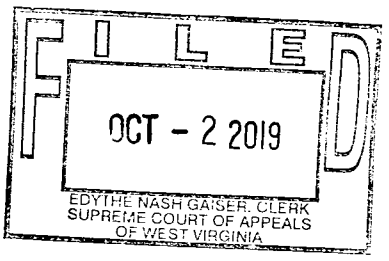
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0411



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

Petitioner,

v.

JERRY W. STIRE,

Respondent.

Honorable James Matish, Judge
Circuit Court of Harrison County
Civil Action No. 18-P-103-3

PETITIONER'S REPLY BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304)558-2522
Janet.E.James@wv.gov

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Community Caretaker

The Investigating Officer's initial encounter with the Respondent was justified under the "community caretaker" doctrine. "The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance." *Ullom v. Miller*, 227 W. Va. 1, 10, 705 S.E.2d 111, 120 (2010).

Here, the Investigating Officer testified that he observed the Respondent get out of his car, "and, at first, it didn't really seem like much," running into the back of his car, "I didn't think much of that either," and then the Respondent "pawed at the air" and began walking toward the 7-Eleven. A.R. at 156. The Respondent staggered a little bit, "and I thought, well, that's weird" and he staggered once more on the sidewalk. A.R. 157. The Investigating Officer testified, "[I]t just didn't sit right with me what I had seen, and so I thought at the time, I thought, well, I'm going to go check this out." *Id.* The Investigating Officer went into the store and introduced himself to the Respondent and said, "Good evening sir, how are you?" *Id.* After the Investigating Officer observed that the Respondent had bloodshot eyes and the odor of alcohol, the Investigating Officer asked him, "Have you been consuming alcohol tonight?" The Investigating Officer told the Respondent that he had seen him run into the back of his car and stagger twice, and asked "Are you okay?" *Id.*

The Investigating Officer's initiation of contact with the Respondent was objectively reasonable, independent and substantial justification for the intrusion. The Respondent was behaving strangely. In adopting the community caretaker doctrine in West Virginia, this Court noted: "formally recognizing the expectation in West Virginia that the role of law enforcement personnel

is not limited to merely to the detection and prevention of criminal activity, but also encompasses a non-investigatory, non-criminal role of police officers to help to ensure the safety and welfare of our citizens." *Ullom* at 227 W. Va. 11, 705 S.E.2d 121. "As many courts have acknowledged, 'police officers are not only permitted, but expected, to exercise what the Supreme Court has termed 'community caretaking functions." *Winters v. Adams,* 254 F.3d 758, 763 (8th Cir.2001) (quoting *United States v. King,* 990 F.2d 1552, 1560 (10th Cir.1993)). Professor LaFave observed, '[d]oubtless there are an infinite variety of situations in which entry for the purpose of rendering aid is reasonable.' 3 Wayne R. LaFave, *A Treatise on the Fourth Amendment,* 3 Search & Seizure § 6.6, p. 396–400 (3d. ed. 1996). Modern society has come to see the role of police officers as more than basic functionaries enforcing the law. From first responders to the sick and injured, to interveners in domestic disputes, and myriad instances too numerous to list, police officers fulfill a vital role where no other government official can. Lives often depend upon their quick exercise of pragmatic wisdom." *State v. Deneui*, 2009 S.D. 99, ¶ 49, 775 N.W.2d 221, 242.

Indeed, this began as a consensual encounter. "A 'consensual' encounter may occur where a citizen agrees to speak to law enforcement personnel. Such a contact may be initiated by law enforcement without the need of any objective articulable level of suspicion and does not, without more, amount to a 'seizure' raising constitutional protections." *Ullom* at 227 W. Va. 8, 705 S.E.2d 118. "The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning." *State v. Shiffermiller*, 302 Neb. 245, 254, 922 N.W.2d 763, 773 (2019). The Investigating Officer asked the Respondent if he would perform field sobriety testing, and the Respondent replied, "Okay." A.R. at 157. There was no seizure until the Investigating Officer placed

the Respondent under arrest.

The four criteria for the encounter to fall within the community caretaker exceptions were met.

> 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.

