THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0014

The State of New Hampshire

v.

Brian Watson

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE BELKNAP COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(5-minute 3JX oral argument)

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1. Whether the trial court committed error in allowing the forensic toxicologist, who had reviewed all of the reports regarding the tests done on the victim's fluids, and who had signed the final report, to testify regarding the laboratory's findings.

2. Whether the court imposed a disproportionate sentence, where the defendant was convicted of selling fentanyl to the victim, where the victim then died as a result of ingesting the drug, and where the defendant expressed no remorse at the victim's death.

3. Whether the trial court committed error when it denied the motion to suppress when it found that the defendant voluntarily waived his rights and never attempted to end the interview.

STATEMENT OF THE CASE

The defendant was charged with sale of fentanyl with death resulting. RSA 318-8-B:26, IX (2017); NOA: 7. [1] He was tried and convicted in Belknap County Superior Court (*O'Neill*, J.). On February 7, 2017, he was sentenced to 20 years to life imprisonment, with 5 years of the minimum sentence suspended. NOA: 7. The trial court also imposed a fine of $25,000 and a statutory penalty assessment of $6,000, and ordered $5,076.50 in restitution. NOA: 8. This appeal followed.

[1] "DB: _" refers to the defendant's brief and page number. "DBA:_" refers to the appendix to the defendant's brief and page number. "DB Supp.: _" refers to the supplement to the defendant's brief and page number. "NOA: _" refers to the defendant's notice of appeal and page number. "Tr.: _" refers to the trial transcript and page number. Other transcripts are identified by the date, followed by "Tr.:" and the page number.

STATEMENT OF FACTS

A. The State's Case

1. The Victim's Mother's Testimony

On the morning of Friday, April 3, 2015, the victim's mother found the victim, dead in his bedroom in their home in Tilton. Tr.: 26-27, 31. He was 21 years old. Tr.: 46.

The victim's mother would wake him up every morning. Tr.: 26. On the evening of April 2, 2015, she returned home late from meetings at the school where she was the director. Tr.: 24, 28. The victim had just had his hair cut and his mother teased him, "telling him how hot he looked." Tr.: 28. Then she told him that she loved him and went to bed at 11:38 p.m. Tr.: 28.

On the morning of April 3, 2015, the victim's mother got up at 6:15 a.m. and could hear his television, so she thought that he was already awake. Tr.: 26, 30, 31. She called to him and asked why he was awake so early, but he did not answer, and she went into his bedroom. Tr.: 26. She saw the victim "sitting up on the end of his bed with his phone" and said, "[Y]ou're not funny, stop it." Tr.: 26. The victim said nothing. Tr.: 26. He was wearing the same clothes that he had been wearing the previous evening. Tr.: 28. His mother "kept walking closer and, [was] like, this isn't funny anymore; stop it you're scaring me." Tr.: 26. She

"reached out and touched him and he was stiff and then [she] reached up under his shirt and he was cold." Tr.: 26.

She called 911 and was told to try CPR. Tr.: 27. When she tried to move the victim to do so, the cell phone fell out of his hand. Tr.: 27.

2. Days Before the Victim's Death

The victim spent the Wednesday before he died with his aunt, helping her with her dogs. Tr.: 30, 63. The dogs were pedigree animals and competed in national dog shows. Tr.: 63-65. The aunt's dog had a new litter of puppies. Tr.: 63. The aunt told the mother that the victim had "been acting kind of funny." Tr.: 31.

The victim's aunt recalled that the victim seemed to move with a "slowed movement." Tr.: 70. She asked the victim if he was using drugs and he said that he was not. Tr.: 70. The aunt told the victim's mother that she suspected drug use. Tr.: 69. She added that the victim had loaned his stepfather some money and the stepfather repaid the loan just before the victim's death. Tr.: 71-72.

The victim's brother had abused pills, but the victim's mother had never worried about the victim and drug use. Tr.: 31. The mother kept urine tests to test the brother for drug use and, after her conversation with the aunt, she gave one of the tests to the victim, but he passed it. Tr.: 31.

3. Teanna Bryson's Testimony

Teanna Bryson was in a romantic relationship with the defendant. Tr.: 300. She knew the victim from Winnisquam High School, but she did not graduate. Tr.: 302, 305. She made contact with the victim through Facebook and asked if he remembered her. Tr.: 306. The first contact was made on March 22, 2015. Tr.: 411. After she heard back from him, she sent him a second message, asking him if he did drugs and telling him that she could provide him with "beyond fire" fentanyl. Tr.: 307-08. The contact was her idea, but she made contact with the victim "to get rid of stuff" for the defendant. Tr.: 308. The victim responded that he lived in Tilton and he had $20 and wanted to "try this shit out." Tr.: 309. Bryson responded that she could be in Tilton shortly. 310. The victim gave her his telephone number. Tr.: 312.

After some messaging back and forth, on March 23, Tr.: 416, the victim sent Bryson a message that he had been able to buy some suboxone, but that he "[m]ight still want to try it when [he was] out of work," Tr.: 319. Bryson responded that, if he injected the fentanyl, the drug that she had to sell was "severely intensifying." Tr.: 319. She sent the victim a description of the car that she was in, stating: "I'm in a big dark blue Ford Excursion. Just hop in the back seat and I'm with my friend, he's an older guy, so that's why it's a big vehicle. I don't drive." Tr.: 320.

The victim attempted to contact Bryson on two more occasions, on March 28 and 31, 2015. Tr.: 421. She did not respond to either message. Tr.: 421.

When the time came for the sale, Bryson did not go with the defendant to sell to the victim, however. Tr.: 322. She had "cotton fever" from accidentally shooting cotton into her veins and stayed home. Tr.: 323. Cotton fever causes shaking and sweating, and makes a person feel "really, really cold." Tr.: 323.

After the sale, Bryson learned that the victim had died of an overdose. Tr.: 321. She sent the defendant a text message, saying, "OMG, B, our shit killed someone." Tr.: 326. She then sent a second message, saying, "We killed one of our customers. I'm devastated and shocked, I am freaking out." Tr.: 326. The defendant responded, "What? Who?" Tr.: 326. Bryson responded that the victim had "overdosed on our dope." Tr.: 327. To this, the defendant responded, "What? No way." And then he added, "Say nothing to no one. Be home as soon as I can." Tr.: 327.

4. Evidence from the Victim's Bedroom

Tilton Detective Brian Kydd-Keeler recalled that, when he went into the victim's bedroom, there was an uncapped hypodermic needle sitting in front of him. Tr.: 114. There was a second hypodermic needle, which had liquid in it, in a drawer in the TV stand. Tr.: 128. The victim's cell phone was in between his feet. Tr.: 114. There was a spoon at his feet. Tr.: 114. There was a brown

residue on the spoon. Tr.: 118. The spoon also had burn marks that were consistent with drug use. Tr.: 121. The detective also found a tourniquet on the TV Stand. Tr.: 117. The detective found three bags in the waste basket in the victim's bedroom. Tr.: 125. The bags contained a "tan-ish" residue. Tr.: 126.

After police left and the victim's body was removed, the mother opened the bottom drawer of the TV stand in her son's room and found some hypodermic needles and "a packet of something." Tr.: 33, 34. She called the police and asked them to return and "check it out." Tr.: 33.

Patrolman Noelle Glenn went to the home that afternoon and took photographs before recovering the needles. Tr.: 74-75. When the mother brought her to the victim's bedroom, Patrolman Glenn found needles, some which had liquid in them, in a drawer in the TV stand. Tr.: 75, 87. Some of the syringes looked as if they had already been used. Tr.: 89. She also found a baggie containing a brownish powder. Tr.: 75-76. The powder was tested by the State Police Forensic Laboratory and was positive for fentanyl. Tr.: 291-92.

5. The Cell Phone Records

The mother gave the police permission to take the victim's cell phone. Tr.: 32-33. The police obtained a search warrant for the phone and unlocked it by going to the morgue and pressing the victim's thumb to it. Tr.: 123. When the police opened the phone, they found text messages in it. Tr.: 144-45.

The messages were exchanged between the victim and a person listed in the phone as "Brian D." Tr.: 386-91. The messages from the victim were sent to a telephone number ending in 7985, a telephone number registered to the defendant. Tr.: 386, 424. The messages, which set up the drug sale, occurred between 8:00 a.m. and 9:00 a.m. on April 2. Tr.: 391. Later that evening, the victim sent the defendant another text message, telling him that he was looking for "two g's." Tr.: 392. When the defendant responded that the cost was $240, the victim answered that he was planning to go to Hannaford grocery store in Franklin to get money and asked if the defendant would like to meet him there. Tr.: 392.

The State introduced a receipt from Hannaford, dated April 2, 2015 at 10:04 p.m. Tr.: 406-07. The State also introduced a security recording from Hannaford which showed the victim entering Hannaford and leaving a few minutes later, carrying bags and his cell phone. Tr.: 408-09.

Finally, there was a message on the victim's phone that was never sent. Tr.: 386. The message read, "It's good, but I think the first…" and then ended. Tr.: 386.

6. The Forensic Toxicologist's Testimony

Daniel Isenschmid, a forensic toxicologist at the National Medical Services (NMS) Laboratories testified. Tr.: 243. NMS provided a variety of services, including testing biological samples for narcotics in medical examiner cases. Tr.:

244. After all the laboratory testing on a sample was completed, Isenschmid or another toxicologist would "review the entire case in the context of all of the work that was done to issue a final report." Tr.: 250. Isenschmid signed the final toxicology report issued in the victim's case. Tr.: 253.

