

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.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Robert L. Deschamps, III, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	2
STANDARD OF REVIEW	5
SUMMARY OF THE ARGUMENT	6
ARGUMENT	6
I. Officer Erickson had objective, specific, and articulable facts which led him to believe Mr. Metz needed assistance	8
II. Officer Erickson’s activation of his emergency lights and temporary seizure of Mr. Metz were proper under the community caretaker doctrine	12
III. Before Officer Erickson was sure Mr. Metz needed no help, he had particularized suspicion for the further investigatory stop leading to Mr. Metz’s arrest for DUI	14
CONCLUSION	18
CERTIFICATE OF COMPLIANCE.....	19

TABLE OF AUTHORITIES

Cases

<i>State v. Burns</i> , 2011 MT 167, 361 Mont. 191, 256 P.3d 944	<i>passim</i>
<i>State v. Gai</i> , 2012 MT 235, ¶ 11, 366 Mont. 408, 288 P.3d 164	5
<i>State v. Grmoljez</i> , 2019 MT 82, 395 Mont. 279, 438 P.3d 802	9, 11
<i>State v. Kenfield</i> , 2009 MT 242, 351 Mont. 409, 213 P.3d 461	5
<i>State v. Litschauer</i> , 2005 MT 331, 330 Mont. 22, 126 P.3d 456	<i>passim</i>
<i>State v. Lovegren</i> , 2002 MT 153, 310 Mont. 358, 51 P.3d 471	<i>passim</i>
<i>State v. Marcial</i> , 2013 MT 242, 371 Mont. 348, 308 P.3d 69	9
<i>State v. Reiner</i> , 2003 MT 243, 317 Mont. 304, 77 P.3d 210	8, 10, 11
<i>State v. Seaman</i> , 2005 MT 307, 329 Mont. 429, 124 P.3d 1137	<i>passim</i>
<i>State v. Spaulding</i> , 2011 MT 204, 361 Mont. 445, 259 P.3d 793	12, 13, 14
<i>State v. Vaughn</i> , 2007 MT 164, 338 Mont. 97, 164 P.3d 873	15, 17
<i>State v. Wheeler</i> , 2006 MT 38, 331 Mont. 179, 134 P.3d 38	5

Other Authorities

Montana Code Annotated

§ 61-8-406	1
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Montana Constitution

Art. II, § 10 7

Art. II, § 11..... 7

United States Constitution

Amend. IV 7

ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in affirming the Municipal Court's denial of Appellant's Motion to Suppress, finding that a police officer acted as a community caretaker in a stop that ripened into a DUI investigation when he responded to a 911 caller's request for a welfare check on an unmoving man leaned back in a running car near a public park, and subsequently observed the man to have bloodshot eyes, slurred speech, and an alcoholic beverage odor?

STATEMENT OF THE CASE

Bryan Metz appeals, asking this Court to overturn two judges' findings that before Missoula Police Officer Devin Erickson's valid community caretaker response to a 911 call concluded, he had developed particularized suspicion to initiate a DUI investigation. (Doc. 18.)

While reserving the right to appeal the municipal court's denial of his motion to suppress the fruits of a lawful search, Mr. Metz pleaded no contest to Driving Under the Influence of Alcohol (Mont. Code Ann. § 61-8-406). (Doc. 1 at 9, 8/16/17 Municipal Court Sent. Order.) After the court-imposed sentence and entered a written judgment, Mr. Metz appealed to the district court, which affirmed the municipal court's decision. (Doc. 14.)

STATEMENT OF THE FACTS

On the morning of April 18, 2017, a woman called 911 seeking a welfare check for a man who did not seem to be moving. (City's Ex. 1 at 00:40.) She said the man was in a running car with exhaust coming out of it, leaned back in his seat, parked near a public park. (*Id.* at 00:32, 00:48; and 01:03.) She gave a description of the car, including the license plate number. (*Id.* at 00:08.) The 911 dispatcher relayed the information to Missoula Police Officer Devin Erickson who went to the park to check on the man. (Doc. 1 at 17-21, 4/18/17 Incident Report.) Officers Michael Kameron and Derek Emerson also responded to the call. (Doc. 1 at 45, 7/17/17, City's Resp. to Mot. to Suppress and Dismiss.)

