DA 18-0360

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 264

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

BRYAN ALLAN METZ,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC 17-472
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Koan Mercer, Assistant Appellate Defender, Calder Thingvold, Law Student Intern, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Misty D. Gaubatz, Law Student Intern, Helena, Montana

Jim Nugent, Missoula City Attorney, Carrie L. Garber, Senior Deputy City Attorney, Missoula, Montana

Submitted on Briefs: September 18, 2019

Decided: November 5, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Defendant and Appellant Bryan Allan Metz (Metz) appeals the Opinion and Order issued by the Fourth Judicial District Court, Missoula County, on April 30, 2018, which affirmed the judgment of the Missoula Municipal Court denying his motions to suppress evidence. We reverse.

¶2 We state the issue on appeal as follows:

> *Did the Municipal Court err when it determined that a particularized suspicion to conduct a DUI investigation existed at the completion of a community caretaker stop?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Shortly after 8:00 a.m. on April 18, 2017, Selene Koepke (Koepke), a Missoula County deputy county attorney, called 911 to request a welfare check on the driver of a vehicle parked near Franklin Park in Missoula. Koepke reported to 911 that the vehicle was running and that she couldn't tell if the driver was moving or not, informed the 911 operator that she did not want to get too close, and gave the vehicle's license plate information. A few minutes after Koepke's 911 call, law enforcement and emergency medical services arrived at the vehicle's location at Franklin Park. The vehicle was parked legally in a designated parking space at the park. Missoula Police Officer Erickson was the first to make contact, and as he approached the vehicle, he observed that the vehicle was not running and the driver, later identified as Metz, was awake, moving, and looking at him. The morning's weather was sunny and pleasant. Officer Erickson's body and dash cameras recorded video of the subsequent interactions leading up to Metz's arrest.

¶4 Officer Erickson arrived, activated his emergency lights, and parked perpendicular to Metz's car on the driver's side. Two more police cruisers arrived at or near the same time as Officer Erickson. One parked on the opposite side of Metz's car from Officer Erickson, and one parked behind Metz's car. As Officer Erickson approached the car, Metz sat up and rolled his window down to speak with Officer Erickson. Officer Erickson informed Metz that a caller thought he was sleeping and was concerned about his safety. Officer Erickson does not personally inquire about Metz's welfare, but tells Metz to step out of the car so that medical personnel can talk to him and see if he is all right. As Metz steps out of his vehicle, three additional police officers are surrounding his car and they ask Officer Erickson if this is a "210," or intoxicated driver, and Officer Erickson responds, "Possibly." Officer Erickson asks to see Metz's identification as an ambulance and fire truck arrive to the scene. Metz asks Officer Erickson if it is "really that big of a deal" to be parked outside of the park. Officer Erickson responds that people were concerned about Metz's welfare, and then calls in Metz's identification to dispatch. Officer Erickson asks how long Metz has been at the park, and Metz responds that he has just been relaxing there for a "couple hours." Officer Erickson asks why he was at the park, and Metz responds that he was just trying to take a nap. At this point, medical personnel begin to walk over to Metz and Officer Erickson and ask if they need medical attention. For the first time in the encounter, Officer Erickson asks a question regarding Metz's welfare and asks Metz if he needs any medical attention. Metz responds that he does not, and Officer Erickson sends the medical personnel away, telling them that "we're good, thank you."

¶5 After Officer Erickson sends the medical personnel away, Officer Kamerer approaches Officer Erickson to ask about the situation. Officer Erickson, still holding Metz's driver's license, tells Metz to "hang tight" and steps away to speak with Officer Kamerer and another officer. Officer Kamerer asks if the vehicle was running when Officer Erickson arrived, and Officer Erickson responds that it was not, but Metz tried to start the vehicle when he was approaching. Officer Kamerer then asks Officer Erickson, "What are you getting off of him?" Officer Erickson responds that Metz has bloodshot eyes and "a little bit of a slur." Officer Erickson asks the other officers, who were looking into the windows of Metz's car, if they saw anything inside the car. Officer Kamerer responds that he was "not seeing anything." Officer Kamerer tells Officer Erickson that if Officer Erickson thinks "there is enough, we can process. If not, then have [Metz] walk and come back and get it later." Officer Erickson remarks about the situation, before stating that he's "not terribly worried" and "[doesn't] really want to pursue it." Officer Kamerer responds that he is fine with that, before Officer Erickson decides that he wants to take another look in Metz's car windows.