NMS found marijuana, fentanyl, and its "metabolic breakdown product," norfentanyl, in the victim's blood. Tr.: 257. When NMS tested the victim's urine, it found a "presumptive positive" for marijuana and opiates. Tr.: 257. Fentanyl, Isenschmid explained, was a controlled substance with potential for therapeutic use, but a "high potential" for abuse. Tr.: 262.

NMS found 21 nanograms of fentanyl per milliliter in the victim's blood, which was a "relatively large concentration of fentanyl." Tr.: 258. A concentration of 21 nanograms per milliliter, Isenschmid explained, "could be enough to shut down [a person's] breathing process" and cause death. Tr.: 261-62.

B. The Defendant's Statements, the Motion to Suppress, and Ruling

The defendant was interviewed on May 8, 2015. DBA: 59. He was given a warning and waiver of rights upon his arrest. DBA: 59; Tr.: 148. He was reminded of those rights at the beginning of the interview and said that he was

willing to answer questions. DBA: 59. The interview was recorded and was played for the jury at trial. Tr.: 478.

The defendant said that he had started selling drugs after losing his job in January. DBA: 62-63. He was trying to avoid foreclosure on his home. Tr.: 63. He acknowledged that his phone number was the number that ended in 7985. DBA: 64. He said he did not know how many sales of drugs he had made and he had sold drugs to "[n]ot many" people. DBA: 65. Pressed, he said that he had sold drugs to fewer than ten people. DBA: 66. The defendant acknowledged that heroin that contained fentanyl was more potent. DBA: 69-70.

Detective Nathan Buffington showed the defendant a picture of the victim after he had died. DBA: 71. The detective then told the defendant that the police had the video of the victim getting his money at Hannaford, the text messages setting up the sale, and the time of death, which was shortly after the defendant had taken the victim home. DBA: 72. The detective told the defendant that his drugs had killed the victim. DBA: 73.

The defendant responded that he had warned the victim not to shoot too much of the heroin. DBA: 73-74. He said that he never wanted anyone to die, but that the victim had been careless. DBA: 75. He then added that he had picked the victim up " a few times" and that the victim usually met him at the Rite-Aid or at the Tractor Supply store, both of which were within walking distance of the

victim's home. DBA: 76. The victim would usually buy $100 worth of heroin. DBA: 76. On the night he died, the victim told the defendant that he was buying the drugs for himself and for a friend. DBA: 77.

On April 20, 2016, the defendant filed a motion to suppress his statements. DBA: 29. He alleged that the waiver of his rights was not knowing, voluntary, and intelligent. DBA: 30. He argued that there "was not even a writing signed by [him] indicating that he had been informed of his rights and properly chose to waive them." DBA: 32. He argued that the State had not demonstrated that he understood his rights. DBA: 32. He concluded that his waiver was invalid. DBA: 32.

The defendant also argued that, because the detectives had asked him if he was willing to hear what they had to say, he simply agreed to listen, but he did not waive his right to remain silent. DBA: 33. He also contended that, because he had been arrested for selling controlled substances, he had the right to end the questioning when the interview veered from that charge. DBA: 35. He said that, while the defendant attempted to speak after being shown the photograph of the deceased victim, Detective Buffington interrupted him. DBA: 36. He contended that he did not try to end the questioning because "he never got a chance to" do so. DBA: 37.

On July 20, 2016, the trial court held a hearing on the motion to suppress. DB Supp.: 1.[2] The court heard the testimony of Detective Buffington and Detective Kydd-Keeler. DB Supp.: 1.

The court found that the detectives stopped the defendant on May 8, 2015, when the defendant was driving on School Street in Tilton. DB Supp.: 2. Detective Kydd-Keeler told the defendant that he was under arrest for sale of a controlled drug and the defendant got out of his car and was handcuffed. DB Supp.: 2. Detective Kydd-Keeler read the defendant his rights from a *Miranda*[3] warning card that he kept in his wallet. DB Supp.: 2. The card had five separate rights listed on it and, after reading each right, the detective asked the defendant if he understood. DB Supp.: 2. According to the court's order, the defendant said that he did. DB Supp.: 2.

Detective Buffington told the defendant that law enforcement knew that he had picked up drugs earlier that day in Manchester. DB: 2. The defendant responded that he was unemployed and that he had been selling drugs "to make ends meet." DB Supp.: 2. The defendant was transported to the police station and placed in a holding cell. DB Supp.: 3.

While Detective Buffington was booking the defendant, he asked if the defendant wanted to speak with law enforcement. DB Supp.: 3. The defendant

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[2] The hearing itself has not been transcribed.
[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

said that he "wasn't sure," but asked again a few minutes later, the defendant agreed to be interviewed. DB Supp.: 3. The interview took place in a small room with a table and three chairs. DB Supp.: 3. The court reviewed the video recording of the interview, which was admitted as State's Exhibit 1 at the hearing. DB Supp.: 4.

Before the actual questioning started, Detective Buffington reminded the defendant that he had been advised of his rights. DB Supp.: 3. The defendant was not handcuffed and did not seem "overly emotional or angry" according to the officers' testimony at the hearing. DB Supp.: 4. The interview took approximately a half an hour. DB Supp.: 5.

Midway through the interview, Detective Buffington showed the defendant a photograph of the deceased victim and told him that the victim had died as the result of taking drugs that the defendant sold to him. DB Supp.: 4. Both before and after this, the defendant made incriminating statements with respect to both selling drugs and the drugs sold to the victim. DB Supp.: 4.

The court then found that neither party disputed that the defendant was subjected to custodial interrogation. DB Supp.: 5. However, the court also found that it was "undisputed" that the defendant had been given his rights and that the State had proved that those rights had been knowingly, voluntarily, and intelligently waived by the defendant. DB Supp.: 6.

The court rejected the defendant's contention that the officers should have informed the defendant that they suspected him of selling the drugs to the victim that resulted in the victim's death. DB Supp.: 7. It also rejected the defendant's implicit argument that, once they began to ask the defendant about the death of the victim, they should have re-read the *Miranda* rights. DB: 7. The court noted that these arguments were not consistent with this Court's opinions. DB: 7.

The court also rejected the defendant's contention that the police officers should have had the defendant fill out a waiver form. DB: 7. Taking the totality of the circumstances into consideration, the court found that the State had met its burden of proof. DB Supp.: 7-8. It similarly rejected the defendant's contention that the rights should have been read to him again before the interview commenced. DB Supp.: 8.

The court rejected the defendant's contention that, because Detective Buffington asked the defendant if he was willing to listen to what the detectives had to say, his waiver of rights was invalid. DB Supp.: 8. The court noted that, during booking, the detective corporal had asked the defendant if he was willing to talk to law enforcement and that it was "objectively clear" that the officers intended to interview him when they brought him to the interview room. DB Supp.: 8-9.

Finally, the court rejected the contention that the defendant's statement that he "wasn't sure" about answering questions constituted an invocation of his rights. DB Supp.: 9. The court found that the response was "equivocal" and that the officers "did not coerce the defendant into speaking against his will." DB Supp.: 9.

C. Sentencing

Sentencing took place on February 7, 2017. 2/7/17 Tr.: 1. The State recommended a sentence of not less than 25 years of imprisonment and not more than life. 2/7/17 Tr.: 5. The State argued that the defendant had sold the victim fentanyl twice on the day that the victim died. 2/7/17 Tr.: 7. The defendant knew that the drug was fentanyl and that it was "fired, that it was potent." 2/7/17 Tr.: 7. The State pointed out that the defendant was a drug dealer and that he was selling drugs to support himself. DBA: 8. The defendant had also violated the terms of his bail conditions by having contact with Bryson. 2/7/17 Tr.: 9.

The State presented the testimony of Detective Buffington. 2/7/17 Tr.: 11. After recounting the contacts between the defendant and the victim on the day of the victim's death, and describing the defendant's violation of his bail conditions, the State asked about deaths in New Hampshire from drugs generally and fentanyl in particular. 2/7/17 Tr.: 20-21.

The court also heard from a number of people about the victim. Robert Adams read a statement from a junior at Winnisquam Regional High School, who recounted not only his hunting trips with the victim, but the fact that the defendant had been his Little League coach. 2/7/17 Tr.: 34-35. He described his feelings toward his old coach as "a flash of sadness and anger." 2/7/17 Tr.: 35-36.

The victim's aunt described the victim's involvement with her dogs and their involvement in national kennel competitions. 2/7/17 Tr.: 37. She described her sadness at the victim's death, 2/7/17 Tr.: 38-39, and called the defendant "a predator," 2/7/17 Tr.: 40. She pointed out that, moments after learning of the victim's death, the defendant completed another drug deal. 2/7/17 Tr.: 40.

The victim's stepfather said that "[e]very day is a struggle." 2/7/17 Tr.: 43. He had met the victim when the victim was 7 and his own son was 11. 2/7/17 Tr.: 43-44. He talked about "book[ing] a funeral home" and feeling that this was not something people should have to do for a 21-year-old person. 2/7/17 Tr.: 46. He ended by saying that the victim's family would not get him back, but hoped that "we can keep one more family safe, one more child protected." 2/7/17 Tr.: 47.

