IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0360

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

BRYAN ALLAN METZ,

Defendant and Appellant.

MOTION TO SUPPLEMENT THE RECORD

Pursuant to Mont. R. App. P. 8(6), Appellant Bryan Metz moves this Court for an order to supplement the record in this matter with the municipal court's August 15, 2017 Opinion and Order on Metz's Motion to Dismiss and/or Suppress. A copy of the Opinion and Order is attached to this motion as Exhibit A.

Although the Opinion and Order is listed in the Missoula Municipal Court ROA Report, a copy of the Opinion and Order itself was not included in or transmitted as part of the record on appeal. Undersigned counsel for Metz attempted to contact the Clerk of District Court to obtain a copy of the Opinion and Order, but the clerk was

unable to locate one within the record on file. The attached copy was obtained from trial counsel.

Opposing counsel has been contacted and has no objection.

Respectfully submitted this 25th day of April, 2019.

OFFICE OF THE APPELLATE
DEFENDER
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By: /s/ Calder Thingvold
CALDER THINGVOLD
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By: /s/ Koan Mercer
KOAN MERCER
Assistant Appellate Defender

EXHIBIT A

IN THE MUNICIPAL COURT OF THE CITY OF MISSOULA

COUNTY OF MISSOULA, STATE OF MONTANA

CITY OF MISSOULA, Plaintiff, vs. BRYAN ALLAN METZ, Defendant.	CAUSE NO.: TK-2017-002547 **OPINION AND ORDER**

Bryan Allan Metz, Defendant herein, is charged with the offenses of Driving While Under the Influence of Alcohol or Drugs (45-8-401, MCA). Defendant has moved to Dismiss the charges, and/or to suppress evidence obtained during the investigation. Defendant contends that there is insufficient probable cause established by the Prosecution, and that the original encounter with law enforcement did not create sufficient particularized suspicion to justify further inquiry. An evidentiary hearing was held on August 2, 2017.

FACTS

The underlying facts of the case, as they pertain to these Motions, are set forth here. On April 18, 2017, Selene Koepke, a resident of the area, reported to a 9-1-1 her concern that a stopped, running vehicle on the 100 block of Kemp was occupied by an individual who appeared to be asleep or unconscious. Officer Erickson (MPD) received a call for service requesting a "welfare check" on the vehicle/driver, indicating to the operator that she was reluctant to approach

the vehicle herself. Within approximately 6 minutes of the call, Officer Erickson arrived on the scene and observed the vehicle. Officer Erickson observed that the vehicle was no longer running, and that there was an occupant in the drivers seat. The Officer made contact with the driver, who indicated he had been sleeping, and asked him to step out of the vehicle. Emergency medical personnel were also dispatched to the scene. Officer Erickson detected what he believed to be the odor of some alcoholic beverage from the Defendant, and observed an empty plastic cup bearing the logo of a popular beer company. Defendant acknowledged that he had been drinking before he had parked the vehicle at this location. The conversation between Erickson and other officers who arrived on the scene indicate that Erickson had not yet concluded that an arrest for DUI was appropriate at this point, as he was uncertain if all the elements of the offense (particularly "actual physical control" of a motor vehicle) could be established. Officer Erickson inquired of Defendant if he had a commercial driver's license (CDL), to which the defendant replied that he did not. Officer Erickson then read the Implied Consent aAdvisory, which excluded the consequences of refusal for a driver who had a CDL. Defendant refused to submit to the test. After several minutes, Officer Erickson was advised through radio dispatch that the Defendant did, in fact, have a CDL. He did not specifically offer the test following this discovery, but did present the Defendant with the portion of the Advisory which specified the consequences for a CDL holder who refused to submit the to test. Defendant also refused any blood or breath test which was requested by his probation officer.

Opinion

1. The Scope of the Welfare check, and "Community Caretaker Doctrine.

Defendant correctly contends that the proper scope of the welfare check should conclude as soon as the responding officer(s) determine that the individual is not in peril, or does not require assistance. Accordingly, the Defendant asserts that when the Defendant responded to the Officer's initial contact, and declined further assistance from the emergency medical crew, there was no longer any "peril" to the driver, and the Officer's inquiry should end.

Defendant notes that a traditional "traffic stop" did not occur in this case, as the Defendant's car was fully stopped when Officer Erickson first made contact with the Defendant on April 18, 2017.

> *Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*

Cady *v. Dombrowski* (1973), 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706.

This principal is now often referred to as the "Community Caretaker doctrine" and was adopted in Montana law in the case of *State v. Lovegren* 2002 MT 153. The facts of that case are not dissimilar. In *Lovegren*, the officer observed a motor vehicle parked by the side of the road with its engine running and lights off. The driver appeared to be asleep, which was held to be sufficient for the officer to make contact with the driver and determine whether he needed assistance. In the brief course of this contact, the officer noted the smell of an alcoholic beverage, and the driver admitted to have been drinking. Here, Defendant points out that Officer Erickson did not observe the vehicle while it was running, and that he specifically noted that the vehicle was not running when he arrived. While this is true, it ignores the fact that Ms. Koepke's initial report to 9-1-1 (which was related to Erickson) did, in fact, indicate that she observed the vehicle running. The "totality of circumstances" here certainly permitted Erickson to conclude that the vehicle may have been running at the time of Ms. Koepke's observation. Observing a sleeping or unconscious individual in a running vehicle parked adjacent to a roadway would certainly provide a sufficient basis for an officer to make further inquiry to determine that the individual is in need of any assistance. See *Lovegren*, supra.