¶6 As Officer Erickson—still with Metz's driver's license—goes to look in Metz's windows, Officer Kamerer and another officer immediately approach Metz and start questioning him. Officer Erickson's body camera video picks up a portion of the audio of Officer Kamerer's questioning of Metz, and Officer Kamerer tells Metz that he can smell alcohol coming off of him. Metz tells Officer Kamerer that he was not drinking before parking his car, and Officer Kamerer asks where his empties are if he has been drinking

since parking. Metz states that he has not been drinking in his car. Officer Kamerer asks if Metz is on probation, and Metz responds that he is on misdemeanor probation. Officers Kamerer and Erickson then discuss whether Metz will provide a breath test at the request of his probation officer. The officers tell Metz that he has "no choice" but to provide one because he is on probation—though no officer has yet spoken with Metz's probation officer—and Metz refuses. Officer Erickson then asks Officer Kamerer to again step aside to discuss the situation, and Officer Erickson states that, "the more I think about it, the more I think I do have enough to push through with a DUI." Officer Erickson tells Officer Kamerer that he "might roll with it."

¶7 Officer Erickson then reapproaches Metz and attempts to conduct field sobriety tests. Eventually, Officer Erickson is able to complete the horizontal gaze nystagmus (HGN) test, but before any further field sobriety tests are completed, Metz is arrested. During the arrest, Officer Emerson questions Metz about whether there is anything in his car that he does not want them to find. Metz responds that there is nothing illegal in his car, and Officer Erickson says that "there is a beer cup in your car." Metz states that it is a Solo cup, and Officer Erickson responds that, "no, it's not a Solo, it's a Miller Lite cup." Metz is then placed in the back of Officer Erickson's police vehicle and eventually read the Montana implied consent advisory before declining to provide a breath test. Metz's car is ultimately searched by probation and parole officers before being towed.

¶8 Officer Erickson transported Metz to the Missoula Police Department, where he applied for a search warrant to test Metz's blood. On the application for search warrant,

Officer Erickson writes that "Bryan was reported as being 'passed out' in his running vehicle." Officer Erickson cited Metz for misdemeanor DUI and failure to carry proof or exhibit insurance.[1] Officer Erickson also completes an Affidavit of Probable Cause, where he again states that officers responded to a "report of a male 'passed out' in his running motor vehicle."

¶9 On April 18, 2017, Metz pled not guilty to the charges in the Missoula Municipal Court. On June 29, 2017, Metz filed a Motion to Suppress and Dismiss, alleging, in relevant part, that any evidence obtained should be suppressed due to a lack of particularized suspicion. On August 2, 2017, the Municipal Court held a hearing on the motion, where Officer Erickson testified and his body camera video was both viewed and entered into evidence. Officer Erickson testified that his job when making contact with Metz on the morning of the incident was to "identif[y] who this person we are out with is, and then let [medical personnel] do the medical assessment." Officer Erickson testified upon making initial contact with Metz that he had "suspicions of intoxication," but no indication of any medical problem. Officer Erickson, when asked what indications led to his particularized suspicion to continue with a DUI investigation, testified that Metz had breath that had a strong odor of alcohol; red, extremely bloodshot eyes; a dazed expression upon initial contact; and an empty alcoholic cup in the back of the car. Officer Erickson further testified that Metz admitted to drinking alcohol "the night prior, before parking his

[1] Metz was never asked to provide proof of insurance during the stop, and the charge was dismissed after Metz provided proof of insurance to the Municipal Court.

vehicle to sleep." On cross-examination, Officer Erickson—after watching the body camera video show him not mention any odor of alcohol to the other officers during their conversation about his observations of Metz after sending medical personnel away—testified that he "[didn't] recall" whether he mentioned the odor of alcohol to those officers or not. Officer Erickson further testified on cross-examination that, based on his observations of Metz, he did not wish to pursue a DUI investigation after this conversation with the other officers present. Officer Erickson also testified that, at that moment, Metz was not free to leave and was "detained for investigation."

¶10 After the hearing, the Municipal Court issued an Opinion and Order denying Metz's motion on August 15, 2017. On August 16, 2017, Metz pled nolo contendere to the DUI charge, and reserved his right to appeal the Municipal Court's denial of his Motion to Suppress and Dismiss to the District Court. After briefing by the parties, the District Court affirmed the Municipal Court's judgment on April 30, 2018. Metz appeals.