Peter Fogg expressed the opinion that the defendant had "offered no remorse" in the victim's death. 2/7/17 Tr.: 47. He said that the defendant had blamed the victim for the death because he had warned the victim about the strength of the drug. 2/7/17 Tr.: 48. Even after the victim died, the defendant

continued to sell drugs. 2/7/17 Tr.: 48. He pointed out that the defendant had "a social position in the community," which was evidenced by his involvement in Little League. 2/7/17 Tr.: 49. Although this position carried with it an "implied duty" to "protect young people," the defendant was a "predator." 2/7/17 Tr.: 49. He characterized the defendant as a "50-year-old man with a 20-year-old girlfriend, who sells to the girlfriend's friends." 2/7/17 Tr.: 50.

According to the victim's mother, the defendant was the Vice President of the Tilton Little League, "a trusted position in the community." 2/7/17 Tr.: 54. While he was out on bail, the defendant attended Tilton Little League games. 2/7/17 Tr.: 51. A group of fathers finally persuaded him to leave. 2/7/17 Tr.: 51.

The victim's mother said that, when she went to court, the defendant "would try to stare [the family] down." 2/7/17 Tr.: 51. She said that his truck had a broken muffler and, as the defendant drove by the family's house, he would "rev his engine." 2/7/17 Tr.: 52. She said that, without a lengthy sentence, the defendant would be "right back to dealing this poison" as soon as he was released. 2/7/17 Tr.: 52.

Defense counsel asked for an 8- to 20-year sentence. 2/7/17 Tr.: 56. Defense counsel provided the court with a "brief collection of individuals" who had been sentenced for similar offenses. 2/7/17 Tr.: 57-58; *see also* DBA: 20. Describing the victim's death as "useless and tragic," defense counsel asked the

court to consider the sentences imposed in similar cases. 2/7/17 Tr.: 58-59. He acknowledged that the defendant's life did "crash and burn," but he had no prior record. 2/7/17 Tr.: 61. Defense counsel pointed out that the defendant had children who were "Honor Roll kids." 2/7/17 Tr.: 61. The defendant had saved a woman from drowning in 1994 and rescued a woman from an overturned car in 1997. 2/7/17 Tr.: 62. He had been a well-liked coach. 2/7/17 Tr.: 62. The defendant did not address the court.

In imposing sentence, the court pointed out that the defendant sold drugs in order to pay his bills. 2/7/17 Tr.: 67. The court noted that the defendant knew that the drug that he was selling was fentanyl. 2/7/17 Tr.: 67. The defendant showed no remorse when he learned of the victim's death, but instead advised Bryson to say nothing. 2/7/17 Tr.: 67-68. The defendant had also violated the bail order while on release. 2/7/17 Tr.: 68. The court recounted the statement by the student who had the defendant as his coach, recalling, "My first coach killed my first friend." 2/7/17 Tr.: 68 (internal quotation marks omitted). The court expressed sadness at the impact on the victim's mother. 2/7/17 Tr.: 68.

The court then said that the message that it intended to send was clear, stating, "Enough is enough." 2/7/17 Tr.: 68. The court said that those who "[chose] to sell this poison" would "suffer severe punitive consequences." 2/7/17 Tr.: 68-69. The court then imposed a sentence of 20 years to life imprisonment,

with five years of the minimum and none of the maximum suspended. 2/7/17 Tr.: 69. The court also imposed a $25,000 fine and a $6,000 statutory assessment. 2/7/17 Tr.: 69-70. It ordered restitution and imposed "no-contact" provisions. 2/7/17 Tr.: 70.

SUMMARY OF THE ARGUMENT

1. The trial court committed no error in allowing the forensic toxicologist, who had reviewed all of the reports regarding the tests done on the victim's fluids, and who had signed the final report, to testify regarding the laboratory's findings.

2. The trial court imposed a legal sentence, within the statutory range. The court considered the seriousness of the offense and the deterrent value of the sentence. The defendant never expressed remorse at the victim's death and instead blamed him for taking the lethal dose which the defendant had sold to him.

3. The defendant has provided this Court with an inadequate record to decide the suppression claims. But even if this Court concludes that the record is adequate, the trial court properly denied the motion to suppress. The defendant voluntarily waived his rights and never attempted to end the interview.

ARGUMENT

I. THE COURT PROPERLY ALLOWED THE FORENSIC TOXICOLOGIST TO TESTIFY TO THE REPORTS THAT HE REVIEWED.

The defendant first contends that the trial court committed error when it allowed the forensic toxicologist, to testify to the results of the tests that he reviewed. DB: 10.

The admission of evidence is discretionary with the trial court. *State v. Oakes*, 161 N.H. 270, 280 (2010). This Court reviews the trial court's ruling for an unsustainable exercise of discretion. *State v. Giddens*, 155 N.H. 175, 179 (2007) . A defendant must demonstrate that the evidentiary ruling was "clearly untenable or unreasonable to the prejudice of his case." *Id.*

The Confrontation Clause's "ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317 (2009). The Clause "guarantees a defendant's right to confront those who 'bear testimony' against him." *Id.* at 309 (internal quotation marks and citation omitted). In *Melendez-Diaz*, the United States Supreme Court concluded that affidavits concerning drug analyses which were submitted in place of live testimony violated the right to confrontation. *Id.* at 328-29.

In *Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011), the United States Supreme Court considered whether the Confrontation Clause permitted the admission of "a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." Because the analyst in *Bullcoming* had done neither, the testimony was improperly admitted. *Id.*

This Court considered this issue most recently in *State v. McLeod*, 165 N.H. 42 (2013). In *McLeod*, this Court addressed the admissibility of expert testimony on the origin of a fire. *Id.* at 46. This Court concluded that, under the New Hampshire Rules of Evidence, an expert may testify "in terms of opinion or inference." *Id.* at 50. Considering the impact of the *Bullcoming* decision, this Court concluded that *Bullcoming* prohibited "surrogate testimony" of another expert, but did not prohibit an expert from offering his independent opinion about underlying testimonial reports. *Id.* at 51. This Court noted that "the assessment is one of degree. Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal." *Id.* (quoting *United States v. Ramos*, 664 F.3d 1, 5 (1st Cir. 2011)).

In this case, the trial court committed no error. The forensic toxicologist not only reviewed all of the tests performed, he signed the final toxicology report issued in the victim's case. Tr.: 253. The forensic toxicologist was asked if the analysts who performed the initial tests knew what they were looking for when doing the "expanded post-mortem panel." Tr.: 255. The forensic toxicologist said that they did not, that they treated the samples "just like all other samples." Tr.: 255.

He added that at times, during the final review, he might conclude that additional testing was needed or that additional contact with the medical examiner was required. Tr.: 255. The forensic toxicologist explained the review process in detail. He stated that he looked at "all the documentation" in the case, including the chain of custody and the requisition. Tr.: 283. He said that he checked to make sure that all of the data had been properly entered into the computer. Tr.: 283. He said that reviewed all of the instrument tracings to be sure that what had been reported was "in fact what [the laboratory had] in the tracings." Tr.: 283. He checked to see whether the samples had been "repeated," and, if so, why. Tr.: 283. He said that he reviewed the history of the case and contacted the medical examiner with questions. Tr.: 284.

In short, consistent with this Court's ruling in *McLeod*, the trial court properly admitted the testimony of the forensic toxicologist. The toxicologist

clearly offered his "independent judgment based upon [his] training and experience." *Id.* at 54.

II. THE SENTENCE IMPOSED WAS NOT IMPROPER.

The defendant next contends that the trial court imposed a disproportionate sentence. DB: 19.

"Trial judges are vested with broad discretionary powers with regard to sentencing. To violate the New Hampshire Constitution, a sentence must be grossly disproportionate to the crime." *State v. Stearns*, 130 N.H. 475, 493 (1988) (quotations, citations, and brackets omitted). "The State Constitution requires the trial court to consider several objective factors before imposing any sentence, including whether the sentence imposed will meet the traditional goals of sentencing — punishment, deterrence and rehabilitation." *State v. Willey*, 163 N.H. 532, 541 (2012). An abuse of sentencing discretion may occur "if the trial court fails to consider all the relevant factors necessary to the exercise of its discretion." *Stearns*, 130 N.H. at 493.

The court in this case imposed a sentence of 20 years to life in prison, with 5 years of the minimum suspended. This sentence is within the range prescribed by statute. *See* RSA 318-B:26, IX ("Any person who manufactures, sells, or dispenses methamphetamine, lysergic acid, diethylamide phencyclidine (PCP) or

any other controlled drug classified in schedules I or II, or any controlled drug analog thereof, in violation of RSA 318-B:2, I or I-a, is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and may be sentenced to imprisonment for life or for such term as the court may order.").

The trial court heard the argument renewed on appeal, that the sentence should be similar to those imposed by other court. See 2/7/17 Tr.: 57-58, 60, 65-66. The defense also filed a comprehensive sentencing memorandum, compiling for the court the sentences imposed by other courts in cases involving death resulting from the sale of drugs. DBA: 21-24.

At sentencing, the court considered several factors in deciding to impose its sentence. It noted that the defendant had sold the drugs to the victim in order to pay bills. 2/7/17 Tr.: 67. The defendant, the court observed, knew that the drugs that he sold to the victim were "potent, fire" and knew that the drugs were, in fact, fentanyl. 2/7/17 Tr.: 67. When he learned that the victim had died, the defendant's response was to tell Bryson to "say nothing." 2/7/17 Tr.: 67-68. Even during his interview with the police, the defendant's showed "a greater concern about [his] career, as opposed to the death of a young individual." 2/7/17 Tr.: 68.

The defendant, the court noted, had violated a bail order while on release which further demonstrated "no genuine remorse." 2/7/17 Tr.: 68. The court considered the impact on the community. 2/7/17 Tr.: 68. The court reflected on

the testimony of the victim's mother. 2/7/17 Tr.: 68 ("No mother, no parent, should have to go through what she experienced that day that she found her son, walking into his room, seeing him there sitting at the foot of his bed, dead. His body cold, his face a death mask. I can't imagine the pain that she and members of the family suffered that day and continue to suffer.").