Ullom at 227 W. Va. 12, 705 S.E.2d 122. The Investigating Officer observed the Respondent running into his car, pawing at the air and staggering two times before he determined that there was a need to determine whether there was something wrong with the Respondent. His initial contact with the Respondent was to inquire whether he was all right and to explain the reasons for the encounter. The Investigating Officer articulated facts that reasonably warranted the encounter. The encounter was justified under the community caretaker exception to the warrant requirement, and satisfied the reasonableness requirements of the Fourth Amendment of the United States Constitution and Article III, Section 6 of the Constitution of West Virginia, and effected the necessary balance between the privacy expectations of West Virginia citizens and the need for police officers to properly execute their community caretaking duties.

Acting on a Hunch

The circuit court erred in finding that the Investigating Officer needed articulable reasonable

suspicion to encounter the Respondent, and that undersigned counsel's "admission" that the Investigating Officer acted on a hunch is fatal to the community caretaker argument. A.R. 12. At the hearing before the circuit court, DMV counsel was making the point that the officer's initial encounter with the Respondent was not because of suspicion of a crime. It was in conformity with his duties as a community caretaker. A.R. 31.

In *Ullom, supra*, this Court found that the officer appropriately conducted a safety check of the driver as a community caretaker, and that there was no need for reasonable suspicion[1] to justify the encounter. "In these circumstances, a *Terry/Stuart* exception was not initially present." 227 W. Va. 9, 705 S.E.2d 119. *See, State v. Marcello*, 157 Vt. 657, 599 A.2d 357, 358 (1991): "In some circumstances ... police officers without reasonable suspicion of criminal activity are allowed to intrude on a person's privacy to carry out 'community caretaking' functions to enhance public safety."

The circuit court erred in conflating the two standards.

Admission of Agency Documents

The circuit court obviously accepted that the agency documents were admitted into evidence, as it relied thereon in making its order and said nothing to contradict this fact. However, the Respondent raised the issue in *Respondent's Reply Brief.*

This Court has heard appeals of decisions by the Office of Administrative Hearings ("OAH") which involved application of the W. Va. Code § 29A-5-2(b) (1964) and has determined that in

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[1]"Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime...." Syllabus Point 1, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

driver's license revocation proceedings before the OAH, the statement of the investigating officer is admissible under W. Va. Code § 29A–5–2(b) (1964). *See, Dale v. Odum*, 223 W. Va. 601, 760 S.E.2d 415 (2014), upholding Syl. Pt. 3, *Crouch v. W. Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 629 (2006).

In the present case, the order of revocation, the DUI Information Sheet and the Implied Consent Statement were moved into evidence by *Motion for Proposed Evidentiary Submission* on December 31, 2014. A. R. 86-97. At the administrative hearing, counsel for the DMV stated, "the DUI Information Sheet had already been moved into evidence. However, it does not contain a copy of the test strip which is the refusal test strip." A. R. 163. She then moved the Intoximeter printout ticket reflecting the Respondent's refusal to take the breath test into evidence. Counsel for the Respondent had no objection to either the statement that the DMV record had been moved into evdicne or to the admission of the Intoximeter printout. A.R. 163.

In *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540, at *4 (W. Va. Mar. 28, 2014) (memorandum decision), an appeal of a decision of the OAH, this Court determined that "in the context of driver's license revocation proceedings, we have held that the statement of an arresting officer is admissible under West Virginia Code § 29A–5–2. Syl. Pt. 3, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006)." In making its decision, this Court considered that "[a]lthough W. Va. Code § 29A–5–2(a) has made the rules of evidence applicable to DMV proceedings generally, W. Va. Code § 29A–5–2(b) [footnote omitted] has carved out an exception to that general rule in order to permit the admission of certain types of evidence in administrative hearings that may or may not be admissible under the Rules of Evidence, [footnote omitted]. Moreover, inasmuch as we view W. Va. Code § 29A–5–2(a) as a statute pertaining

to the application of the Rules of Evidence to administrative proceedings generally, while W. Va. Code § 29A–5–2(b) specifically addresses the admission of particular types of evidence, W. Va. Code § 29A–5–2(b) would be the governing provision." *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540, at *4 (W. Va. Mar. 28, 2014).

In *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision), this Court reviewed a decision from an administrative hearing conducted by the OAH and determined that

> there is no requirement that the evidence of record be testimonial as opposed to documentary. *See* W. Va. Code § 29A–5–2(b) ("All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference."). *See also* Syl. pt. 3, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) (holding that statements of the arresting officer are admissible in the context of driver's license revocation proceedings); *Dale v. Odum*, —W. Va. ——, —— S.E.2d ——, 2014 WL —— (Nos. 12–1403 & 12–1509 Feb. 11, 2014) (per curiam) (relying on *Crouch* to reinstate a license revocation where the driver argued that the evidence contained in the DUI Information Sheet was inadmissible hearsay).

