

**NO. S-17-675**

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BEFORE THE NEBRASKA SUPREME COURT

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STATE OF NEBRASKA,

Appellee,

v.

STEVEN F. SHIFFERMILLER,

Appellant.

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**APPEAL FROM THE DISTRICT COURT  
OF LANCASTER COUNTY, NEBRASKA**

Honorable Robert Otte, District Judge

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**SUPPLEMENTAL BRIEF OF APPELLANT  
IN SUPPORT OF PETITION FOR FURTHER REVIEW**

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Respectfully submitted:

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii  
ARGUMENT ..... 1  
CONCLUSION..... 4

**TABLE OF AUTHORITIES**

**Cases**

*Cady v. Dombrowski*, 413 U.S. 433 (1973) ..... 1, 2  
*Majors v. State*, 70 So.3d 655 (Fla.App. 2011)..... 3  
*State v. Bakewell*, 273 Neb. 372 (2007) ..... 1, 2  
*State v. Marshall*, A-15-019 (unpublished opinion) ..... 4  
*State v. Moser*, 20 Neb.App. 209 (2012)..... 2, 3  
*State v. Rohde*, 22 Neb.App. 926 (2015)..... 3, 4  
*State v. Shiffermiller*, 26 Neb. App. 250 ..... 2

## ARGUMENT

The Nebraska Court of Appeals erred in expanding the community caretaker exception to the Fourth Amendment. The Court of Appeals relies on the community caretaking exception announced by the Supreme Court of the United States in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) and narrowly adopted by the Nebraska Supreme Court in *State v. Bakewell*, 273 Neb. 372, 376-7, 730 N.W.2d 335 (2007), in its opinion. Although the Court of Appeals quoted *Blakewell* for the proposition that “this exception should be narrowly and carefully applied in order to prevent its abuse.”, the application and expansion of the exception is well beyond the narrow and careful application required. The Court of Also cited no support for the expansion of the community caretaking exception beyond the scenarios already adopted by this Court. The Court of Appeals in their opinion stated,

Nebraska law has applied the community caretaking exception in a few reported appellate cases. It has been found to apply in three cases, including a case wherein a vehicle was being driven in an erratic manner, *State v. Bakewell*, supra: a case wherein a vehicle was stopped at an intersection for [26 Neb.App. 263] a period of several minutes, *State v. Smith*, 4 Neb.App. 219. 540 N.W.2d 374 (1995) and a case wherein a passenger was observed to have “the upper half of her body through [the] moonroof” of a moving vehicle and was waving her arms. *State v. Rohde*, 22 Neb.App. at 942, 864 N.W.2d at 715. While all of these cases concerned an exigency or need to protect or assist an occupant of the vehicle in question, we find the same analysis to be applicable when those needing protection are located outside the vehicle. In fact, it was the general public that the Supreme Court sought to protect when first applying the community caretaker exception in *Cady v. Dombrowski*, supra.

In the present case, there was an indication, when officers initially made contact with Shiffermiller, that a crime had been committed. We found, above, that the investigation of this potential crime was reasonable in scope and duration. The officers determined there was no need to pursue a further criminal investigation. However, after the initial detention and investigation, the officers were still concerned regarding the safety of Shiffermiller, as well as the safety of the general

public if Shiffermiller were not properly cared for. Thus, the detention continued while the officers determined the appropriate next step.

*State v. Shiffermiller*, 26 Neb. App. 250, A-17-675.

In both *Cady* and *Bakewell*, the Defendants were inside of vehicles which were driven erratically and dangerously. *Id.* Law enforcement in both cases seized or searched the vehicle to conduct a "safety check of the vehicle." *Bakewell* at 374. The court, specifically in *Cady*, stated that such search and seizure is reasonable under the community caretaking exception due to "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." *Cady* at 441.

The Court of Appeals misapplies this exception far beyond automobiles to a range never authorized by Nebraska law.