Finally, the court turned to the matter of deterrence. The court stated:

> Now there's been some mention of messages, and sometimes, unfortunately, messages are mixed. The message that I intend to transfer today is clear. Enough is enough. Those who choose to sell this poison, those whose actions are responsible for the untimely death of others, must understand that if convicted, they will suffer severe punitive consequences. Justice requires no less.

2/7/17 Tr.: 69.

Remorse, or the lack thereof, may affect a court's view of the potential for rehabilitation. *See, e.g., United States v. Martin*, 520 F.3d 87, 95 (1st Cir. 2008) ("[T]he sincerity of [the defendant's] remorse, together with his character and personality traits, indicated a capacity for rehabilitation."). The court in this case clearly considered the defendant's concern for his own welfare, even after learning from Bryson that the victim had died, in fashioning the sentence. But the court also considered the deterrent value of the defendant's sentence, particularly in light of the general deterrence to drug dealers who sell fentanyl.

The defendant contends that his sentence in this case was disproportionate because he did not have "a significant criminal history" and he "was not a major

distributor of drugs." DB: 20. He points out that, in his interview, he told the police that he had been involved in selling drugs for only two months at the time of the victim's death. DB: 20. He blames Bryson for setting up the deal with the victim. DB: 21-22. He argues that the trial court sent a message that he was "the worst of the worst," a characterization that he contends is unfair. DB: 23.

But the trial court considered these arguments. It also heard the testimony of Detective Buffington who recalled that, when asked what the police should tell the victim's parents, the defendant responded that if the victim "had followed his instructions[,] he would be alive." 2/7/17 Tr.: 18. The court also heard that the defendant had been a man of some importance in the community and that, even upon release, he did not seem to understand that his standing had been forfeited. 2/7/17 Tr.: 51 (when he was asked to leave the Little League game by parents, the defendant refused). On this record, the defendant cannot demonstrate that the trial court exceeded its discretion in imposing an otherwise lawful sentence.

III. THE DEFENDANT HAS PROVIDED THIS COURT WITH AN INSUFFICIENT RECORD AND THE TRIAL COURT OTHERWISE COMMITTED NO ERROR IN DENYING THE MOTION TO SUPPRESS.

Finally, the defendant contends that the trial court committed error when it declined to suppress the defendant's statements. He first contends that the trial court committed error when it found that the defendant had knowingly,

voluntarily, and intelligently waived his *Miranda* rights. DB: 24. He also argues that the police did not "scrupulously honor" his attempt to end the questioning. DB: 27.

"When reviewing a trial court's ruling on a motion to suppress, [this Court will] accept the trial court's findings unless they lack support in the record or are clearly erroneous. [This Court's review] review of the trial court's legal conclusions, however, is *de novo.*" *State v. Velez*, 150 N.H. 589, 592 (2004).

This Court cannot decide the two claims raised by the defendant because the hearing on the motion to suppress was not transcribed. *See* NOA: 4 (July 20, 2016 hearing not ordered for transcription). As a result, while this Court can review the transcript of the interview and can consider the pleadings, it is in no position to determine if the trial court's ruling was supported by the record developed at the July 20, 2016 hearing. Since it is the appellant's burden to provide the record, *State v. Winward*, 161 N.H. 533, 542 (2011), this Court should decline to consider the claim.

But even if the record were sufficient, this Court has no reason to question the trial court's ruling. "In order to introduce a defendant's statements made during custodial interrogation, the State must prove beyond a reasonable doubt that the defendant knowingly, intelligently, and voluntarily waived his constitutional rights." *State v. Gagnon*, 139 N.H. 175, 177 (1994) (quotation

omitted). Moreover, a defendant must be unequivocal in invoking his right to remain silent and "[a]n expression of doubt or uncertainty cannot be considered unequivocal." *State v. Lynch*, 169 N.H. 689, 697 (2017).

Nothing suggests that the defendant unequivocally asserted his right to remain silent. The trial court found that the defendant said that he "wasn't sure" about meeting with law enforcement, but asked again a few minutes later, the defendant agreed to be interviewed. DB Supp.: 3. Without the transcript of the hearing, this Court has no basis to question this finding. As a result, the defendant made no unequivocal invocation of his right to remain silent. The trial court made no error on this record.

A. Waiver

There is nothing on this record that suggests that the defendant was incapable of comprehending the rights that he had waived. The defendant was born in 1964, so at the time he was interviewed, he was fifty years old. DBA: 39. According to his interview with the police, he had been recently laid off by Staff Hunters. DBA: 43. He owned a home with a $1,000 monthly mortgage payment. DBA: 44.

In short, the record that exists suggests that the defendant understood his rights and that his waiver was voluntary. The transcript of the interview is clear. Buffington told the defendant "Brian, you are here at the police department You

are in custody. You were arrested today for Sales of a Controlled Drug. You were arrested on the side of me road. During that time, Detective Keeler and I did go over your Constitutional Rights with you, correct" DBA: 39. The defendant agreed. DBA: 39. Buffington asked, "And understanding those rights, you're willing to sit here and listen to what we have to say, correct?" DBA: 39. The defendant said yes. DBA: 39.

Moreover, there is no requirement that a waiver of rights must be in writing. *Cf. State v. Jones*, 125 N.H. 490, 493 (1984) (lack of a signature does not invalidate *Miranda* waiver). *See also United States v. Van Dusen*, 431 F.2d 1278, 1281 (1st Cir. 1970) ("It is clear from the *Miranda* decision and its progeny that a *written* waiver of rights is not required."). Therefore, the defendant's contention that he did not sign a written waiver does not prove that he did not waive his rights.

B. Right of Silence

The defendant next contends that the trial court erred when it denied his motion to suppress on the grounds that the police ignored his attempts to end the interrogation. DB: 29. The defendant contends that he tried, after being shown the photograph of the deceased victim, to speak at four different times and each time he was interrupted by Detective Buffington. DB: 29. The defendant argues

that the detective's instruction that he not "talk for a second" should have prompted a second *Miranda* warning. DB: 29.

"The admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" *State v. Laurie*, 135 N.H. 438, 441 (1992) (quoting *Michigan v. Mosley*, 423 U.S. 96, 104 (1975)).

There are several flaws with the defendant's argument. The first is that, as noted above, the defendant has not provided this Court with a transcript of the suppression hearing and so the record presented before this Court is incomplete. *Winward*, 161 N.H. at 542. This Court is in no position to judge if the defendant made his desire to end the questioning clear to the police, because their answers on this point are not before this Court.

Second, according to the transcript, the defendant did not unequivocally invoke his right to silence. To the contrary, he tried to continue to talk, demonstrating a willingness to continue talking, rather than to remain quiet. The detective, rather than interrupting the defendant, was repeatedly interrupted by him.[4] The defendant never asserted the right; he never told the officers that he did

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[4] Upon showing the defendant the photograph of the deceased victim, the following exchange took place between the defendant and Detective Buffington:

> N. BUFFINGTON: That's Seth Tilton-Fogg dead.. That right there, Brian ...
> B. WATSON: Yeah..
> N. BUFFINGGTON: Is a product of your drugs.
> B. WATSON: Now....

not want to talk. As a result, he cannot claim that he asserted a privilege. *See Salinas v. Texas*, 133 S. Ct. 2174, 2181 (2013) ("Our cases establish that a defendant normally does not invoke the privilege by remaining silent."); *see also United States v. Teleguez*, 492 F.3d 118, 125-26 (1st Cir. 2007) (selective responses to police questions did not constitute an unequivocal invocation of rights). The attempt to characterize the defendant's eagerness to explain his side of things as reticence equal to a desire to end the interrogation is simply without support on the record as it exists.

Of course, the *Miranda* protections extend to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). But in this case, unlike the *Innis* case, the defendant never requested a lawyer, nor did he invoke his right to remain silent.

N. BUFFINGTON: (Unclear).... don't ....
B. WATSON: That's just ....
N. BUFFINGTON: Don't talk for a second. Okay.
B. WATSON: Now I was told different than that.
N. BUFFINGTON: Now I don't ...
B. WATSON: (Unclear)
N. BUFFINGTON: Listen (unclear)
B. WATSON: (Unclear)... really bad.
N. BUFFINGTON: I don't care what you were told. That doesn't matter .. I have video of him getting his money. I have all the text messages all the way up to where you picked him. up. I have the time of death minutes after you dropped him off and he got back to his house. Dead. So, this -- so listen to me for a second because where you go from here....
B. WATSON: Yeah.
N. BUFFINGTON: Is going to be very huge for the rest of your life.

Moreover, after being told to listen, his statements were not incriminating. They were actually all denials or attempts to minimize his responsibility. He told the officers, when confronted with the fact that he had sold the lethal dose, that he "was told different from that." DBA: 51. He added, "But we were also told that it was somebody afterwards. That was not what happened." DBA: 52. He denied responsibility. *See* DBA: 53 ("I literally told [the victim] out flat. It's like 'be careful, do not overdo it with this.' People going looking for that much better."); *see also* DBA 55 ("He shot too much. And the first thing that comes to my mind it's like, you know, why would you do that? You know how strong it is and it's like why would you do that?").