STANDARD OF REVIEW

¶11 Upon Metz's appeal from Municipal Court, the District Court functioned as an intermediate appellate court. *See* §§ 3-5-303 and 3-6-110, MCA. When district courts function as intermediate appellate courts for appeals from lower courts of record, we review the appeal de novo as though it were originally filed in this Court. *State v. Akers*, 2017 MT 311, ¶ 9, 389 Mont. 531, 408 P.3d 142. We examine the record independently of the district court's decision, reviewing the lower court's findings of fact under the clearly erroneous standard, its discretionary rulings for abuse of discretion, and its legal

conclusions for correctness. *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 8, 391 Mont. 457, 419 P.3d 1208.

¶12 We review a lower court's denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Wilson*, 2018 MT 268, ¶ 21, 393 Mont. 238, 430 P.3d 77 (citing *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60). A lower court's finding that particularized suspicion exists is a question of fact which we review for clear error. *Gill*, ¶ 10 (citing *City of Missoula v. Moore*, 2011 MT 61, ¶ 10, 360 Mont. 22, 251 P.3d 679). "A finding is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if our review of the record leaves us with the firm conviction that a mistake has been made." *Gill*, ¶ 10 (citing *Moore*, ¶ 10).

DISCUSSION

¶13 *Did the Municipal Court err when it determined that a particularized suspicion to conduct a DUI investigation existed at the completion of a community caretaker stop?*

¶14 In both the Municipal Court and District Court, Metz moved to suppress information obtained after the completion of the welfare check—which Metz argues was completed once he sat up in his car—because Officer Erickson lacked a particularized suspicion to detain him for a DUI investigation. Both the Municipal Court and District Court found that Officer Erickson obtained particularized suspicion to conduct a DUI investigation during the welfare check and denied Metz's motion.

¶15 In *State v. Lovegren*, 2002 MT 153, 310 Mont. 358, 51 P.3d 471, we adopted the following test regarding the community caretaker doctrine:

> 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.

Lovegren, ¶ 25. After an officer makes a valid stop pursuant to the community caretaker doctrine, events may occur during the stop which give rise to a particularized suspicion for that officer to make a further investigatory stop pursuant to § 46-5-401, MCA. *Lovegren*, ¶ 27. "In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense." Section 46-5-401(1), MCA.

¶16 While Metz argues that Officer Erickson should have been assured that Metz was not in peril and terminated the encounter when he arrived and neither of the conditions indicated in the 911 call were present—contrary to the information provided by the call, Metz's car was not running and Metz was moving—we find such an interpretation of the community caretaker doctrine too restrictive. An officer has a duty to respond to a 911 call for help, and under the first prong of the *Lovegren* test, Officer Erickson had the right to stop and investigate because the community caretaker role is "an affirmative duty of peace

officers." *State v. Grmoljez*, 2019 MT 82, ¶ 12, 395 Mont. 279, 438 P.3d 802 (citations omitted). The 911 call informed Officer Erickson that someone was in need of help, and he could not be assured that Metz did not need help merely because he was moving. As such, Officer Erickson's initial contact with Metz was a proper community caretaker stop.

¶17 Importantly, the *Lovegren* test set a limitation on the use of the community caretaker doctrine by holding that once an "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." *Lovegren*, ¶ 25. We have previously "underscore[d] the doctrine's intended application to situations where a citizen is in need of help or is in peril, thus authorizing an officer to render assistance or mitigate the peril, in cases unrelated to the detection and investigation of crime." *State v. Marcial*, 2013 MT 242, ¶ 15, 371 Mont. 348, 308 P.3d 69 (internal quotations and citations omitted).

¶18 The State argues that Officer Erickson obtained particularized suspicion to perform a DUI-related investigatory stop prior to the completion of his welfare check. The Municipal Court held that before Officer Erickson was able to determine that Metz was not in need of assistance, "he had become aware of evidence (including the Defendant's own admission) that the driver had consumed alcohol." A review of Officer Erickson's

testimony at the suppression hearing and his body camera video of the incident shows that the Municipal Court's holding is flatly wrong.

¶19 To obtain "particularized suspicion for an investigative stop, the peace officer must be possessed of (1) objective data and articulable facts from which he or she can make certain reasonable inferences and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense." *Marcial*, ¶ 18 (quoting *State v. Wagner*, 2013 MT 159, ¶ 10, 370 Mont. 381, 303 P.3d 285). We evaluate whether particularized suspicion exists under the totality of the circumstances, considering the quantity or content of the information available to the officer and the quality or degree of reliability of that information. *Moore*, ¶ 16.