Officer Erickson is an experienced police officer of over nine years, and upon receiving information about the 911 call, he was concerned "there could be a medical issue." (8/2/17 Hr'g, Part 1 of 2, beginning at 12:40.) Arriving at the park, he saw the car described by the 911 dispatcher. (Doc. 13 at 3, 11/6/17 City's Resp. Br.) He parked perpendicular to it, leaving an open parking spot between it and his patrol vehicle. (Def's Ex. 1 at 8:19:27.) Two other police cars responded to the call, parking single file, perpendicular to the car's other side. *Id.* No police vehicle was behind the car. *Id.* When Officer Erickson activated his lights, the driver sat up, looked at him with a dazed expression, and unsuccessfully tried to start his car. (*Id.* and Doc. 13 at 3.) Officer Erickson walked to the car to check on the man,

explaining, “they were concerned about your safety,” and “whoever saw you and called us said that it looked like you were sleeping, and they didn’t know how you were doing. So, why don’t you go ahead and just step on out and we’ll have medical just talk with you for a second and make sure you’re alright.” (Def’s Ex. 1 at 00:01 and 00:10.) Officer Erickson immediately noticed the driver, later identified as Bryan Metz, had bloodshot eyes and slurred speech. (Doc. 14 at 8.)

Officer Erickson asked Mr. Metz to step out of his car so medical personnel could check on his welfare. (Doc. 14 at 4.) Mr. Metz exited his car, gave Officer Erickson his driver’s license, and asked if it was “really that big of a deal” he was there. (Def’s Ex. 1 at 00:54.) Officer Erickson told Mr. Metz, “people were concerned about your welfare, so that’s what we’re doing.” (*Id.* at 01:02.) Just after Mr. Metz exited his car, Officer Erickson told Officer Kameroner this was a possible “two-ten,” numeric shorthand for an intoxicated driver. (Doc. 1 at 51, 7/17/17 City’s Resp. to Mot. to Suppress; Def’s Ex. 1 at 00:26.) Mr. Metz seemed confused about how long he had been parked there, first saying he had just pulled up, then that he did not know how long it had been, and finally that he had been there for a couple of hours. (Def. Ex. 1 at 00:04 and 01:57.) He told Officer Erickson he was napping and would soon walk to work. (Def’s Ex. 1 at 02:20 and 05:48.) Officer Erickson noticed Mr. Metz had bloodshot eyes, slurred speech, a dazed expression, and an alcoholic beverage odor on his breath. (Doc. 1 at 51.)

Officer Erickson offered Mr. Metz medical help, which he declined. (Def's Ex. 1 at 02:32 and 02:41; Doc. 14 at 4.) Then medical personnel were released, and Officer Erickson asked Mr. Metz to wait for just a minute while he conferred with the two other officers present. (*Id.*)

Officer Erickson told the other two officers that Mr. Metz had bloodshot eyes and slurred speech. (Def's Ex. 1 at 03:02.) He discussed whether there was evidence Mr. Metz was in actual physical control of the car, deliberating whether to pursue a DUI investigation. (Def's Ex. 1 at 03:33.)

Officer Erickson looked through the car windows, saw an empty Miller Lite beer cup, and returned to Mr. Metz who was speaking with Officer Kameron. (Def's Ex. 1 at 04:55.) Mr. Metz admitted he had been drinking alcohol in violation of his probation, though he could not recall his probation officer's name. (Def's Ex. 1 at 06:10.) Officer Erickson conferred with Officer Kameron away from Mr. Metz, saying, "The more I think about it, the more I think I do have enough to push through with a DUI," and "I mean he did try to turn over the ignition. The key was in the ignition. That's actual physical control." (Def's Ex. 1 at 08:45.)

Officer Erickson continued with a DUI investigation, eventually arresting Mr. Metz, who said, "I was sittin' here parked. You rolled up with a frickin' fire truck and an ambulance as if I was dying." (Def's Ex. 1 at 8:48.) Mr. Metz was

cited for Driving Under the Influence of Alcohol. (Doc. 1 at 114, 4/18/17 City of Missoula Citation 081D004942A.)