In sum, he voluntarily waived his rights and the trial court committed no error in concluding that was the case. In addition, the trial court correctly rejected the contention that his determination to present his "side" to the police was not consistent with a desire to end the interrogation. The trial court's ruling on the motion to suppress should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute 3JX oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General

November 22, 2017

Elizabeth C. Woodcock
N.H. Bar No.: 18837
Assistant Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that two copies of the foregoing were mailed this day, postage prepaid to Mark Sisti, Esquire, counsel of record at the following address:

Mark Sisti, Esquire
Sisti Law Offices
387 Dover Rd.
Chichester, NH 03258

November 22, 2017

Elizabeth C. Woodcock

APPENDIX

file

BELKNAP, SS. THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

State of New Hampshire

v.

Brian Watson
Docket No. 2015-CR-163

STATE'S SENTENCING MEMORANDUM

NOW COMES the State of New Hampshire by and through Melissa Guldbrandsen, County Attorney, and hereby submits this Sentencing Memorandum.

1. The defendant was convicted of Sale of Controlled Drug: Death Resulting and Sale of Controlled Drug. Because the Sale of Controlled Drug was, arguably, an alternative charge,[1] the State seeks imposition of a sentence on the Death Resulting Charge only, Charge ID# 1094712C.
2. The sentence sought by the State is documented in the attached Sentencing Form. Its significant components include:
   a. Imprisonment of 25 years to life.[2]
   b. Fine of $25,000 plus penalty assessment of $6,000.[3]
   c. Payment of restitution to the family of the decedent of $5076.00 for funeral expenses.
3. The Court may consider the traditional objective factors regarding the goals of sentencing: punishment, deterrence and rehabilitation. State v. Willey, 163 N.H. 532, 541 (2012). The Court has broad discretion to consider various sources and types of evidence. Id. The Court may not consider trial tactics, the Defendant's

[1] Evidence adduced at trial was that two sales occurred between the Defendant and the deceased on April 2, 2015.
[2] RSA 318-B:26, IX (defendant may be sentenced to imprisonment for life or for such term as the court may order).

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failure to admit guilt; his silence at sentencing or his lack of remorse at trial. Id. at 542-545. The Court can consider other evidence of the Defendant's lack of remorse. Id. at 546 ("We note that our holding—that a sentencing court may not consider a defendant's failure to express remorse at trial—does not preclude a court from considering other evidence that indicates a defendant's lack of remorse"). The Court can also consider evidence of other related criminal behavior by the Defendant. State v. Rodriguez, 127 N.H. 496, 500 (1985) (other drug activity by defendant) ; State v.Tufts, 136 N.H. 517, 518-520 (1992) (an uncharged sexual assault by Defendant in sexual assault case).

4. The parent(s) of the decedent are expected to appear and provide a victim impact statement for the Court's consideration at sentencing. RSA 21-M:8-k 16.
5. The Court may also consider the evidence presented during the six day jury trial, which included the fact that the Defendant sold Fentanyl to the Decedent not once but twice on April 2, 2015, that the decedent died the night of April 2, 2015 from acute Fentanyl intoxication, and that the Defendant knew the drug he was selling was Fentanyl.
6. Evidence at trial included voluminous telephone records from the Defendant's phone and from the decedent's phone; testimony from the New Hampshire Chief Medical Examiner, Dr. Andrew along with the responding Medical Examiner; testimony from a forensic lab analyst; testimony from a doctor from NMS Laboratory; testimony from two police detectives and a patrol officer; testimony from keepers-of-the-record from two cellular companies; testimony from Hannaford's employees; testimony

[3] RSA 318-B:26 I.(c)(2) (fine of up to $100,000).

from a forensic phone examiner; testimony from Defendant's former girlfriend, and testimony from the decedent's mother and his aunt.

7. The evidence in this case shows that the Defendant was actively engaged in the business of selling drugs in the time leading up to the decedent's death and after. The Court and jury viewed a video/audio recording of an interview between the Defendant and Tilton Police Detectives. Although portions of the interview were redacted in accordance with pre-trial rulings limiting the admissibility of those portions before the jury, the State suggests that the entire interview is relevant and admissible for the Court's consideration at sentencing. In particular, previously redacted portions from the interview transcript (Bates pages 65-69 and 76-77) will be offered at sentencing which show that the Defendant was engaged in the business of selling drugs and that he had at least five (5) other regular customers.

8. Additionally, in addition to selling the decedent drugs on two separate occasions on April 2, 2015, phone evidence shows that the Defendant sold drugs to the decedent at least six (6) times prior to the decedent's death (from 3/28/15 through 4/2/15).

9. The Court should also consider that the Defendant continued selling drugs, even after his girlfriend told him that the decedent died. In particular, on May 8, 2015, the Defendant was returning from Manchester, and had over a finger (12 grams) of Fentanyl in his possession. At trial the jury heard evidence that the Defendant routinely traveled to Manchester to purchase drugs to re-sell in the Tilton area.

10. Indictments regarding Possession and Possession with Intent to Distribute are currently pending in this Court with regard to the 12 grams of Fentanyl that the

Defendant had in his possession on May 8, 2015. At sentencing, the State will present to the Court the lab result regarding the weight and substance from this date.

11. A Presentence Investigation Report (PSI) was prepared in this matter after the Defendant entered into a plea agreement with a different prosecutor for the State. The PSI was completed but then the Defendant withdrew his plea agreement and the matter was scheduled for trial. The PSI, which was prepared based upon the Defendant accepting responsibility for his conduct, recommends a sentence of 10-20 years. The PSI included reference to the evidence that the Defendant had sold the decedent 2 grams of drugs on the night of the decedent's death; that the Defendant was later informed by his girlfriend that "our shit killed someone"; and that the Defendant was arrested about a month later, on 5/8/16, with 12.11 grams of Fentanyl. The PSI noted that the Defendant participated in volunteer community activities including coaching Little League. The PSI did not take into consideration the following evidence:

    a. The Defendant sold drugs to the decedent the morning of his death, in addition to the sale in the evening. (*This evidence was presented through phone records during the jury trial*);

    b. That the Defendant regularly traveled to Manchester to purchase drugs to sell in the Tilton area. (*This evidence was presented through phone records during the jury trial*);

    c. Cell phone records document that the Defendant sold drugs to the decedent numerous times in the weeks prior to his death. (*The State seeks to present this evidence at the sentencing hearing, consisting of 6 deals in addition to the*

initial deal arranged by T.B. via Facebook and excluding the 2 deals from April 2nd).

d. That the Defendant had at least five (5) other "customers" to whom he regularly sold drugs. (*The State seeks to present this evidence at the sentencing hearing).*

THE STATE'S RECOMMENDED SENTENCE ADDRESSES THE GOALS OF SENTENCING AS FOLLOWS:

PUNISHMENT

Under all of the circumstances of this case, the Defendant deserves a severe punitive sanction. The Defendant was approximately 50 years old at the time of this crime, while the decedent was 21. The Defendant met the decedent (and the other people to whom he was selling) through his 21-year-old girlfriend. The girlfriend had been a high school classmate of the decedent's only a few years prior. The fact that the decedent actually worked as a coach makes his crime more egregious, since the young people in the community may well have trusted and respected him. The Defendant was clear in his interview with Police that he was selling drugs for the purpose of earning an income after he had lost his job. In the evening of April 1st and into the morning of the 2nd, the Defendant repeatedly called and texted the decedent in an attempt to arrange a drug sale. As documented during trial, the Defendant was pushing his product—which he knew was Fentanyl—on the decedent. The Defendant was persistent in his selling, and he was selling for the sole purpose of making a profit. The Defendant's lack of remorse was evident in his interview with police when he repeatedly blamed the victim for using too much of the drug. The Defendant's own girlfriend (at the time) even noticed his lack of

remorse when the following exchange occurred: "OMG, Bee, our shit killed someone... We killed one of our customers. I'm devastated..in shock. I am freaking out." When the Defendant responded to her, he said, among other things, "say nothing to no one" and "His phone has my number on it" and "we are fucked" his girlfriend replied: "And seriously? That's ALL your worried about babe??? I'm so devastated, can't stop crying..." (State's Exhibit 14). There was also ample evidence that the Defendant knew his drugs were very potent and contained Fentanyl. In fact, the jury heard that on the day the decedent died, before he sold to the decedent in the evening of April 2, 2015, the Defendant received a text from another "client" telling him that she had passed out for an hour after using his drugs.

In this case, after the Defendant was indicted, he had a bail condition of no contact with T.B. Later in the case, the Court revoked his bail when the State proved that he had violated this condition. During trial, the State was only able to secure the presence of T.B. through a Material Witness Warrant. When T.B. testified at trial, she stated that she was terrified of the Defendant. The State had the no-contact bail condition to prevent any influence over T.B. by the Defendant. The fact that the Defendant breached that condition is relevant to the Court's sentencing in this matter.

In this time of the Opiod Crisis in New Hampshire, wise people often disagree on how drug crimes should be treated. With regard to possession and "small" sales cases, some people argue for treatment and others argue for incarceration. Virtually all of these people, however, agree that drug dealers should be punished to the fullest extent of the law when there is proof that their drugs killed another person. The legislature made this clear in RSA 318-B:26, IX by providing for strict liability in so-called "death resulting"

cases with a sentence of life imprisonment. Where, as here, that the person is engaging in a business of drug dealing for a profit—for financial gain—and not just to "support their own habit", a significant sentence is justified. In this case, there is ample evidence that the Defendant was dealing drugs for his own selfish financial profit. There is also evidence that he continued this criminal conduct even after learning of the decedent's death. The Fentanyl that the Defendant sold killed a 21 year old young adult who still lived with his parents (based on text messages the Defendant knew the decedent lived with his parents and both had to avoid their detection), and who had an entire life ahead of him. The punitive aspect of this sentence is justified.