¶20 As we have determined that Officer Erickson's initial seizure of Metz to conduct a welfare check pursuant to the community caretaker doctrine was valid, we must address whether Officer Erickson obtained particularized suspicion to conduct an investigatory stop of Metz prior to the completion of the community caretaker stop. As recognized in *Lovegren*, a community caretaker encounter must be terminated once the officer is assured that the citizen is not in peril or in need of assistance. *Lovegren*, ¶ 25.

¶21 At the suppression hearing, Officer Erickson testified that his purpose upon making contact with Metz was simply to identify him—not to inquire into Metz's welfare as Officer Erickson had decided to let the arriving medical personnel handle any medical assessment. This lack of concern for checking Metz's welfare is reflected in Officer Erickson's interactions with Metz, where, rather than asking any questions related to

Metz's welfare, he tells Metz to get out of the car and asks for identification. Three other police officers are present when Metz exits the car, and not a single one of them asks about Metz's welfare—instead asking Officer Erickson if Metz was a "210" or intoxicated driver. None of the other officers approach to see if Metz is in need of help, but begin looking into Metz's car windows. Once outside of the car, Metz questions if it is a big deal to be parked where he was—legally, at a public park on a nice morning—and explains that he was simply taking a nap. Officer Erickson calls in Metz's driver's license information to dispatch—seeking to obtain Metz's driving history and determine whether there are any warrants for Metz—but again appears wholly unconcerned with Metz's welfare as it is apparent that Metz is fine. Eventually, medical personnel exit the ambulance and start to walk over to Metz and Officer Erickson. It is only at the point which they arrive and ask if Metz needs medical attention that Officer Erickson finally inquires as to Metz's welfare and asks Metz if he needs any medical attention. Metz responds that he does not, and Officer Erickson immediately sends the medical personnel away without allowing them to speak with or conduct an assessment of Metz, even though Officer Erickson had Metz exit the vehicle so that medical personnel could "talk with [Metz] for a second and make sure [he is] all right." Officer Erickson also testified at the hearing that he only sought to identify Metz during the incident because he was going to let medical personnel "do the medical assessment."

¶22 "[W]e require that a welfare check be based on objective, specific, and articulable facts from which an officer would suspect that a citizen is in need of help or is in peril, and

that the stop actually involve a welfare check[.]" *State v. Spaulding*, 2011 MT 204, ¶ 24, 361 Mont. 445, 259 P.3d 793 (internal citation omitted).

¶23 Officer Erickson's initial contact with Metz was valid under the community caretaker doctrine. Virtually immediately upon arriving and speaking with Metz, it is obvious Officer Erickson was assured that Metz was not in peril or in need of assistance. Officer Erickson essentially admitted as much at the suppression hearing, when he testified that he was seeking to identify Metz—but did not testify that he was seeking to help Metz. Under the third prong of the *Lovegren* test, and recognizing that a "welfare check" must actually involve a welfare check, Officer Erickson's community caretaker stop was completed before he told Metz to exit his car. Similar to *State v. Strom*, 2014 MT 234, 376 Mont. 277, 333 P.3d 218,[2] at the point Officer Erickson asks Metz to get out of the car, produce identification, and answer questions about how long he has been there, this matter has moved beyond a welfare check to an investigation, but there was not yet particularized suspicion.

¶24 The Dissent disagrees with the Court's analysis regarding the length of Officer Erickson's community caretaker stop, finding that Officer Erickson "asked legitimate preliminary questions to help ascertain [Metz's] condition" after he directed Metz out of his vehicle. Dissent, ¶ 38. Quite notably, none of Officer Erickson's "legitimate" questions

[2] Although *Strom* involved officer contact based on "suspicious activity" rather than community caretaker contact of a vehicle similarly parked legally in a parking lot of a public park during daylight hours, similar to the case at hand upon making contact with the vehicle's occupants, the officer derived no objective data or resulting suspicion that justified further investigation. *See Strom*, ¶ 16.