Fn. 5, No. 13-0266, 2014 WL 1407375.

In *Dale v. Reed*, No. 13-0429, 2014 WL 1407353, at *2 (W. Va. Apr. 10, 2014) (memorandum decision), an appeal of an OAH decision, this Court held that "[u]nquestionably, however, the DUI Information Sheet is admissible, affirmative evidence of its contents." In *Reed v. Craig*, No. 14-0346, 2015 WL 3387982, this Court held:

> In *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) and *Dale v. Odum*, 233 W. Va. 601, 609, 760 S.E.2d 415, 423 (2014), this Court ruled that documents (such as statements of arresting officers) that are not typically admissible during normal court proceedings are admissible in administrative hearings, and that there is no foundational requirement for the admission of these

documents. We concluded in *Crouch* that

> [w]ithout a doubt, the Legislature enacted W. Va. Code § 29A–5–2(b) with the intent that it would operate to place into evidence in an administrative hearing "[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself ...."
>
> W. Va. Code § 29A–5–2(b).

> Indeed, admission of the type of materials identified in the statute is mandatory, as evidenced by the use of the language "*shall* be offered and made a part of the record in the case ...." 219 W. Va. at 76, 631 S.E.2d at 634.

Reed v. Craig, No. 14-0346, 2015 WL 3387982, at *4 (W. Va. May 15, 2015).

In *Dale v. Judy*, No. 14-0216, 2014 WL 6607609 (W. Va. Nov. 21, 2014) (memorandum decision), this Court reviewed a circuit court appeal from an OAH decision and opined that

> [i]n *Groves v. Cicchirillo,* this Court noted " 'that the fact that a document is deemed admissible under West Virginia Code § 29A–5–2(b)] does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy.' " 225 W. Va. 474, 479, 694 S.E.2d 639, 644 (2010) (quoting *Crouch v. W. Va. Div. of Motor Vehicles,* 219 W. Va. 70, 76 a 12, 631 S.E.2d 628, 634 al2 (2006).).

No. 14-0216, 2014 WL 6607609 at *3.

In *Dale v. Haynes*, No. 13-1327, 2014 WL 6676546 (W. Va. Nov. 21, 2014) (memorandum decision), an opinion entered on the same day as *Dale v. Judy, supra*, this Court recognized that the OAH was the tribunal which properly admitted the DMV's file pursuant to W. Va. Code § 29A-5-2(b) (1964). "The circuit court acknowledged that the Incident Report and the DUI Information Sheet were 'properly admitted into evidence at the administrative hearing and [were] admissible under [West Virginia Code §] 29A–5–2(b).' The circuit court also noted that, pursuant to *Crouch v. West Virginia Division of Motor Vehicles,* 219 W. Va. 70, 631 S.E.2d 628 (2006), the admission of those documents created a rebuttable presumption as to their accuracy. *Id.* at 76 n. 12, 631 S.E.2d at 634 n. 12. However, the circuit court found that respondent's counsel rebutted the accuracy of [the

Commissioner's] evidence by illustrating [the investigating officer's] inconsistent statements regarding what he observed and his role in the arrest.'" No. 13-1327, 2014 WL 6676546, at *3.

In *Reed v. Craig*, No. 14-0346, 2015 WL 3387982 (W. Va. May 15, 2015) (memorandum decision), an appeal of an OAH decision, this Court noted, "In *Crouch v. W.Va. Div. of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006) and *Dale v. Odum*, 233 W.Va. 601, 609, 760 S.E.2d 415, 423 (2014), this Court ruled that documents (such as statements of arresting officers) that are not typically admissible during normal court proceedings are admissible in administrative hearings, and that there is no foundational requirement for the admission of these documents." *Reed v. Craig* at *4.