DETERRENCE—SPECIFIC

The impact of this sentence on the Defendant – with a lifetime of parole supervision – will be to ensure that he never engages in drug dealing again. Given the fact that he continued to sell, even after knowing that one of his customers died, this Defendant requires a lifetime of supervision. The Defendant tried to claim during his interview that he believed the decedent died from someone else's drugs (N.C.). The irony, is that the Defendant's phone records show that the Defendant was also selling drugs to N.C. during the same time frame. Under all of the circumstances, knowing that the decedent had died as a result of a drug overdose, even believing that the Defendant thought it was "someone else's drugs", a reasonable person would not continue with the business. There was ample evidence that the Defendant knew the drugs he was selling were potent, strong, and in fact were not Heroin, but actually Fentanyl.

DETERRENCE—GENERAL

This sentence is designed with General Deterrence in mind. It is intended to send a clear message, that dealing in Fentanyl, one of the most toxic poisons in the drug world will not be tolerated in Belknap County. Furthermore, when the sale of this poison results in the death of another, Defendants will receive a substantial stand committed sentence.

REHABILITATION

There is no constitutional right or requirement that a sentence be rehabilitative. State v. Darcy, 121 N.H. 220 (1981). The State recommends that the provisions of RSA 651-A:22-a apply to this sentence and feels that this provision makes the sentence sufficiently rehabilitative.

WHEREFORE, the State respectfully requests this Honorable Court to:

A. Consider the above in rendering a Sentence in this matter; and
B. Grant such other and further relief as it deems just and equitable.

Respectfully submitted,
State of New Hampshire

Dated: February 2, 2017

Melissa Guldbrandsen, Esquire
Belknap County Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of this motion to Attorney Sisti, via email, on this date and will hand deliver a copy to him prior to the sentencing hearing.

Melissa Guldbrandsen, Esquire
Belknap County Attorney

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. SUPERIOR COURT

State of New Hampshire

v.

Brian Watson

Docket No. 211-2015-CR-163/164

OBJECTION MOTION IN LIMINE
Re: TOXICOLOGY RESULTS

NOW COMES the State of New Hampshire, by and through the Belknap County Attorney's Office, and objects to defendant's motion to prohibit the testimony of the toxicologist. In support of our objection, the State asserts the toxicologist's testimony will not violate the defendant's constitutional rights, specifically the 6th amendment right to confront witnesses, and is appropriate since the toxicologist is an independent expert forming a conclusion based on the review of raw scientific data. In furtherance of the State's position, the State states as follows:

1. The Defendant stands charged with Sale of a Controlled Drug – Death Resulting occurring on April 2, 2015. Dr. Thomas Andrew, Chief Forensic Pathologist at the State of New Hampshire Medical Examiner's Office performed an autopsy of the victim. As part of the autopsy, blood and urine from the victim was secured and transmitted to National Medical Services, Inc. (NMS) for analysis.

2. Pursuant to NMS policy and procedure, several people are involved in the analysis process, which involves several tests. Once the tests are performed, the data is reviewed by a certifying scientist/toxicologist. Dr. Daniel Isenschmid reviewed the data of the tests performed on victim's blood and urine, formed an opinion and signed a report as the certifying scientist/toxicologist.

3. As stated in the deposition of Dr. Isenschmid that occurred on July 28, 2016, in reaching his conclusion in this case, Dr. Isenschmid reviewed "all of the work that was done in the laboratory". Deposition, page 10. Specifically, he reviewed "the laboratory data" and personally observed "all of the analytical results from the tests". Deposition, pages 24 and 29. He was not reviewing the reports of others in reaching his conclusion.

4. The State posits that allowing the expert testimony of Dr. Isenschmid will not violate the Defendant's Sixth Amendment right to confrontation. State v. McLeod, 165 N.H. 42 (2013); State v. Dilboy, 163 N.H. 760 (2012); U.S. v. Soto, 720 F.3d 51 (1st Cir. 2013), cert. denied Soto v. U.S., 134 S.Crt. 336 (2013).

5. Dr. Isenschmid will be testifying as an expert witness who has formed an independent opinion about the substances present in the decedent's blood after reviewing the raw data generated by 5 separate analysts who tested the blood and urine samples. "As long as [an expert witness] is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross examination." United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009). State v. McLeod held that the Confrontation Clause is not violated when an expert testifies regarding his or

her independent judgement, even if that judgment is based upon inadmissible hearsay testimony. 165 N.H. 42 (2013). Furthermore, "so long as the expert 'applies his training and experience to the sources before him and reach[es] an independent judgement, . . . [t]he expert's opinion will be an original product that can be tested through cross-examination'". Id.

6. The New Hampshire Rules of Evidence (N.H.R.E.) pertaining to expert witnesses contemplates this situation. N.H.R.E. 705 states an "expert may testify in terms of opinion or inference and give reason thereof without prior disclosure of the underlying facts or data". N.H.R.E. 703 states data underlying an expert opinion need not be admissible.

7. The package of data received from N.M.S. labs includes the data printouts generated by the testing analysts relied upon by Dr. Isenschmid. This data was essentially produced by a machine in the testing process.

8. The State requests the Court permit Dr. Isenschmid to testify as to the policies and procedures at NMS, the testing performed, his opinion of the results, and his report.

WHEREFORE, the State respectfully requests the Honorable Court as follows:

A. Deny the defendant's Motion in Limine; and

B. Grant such other and further relief as may be just.

Respectfully submitted,

The State of New Hampshire

Dated: August 30, 2016

Carley Ahern, Deputy County Attorney
Belknap County Attorney's Office
64 Court Street

Laconia, NH 03246
Tel. 527-5440

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a copy of the within Objection to Mark Sisti, Esquire.

Carley Ahern

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. SUPERIOR COURT

State of New Hampshire

v.

Brian Watson

Docket No.: 15-CR-163

ORDER

Hearing held (12/19/16) on the defendant's Motion to Reconsider Order on Motion to Suppress (filed 7/29/16), the State's Objection to same (filed 8/1/16), the defendant's Motion to Bar Introduction of Toxicology Results (filed 7/29/16), the State's Objection to same (filed 8/30/16), the defendant's Motion *in Limine* (filed 7/29/16) and the State's Objection to same (filed 8/30/16). Subsequent to review, the Court renders the following determination(s).

By way of brief background, the defendant, Brian Watson, stands indicted on one (1) count of Sale of a Controlled Drug Death Resulting, contrary to RSA 318-B:26, IX, and one (1) count of Sale of a Controlled Drug, contrary to RSA 318-B:2, I.[1] On July 28, 2016, the Court (O'Neill, J.) issued an Order DENYING the defendant's Motion to Suppress certain inculpatory statements that he made during an interview with officers from the Tilton Police Department. The defendant moves for the Court to reconsider that determination, and the State objects. The defendant also moves *in limine* to strike comments made by law enforcement during the defendant's interrogation and to bar introduction of the toxicology results at trial. The Court will address each of these matters in turn.

Defendant's Motion to Reconsider Order on Motion to Suppress

[1] This matter has been consolidated for trial with the case docketed 211-2015-CR-164, in which the defendant stands indicted on one (1) count of Possession of a Controlled Drug, also contrary to RSA 318-B:2, I.

The defendant contends that the Court should reconsider its determination that the State proved beyond a reasonable doubt that the defendant waived his Miranda rights before making the inculpatory statements to law enforcement. The defendant specifically contends that there is no factual basis to support this conclusion anywhere in the Court's July 28, 2016 Order. To this end, the defendant argues, among other things, that Corporal Buffington's exchange with the defendant at the outset of the interview[2] did not rise to the level of a valid waiver of rights by the defendant. The defendant therefore contends that the Court erred in not suppressing the statements in question.

A Motion for Reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended" in reaching its determination. N.H.R. Crim. P. 43(a). Upon review, the Court finds that the defendant's present Motion fails to meet these requirements. The Court specifically addressed the exchange challenged by the defendant in the July 28, 2016 Order. The defendant's present argument is, at its essence, a disagreement with the Court's ultimate conclusion with regards to that exchange. As this is not enough, in and of itself, to support the reconsideration of a determination under Rule 43, the defendant's present

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[2] CORPORAL BUFFINGTON: Brian, you are here at the police department. You are in custody. You were arrested today for sales of a controlled drug. You were arrested on the side of the road. During that time, Detective Keeler and I did go over your constitutional rights with you, correct?

DEFENDANT: Yes.

CORPORAL BUFFINGTON: Okay, and you understood all of those rights at the time?

DEFENDANT: Yeah.

CORPORAL BUFFINGTON: And understanding those rights, you're willing to sit here and hear what we have to say, correct?

DEFENDANT: Yep.

CORPORAL BUFFINGTON: Okay.

(St.'s Ex. 1.)

Motion necessarily fails. Nevertheless, the Court will briefly address the defendant's argument substantively for the purposes of clarity.

A waiver of Miranda "need not be explicit to be valid; in the absence of an express waiver, [a court must] look to the totality of circumstances to determine whether the defendant's understanding of his rights, together with his conduct, support [a finding] that he waived his rights beyond a reasonable doubt." State v. Girmay, 139 N.H. 292, 296 (1994) (citation omitted). Our Supreme Court has specifically noted that law enforcement need not explicitly ask a defendant whether he waives his rights in order for his waiver to be valid, holding instead that a defendant's statements that he understood each right as it was being read and his affirmative response when asked by law enforcement whether he wanted to speak "support[ed] the trial court's ruling that the defendant implicitly waived his rights." State v. Plante, 133 N.H. 384, 387 (1990). This is precisely what happened here.