after directing Metz to exit his vehicle and prior to sending medical personnel away involve actually asking Metz about his condition, though we require a community caretaker stop to "actually involve a welfare check[.]" *Spaulding*, ¶ 24. The Dissent then chides the Court for failing to afford Officer Erickson the latitude to react and follow up on his observations. Dissent, ¶ 40. Officer Erickson testified at the suppression hearing that he did not observe any indication of a medical problem, so it is unclear why Officer Erickson would then need latitude to react and follow up on that observation when he has already determined that there is no need to either "render assistance or mitigate the peril[.]" *Marcial*, ¶ 15 (quoting *Lovegren*, ¶ 25). Most tellingly, Officer Erickson—though he testified that he was going to let medical personnel do an assessment of Metz—sends the medical personnel away without having them conduct any assessment of Metz after simply asking Metz if he needed any medical attention and Metz responding "No." If Officer Erickson intended to conduct a welfare check with his questioning of Metz outside of the vehicle, he would have questioned Metz about his welfare. Ultimately, however, the Dissent's disagreement with our finding of when the community caretaker stop was completed is a distinction without a difference as applied to the facts of this case, because the ultimate analysis of whether Officer Erickson obtained particularized suspicion to conduct a DUI investigation would be unchanged.

¶25 The Municipal Court, and later the District Court, both found that the "welfare check" lasted well beyond the point where Officer Erickson told Metz to step out of the car. The Municipal Court, and again later the District Court, also found that the "welfare

check" lasted well beyond the point where Officer Erickson sent the medical personnel away. The Municipal Court's finding regarding the length of the community caretaker stop in this case is clearly erroneous. In finding that Officer Erickson had a particularized suspicion to detain Metz for an investigatory stop, the Municipal Court included numerous indicia of intoxication that were not obtained until well after the "welfare check" was completed, and therefore its finding regarding particularized suspicion is also clearly erroneous.

¶26 At the time Officer Erickson's welfare check was completed, based upon the testimony and video evidence presented at the suppression hearing, he had observed that Metz looked at him with a "dazed expression," had bloodshot eyes, and apparently spoke with a slight slur—though this alleged slur is not evident in the video of the incident. None of these are suspicious on a person who was just awakened from a nap by being surrounded by three police cars, four police officers, an ambulance, and a fire truck. After sending the medical personnel away—again, well after the welfare check was completed and after speaking to Metz for nearly three minutes—Officer Erickson relays his real-time impressions to the other officers present. Officer Erickson does not mention smelling alcohol, he does not mention Metz admitting to being on probation, he does not mention Metz admitting to drinking, and he does not mention seeing a "beer cup." Officer Erickson only relays to the other officers that he has observed Metz with bloodshot eyes and speaking with a slight slur, and that he does not wish to pursue a DUI investigation. The other officers, who never attempted to check on Metz's welfare, indicate to Officer

Erickson that they have seen nothing illegal in the car. From Officer Erickson's own testimony and the evidence shown on the body cam video, Officer Erickson—correctly—did not believe that he had particularized suspicion to conduct a DUI investigation at the time he told Metz to "hang tight" and walked away with his driver's license.

¶27 We also note that Officer Erickson, in both his Application for Search Warrant and his Affidavit of Probable Cause, claimed that Metz was reported as being "passed out" in a running vehicle. Metz was not reported as being "passed out" by Koepke during her 911 call, and the 911 notes admitted into evidence at the suppression hearing also make no reference to Metz being "passed out." At the hearing, Officer Erickson did not testify to hearing the phrase "passed out" over the dispatch radio. Officer Erickson was not responding to a report of a "passed out" driver, but one who was reported as *possibly* not moving. This information, combined with his observations of Metz during the very brief welfare check, does not rise to the level of particularized suspicion.

¶28 At the suppression hearing, Officer Erickson testified to five things which gave him particularized suspicion to conduct a DUI investigation: a strong odor of alcohol; bloodshot eyes; a dazed expression; a beer cup in the car; and Metz admitting to drinking. The Municipal Court held that all five of these factors were apparent to Officer Erickson during the community caretaker stop. In fact, only two of these indicators—bloodshot eyes and a dazed expression—existed at the time the welfare check was completed. These objective factors present at the completion of the community caretaker stop, in the absence of the additional indicators observed later, do not support an inference that Metz had committed,

was committing, or was about to commit a crime, and therefore Officer Erickson did not obtain particularized suspicion to conduct an investigatory stop. *Marcial*, ¶ 18. The Dissent lists numerous cases where we have held that an officer may obtain particularized suspicion to conduct a DUI investigation after noticing different indicators of intoxication. Dissent, ¶ 41. In each of these cases, when we found the existence of particularized suspicion, the responding officer observed the odor of alcohol, an open alcoholic container, or both. If Officer Erickson noticed an odor of alcohol on Metz during the community caretaker stop, he would have gained particularized suspicion to conduct an investigatory DUI stop. In the present case, however, Officer Erickson did not observe either the odor of alcohol or an open alcoholic container prior to the completion of his community caretaker stop.