In *Reed v. Zipf*, 239 W. Va. 752, 806 S.E.2d 183 (2017), this Court found that "[d]espite the circuit court's assertion, Mr. Zipf's DUI Information Sheet was part of the record before the OAH, and it revealed that Officer Lindsey observed 'slurred speech' and an 'odor of alcoholic beverages' coming from Mr. Zipf. On the admission of a DUI Information Sheet as evidence in a driver's license revocation hearing, we have held: In an administrative hearing conducted by the Division of Motor Vehicles, a statement of an arresting officer as described in W. Va. Code § 17C-5A-1(b) (2004) (Repl. Vol. 2004), that is in the possession of the Division and is offered into evidence on behalf of the Division, is admissible pursuant to W. Va. Code § 29A-5-2(b) (1964) (Repl. Vol. 2002)." 239 W. Va. 752, 756, 806 S.E.2d 183, 187.

In *Reed v. Lemley*, No. 17-0797, 2018 WL 4944553 (W. Va. Oct. 12, 2018) (memorandum decision), this Court held:

> We begin by noting that West Virginia Code § 29A-5-2(b) directs that [a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case.
>
> We have previously stated that "[w]ithout a doubt, the Legislature enacted W. Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an

> administrative hearing "[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself." *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 76, 631 S.E.2d 628, 634 (2006). As evidenced by the use of the word "shall," admission of the evidence identified in the statute is mandatory. *Id.* The secondary chemical test result was in the DMV's possession, and the DMV sought to avail itself of the result. Accordingly, the result of the secondary chemical test should have been admitted into evidence, subject to a rebuttable presumption as to its accuracy. *Id.* at 76, n.12, 631 S.E.2d at 634, n.12 ("We point out that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy.").

No. 17-0797, 2018 WL 4944553, at *4.

Crouch, supra clearly set forth that the agency's documents are admissible pursuant to the Administrative Procedures Act, but added that the documents would be admissible pursuant to the Rules of Evidence. "Assuming arguendo that the West Virginia Rules of Evidence were to apply to this issue, the 'STATEMENT OF ARRESTING OFFICER' would nevertheless be admissible. West Virginia Rule of Evidence 803(8)(C) provides an exception to the hearsay rule for '[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (C) in civil actions ..., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.' Subsection (C) would apply to the extent that this Court has characterized administrative revocation hearings as civil in nature. *See, Carte v. Cline*, 200 W.Va. 162, 167, 488 S.E.2d 437, 442 (1997) ('Administrative revocation hearings are civil in nature ....'). Accordingly, as a statement that sets forth 'factual findings resulting from an investigation made pursuant to authority granted by law' as outlined in West Virginia Rule of Evidence 803(8)(c), the 'STATEMENT OF ARRESTING OFFICER' would be admissible under that rule." Fn. 10, *Crouch v. W. Virginia Div. of Motor Vehicles.*

The DMV's records are ***required*** to be admitted at OAH hearings. W. Va. Code §29A-5-2(b)(1964); *Crouch v. W. Va. Division of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006), *Comm'r of W. Va. Div. of Motor Vehicles v. Brewer*, 13-0501, 2014 WL 1272540 (W. Va., Mar. 28,

2014)(memorandum decision), *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam), *Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010), *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam), *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam), *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va., Apr. 10, 2014) (memorandum decision), *Dale v. Reynolds*, 13-0266, 2014 WL 1407375 (W. Va., Apr. 10, 2014) (memorandum decision), *Davis v. Miller*, 11-1189, 2012 WL 6097655 (W. Va., Dec. 7, 2012) (memorandum decision), and *Miller v. Chenoweth*, 229 W. Va. 114, 727 S.E.2d 658 (2012)(per curiam).

The DMV's file documents were properly admitted.

Irrelevance of Officer Testimony about Other Cases

The Respondent argues in the last paragraph of his brief that he was precluded from adducing certain testimony about the Investigating Officer at the administrative hearing. In his brief, he mischaracterizes the record. At the hearing, counsel for the Respondent stated, "So, your Honor, what you're telling me is I'm unable to ask him questions as to his experience in court and testifying as to his DUI actions and his field sobriety tests and the manner in which he's performing them." A.R. 176. The Hearing Examiner responded, "Not is cases which have nothing to do with this case, no." A.R. 176-77. Respondent's counsel then inquired extensively about the administration of field sobriety tests in his client's case. Respondent's counsel mentioned nothing of a "DUI Rampage" or any of the other assertions set forth in *Respondent's Reply Brief*.

CONCLUSION

The circuit court order must be reversed.

Respectfully submitted,

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

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Janet E. James #4904
Assistant Attorney General
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304) 558-2522
Janet.E.James@wv.gov