It is undisputed in the record that the defendant indicated to Detective Kydd-Keeler that he understood each right as Detective Kydd-Keeler read it to him at the time of arrest. Similarly, the defendant explicitly indicated at the outset of the interview that he remembered being read his rights and that he understood those rights at the time they were read and at the time the interview commenced. (St.'s Ex. 1.) It is also undisputed in the record that the defendant agreed during booking, after some initial hesitation, to speak with law enforcement. Further, at the start of the interview Corporal Buffington asked the defendant whether he was "willing to sit here and hear what we have to say," to which the defendant answered in the affirmative. (St.'s Ex. 1.) These facts plainly indicated that the defendant understood each right as it was being read and responded affirmatively when asked whether he wanted to speak with police. As in Plante, these

facts, when taken in their totality, support a finding that the defendant waived his Miranda rights beyond a reasonable doubt.

Accordingly, the defendant's Motion to Reconsider Order on Motion to Suppress is DENIED, consistent with the above.

Defendant's Motion in Limine

The defendant specifically seeks to redact statements made by law enforcement during the defendant's interrogation. The defendant asserts that the officers made numerous "inflaminatory" statements that are not relevant and are prejudicial to the defendant. The defendant also argues that these statements are not supported by the evidence in the defendant's case. In support of his Motion, the defendant specifically references the following statements made by the officers: (1) that the victim was attempting to contact the defendant shortly before his death; (2) that the defendant was "cold-hearted and lacks remorse"; and (3) comments related to the victim's parents and their reaction to his death. The defendant contends that these statements are more prejudicial than probative and that these statements "would engender sympathy on the part of the jury."

The State objects and argues that the statements referenced in the defendant's Motion are admissible for multiple reasons. First, the State disagrees with the defendant's contention that the statements referenced in the defendant's Motion are not supported by the evidence. More specifically, the State contends that the evidence at trial will show that the victim was found with his phone in hand and that the phone showed the victim had begun to text the defendant about the effects of the controlled substance he had injected. With respect to the statement that the defendant was "cold-hearted and lacks remorse," the State argues that this is supported by the evidence because of the statements made by the defendant to another individual about continuing

to sell controlled substances after learning about the victim's death. Next, the State argues that the officers' statements will not mislead the jury because the jury will understand that these statements were made as an interrogation tactic designed to elicit a response. Finally, the State argues that these statements are less prejudicial than the actual facts of the case that will be admitted at trial.

Evidence is relevant if it "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H.R.Ev. 401. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. N.H.R.Ev. 403. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Addison, 160 N.H. 493, 501 (2010).

Upon review, the Court concludes the defendant has failed to establish that the statements made by law enforcement during the defendant's interrogation are inadmissible under the New Hampshire Rules of Evidence. The Court finds that the probative value of the evidence is not substantially outweighed by any Rule 403 concern here. The officers' statements have probative value because they provide context for the defendant's incriminating statements during the interrogation. See State v. Willis, 165 N.H. 206, 220, 223 (finding police statements that provided context for defendant's statements had probative value). In contrast, the danger of unfair prejudice to the defendant if this evidence is introduced is not particularly high. More

specifically, this is not evidence that would cause some tendency to induce a decision against the defendant on a purely emotional basis. See id. at 220.

Additionally, there is similarly little danger that this evidence will confuse or mislead the jury. The Court is confident that jury will understand that statements made by law enforcement during an interrogation are made with the ultimate goal of eliciting a confession. Additionally, the statements the defendant seeks to redact are not factually misleading. Based on the State's representations, it appears to the Court that these statements are supported by evidence that will be admitted at trial. Simply put, the jury is not being presented with evidence that proposes factual circumstances that never occurred in this case. However, if the defendant believes that the jury will improperly consider the officers' statements, the defendant is free to submit a proposed limiting instruction at the appropriate time.

Accordingly, the defendant's Motion *in Limine* is DENIED, consistent with the above.

Defendant's Motion to Bar Introduction of Toxicology Results

The following is a very brief factual history, as it pertains to the defendant's Motion to Bar Introduction of Toxicology Results, based on the parties' pleadings and their exhibits and arguments at the hearing on said Motion. It is provided for the purposes of context and should not be construed as findings of fact by the Court.

As noted above, the defendant stands indicted on one count of Sale of a Controlled Drug and one count of Sale of a Controlled Drug Death Resulting. The New Hampshire Medical Examiner's Office performed an autopsy of the victim, during which blood and urine was collected and sent to National Medical Services, Inc. ('NMS') for analysis. NMS' analysts performed testing on the victim's blood and urine. The laboratory data from said testing was provided to Dr. Daniel Isenschmid for review. Dr. Isenschmid formed a conclusion based on

said data and issued a report on April 21, 2015 ("Toxicology Report") regarding the substance present in the victim's blood and urine. It is undisputed that he did not perform an independent analysis and was not involved in performing the testing that generated the laboratory data. Dr. Isenschmid has been placed on the State's witness list and the State intends to call Dr. to testify regarding his Toxicology Report.

The defendant now moves to bar introduction of any and all testimony concerning the Toxicology Report. The defendant contends that admitting said Report without in-court testimony from the lab analysts involved in the actual testing of the specimens violates his rights to confrontation under Part I, Article 15 of the New Hampshire Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Specifically, the defendant asserts that Dr. Isenschmid was not involved in the actual testing or preparation of the specimens, that he did not oversee the individuals that conducted the testing, and that he does not have any personal knowledge regarding the integrity or competency of those individuals. The defendant contends that calling Dr. Isenschmid in place of the actual testers violates his right to confrontation because Dr. Isenschmid has no knowledge of whether any faulty or fraudulent testing took place.

The State objects and argues that Dr. Isenschmid's testimony will not violate the defendant's constitutional rights, specifically his Sixth Amendment right to confront witnesses. The State asserts that Dr. Isenschmid is testifying as an expert witness who has formed an independent opinion about the substance in the victim's blood and urine based on raw data generated by lab analysts. The State contends that his testimony satisfies the defendant's constitutional right to confrontation and is permitted by the New Hampshire Rules of Evidence, specifically Rule 703 and Rule 705. The State requests that the Court allow Dr. Isenschmid to

testify as to the policies and procedures at NMS, the testing performed, his opinion of the results from said testing, and the Toxicology Report. In support of its arguments, the State relies on the following cases: Bullcoming v. New Mexico, 564 U.S. 647 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Crawford v. Washington, 541 U.S. 36 (2004); and State v. McLeod, 165 N.H. 42 (2013).

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "[T]he Confrontation Clause guarantees a defendant the opportunity to confront any person whose testimonial statements are introduced against him, and to assess the reliability of those statements 'in the crucible of cross-examination.'" State v. Maga, 166 N.H. 279, 283 (2014) (quoting Crawford, 541 U.S. at 61). The United States Supreme Court has held that certified forensic laboratory reports are testimonial statements for purposes of the Confrontation Clause. Melendez-Diaz, 557 U.S. at 310–11. "The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Bullcoming, 564 U.S. at 652.

While Melendez-Diaz and Bullcoming provide guidance on the issue, the Court would note that both cases are factually distinguishable from the case presently before this Court. In Melendez-Diaz, the issue was whether forensic laboratory certificates could be introduced at trial without being accompanied by live, in-court testimony. See 557 U.S. at 309. Here, the State is not attempting to introduce the Toxicology Report without in-court testimony from the individual who created said report. Turning next to Bullcoming, the issue in that case was "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purposes of proving a particular

fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 564 U.S. at 652. Again, this is unlike the defendant's present case because the State has not called Dr. Isenschmid to testify as to another analyst's report. Rather, Dr. Isenschmid is testifying with respect to the Toxicology Report that he produced after forming his own independent conclusions from the raw data provided to him. As such, the Court finds that neither the holding in Melendez-Diaz or in Bullcoming support the defendant's contention that the State is violating his constitutional right to confrontation by calling Dr. Isenschmid to testify as to the Toxicology Report.

Upon review, the Court concludes that introduction of the Toxicology Report through the live testimony of Dr. Isenschmid is permitted under New Hampshire law and the New Hampshire Rules of Evidence. Evening if the Court were to conclude that the raw data provided to Dr. Isenschmid was testimonial, Dr. Isenschmid's testimony regarding the Toxicology Report does not violate the defendant's constitutional right to confrontation. More specifically, the New Hampshire Supreme Court has held that "the Confrontation Clause is not violated when an expert testifies regarding his or her independent judgment, even if that judgment is based upon inadmissible testimonial hearsay." McLeod, 165 N.H. at 53. Dr. Isenschmid reviewed the data provided to him and formed his own conclusion as to the substance present in the victim's blood and urine at the time of his death. As such, the Court concludes that Dr. Isenschmid may testify as to his independent judgment without violating the defendant's constitutional rights.

Furthermore, the Court concludes that Dr. Isenschmid's proposed testimony is permitted under the Rules of Evidence. See N.H.R. Ev. 702, N.H.R. Ev. 703, N.H.R. Ev. 705. Rule 703 provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the

> hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, **the facts or data need not be admissible in evidence.**

(emphasis added). The defendant does not contend that Dr. Isenschmid unreasonably relied upon facts or data in forming his own opinion. Therefore, even if the underlying raw data is inadmissible, Dr. Isenschmid may testify to his own opinion that he formed in reliance on this data.

