State of New Hampshire
Supreme Court

NO. 2017-0385

2018 TERM

MARCH SESSION

State of New Hampshire

v.

David Martinko

RULE 7 APPEAL OF FINAL DECISION OF THE
STRAFFORD COUNTY SUPERIOR COURT

REPLY BRIEF

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ARGUMENT

I. Whether Mr. Martinko "Advances a Unit-of-Prosecution Argument"

The State contends that although posed as a double jeopardy case, "the defendant really advances a unit-of-prosecution argument." *State's Brf.* at 8.

This court has already determined that the appropriate unit of prosecution is the pattern itself, *State v. Richard*, 147 N.H. 340, 342 (2001), and that patterns alleged against a defendant must reflect patterns presented in the evidence. *Martinko's Brf.* at 12-13 (collecting citations). Mr. Martinko does not intend to re-litigate those matters.

Multiplicitous indictments are a form of double jeopardy. In the context of the pattern sexual assault statute, a discussion of whether charges are multiplicitous necessarily involves the nature of the pattern or patterns alleged.

Whether that makes this a "unit-of-prosecution argument" does not advance the outcome of this matter.

II. Mr. Martinko Does Not Claim That the Pattern Statute Requires All Assaults Within Five Years be Brought as One Charge

In its brief, the State says the defendant's position is that the pattern sexual assault statute "requires the State to charge as a single aggravated felonious sexual assault all assaults against the same victim through the same sexual variant within a five-year period." *State's Brf.* at 8, 11.

That is *not* Mr. Martinko's position. That issue has already been resolved by this court. *State v. Jennings*, 155 N.H. 768, 777 (2007) ("The defendant argues that the pattern sexual assault statute is intended to define as a single pattern all sexual assaults of the same variant that occur within a five-year period.... The pattern statute on its face contains no such limit.").

Mr. Martinko's position is that, whatever pattern the State alleges, the pattern must be reflective of the defendant's actual conduct. *Jennings*, 155 N.H. at 778 ("[T]he statute allows the State to charge more than one pattern ... each as an individual unit of prosecution, *when the evidence of discrete patterns so warrants.*") (emphasis added). The pattern may be defined by differing victims, *State v. Fortier*, 146 N.H. 784 (2001); varying acts, *State v. DeCosta*, 146 N.H. 405 (2001); shifting locations, *Jennings;* common time frames, *Richard*, 147 N.H. at 343; or any other pattern-defining characteristic. Double jeopardy law constrains the State to some degree, insisting that the charged patterns reflect the alleged conduct.

The State's extended exegesis of the statute, *State's Brf.* at 11-14, makes the point for Mr. Martinko. But because Mr. Martinko has not advanced the position the State foists on him, the discussion is largely irrelevant.

III. Time-Based Patterns in This Case are Arbitrary

In his brief, Mr. Martinko acknowledged he is guilty of a single pattern taking place over three years.[1] *Martinko's Brf.* at 8.

The State, however, persists in its claim that there are three patterns, defined by time period, with alleged time-breaks between August 31 and September 1, three years in a row – 2010, 2011, and 2012. *State's Brf.* at 15.

As noted in Mr. Martinko's opening brief, however, there is nothing in the record to suggest a change in pattern on those dates, and no mention of 2011 at all. *Martinko's Brf.* at 9.

The three patterns alleged by the State have no basis in the evidence, and are thus arbitrary. There was only one pattern, and the informations therefore violate double jeopardy.

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[1]In its statement of facts, the State claims that Mr. Martinko "confessed to the Dover Police that he had sexually assaulted [the victim] on just one occasion." *State's Brf.* at 4. Contrary to this assertion, Mr. Martinko has never denied that he had sexual contact with the victim over an extended period.

IV. The State's Charges Were Not Differentiated by Variant

In its brief the State says that as long as the sexual variants differ, it could have "charge[d] two patterns of sexual assault, even where the assaults took place during a common time period." *State's Brf.* at 15-16. But Mr. Martinko was not charged that way.

The State defined its charged patterns, differentiated on time alone, each alleging the same variant. But it did not ground its alleged patterns in any evidence. There is nothing in the record to show that patterns – defined by any characteristic – began or ended on the dates the State arbitrarily listed.

V. Gap in Conduct Does Not Differentiate a Pattern

The State asserts that a "cessation coupled with [a] change in frequency ... constitutes a ... pattern." *State's Brf.* at 17. There are several problems with this assertion.

First, the informations do not contain any language indicating that the charges reflect a change in pattern coupled with a gap.

Second, the purpose of the pattern sexual assault statute is to allow for inexactitude by young or inarticulate victims, and a pattern prosecution is lawful where the alleged dates are inexact. *State v. Lakin*, 128 N.H. 639 (1986). Because dates are inexact, a short gap in continuing conduct cannot be the start of a new pattern. Rather, a gap is merely the result of the inexactitude allowed by the pattern.

Third, the statute requires that, to establish a pattern, there must be proof of at least two assaults within a two-month period. If the alleged gap is greater than two months, perhaps there is the start of a new pattern. But here, where the alleged gap appears to be less than two months, no new pattern commenced.

Accordingly Mr. Martinko should have been charged, at most, with a single pattern starting and ending at times indicated by the evidence.