Certainly, the scope of the Caretaker function ends when the officer determines that the subject is not in need of any assistance. However, the Defendant's contention that this determination is reached when the Officer determines that the subject has awoken, and is responsive is too constrictive. Many serious, even life-threatening mental or physical ailments may not be excluded simply by the subject regaining consciousness, or even refusing medical assistance. A report of an unconscious driver in a motor vehicle parked

along a street, engine running at 10:00 a.m. may reasonably suggest a greater medical concern than the driver simply taking a nap. The Montana Supreme Court has recognized that, in the course of an investigatory stop, law enforcement enjoys some latitude to "react and follow up on their observations" See *State v. Nelson* 204 MT 310. The same latitude should exist when the contact is reasonably triggered by the community caretaking function. Accordingly, the Court concludes that the initial contact of the Defendant by Erickson was entirely reasonable and appropriate pursuant to the Caretaker function.

There are objective, articulable facts from which an experienced officer may suspect that the occupant(s) of the vehicle may require some assistance. Such initial contact revealed that the Defendant may have been consuming alcohol, and the Officer proceeded to conduct a DUI investigation. See *State v. Lovegren,* 2002 Mont. 164, 301 MT 358. Officer Erickson was not only authorized to contact the Defendant under the community caretaker doctrine, but may have been under a duty to do so, given the totality of the circumstances. The Court agrees that the "caretaking" function ends when it can be determined that the individual driver is not in need of assistance. However, before Officer Erickson was able to make that determination, he had become aware of evidence (including the Defendant's own admission) that the driver had consumed alcohol. The "Totality of the circumstances" then transformed the contact from a "caretaking function" into a DUI investigation.

2. **The Implied Consent Advisory.**

Defendant also contends that the Defendant's refusal to submit to a blood/alcohol test should be suppressed because the Officer incorrectly expressed the implied consent advisory. In the video introduced at the hearing, Officer Erickson initially inquired whether the Defendant had a Commercial Driver's license. Apparently, the defendant responded in the negative, and Officer Erickson read to the Defendant the implied consent advisory that omitted the consequences of refusing the breath test assuming the Defendant had a regular driver's license, and the Defendant refused the test. The specific statutory requirements for the Preliminary Alcohol Screening Test (PAST) are set forth in Secti8on 61-8-409, MCA. The statute does specifically require the Officer to inform the Defendant of his right to refuse the PAST, and to advise the Defendant of the consequences of refusal. Section 61-8-409(3) describes the consequences to include "suspension for up to one year of that person's driver's license". Although the Officer here may have assumed that the Defendant replied correctly when he indicated he did not have a CDL, the advisory read to him did include the consequences set forth in the statute, and the Defendant's motion to suppress the Defendant's refusal on the grounds that he actually had a CDL is denied. See *State v. Kintli* 2004 MT 373.

3. **Suppression of Defendant's Answers to Questions following "custodial interrogation".**

The initial contact and questioning of the Defendant was conducted in this case as a logical extension of the Officer's caretaking function. As there was no custodial interrogation during the initial portion of the contact, the Defendant's responses may not be suppressed on the basis that he was not specifically advised of his **Miranda**

rights. The information gathered by the Officer during the initial contact, the totality of the circumstances (Defendant observed for some time parked, engine running, and motionless in the vehicle, smell of an alcoholic beverage, the empty beer cup in the Defendant's vehicle, and the Defendant's statement that he had been drinking) elevated the contact into a DUI investigation. During this investigation, the Officer was concerned that the Defendant appeared uncooperative or beligerant, and the Defendant was handcuffed. While the Officer's concern is not irrational, placing him in handcuffs did materially change the nature of the contact. At that time, the Defendant could only assume that he was not free to leave the scene, and for all intents and purposes was in "custody". Accordingly, any answers to the Officer's questions after he was handcuffed should be suppressed, until after the Defendant was advised of his Miranda rights..

4. **The Search Warrant and Application.**

Defendant moves to suppress the fruit of the search warrant on the basis that the Officer included incorrect or untrue statements in his Application for the search warrant. Many of the specific statements challenged by the Defendant are difficult for the Court to address, since the evidence presented are not clearly rebuttable. Thus, the Court is in a poor position to assess whether the Defendant's face was "flushed" when observed by the Officer. Nor is there any showing that the Defendant's clothing was "messy" or "torn" was incorrect. The Court is unable to merely assume such statements were false, and Defendant has failed to make a preliminary showing that any of the statements were deliberate falshoods. See *State v. Minez,* 2004 MT 115.

Defendant also contends that the officer's statement in the search warrant application that the Defendant was reported as "passed out" inside his vehicle is materially false, as Ms. Koepke had actually indicated that Defendant was "sleeping". Neither party here discusses what, if any, significant difference exists between the two competing terms, both of which describe one who is apparently unconscious. It is difficult for the Court to conclude that this statement was materially false. Defendant's motion to suppress the fruit of the search is therefore Denied.

5. **Defendant's Motion to Dismiss charges.**

Defendant has also moved to dismiss the charge of failure to carry proof of liability insurance, as the Defendant was not specifically asked to produce it. This charge was previously dismissed, and that issue is moot. Defendant's motion to dismiss the charge of failure to submit to a blood/breath test are dismissed for the reasons stated above.

DATED, this __ day of August, 2017.

Sam Warren
Municipal Court Judge

Electronically Signed By:
Hon. Judge Sam Warren
On Behalf Of:
Hon. Judge Alex Beal
Tue, Aug 15 2017 09:19 AM

CERTIFICATE OF SERVICE

I, Gem Koan Mercer, hereby certify that I have served true and accurate copies of the foregoing Motion - Unopposed - Supplement the Record to the following on 04-25-2019:

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Electronically signed by Pamela S. Rossi on behalf of Gem Koan Mercer
Dated: 04-25-2019