STANDARD OF REVIEW

This Court reviews a district court's ruling on a criminal defendant's motion to suppress evidence to determine whether the district court's findings of fact are clearly erroneous, and whether the district court correctly applied those findings as a matter of law. *State v. Wheeler*, 2006 MT 38, ¶ 12, 331 Mont. 179, 134 P.3d 38. Findings of fact are clearly erroneous when they are unsupported by substantial evidence, when the court misapprehended the effect of the evidence, or when a record review leaves this Court with the firm conviction that a mistake has been made. *Id.* ¶ 10. This Court reviews a district court's conclusions of law regarding the application of the community caretaker doctrine for correctness. *State v. Kenfield*, 2009 MT 242, ¶ 15, 351 Mont. 409, 213 P.3d 461. This Court reviews cases originating in local courts and appealed to district courts as though the appeal were originally filed in this Court. *State v. Gai*, 2012 MT 235, ¶ 11, 366 Mont. 408, 288 P.3d 164.

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SUMMARY OF THE ARGUMENT

This Court has held that a police officer functions as a community caretaker when the officer has objective, specific, and articulable facts which would lead an experienced officer to believe a person is in peril or need of assistance. This Court has further held that an officer need not identify these objective, specific, and articulable facts throughout the entire course of the procedure. Rather, once an officer validly makes contact as a community caretaker, if ensuing facts or events give rise to particularized suspicion, the officer may proceed with a criminal investigation despite having had no particularized suspicion at the outset.

Under the community caretaker doctrine, Officer Erickson appropriately exercised his duty to check on Mr. Metz after a 911-caller sought a welfare check for him. Before his community caretaker duty ended, his observations and Mr. Metz's subsequent actions engendered particularized suspicion of criminal activity. This did not negate the validity of the initial stop to see if Mr. Metz needed assistance.

ARGUMENT

The district court's decision should be affirmed because Officer Erickson's contact with Mr. Metz was consistent with the purpose and tenets of the community caretaker doctrine.

This Court has recognized that police officers are duty-bound not only to fight crime, but also to ensure public safety by investigating uncertain situations. *State v. Seaman*, 2005 MT 307, ¶ 21, 329 Mont. 429, 124 P.3d 1137. The community caretaker doctrine justifies police-citizen encounters when a person needs help or is in peril. *Id.* ¶ 15. This Court has provided a prudent, three-part test to determine when an officer may function as a community caretaker, stopping an individual without a warrant:

First, as long as there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate. Second, if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. Third, once, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating not only the protections provided by the Fourth Amendment, but more importantly, those greater guarantees afforded under Article II, Sections 10 and 11 of the Montana Constitution as interpreted in this Court's decisions.

State v. Lovegren, 2002 MT 153, ¶ 25, 310 Mont. 358, 51 P.3d 471.

After an officer validly stops a person under the community caretaker doctrine, if events arise giving the officer particularized suspicion that the person has committed, is committing, or is about to commit an offense, then the officer's contact with the person may properly ripen into an investigatory stop. *Id.* ¶ 27.

Here, the first part of the *Lovegren* community caretaker test was satisfied when Officer Erickson checked on Mr. Metz after police dispatch relayed

objective, specific, and articulable facts from the 911 call. (8/2/17 Hr’g, Part 2 of 2, at 00:06.) These objective, specific, and articulable facts are: a man who did not seem to be moving was leaned back in a running car with exhaust coming out of it, parked next to a public park, and this sight was concerning enough that a passing driver called 911 seeking a welfare check for the man. (City’s Ex. 1, throughout.)

The second part of the community caretaker test is inapplicable here because Officer Erickson determined Mr. Metz needed no help and there was no peril to mitigate. (Def’s Ex. 1 at 02:32.)

Under the third part of the community caretaker test, a DUI investigation constitutes a seizure. However, before Officer Erickson determined Mr. Metz needed no help, he had already developed particularized suspicion for the further investigatory stop that ripened into the DUI investigation. (8/2/17 Hr’g, Part 1 of 2 at 19:24; Doc. 14 at 5-6.)