VI. Mr. Martinko's Counsel Provided Ineffective Assistance Without Being Prescient

The State claims that Mr. Martinko's attorney was not ineffective because no lawyer can predict later-established precedent. *State's Brf.* at 18-19. As noted in his opening brief, however, this matter is controlled by *State v. Jennings*, 155 N.H. 768 (2007).

In *Jennings*, this court approved three pattern indictments because one group of assaults occurred in 2002 and 2003 in Nashua, another occurred in 2003 and 2004 at Wellesley Street in Milford, and the third occurred in 2004 and 2005 at King Street in Milford. The indictments were lawful because "the pattern indictments allege[d] three separate *sets of acts*." *Jennings*, 155 N.H. at 778 (emphasis added). As noted in Mr. Martinko's opening brief, this court's jurisprudence establishes that patterns alleged against a defendant must reflect actual patterns found in the evidence, and cannot be arbitrarily unrelated to the alleged conduct. *Martinko's Brf.* at 12-13 (collecting citations).

All of that jurisprudence occurred before Mr. Martinko's plea and sentencing.

Accordingly, there is no basis on which to claim that the lawyer, in order to have advised Mr. Martinko of his double jeopardy rights, would have had to possess extraordinary prescience.

VII. Reversal of Multiplicitous Charges is Appropriate Remedy

The State posits that the appropriate remedy is to vacate Mr. Martinko's plea and remand for a hearing to determine counsel's actions at the time of Mr. Martinko's plea and sentencing. *State's Brf.* at 6, 20, 21. The problem with merely vacating the plea, however, is that the superior court would have in hand three informations that are manifestly defective, which it would then be obliged to dismiss; if it wished to re-try, the State would be obliged to re-indict.

In his opening brief, Mr. Martinko requested this court "reverse two of the three convictions, and remand for re-sentencing on the remaining information." *Martinko's Brf.* at 16. That was an attempt to find the most efficient procedure by which Mr. Martinko could plea to conduct which he admits, regrets, and accepts punishment, without further burdening the courts.

Regarding ineffective assistance, the court made three factual holdings. The court "accept[ed], without finding" Mr. Martinko's representation that he "raised the issue with his defense attorney and was advised that his pleas ... did not violate" double jeopardy. ORDER ON MOTION TO VACATE PLEA AND SENTENCES at 2 (June 7, 2017); *Addendum to Opening Brf.* at 37. The court also "assume[d], without deciding" that Mr. Martinko, had he known of the double jeopardy violation "would not have entered pleas of guilty" and that therefore the prejudice prong of ineffective assistance "has been met." *Id.* at 2, *Addendum* at 38.

The nature of these holdings indicate that at this point a hearing is not necessary. As to the first holding – that Mr. Martinko raised the issue but was assured there was no violation – a hearing may not be fruitful because regardless of whether Mr. Martinko asked, the attorney had a duty to advise. *Padilla v. Kentucky*, 559 U.S. 356 (2010). As to the second and third holdings – whether the attorney told the defendant an inaccurate version of the law and whether Mr. Martinko would have pleaded had he known – a hearing also may not be fruitful because the

defendant maintains he pleaded guilty with an inaccurate understanding, an issue that would not be advanced by a hearing.

In addition, it should be noted that Mr. Martinko twice requested a hearing on ineffective assistance, to which the State objected. MOTION TO VACATE PLEA & SENTENCES (Apr. 20, 2017), *Addendum to Opening Brf.* at 30; MOTION TO APPOINT COUNSEL (Nov. 27, 2015), *Appx.* at 18; OBJECTION TO MOTION TO VACATE PLEA & SENTENCES (May 2, 2017), *Appx.* at 24. In its order, the court acknowledged it had discretion to schedule a hearing, but wrote that "a hearing would not assist it in determining the issues raised in Mr. Martinko's motion, and his request for a hearing is accordingly denied." ORDER ON MOTION TO VACATE PLEA AND SENTENCES (June 7, 2017), *Addendum to Opening Brf.* at 36.

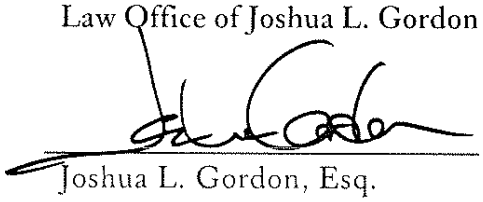
Accordingly, Mr. Martinko, as he did before, requests reversal of two of the informations, with remand for re-sentencing on the third.

CONCLUSION

For the foregoing reasons, this court should hold that Mr. Martinko's pleas violated his State and Federal protections against double jeopardy, and that his trial counsel therefore provided ineffective assistance. It should then reverse two of the informations, and remand for re-sentencing on the third.

Respectfully submitted,

David Martinko
By his Attorney,
Law Office of Joshua L. Gordon



Dated: March 26, 2018

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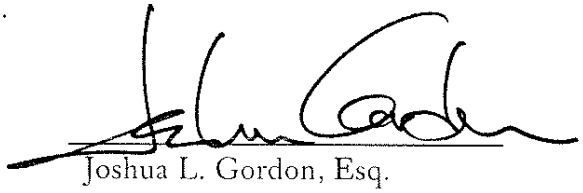
CERTIFICATION

I further certify that on March 26, 2018, copies of the foregoing will be forwarded to Elizabeth Lahey, Esq., Office of the Attorney General.



Dated: March 26, 2018

Joshua L. Gordon, Esq.