Finally, the Court would emphasize that the defendant has not provided any case law that supports his contention that he is entitled to confront each individual involved in handling the specimens tested by NMS. Upon further research, the Court has discovered a number of persuasive cases from other jurisdictions that have held a defendant's right to confrontation was not violated when the prosecution introduced laboratory reports created by someone other than those who conducted the actual testing. For example, in United States v. Darden, 656 F. Supp. 2d. 560, 563 (D. Md. 2009), the District Court of Maryland allowed the prosecution to admit a blood alcohol report through the testimony of a supervising toxicologist even though he was not involved in the actual testing of the defendant's blood. The toxicologist's testimony included the procedures and policies in the lab for analyzing blood specimens, the actual testing procedures and quality control measures employed to ensure accurate testing, and clearly stated that he was not involved in the actual testing. Id. at 561-62. The Court concluded that the toxicologist "did not rely on statements by technicians . . . and the only 'statements' at issue did not come from 'out-of-court' technicians but from printed data generated by the testing machines." Id. at 563. The court ultimately held that the "[toxicologist's] testimony [was] admissible and the absence of the testimony of the technicians does not violate [the defendant's] rights under the Confrontation Clause." Id.

Similarly, the Supreme Court of Pennsylvania held that a defendant's constitutional right of confrontation was not violated when a toxicology report was introduced at trial through the testimony of a toxicologist who created said report based on the data from testing performed by lab technicians not called at trial. Commonwealth v. Yohe, 79 A.3d 520, 564 (Pa. 2013), cert. denied, Yohe v. Pennsylvania, 134 S. Ct. 2662 (2014). The Court explained that while the toxicologist utilized and relied on raw data that was produced by lab technicians, he was the analyst who actually "evaluated and validated the entire record, decided which number to report as [the defendant's] blood alcohol content, and signed his name to the report." Id. at 560. The Court concluded "[h]e was, therefore the certifying analyst who authored the Toxicology Report and the analyst whom [the defendant] had the right to confront." Id. The Court also went on to state the following:

> Although [the toxicologist] did not handle [the defendant's] blood sample, prepare portions for testing, place the prepared portions in the machines, or retrieve the portions after testing, these facts are not dispositive and do not account for [the toxicologist's] involvement in utilizing the information provided by his subordinates, legitimately relying on their work and that of other employees in the lab who logged receipt of the sample, checked the integrity of the sample, ensured proper storage, and of the phlebotomist who drew [the defendant's] blood at the hospital.

Id.

Here, the factual circumstances are analogous to those in Darden and Yohe. Specifically, in each case a toxicology report was issued and certified by a toxicologist who relied on data generated by other technicians or analysts. The toxicologist in all three cases relied on the raw data to form an independent conclusion as to the substance present in a particular specimen. Consistent with the reasoning in Darden and Yohe, the Court concludes that the defendant's constitutional right to confrontation is not violated by the State's decision to call Dr. Isenschmid, rather than the five analysts who were involved in producing the data that Dr. Isenschmid relied

on. Said analysts did not classify the substance found within the victim's blood and urine. Rather, the actual opinion as to the substance found in the specimens was formed independently by Dr. Isenschmid. In light of these facts, the Court concludes that Dr. Isenschmid is the individual who is making the testimonial statements against the defendant. See Melendez-Diaz, 557 U.S. at 310–11 (holding that forensic laboratory reports were testimonial statements for Confrontation Clause purposes). Therefore, the Court finds that this is the individual that the defendant has a constitutional right to confront.

The Court also concludes that the defendant has an opportunity to confront NMS' laboratory procedures and policies through Dr. Isenschmid. More specifically, Dr. Isenschmid's deposition indicates that he has been employed by NMS for an extended period of time and that he is familiar with the lab's procedures for handling and testing specimens. Dr. Isenschmid stated that he is also familiar with the "extensive training process" that each individual in the lab is required to go through. Finally, to the extent that the defendant argues that Dr. Isenschmid has no knowledge of whether the data produced by the analysts is accurate, Dr. Isenschmid stated in his deposition that the lab has certain quality controls. Specifically, he explained that the lab "[has] ways to check that instruments were functioning properly, [and] that the analytical test was done in accordance with [NMS'] standard operating procedures." While Dr. Isenschmid cannot testify as to how the machine was operated to produce the raw data because he was not the individual operating the machine, he is able to testify as to whether the data provided to him indicated or would indicate whether there is any error with said data. In light of Dr. Isenschmid's statements at his deposition, the Court concludes that Dr. Isenschmid is able to testify as to the NMS's policies and procedures and whether there was evidence that NMS' quality control measures were met.

Accordingly, the defendant's Motion to Bar Introduction of Toxicology Results is DENIED, consistent with the above.

Conclusion

In sum, the Court renders the following determinations. The defendant's Motion to Reconsider Order on Motion to Suppress is DENIED, consistent with the above. The defendant's Motion *in Limine* is DENIED, consistent with the above. The defendant's Motion to Bar Introduction of Toxicology Results is also DENIED, consistent with the above.

SO ORDERED

12/23/16
Date

James D. O'Neill, III
Presiding Justice

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. SUPERIOR COURT

State of New Hampshire

v.

Brian Watson

Docket No. 211-2015-CR-163

OBJECTION TO
MOTION TO SUPPRESS

NOW COMES the State of New Hampshire, by and through the Belknap County Attorney's Office, and objects to the Motion to Suppress, stating as follows:

1. After an investigation into the sale of controlled drugs which caused the death of a young man on April 2, 2015, the Tilton Police Department arrested the Defendant on May 8, 2015. On that date, Defendant was returning from a trip to Manchester to purchase drugs. The Defendant failed to stop at a traffic light and was subsequently taken into custody on an arrest warrant.

2. At the time of arrest, the Defendant was informed that he was being placed under arrest for Sale of a controlled/narcotic Drug. He was further informed that an inventory of his vehicle would be conducted. Detective Keeler told the Defendant that "[he] was going to read him his rights so that we could speak about what was going on today." Detective Keeler read the Defendant "his Consitutional (sic) Miranda Rights off of a Tilton Police Department issued Miranda Rights Card. After each right [Defendant] said he understood and he was still willing to speak with Detective Buffington and I." There was a discussion roadside wherein the Defendant told the detectives that he had been selling drugs to support himself and his bills. When asked if there were any drugs in the vehicle, the Defendant told the detectives where the drugs were located inside the center console of his vehicle. The drugs were seized and the Defendant was brought to the police station.

3. At the station, the Defendant was placed in an interview room. The detectives went through the following colloquy with the Defendant prior to an interrogation (page 1 of interview transcript):

N. BUFFINGTON: Brian, you are here at the police department. You are in custody. You were arrested today for Sales of a Controlled Drug. You were arrested on the side of the road. During that time, Detective Keeler and I did go over your Constitutional Rights with you, correct?

B. WATSON: Yes.

N. BUFFINGTON: Okay. You understood all those rights at that time?

B. WATSON: Yep.

N. BUFFINGTON: And understanding those rights, you're willing to sit here and listen to what we have to say, correct?

B. WATSON: Yep.

Following this colloquy, the detectives interrogated the Defendant regarding his sales of drugs generally and then specifically regarding the sale of drugs on April 2, 2015 which caused the death of a young man.

4. The State agrees that the Defendant was in custody for purposes of *Miranda*. The detectives read the Defendant his Constitutional rights. The Defendant's waiver of those rights must be knowing, intelligent and voluntary. A review of whether there was a valid waiver of those rights by the Defendant is based on the totality of the circumstances. State v. Spencer, 149 NH 622 (2003).

5. It is the State's burden to prove beyond a reasonable doubt that the Defendant waived his *Miranda* rights. In the matter at bar, the Defendant was read his *Miranda* rights roadside. At the station, the detectives did not again read the Defendant his *Miranda* rights verbatim, but did they did remind him of his rights. They again asked if he understood those rights, to which he stated he did.

Lastly they again confirmed that the Defendant agreed to "listen to what they have to say". At no time did the Defendant indicate he was unsure or confused, nor did he ever state that he did not want to talk to the detectives. Defendant posits that because the detectives used the language "listen to what we have to say" the State cannot meet its burden that the Defendant waived his right to *speak* with the detectives. However, the Defendant voluntarily engaged in a conversation with the detectives. He answered questions and he responded to statements which would elicit information. There was no coercion or threat during this dialogue, nor were the detectives hostile. The interrogation was relatively short, lasting for only 30 minutes. At no time did the Defendant indicate that he did not understand the rights read to him. The Defendant told the detectives that he was an engineer and had lost his job. Based upon the totality of the circumstances, the State can meet its burden that the Defendant knowingly, intelligently and voluntarily waived his rights.

6. Defendant also posits that because the detectives 'cut off' the Defendant a few times before he could finish a sentence, the police did not scrupulously honor his right to remain silent. The State asserts that when the Defendant did have an opportunity to speak, he never intimated that he wanted to invoke his right to remain silent. At no time during 30 minutes did he indicate to detectives that he no longer wished to continue the discussion. Without this predicate act on the part of the Defendant, the detectives were at liberty to continue the interrogation.

WHEREFORE, the State respectfully requests the Honorable Court as follows:

A. Deny the Motion to Suppress; and

B. Grant such other and further relief as may be just.

Respectfully submitted,
State of New Hampshire

Dated: 5/2/16

Roni M. Karnis, Assistant County Attorney #14207
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CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a copy of the within Objection to Motion to Suppress to Mark Sisti, Esquire.

Roni M. Karnis, Assistant County Attorney