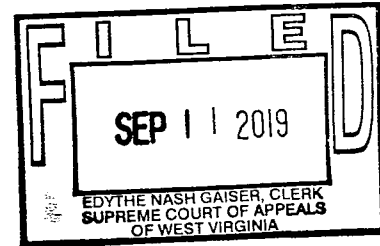


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Docket Number 19-0411



**ADAM HOLLEY, ACTING COMMISSIONER OF
THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

Petitioner,

vs.

JERRY W. STIRE,

Respondent.

RESPONDENT'S REPLY BRIEF

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STATEMENT OF THE CASE

The Petitioner's set forth in her, Statement of the Case, her slant of the facts of the case but the Findings of Fact by the Circuit Court are clear and concise and applicable to the issues of this particular case, which is fact driven.

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 (5-7 minutes), Office Billie heard a car door open, and observed the Respondent 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 Respondent 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 Respondent speaking with the store clerk.

5. Officer Billie knew that he was outside of his jurisdiction when he walked into the 7-Eleven where he first encountered the Respondent.

6. Officer Billie introduced himself as a police officer to the Respondent, and claims that Respondent smelled like alcohol, had bloodshot eyes, and had slurred speech. Officer Billie asked Respondent if he had consumed alcohol that night, and whether he had driven to the 7-Eleven. Respondent then replied that Officer Billie had not seen him drive, and that he was outside of his jurisdiction. Officer Billie then told Respondent that according to West Virginia Code § 17C-5-2, he could approach a driver anywhere in the State of West Virginia.

7. After being told by Officer Billie that he needed to perform field sobriety tests, Respondent agreed to some field sobriety tests, which Officer Billie conducted inside the 7-Eleven. The officer testified that it was questionable that the Respondent failed the tests. However, Respondent refused a preliminary breath test. Based on the field sobriety test and Respondent's refusal of a preliminary breath test, Officer Billie then arrested Respondent for driving under the influence. Respondent also refused a secondary chemical test.

8. While at the jail, Officer Billie did a post - arrest interview with Respondent. Respondent denied being under the influence of alcohol, controlled substances, or drugs, but refused to sign the interview.

9. The criminal charge against Respondent 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, because it was acknowledged that Officer Billie was out of his jurisdiction.

10. On July 1, 2014, the DMV revoked Respondent's driving privileges for driving under the influence (hereinafter "DUI").

11. Respondent 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. No records relative to this case were introduced into evidence in that proceeding.

12. Over three (3) years later, the OAH entered a Final Order on May 31, 2018, upholding the DMV's revocation of Respondent's driving privileges for DUI and refusal to submit to a secondary chemical test.

13. Respondent has taken the position since his first encounter with Officer Billie that he was outside his jurisdiction and therefore the arrest was not lawful. Further, it is clear that Officer Billie did not see Respondent drive or consume alcohol. There is no evidence, other than Officer Billie's testimony, that the Respondent was under the influence of alcohol.

14. Petitioner presents several arguments in her brief: that Respondent's refusal to submit to a secondary chemical test was a sufficient independent reason for revocation; that Officer Billie was within his jurisdiction because he was outside the municipality but still in Harrison 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 Respondent driving in order to arrest him for DUI; and that Officer Billie's encounter with Respondent was justified under the "community caretaker" doctrine.

15. It is undisputed that Officer Billie was outside his jurisdiction, that he knew he was outside of his jurisdiction, that he did not see the Respondent within his jurisdiction, that he did not see the Respondent drive a motor vehicle and that he did not call any other law enforcement officer, with jurisdiction, to assist him in the arrest.

SUMMARY OF ARGUMENT

The Petitioner wants to argue that W.Va. Code §17C-5A-2 and W.Va. Code §17C-5-2 and W.Va Code §17C-5-4(b) and (c), somehow gives any and all officers within or without their jurisdiction to arrest someone if they have reasonable grounds to believe that a person has driven under the influence. These code sections do not give a blanket right to all officers to arrest for DUI but just establishes what the law is (§17C-5-2); The DMV hearing process (§17C-5A-2); and further, §17C-5-4(b) states that “*A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has reasonable cause to believe a person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.*” It appears that because this statute says “a law enforcement officer” the Petitioner wants to make the argument that the jurisdiction provisions of the State of West Virginia do not apply.