The Court of Appeals previously treated the exception with skepticism even suggesting that in *State v. Moser*, that a motion to suppress could have been successful based on a traffic stop initiated due to the officer's belief that a shattered windshield created an obstructed view for the driver. In that instance, the Court of Appeals stated,

[T]he record before us in this postconviction proceeding does not show that Moser's vehicle was traveling in an erratic manner, such as the vehicle in *State v. Bakewell*, *supra*, or was stopped in traffic, such as the vehicle in *State v. Smith*, *supra*. There was no evidence that the vehicle had recently been involved in an accident such that it was necessary to check on the status of the vehicle or its occupants. In short,

there was no sense of urgency to check on the welfare of the driver in this case, as was present in Bakewell or Smith. Based upon this record, it is possible that the community caretaking exception would not have provided a viable justification for the stop of Moser's vehicle had counsel pursued a motion to suppress.

*State v. Moser*, 20 Neb.App. 209, 223-224 (2012).

The Nebraska Court of Appeals also evaluated the issue in *State v. Rohde* relying on cases from other jurisdictions as well.

In *Majors v. State*, 70 So.3d 655 (Fla.App. 2011), a bank manager notified police that a customer was acting strangely, attempting to withdraw a large amount of money, and wanted the check made payable to the driver of a vehicle parked outside the bank and that the customer kept going back and forth between the vehicle and the bank. The Florida District Court of Appeal held that the community caretaking exception did not apply to justify the stop because, if the officers intended to stop the vehicle to check on the safety of its occupants or any person its occupants may have been threatening, **the stop would have been based on sheer speculation**, rather than articulable facts related to public safety.

*State v. Rohde*, 22 Neb.App. 926, 941-942 (2015). This analysis is applicable to the situation before this Court as well. Although when challenged, the officer testified that he was concerned that Shiffermiller was under the influence and therefore a potential danger to the community if he were to drive after the officers left the situation, that assertion is not supported by the

remainder of the evidence, or lack thereof. It is logical to conclude that if the officers were concerned about Shiffermiller's sobriety, they would have conducted some sort of field sobriety test and not just relied upon their own speculation. They did not do so. This discrepancy should be in Shiffermiller's favor and cuts against the finding of the community caretaking exception.

The Court of Appeal's expansion of the community caretaking exception is even more inconsistent with their own application acknowledging that this Court has not expanded the community caretaking exception to residences as noted in *State v. Marshall*, A-15-019 (unpublished opinion). The Court of Appeals application of the community caretaker exception as it relates to Shiffermiller expands the exception well beyond what this Court has cautioned against, and what the Court of Appeals itself has cautioned against previously. This aggressive expansion should not be upheld as it is an egregious encroachment on the Fourth Amendment protections.

### **CONCLUSION**

This case is a clear example of a law enforcement fishing expedition in order to arrest an individual when they do not otherwise have probable cause. Officers overstepped the bounds of a permissible *Terry* stop and after conclusion of their investigation continued to hold the Defendant in violation of his Fourth Amendment rights. Furthermore, while the Defendant was being unlawfully held, officers completed an unlawful search outside of the scope of *Terry* and current legal precedent. The Defendant-Appellant would request this court to reverse the Court of Appeal's and trial court's determination on the Shiffermiller's motion to suppress and remand for further proceedings in this case.

Respectfully submitted,

Steven F. Shiffermiller, Appellant

By:

A handwritten signature in blue ink, appearing to read "Matt Kosmicki", written over a horizontal line.

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# Certificate of Service

I hereby certify that on Tuesday, November 27, 2018 I provided a true and correct copy of this *Supplemental Brief of Appt Shiffmiller* to the following:

State of Nebraska represented by Nathan Andrew Liss (23730) service method: Electronic Service to **nathan.liss@nebraska.gov**

Signature: /s/ MATTHEW KENNETH KOSMICKI (21875)