¶29 The Dissent asserts the Municipal Court "clearly understood the difference between the officer's community caretaker inquiries and the ensuing DUI investigatory stop."[3] Dissent, ¶ 42. The Dissent arrives at this conclusion despite itself recognizing some of the indicators testified to by Officer Erickson did not in fact occur prior to completion of the welfare check and contrary to the Municipal Court's conclusion these indicators were present during the welfare check. The Dissent correctly recognizes Officer Erickson did

[3] The Dissent further takes issue with our characterization of the Municipal Court's holding as "flatly wrong." Dissent, ¶ 42. As clearly noted in the portion of this opinion objected to by the Dissent, the Municipal Court held that Officer Erickson "had become aware of evidence (including the Defendant's own admission) that the driver had consumed alcohol" before the completion of the welfare check. Opinion, ¶ 18. The Dissent—correctly—does not find that Metz admitted to drinking alcohol during the welfare check, and therefore our characterization of the Municipal Court's holding that he did as "flatly wrong," is not inaccurate, even under the Dissent's analysis.

not observe a "beer cup" and Metz did not admit to drinking during the welfare check—this recognition is contrary to Officer Erickson's testimony that both of these indicators provided him particularized suspicion to conduct a DUI investigation and contrary to the Municipal Court's holding that both of these indicators occurred during the welfare check. The Dissent then asserts Officer Erickson did notice a strong odor of alcohol on Metz during the welfare check. To arrive at this conclusion, the Dissent disregards both the body camera video of the incident and a large portion of Officer Erickson's testimony. The Dissent appears to base its conclusion that Officer Erickson did observe a strong odor of alcohol upon the same testimony that it disregarded when it recognized Officer Erickson had not observed a "beer cup" and Metz had not admitted to drinking prior to completion of the welfare check. As evidenced on the body camera video, Officer Erickson did not relay that he smelled alcohol (or that he observed a "beer cup" or that Metz admitted to drinking) to the other officers present as they discussed, in real-time, whether Officer Erickson had particularized suspicion to conduct a DUI investigation. Again, as evidenced by the body cam video, Officer Erickson informed the other officers of the indicators he observed (bloodshot eyes and some slurred speech), asked what they observed, and ultimately determined he did not have enough to detain Metz for a DUI investigation. At the suppression hearing, Officer Erickson testified he did not wish to pursue a DUI investigation when he concluded this conversation with the other officers. Indeed, the smell of alcohol is not even mentioned on the video by any of the four officers present until after the welfare check is concluded under the analysis of both the Court and the Dissent—

and even then it is not mentioned by Officer Erickson, but by Officer Kamerer after the welfare check is completed when he re-initiates law enforcement contact with Metz.

¶30 While it was within the province of the Municipal Court to assess both the credibility of Officer Erickson's testimony at the suppression hearing and the weight to be given to that testimony, *State v. Gilmore*, 2004 MT 363, ¶ 22, 324 Mont. 488, 104 P.3d 1051, nothing in our case law requires this Court to simply disregard video evidence which contradicts testimony apparently found credible by a lower court, particularly when the lower court's holding is clearly erroneous. While we have not squarely addressed a situation in which an officer's testimony is contradicted by video evidence, we find instructive decisions from other jurisdictions which have addressed this issue. "[W]e cannot blind ourselves to the videotape evidence simply because [an officer's] testimony may, by itself, be read to support the [lower court's] holding." *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000). As succinctly stated by the Supreme Court of Florida:

> We respect the authority and expertise of law enforcement officers, and thus rely on an officer's memory when necessary. But we would be remiss if we failed to acknowledge that at times, an officer's human recollection and report may be contrary to that which actually happened as evinced in the real time video. This is the reality of human imperfection; we cannot expect officers to retain information as if he or she were a computer. Therefore, a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection. Such a standard would produce an absurd result.

Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles, 209 So. 3d 1165, 1172 (Fla. 2017).