I. Officer Erickson had objective, specific, and articulable facts which led him to believe Mr. Metz needed assistance.

Under this Court’s community caretaker test, an officer may stop and investigate when objective, specific, and articulable facts exist which would lead an experienced officer to suspect someone needs help or is in peril. *Lovegren*, ¶ 25. An officer stopping and investigating in response to a 911 call reporting a possible crime is not acting under the community caretaker doctrine. *State v. Reiner*, 2003

MT 243, ¶ 22, 317 Mont. 304, 77 P.3d 210. However, an officer is acting under the community caretaker doctrine when stopping to investigate whether a driver needs help in response to a 911 call reporting a driver slumped over in the driver's seat of a legally parked, running vehicle. *State v. Burns*, 2011 MT 167, ¶¶ 7, 34, 361 Mont. 191, 256 P.3d 944. Further, an officer properly acts as a community caretaker when stopping to check on a legally-parked driver on a pleasant morning if the officer intends to make a welfare check out of concern for the driver based upon objective, specific, and articulable facts. *State v. Grmoljez*, 2019 MT 82, ¶ 10, 395 Mont. 279, 438 P.3d 802.

Lovegren's community caretaker test requires that prior to stopping an individual as a community caretaker, an officer must have objective, specific, and articulable facts from which an experienced officer would suspect someone is in peril or in need of assistance. The Appellant's brief incorrectly states that these facts must be present "at all times throughout the caretaker investigation;" however, this Court has unambiguously declined to modify the *Lovegren* test to require identification of such facts throughout the entire course of the community caretaker check. *State v. Marcial*, 2013 MT 242, ¶ 16, 371 Mont. 348, 308 P.3d 69.

Police officers have a duty to investigate uncertain situations to ensure public safety. *Seaman*, ¶ 21. It would be a dereliction of that duty for an officer to leave an uncertain situation in which someone might need help. *Id.* ¶ 27.

In *Reiner*, a citizen called 911 to report a possible intoxicated driver. *Reiner*, ¶ 3. When a Ronan police officer saw a parked car matching the description given to 911, he activated his lights and approached. *Id.* ¶¶ 4-5. He found the driver asleep behind the wheel, and upon awakening him, the officer began a DUI investigation. *Id.* ¶¶ 5, 21. This Court found that the first prong of the *Lovegren* test was not met because the officer did not stop out of concern for the driver's need of assistance or the possibility that he was in peril, but rather to investigate a DUI report. *Id.* ¶ 22.

In *Burns*, a citizen called 911 out of concern for a slumped over driver in a running car, parked on a residential street. *Burns*, ¶ 7. The caller was worried about the driver's safety in the cold weather and concerned about the car's ability to continue running. *Id.* Two Billings police officers responded and attempted to awaken the car's driver. *Id.* ¶¶ 8-9. After awakening him, both officers saw an open vodka bottle in the car and noticed the driver had slurred speech and an odor of alcohol. *Id.* ¶ 10. One officer also noticed the driver had red, glassy eyes. *Id.* The officers began a DUI investigation, eventually arresting and charging the driver with felony DUI. *Id.* ¶¶ 11-12. This Court found that unlike in *Reiner*, the officers properly acted under the community caretaker doctrine because they stopped to check on the driver's welfare and had objective, specific, and articulable facts signifying the driver could be in peril or need assistance. *Id.* ¶¶ 34 and 36.

In *Grmoljez*, a Montana Highway Patrol trooper noticed a car safely parked off the road in a gravel turnout along the highway on a bright, warm morning. *Grmoljez*, ¶¶ 3, 11. The trooper saw the driver look at him “without any emotions,” and noticed no obvious signs of mechanical distress with the car. *Id.* ¶ 3. Concerned the car might be out of gas, the trooper parked behind the car, activated his rear lights, and walked to the car to ask the driver if everything was ok. *Id.* ¶ 4. The driver admitted to drinking, the trooper smelled alcohol, and the interaction ripened into a DUI investigation. *Id.* This Court found that it would have been a dereliction of the trooper’s duties not to stop and investigate this uncertain situation involving a driver in possible need of help, and that the welfare check satisfied the first prong of the community caretaker test. *Id.* ¶¶ 12-14.

Here, as in *Reiner* and *Burns*, Officer Erickson approached Mr. Metz in response to a 911 call. Unlike *Reiner*, Officer Erickson was not responding to concerns a crime had been committed. Instead, as in *Burns*, he responded to concerns for Mr. Metz’s welfare. He had objective, specific, and articulable facts indicating Mr. Metz might be in peril or in need of assistance. The 911 caller was worried because Mr. Metz seemed to be unmoving in a running car with exhaust coming out of it, leaned back in his seat, parked next to a public park. When Officer Erickson responded, Mr. Metz sat up, looked at Officer Erickson with a dazed expression, and unsuccessfully tried to start his car. Like in *Grmoljez*,

Mr. Metz was legally parked on a sunny morning, made eye contact with the officer, and exhibited no obvious signs of distress.

