 18th Family Court Circuit Clerk
of Harrison County, West Virginia