¶31 As noted above, the Dissent itself already disregards a large portion of Officer Erickson's testimony—and the Municipal Court's holding—based primarily on its review of the body cam video, choosing only to retain as much as necessary to find particularized suspicion and maintain a conviction. In the face of video evidence clearly demonstrating that Officer Erickson did not have—and did not believe that he had—a particularized suspicion to conduct a DUI investigation, it is not appropriate to pick and choose in such a manner.

¶32 The Municipal Court's determination that Officer Erickson obtained particularized suspicion to conduct a DUI investigation during the scope of his community caretaker stop of Metz is clearly erroneous. Officer Erickson did not have particularized suspicion to conduct a DUI investigation at the time he was assured Metz was not in peril or in need of assistance, and he therefore illegally seized Metz to conduct his investigation. *Lovegren*, ¶ 25. Metz's motion to suppress should have been granted by the Municipal Court, and therefore the District Court also erred by affirming the Municipal Court's decision. As such, the Municipal Court's denial of Metz's motion to suppress is reversed, Metz's conviction for misdemeanor DUI is vacated, and this matter is remanded with instructions to dismiss with prejudice.

CONCLUSION

¶33 The Municipal Court erred when it determined that Officer Erickson had particularized suspicion to conduct a DUI investigation at the completion of his community caretaker stop.

¶34 Reversed and remanded.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON
/S/ JIM RICE
/S/ DIRK M. SANDEFUR

Justice Beth Baker, dissenting.

¶35 Particularized suspicion being a question of fact, *Gill*, ¶ 10, I would conclude that the Municipal Court did not clearly err in denying Metz's motion to suppress. The record contains substantial credible evidence to support its finding that Officer Erickson had an objective, articulable basis to pursue a DUI investigation by the time he concluded his community caretaker inquiry.

¶36 The Municipal Court recognized that the "caretaking" function ends "when it can be determined that the individual driver is not in need of assistance." It found as a matter of fact, however, that before Officer Erickson was able to make that determination, he had become aware of evidence that Metz had consumed alcohol. The clear error standard of review requires this Court, in order to reverse, to conclude that the trial court lacked substantial record evidence, misapprehended the effect of that evidence, or plainly made a mistake. *Gill*, ¶ 10. Substantial evidence is relevant evidence that a reasonable person could accept as adequate to support a conclusion. *Nicholson v. United Pac. Ins. Co.*, 219 Mont. 32, 42, 710 P.2d 1342, 1348-49 (1985). Substantial evidence must be more than a mere scintilla, but it may be less than a preponderance of the evidence. *Carestia v.*

Robey, 2013 MT 335, ¶ 7, 372 Mont. 438, 313 P.3d 169. Although weak and conflicting, evidence is substantial if it is greater than trifling or frivolous. *Baird v. Norwest Bank*, 255 Mont. 317, 323, 843 P.2d 327, 331 (1992).

¶37 First, the record does not support the Court's insistence that Officer Erickson lacked "concern for checking Metz's welfare." Officer Erickson testified at the motions hearing that, based on the report he received of the 911 call, there could be concerns about the driver's welfare, and he needed to do a welfare check. That involves, the officer explained, making physical contact, determining if there is a crisis or medical issue, then making a determination as to how to proceed. The video shows this is just what Officer Erickson did.

¶38 When the officer first made contact, Metz sat up and responded that he had just pulled up. Officer Erickson said people had called and were concerned about his safety; he asked Metz, "Why don't you go ahead and step on out, and we'll have medical just talk with you for a second and make sure you're all right." He asked Metz for identification he could look at "while they talk with you." When Metz asked why it was such a big deal, Officer Erickson responded, "People were concerned about your welfare, so that's what we're doing." An ambulance arrived on the scene after Metz was standing outside the car. Officer Erickson asked Metz about how long he'd been there; when Metz didn't immediately respond, he asked: "a couple minutes, a couple hours?" Metz responded, contrary to his first statement, that he guessed he'd been there a couple of hours. The officer then asked why he had been stopped there; Metz shrugged and said he'd been there to take

a nap. Just then, the medical responders approached and asked if they needed assistance, and Metz said "no." By this time, having observed Metz and asked legitimate preliminary questions to help ascertain his condition, Officer Erickson determined that there was not a medical issue and so advised the responders.