Certainly the jurisdiction limitations of police officers as established by statute are reasonable and necessary. W.Va. Code §8-14-3 is entitled “Powers, authority and duties of law - enforcement officials and policemen.” It sets forth the basis from which the Petitioner claims that Officer Billie had jurisdiction. However, there is a clear distinction between arrest made outside of the jurisdiction for offenses committed within the officer’s jurisdiction and offenses committed outside the corporate limits of the municipality. See, *State v. McCraine*, 214 W.Va. 188, 196, 588 S.E. 2d 177, 185 (2003), *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, there is no evidence, whatsoever, that an offense was committed within the Shinnston City limits. In fact, the only evidence presented was

that all of Officer Billie's actions took place outside the jurisdictional limits of Shinnston and that the Respondent was never even alleged to have been in the City of Shinnston. This code section specifically sets forth the jurisdiction limits of a municipal police officer. Clearly, Officer Billie was outside his jurisdiction.

The Petitioner next argues that Officer Billie was justified in approaching the Respondent under the community caretaker doctrine. The community caretaker doctrine recognizes that law enforcement officers have community safety and welfare duties beyond their criminal investigation duties. See, *Ullom v. Miller*, 227 W.Va. 1, 11, 705 S.E. 2d 111 (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 Petitioner 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 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 [Respondent] at that point in time,” and that one of the first things he said to Respondent was, “have you been consuming alcohol tonight?” The only thing Officer Billie observed before approaching Respondent was Respondent stumbling and “pawing at the air.” Officer Billie did not testify that he thought Respondent 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 Respondent’s safety and welfare.

Additionally, at the March 1, 2019, hearing before the Circuit Court of Harrison County, Counsel for Petitioner 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 short of the ‘articulate 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 Respondent, Petitioner’s community caretaker must fail. Further, the “community caretaker doctrine” does not grant jurisdiction to a municipal police officer outside of his jurisdiction.

Next the Petitioner wants to argue because the investigating officer did not know the law, that somehow or another that would make it a lawful arrest. The cases that she cites talk about the introduction of evidence, not the lawfulness of the arrest and Officer Billie’s lack of knowledge of the law should not in any way be able to give him more jurisdiction than the laws of the State of West Virginia provide.

The Petitioner next wants to rely upon *State v. Gustke*, 205 W.Va. 72, 516 S.E.2d 283 (1999). The facts of that case are so far removed from the facts of this case that it is hard to believe that the

Petitioner would want to rely upon that case for precedence. In fact, it appears that the DMV has taken the position that this case gives all law enforcement officers acting outside his or her territorial jurisdiction the authority to arrest for DUI's. That is not the finding of "*Gustke*", nor should it be. In *Gustke* it was clear that the Defendant was driving in such a manner to create a true hazard to those around him to justify a stop, the vehicle was being driven erratically and weaving from lane to lane and further in *Gustke* that officer called in support from an officer who had jurisdiction. Certainly no citizen would have had the right to arrest the Respondent in this case because he was sitting in a car for over five (5) minutes, got out and stumbled as he entered into a convenience store and had a conversation with a clerk. There was "no breach of the peace" nor any reason for intervention by anyone, let alone facts which would justify a citizen's arrest.

Lastly, the Petitioner wants to argue that the Court was wrong in not upholding W.Va. Code, 17-C-5-4 concerning a secondary chemical test. However, the code specifically says that it can only be conducted as incidental to a lawful arrest. That Court and this Court should find that the Respondent's arrest was not a lawful arrest and therefore, his refusal to submit to a secondary chemical test cannot be a basis for the revocation of his driver's license. However, even if this Court would determine that it was a lawful arrest, his refusal should not be used against the Respondent because he believed that it was not a lawful arrest based upon the fact that he knew and the officer knew that he was outside of his jurisdiction. If the Court upholds the argument of the Petitioner and modifies or otherwise changes the rule of law then it should not be retroactive back to when the Respondent refused to take the test, because at that time the law would have been that the officer was outside of his jurisdiction and therefore the arrest would not be lawful.

This case is also complicated by the fact that the evidence upon which the Petitioner relies

and the Administrative Judge relies was not introduced into evidence in this case as there was never a motion to introduce any of the documentation, including the implied consent documentation, into evidence in this case and should not have been considered by the hearing examiner or any other Court thereafter.

Further, the hearing examiner refused to allow cross-examination of the investigating officer to show that he was on a "DUI rampage" and had arrested numerous people within a very short period of time, which resulted in numerous dismissal of cases, for his failure to follow the basic rules of the State of West Virginia concerning police officer conduct. Said testimony would have clearly shown that it was no community caretaker doctrine and that there was no mistake of law in this case as the officer was on a personal rampage to obtain as many DUI arrests that he could advance his career.

CONCLUSION

Therefore, the decision of the Circuit Court of Harrison County, West Virginia should be upheld and affirmed.

Respectfully Submitted:



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