The Appellant's brief urges that because it was sunny and Mr. Metz sat up, Officer Erickson was unjustified in acting as a community caretaker and should not have heeded the 911 call to check on Mr. Metz. However, Officer Erickson believed Mr. Metz could need help, and testified that his experience would not lead him to "call off medical" just because Mr. Metz sat up. (8/2/17 Hr'g, Part 1 of 2, at 19:14.) Officers are not required under *Lovegren* to determine whether assistance is needed prior to responding, and requiring them to do so would deviate from the public's trust in and expectations for our police officers. Officer Erickson was authorized under *Lovegren* to act as a community caretaker, and more importantly, he had a duty to act as a community caretaker to ensure public safety in this uncertain situation.

II. Officer Erickson's activation of his emergency lights and temporary seizure of Mr. Metz were proper under the community caretaker doctrine.

An officer may temporarily seize a driver to inquire about the driver's well-being under the community caretaker doctrine. *State v. Spaulding*, 2011 MT 204, ¶ 19, 361 Mont. 445, 259 P.3d 793; *State v. Litschauer*, 2005 MT 331, ¶ 4, 330 Mont. 22, 126 P.3d 456; *Seaman*, ¶ 26. Particularized suspicion is not required

to temporarily seize a driver when an officer acts under a duty to investigate for the driver's safety. *Lovegren*, ¶¶ 5-7.

In *Spaulding*, a Carbon County sheriff's deputy saw a vehicle abruptly pull over and park on the side of a dirt road on a cold night. *Spaulding*, ¶¶ 3-4. Concerned the driver could be lost, or the vehicle could be having mechanical troubles, the deputy activated his rear emergency lights and parked behind the vehicle, temporarily seizing the driver. *Id.* ¶ 19. This Court found that the seizure was constitutional because the deputy was justified in conducting a welfare check under the tenants of the community caretaker doctrine. *Id.* ¶ 29.

In *Litschauer*, a Belgrade police officer responded to a 911 call reporting a driver screaming and banging her head against a steering wheel. *Litschauer*, ¶ 4. After locating a travelling car matching the description, the officer activated his emergency lights, indicating for the driver to pull over and stop. *Id.* This Court found the stop appropriate under the community caretaker doctrine. *Id.* ¶ 13.

In *Seaman*, a Montana Highway Patrol trooper noticed a vehicle parked on an off-ramp shoulder on a sub-freezing afternoon. *Seaman*, ¶ 3. Concerned the driver might need help, the trooper pulled behind the vehicle, activated his flashing, overhead emergency lights, and approached to ask the driver some questions. *Id.* ¶¶ 4, 6, 26. Though the trooper's flashing lights were on, this Court found no significant seizure or intrusion because the officer's initial questions

showed concern for the driver's well-being. *Id.* ¶ 30. This Court further found the stop was justified under the community caretaker doctrine. *Id.* ¶ 31.

Here, as in *Spaulding*, *Litschauer*, and *Seaman*, Officer Erickson activated his lights before talking with Mr. Metz. It can be inferred that Officer Erickson did so to get Mr. Metz's attention, since he was uncertain whether Mr. Metz was conscious or awake. It can also be inferred that the lights were intended to ensure Mr. Metz would not leave once he noticed the officer's car because, like the officer in *Litschauer*, Officer Erickson did not want Mr. Metz driving on public roads without first ascertaining that he needed no help in light of the objective, specific, and articulable facts that led to the stop. Finally, a police vehicle's lights alert nearby people that an officer is engaged in police work and they should not approach or distract the officer. Officer Erickson's use of his emergency lights and temporary seizure of Mr. Metz were proper under the community caretaker doctrine because he did so out of concern for Mr. Metz's well-being.

III. Before Officer Erickson was sure Mr. Metz needed no help, he had particularized suspicion for the further investigatory stop leading to Mr. Metz's arrest for DUI.

During an officer's justified encounter with a citizen under the community caretaker doctrine, the encounter can escalate into a DUI investigation when the officer's additional observations elicit particularized suspicion of wrongdoing.

State v. Vaughn, 2007 MT 164, ¶ 22, 338 Mont. 97, 164 P.3d 873. If, while properly contacting a person as a community caretaker, an officer notices no apparent signs of peril, but sees things that give rise to a particularized suspicion of a DUI, the officer may further investigate, changing the reason for contact from a welfare check to a DUI investigation. *Burns*, ¶ 35. When an officer appropriately stops a person under the community caretaker doctrine, and the person's subsequent actions create a particularized suspicion of criminal activity, the initial stop's validity is not negated. *Litschauer*, ¶ 8. To effectively discharge their duties, officers must have latitude to react to and follow up on their observations. *Seaman*, ¶ 29.

In *Vaughn*, a Gallatin County sheriff's deputy saw a car slow down, pull to the side of the highway, and park halfway in the driving lane and halfway on the shoulder. *Vaughn*, ¶ 16. Believing the driver might need help, the deputy parked behind the car, activated his rear, amber flashing lights, and approached to ask if the driver needed help. *Id.* As the deputy approached the vehicle, he noticed an open beer can between the front seats. *Id.* ¶ 23. And as the driver responded to the deputy's welfare inquiry, the deputy noticed the driver's watery, bloodshot eyes and slurred speech. *Id.* This Court held that the deputy's observations while approaching the car and contacting the driver established particularized suspicion,

justifying further investigation once the stop's initial caretaking purpose had been accomplished. *Id.* ¶ 23.

In *Burns*, as described above, two police officers responded to a 911 caller's welfare check request for a man slumped over in the driver's seat of a running parked car. *Burns*, ¶ 34. The officers saw an open vodka bottle on the front passenger seat, and when the driver awoke and identified himself, the officers noticed his red eyes, slurred speech, and alcohol odor. *Burns*, ¶ 35. They further noticed his lack of balance, disorientation, and inability to find his driver's license. *Id.* This Court found that while the officers initially acted as community caretakers, their observations during that initial contact gave them particularized suspicion to investigate further and convert the contact from a welfare check to a DUI investigation. *Id.*

In *Litschauer*, as described above, an officer responded to a 911 call reporting a driver screaming and hitting her head against a steering wheel. *Litschauer*, ¶ 4. After the officer pulled the driver over and approached to tell her about the 911 call, he noticed her glassy eyes, slurred speech, and strong alcohol odor. *Id.* This Court found that after the officer dutifully inquired if the driver needed help, his subsequent observations justified further investigation of a DUI. *Id.* ¶ 10.

Here, as in *Vaughn*, *Burns*, and *Litschauer*, Officer Erickson's initial encounter with Mr. Metz was a welfare check. (Def's Ex. 1 at 01:02.)

Officer Erickson explained the purpose for his stop, noting that the 911 caller was "concerned about your safety," and that his intent was to "have medical just talk with you for a second and make sure you're all right." (Def's Ex. 1 at 00:10.)

However, before Officer Erickson was assured that Mr. Metz needed no assistance and was in no peril, his observations evoked particularized suspicion of DUI. He observed Mr. Metz's bloodshot eyes, slurred speech, and the alcoholic beverage odor coming from Mr. Metz; he told another present officer this was a possible "two-ten," or intoxicated driver; and he saw an empty beer cup in Mr. Metz's car, all while acting as a community caretaker. While Officer Erickson was not immediately sure, he stated that the more he thought about it, the more he believed Mr. Metz was in actual physical control of the car and met the requirements for processing under Montana's DUI statute. The District Court did not err in affirming the municipal court's conclusion that Officer Erickson had particularized suspicion to initiate a DUI investigation before his duties as a community caretaker concluded.

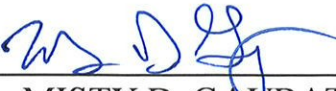
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CONCLUSION

Officer Erickson rightly fulfilled his duty under the community caretaker doctrine. While acting as a community caretaker, his observations gave him particularized suspicion that Mr. Metz had committed the crime of driving while under the influence of alcohol. Officer Erickson properly seized Mr. Metz, the community caretaker interaction ripened into a DUI investigation, and the evidence leading to Mr. Metz's arrest and charges was properly obtained. For the foregoing reasons, the Montana Fourth Judicial District Court's decision upholding that of the Missoula Municipal Court should be affirmed.

Respectfully submitted this 6th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,743 words, excluding certificate of service and certificate of compliance.

/s/ 
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CERTIFICATE OF SERVICE

I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-06-2019:

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