¶39 As both the Municipal Court and the District Court correctly observed, an officer "could [be] remiss in her duty had she stopped her inquiry before she determined whether the defendant needed assistance." *State v. Seaman*, 2005 MT 307, ¶ 21, 329 Mont. 429, 124 P.3d 1137 (citing *State v. Nelson*, 2004 MT 13, ¶ 9, 319 Mont 250, 84 P.3d 25); *see also Lovegren*, ¶ 26. "Thus, the duty to investigate resides with the officer and until the officer is assured that the citizen is not in peril, the stop does not amount to a seizure." *Seaman*, ¶ 27. Officer Erickson testified at the hearing that he "would not just call off medical" because Metz sat up awake after he approached the vehicle.

¶40 In *Seaman*, we concluded that, after turning around to check on a driver pulled to the side of the road, an officer who observed the driver walking around outside the vehicle and getting back in did not exceed the community caretaker function by proceeding to approach the driver to check on her welfare simply because she had not exhibited obvious signs of peril. *Seaman*, ¶¶ 25-28. The Court today fails, as we required of the reviewing court in that case, to afford Officer Erickson the "latitude to react to and follow up on [his] observations." *Seaman*, ¶ 29. The brief amount of time Officer Erickson took with Metz and the few questions he asked prior to the approach of medical responders were appropriate to assure the officer that Metz did not need assistance. Once Metz refused and

Officer Erickson sent the responders away, the community caretaker function concluded. By that time, however, Officer Erickson had observed, as he testified at the hearing, Metz's dazed expression on initial contact, a strong odor of alcohol, red and bloodshot eyes, and Metz's inability to recall or refusal to explain how long he'd been there. Most of these observations are of conditions that may not be determined by viewing the video recording. Officer Erickson had not yet asked Metz any questions about whether he had consumed alcohol.

¶41 Taking the video recording and Officer Erickson's testimony together, the record supports the Municipal Court's finding that Officer Erickson then had specific and articulable facts which, together with rational inferences, reasonably warranted concern that Metz was under the influence of alcohol and gave particularized suspicion for further investigation. We have held many times that an officer's observation of indications such as bloodshot eyes, slurred speech, or an odor of alcohol on a driver's breath are sufficient articulable facts to support a finding of particularized suspicion. *See Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 42, 289 Mont. 1, 961 P.2d 75 (concluding that an officer's observations of an odor of alcohol, bloodshot eyes, and the driver's difficulty producing her driver's license gave rise to particularized suspicion of DUI); *Seaman*, ¶ 30 (concluding that a welfare check "lawfully ripened into an investigatory DUI stop" when, while the officer "was asking Seaman if she was okay and her car was okay, he noticed the odor of alcohol"); *State v. Vaughn*, 2007 MT 164, ¶ 23, 338 Mont. 97, 164 P.3d 873, *overruled in part on other grounds*, *Whitlow v. State*, 2008 MT 140, ¶ 18 n. 4, 343 Mont. 90,

183 P.3d 861 (concluding that officer's observations of open beer can, slurred speech, and bloodshot, watery eyes were sufficient to establish a particularized suspicion that driver may have been intoxicated); *State v. Burns*, 2011 MT 167, ¶ 35, 361 Mont. 191, 256 P.3d 944 (holding that, although officers "saw no apparent signs of peril" once they awakened the sleeping driver, their observations of a vodka bottle on the front passenger seat and the driver's slurred speech, red and glassy eyes, difficulty locating his driver's license and maintaining his balance, and disorientation gave particularized suspicion to further investigate); *State v. Marcial*, 2013 MT 242, ¶¶ 5, 19, 371 Mont. 348, 308 P.3d 69 (holding that where an officer asked defendant driver who nearly crashed his car if he was okay, and where the officer smelled alcohol on defendant among other signs of intoxication, the officer possessed particularized suspicion that defendant had been driving under the influence).

¶42 Although a fact-finder reasonably could come to different conclusions after reviewing the evidence, the Municipal Court was not "flatly wrong" (Opinion, ¶ 18) when it found that Officer Erickson had obtained particularized suspicion to investigate Metz for DUI by the time the welfare check concluded. Its finding is supported by more than a "mere scintilla" of evidence, and the court clearly understood the difference between the officer's community caretaker inquiries and the ensuing DUI investigatory stop. The District Court accordingly did not err in affirming Metz's conviction. I, too, would affirm.

/S/ BETH BAKER

Chief Justice Mike McGrath and Justice James Jeremiah Shea join in the dissenting Opinion of Justice Baker.

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA