

THE STATE OF NEW HAMPSHIRE

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SUPREME COURT

SUPREME COURT

2017 DEC - 1 P 2: 32

No. #2017-0413

STATE OF NEW HAMPSHIRE

v.

SEAN F. STACEY

DEFENDANT'S APPEAL PURSUANT TO RULE 7 FROM A DECISION OF THE
STRAFFORD COUNTY SUPERIOR COURT

BRIEF FOR THE DEFENDANT

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QUESTION PRESENTED

1. Did the trial court err in denying Mr. Stacey's Motion to Suppress?

This question was preserved by a written Motion to Suppress and an evidentiary hearing on April 26, 2017. Supp.¹12; Mot. 1-30.

¹ Citations are as follows:

"Mot." refers to the transcript of the Motion hearing held on April 26, 2017.

"Supp." refers to supplement bound with this brief.

STATEMENT OF THE CASE

Sean Stacey was charged with two counts of Possession of a Controlled Drug, one as a Felony and one as a Class A Misdemeanor.

Mr. Stacey filed a Motion to Suppress. Following an evidentiary hearing on April 26, 2017, the court denied the motion. Following a trial by stipulated facts, the court found him guilty of both charges. Mr. Stacey appeals those convictions.

STATEMENT OF FACTS

At approximately 6:45 p.m. on June 30, 2016, Trooper Jordan Kopko was working a speed detail on Route 16 in Dover. At that time, he pulled Mr. Stacey over for driving 75 mph in a 55 mph zone. Supp. 1. While speaking to Mr. Stacey, Trooper Kopko noticed “an odor of marijuana coming from the vehicle.” Id. He also learned that the car was not registered to Mr. Stacey. Mot. 14

Trooper Kopko asked Mr. Stacey for permission to search the car. Mr. Stacey refused to give permission. Mot. 9. Trooper Kopko explained that the other option was for him to seize and tow the car and apply for a search warrant. Supp. 1.

A second trooper, Trooper Michelle Montville, arrived on scene. Mot. 10. Trooper Montville gave Mr. Stacey a ride from the scene. Id. at 12. Trooper Kopko stayed with the car until it was towed. Id. Trooper Kopko did not apply for a search warrant that evening. Instead, he “resumed speed detail until approximately 9:00 p.m. when his shift ended.” Supp. 3.

Trooper Kopko was aware that there are state troopers on duty twenty-four hours a day, seven days a week. Mot. 18. He was aware that Trooper Montville was working the midnight shift and would have had “plenty of time on that shift to apply for a search warrant.” Id. at 20. He was also aware that judges are available after business hours, on weekends, and on holidays. Mot. 18. Nevertheless, Trooper Kopko did not ask Trooper Montville, or any other trooper, to apply for a search warrant because “it was his case and he wanted to see it through to the end.” Supp. 4.

Trooper Kopko was not scheduled to work the following two days. Knowing that he was going to be off for two days, Trooper Kopko called a supervisor from the roadside who told him

that applying for a warrant “could wait.” Mot. 13. Trooper Kopko went home without applying for a warrant.

The next day Trooper Kopko worked was Sunday, July 3, 2016. He also worked on Monday, July 4, 2016. Because it was “a holiday—holiday weekend, [he] didn’t think it was a very urgent or exigent circumstance to make sure that, you know, get in—bother a judge and get in and out of that cruiser.” Mot. 13. Instead, Trooper Kopko waited until the afternoon of Tuesday July 5, when he was already scheduled to be at court in Lebanon and he could “kill[] two birds with one stone.” Id. at 19. “On the afternoon of July 5, approximately five days after seizing the vehicle, Trooper Kopko presented a search warrant application to a judge.” Sup. 4. The judge signed the warrant and Trooper Kopko executed it that day. Id. While executing the warrant, Trooper Kopko found the drugs Mr. Stacey was convicted of possessing.

SUMMARY OF THE ARGUMENT

The State acted unreasonably in seizing the car and holding it for approximately five days before applying for a search warrant. Because this continuing seizure was unreasonable, the evidence found when the warrant was executed must be suppressed.

ARGUMENT

The court committed prejudicial error in failing to grant the defendant's Motion to Suppress. When reviewing a trial court's denial of a motion to suppress, the Court "accept(s) the trial court's factual findings unless they lack support in the record or are clearly erroneous." State v. Gay, 169 N.H. 232, 240 (2016). The Court reviews legal conclusion *de novo*. Id.

Part I, Article 19 of the New Hampshire Constitution states that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, similarly states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Under these provisions, a warrantless search and/or seizure is unconstitutional unless it fits into a judicially recognized exception to the warrant requirement. State v. Ricci, 144 N.H. 241, 243 (1999); State v. Sterndale, 139 N.H. 445, 447 (1995). "Absent a warrant, the burden is on the State to prove that the search was valid pursuant to one of these exceptions." Id.

Here, the police seized the car and held it for approximately five days before applying for a search warrant. "[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" United States v. Jacobsen, 466 U.S. 109, 124 (1984). Accordingly, "even a seizure based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant." United States v. Martin, 157 F.3d 46, 54 (2nd Cir. 1998). The ongoing seizure of five days was unreasonable where the police could have applied for a warrant within hours had they acted diligently.

The reasonableness of a delay depends upon whether the police obtained a warrant as soon as they could have had they been acting diligently in obtaining a warrant. Illinois v. McArthur, 531 U.S. 326, 332 (2001) (“As far as the record reveals, this time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.”); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (“either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search”) (emphasis added); United States v. Laist, 702 F.3d 608, 616 (11th Cir. 2012) (“[T]he Fourth Amendment still obligated the United States to diligently obtain a warrant.”) (internal citation omitted); Modrell v. Hayden, 436 Fed.Appx. 568, 580 (6th Cir. 2011) (“Moreover, there is no indication that the officers dithered or otherwise lacked diligence in filing their warrant application.). Because the test of reasonableness is one of the diligence of the police, there is no *per se* amount of time that is reasonable. Compare United States v. Place, 462 U.S. 696, 709-710 (1983) (a ninety minute seizure of luggage was unreasonable) and Laist, 702 F.3d at 616-617 (finding a twenty-five day delay reasonable where, following a year-long investigation, the government began to draft the warrant promptly, several edits were exchanged between the U.S. attorney and the FBI agent, and “there was considerable effort...put into the preparation of the... affidavit,” which was at least 17 pages long. “Rather than being replete with boilerplate... the warrant affidavit contained a lot of valuable information, including an explanation of the peer-to-peer file sharing system used.”) (internal quotations omitted).

The requirement is not simply that the police act diligently, but that they take no longer than reasonably necessary to obtain a warrant. See United States v. Song Ja Cha, 597 F.3d 995, 1000-1001 (9th Cir. 2010) (“Although the United States argues that the police officers were

extraordinarily diligent and worked tirelessly around the clock in their pursuit of a search warrant, the McArthur test asks only how long was reasonably *necessary* for police, acting with diligence, to obtain the warrant. Here, even if the police officers acted diligently during the seizure interviewing witnesses multiple times and drafting a meticulous warrant application, they took a much longer time than was reasonably necessary to obtain the warrant. The government already had probable cause by 1 a.m. Sunday.” (internal citation and quotation omitted) (emphasis in original); Rodriguez v. United States, 135 S.Ct.1609 (2015) (“How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop’s mission.) (internal quotation and brackets omitted).

The delay in this case is similar to that in United States v. Mitchell, 565 F.3d 1347 (11th Cir. 2009). In Mitchell, there was a twenty-one day delay in applying for the search warrant because the FBI agent “didn’t see any urgency” in obtaining a warrant prior to leaving for a two week training and “felt there was no need to get a search warrant... until he returned back from [the] training.” Id. at 1351. The court found the delay was unreasonable because “[n]o effort was made to obtain a warrant within a reasonable time because law enforcement officers simply believed that there was no rush.” Id. at 1353. In reaching its conclusion that the delay was unreasonable, the court considered that the affidavit “contained less than three double-spaced pages of original content,” and that the agent did not seek “the assistance of another law enforcement officer.” Id. at 1351, 1352.

Here, Trooper Kopko did not see the need to apply for a search warrant before he had two days off. He could have applied for a warrant the evening he seized the car, but instead chose to “resume[] [his] speed detail until approximately 9:00 p.m. when his shift ended.” Supp. 3. Had

Trooper Kopko thought applying for a warrant was a priority, he could have completed the application in the two hours before his shift ended that evening. The affidavit he prepared contained only one page of original content. Trooper Kopko could have completed the warrant application that night, instead of continuing his speed detail.

There were no intervening circumstances that took Trooper Kopko's attention. See Mitchell, 565 F.3d at 1353 (noting that the court would have been sympathetic to a delay "if some overriding circumstances arose, necessitating the diversion of law enforcement personnel to another case."). Had Trooper Kopko left the Spaulding turnpike to return to Troop A to fill out the warrant application and come across a motor vehicle accident where no other officer was on scene, that would justify a delay in applying for the warrant. Nothing of that nature occurred. Trooper Kopko was not diverted due to an emergency situation or some overriding circumstance. Instead, he chose to continue with the speed detail that he had been carrying out when he stopped Mr. Stacey. He spent the rest of his shift on the speed detail, knowing that he had the next two days off. He did not seek another officer's assistance in applying for a warrant because it was "his case." Supp. 4.

Once Trooper Kopko was back on duty, he still waited multiple days because he didn't think it was important enough to bother a judge outside of business hours. Just as in Mitchell, "[n]o effort was made to obtain a warrant within a reasonable time because [Trooper Kopko] simply believed that there was no rush." 565 F.3d at 1353.

"The right to travel... is an important aspect of the citizen's liberty." Aptheker v. Secretary of State, 387 U.S. 500, 505 (1964). For this reason, the constitution proscribes shorter time limits on seizures which impact an individual's ability to travel than on other seizures of personal property. See Place, 462 U.S. 696. In Place, the government seized a traveler's

luggage at an airport. The Court found that that seizure, “intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary.” Id. at 708. Because of this intrusion on Place’s liberty, the court found that a delay of ninety minutes was unreasonable. Additionally, the Court considered the fact the police failed to “diligently pursue their investigation.” Id. at 709.

Because of the impact on an individual’s liberty interest in traveling, a warrantless seizure of a car should be viewed similarly to a warrantless seizure of a person’s home. It is difficult to imagine any seizures of property that impact a person more than keeping him out of his home or removing from him access to his means of transportation. Depriving an individual of access to his means of transportation can preclude him from getting to work, endangering his employment. It can keep him from getting to necessary medical appointments, negatively impacting his health. It could keep him from going to meetings or gatherings for any conceivable purpose, thereby infringing on his first amendment rights to freedom of association. It could stop him from going to church, impacting his free exercise of religion. There are few actions the government can take that would have a larger impact on an individual than seizing his means of transportation, especially where an individual lives in an area without extensive public transportation.

Cases that have dealt with keeping an individual out of his house while the police apply for a warrant have dealt with much smaller periods of time than the five day delay present here. In McArthur, the court upheld a two hour delay because the police were diligent in applying for the warrant and Mr. McArthur was only restrained from his house for a limited period of time. 531 U.S. 326. Cases involving circumstances similar to McArthur are measured in hours, not days. See United States v. Perez-Diaz, 848 F.3d 33, 41(1st Cir. 2017) (three hour delay

reasonable where “[t]here is no indication that Agent Ortiz did not act with diligence in securing the warrant; rather, the evidence suggests that three hours was the time required to obtain the warrant and to return to Pérez’s apartment with the warrant.”); United States v. Song Ja Cha, 597 F.3d 995 (9th Cir. 2010) (finding a seizure of twenty-six hours to be unreasonable); United States v. Legette, 260 Fed.Appx. 247 (11th Cir. 2008) (a delay of less than four hours was reasonable where police acted diligently). Here Mr. Stacey’s liberty interest in traveling was restricted for far longer than anything courts have upheld regarding securing a person’s home.

The trial court incorrectly relied on the car belonging to someone other than Mr. Stacey to downplay the impact of the five day long seizure. There was no testimony put forth at the suppression hearing to indicate how frequently Mr. Stacey drove this car or for how long he had borrowed it. Assuming, *arguendo*, that Mr. Stacey had only borrowed the car for the evening, the Trooper Kopko’s delay in applying for a search warrant was still unreasonable. Part 1, Article 19 confers automatic standing to challenge a search or seizure. State v. Settle, 122 N.H. 214, 218 (1982); State v. Sidebotham, 124 N.H. 682, 687 (1984) (“The right to be secure from all unreasonable searches and seizures of all one’s possessions without a concurrent right to challenge the legality of any search or seizure is meaningless.”). It was unreasonable for Trooper Kopko to believe that holding a car for five days would not seriously impair someone’s liberty interest in traveling. Because of the automatic standing provided by the state constitution, it is irrelevant whose liberty interest was impacted.

Because the State held the car for an unreasonable length of time before applying for a search warrant, the evidence in this case must be suppressed.

CONCLUSION


Trooper Kopko acted unreasonably when he seized the car Mr. Stacey was driving and held it for nearly five days before applying for a search warrant. There was no intervening circumstance that would make this delay reasonable. The delay was caused by this case not being a high priority for Trooper Kopko. Because the delay was unreasonable, the evidence found when the search warrant was executed must be suppressed.

REQUEST FOR ORAL ARGUMENT

Mr. Stacey requests 15 minutes of oral argument before the full court.

CERTIFICATION

I, Wade Harwood, hereby certify that two (2) copies of the foregoing Brief were forwarded on the 1st day of December, 2017 to Stephen Fuller, Esq., of the Attorney General's Office, at 33 Capitol Street, Concord, NH 03301.



Wade Harwood, Esq.

**SUPPLEMENT
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STATE OF NEW HAMPSHIRE
SUPERIOR COURT

STRAFFORD, SS.

219-2016-CR-00649

STATE OF NEW HAMPSHIRE

v.

SEAN STACEY

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Sean Stacey ("Stacey"), is charged with one count of misdemeanor A possession of a controlled drug and one count of felony possession of a controlled drug. Stacey now moves to suppress evidence obtained as the result of the alleged unlawful seizure of the car he was driving on June 30, 2016. The State objects. The court held a hearing on this matter on April 26, 2017. After considering the parties' arguments, the factual circumstances of the case, and the applicable law, for the reasons stated in this order, Stacey's motion is DENIED.

I. Factual Background

On Thursday, June 30, 2016, at approximately 6:45 p.m., Trooper Jordan Kopko of the New Hampshire State Police was on speed detail on Route 16 in Dover, New Hampshire when he observed a vehicle travelling 75 mph in a 55 mph zone. Trooper Kopko stopped the vehicle. The trooper approached the vehicle, identified himself and asked the driver for his license and registration. The driver, who was later identified as Stacey, was the sole occupant of the vehicle. While speaking with Stacey, Trooper Kopko detected an odor of marijuana coming from the vehicle.

As Stacey was retrieving his driver's license from his wallet, Trooper Kopko observed a stack of cash folded and wrapped in a blue rubber band inside Stacey's wallet. Trooper Kopko noted that the cash was "not inside the designated area [of the wallet] where most people keep their cash." (Def.'s Mot. Suppress, Ex. A ¶ 4.) Stacey produced a valid New Hampshire driver's license and the vehicle's registration. The vehicle, a 20011 Chevy Silverado (N.H. Registration: 3696260), was registered to Mona J. Ford.

Trooper Kopko asked Stacey about the odor of marijuana. Stacey said he did not know why Trooper Kopko smelled a marijuana odor coming from the vehicle. However, when Trooper Kopko began questioning Stacey about the odor of marijuana, Trooper Kopko noticed Stacey's demeanor change and he appeared nervous. Stacey no longer made eye contact with Trooper Kopko and continuously glanced at the center console and at a backpack on the passenger side of the vehicle.

Trooper Kopko asked Stacey if he would consent to a search of the vehicle. Stacey said he would not. Trooper Kopko told Stacey that alternatively Trooper Kopko would seize the vehicle, Stacey would be free to leave, and then Trooper Kopko would apply for a search warrant. Stacey said he would like Trooper Kopko to apply for a search warrant.

As Stacey was arranging for a ride, Trooper Michelle Montville arrived on scene. Trooper Kopko asked Trooper Montville to provide Stacey a "courtesy transport" to the next exit, as it was not safe for Stacey to wait on the side of the highway. Trooper Kopko testified, however, that he would not have allowed Stacey to walk away because it would not have been safe and because it is not legal to walk down Route 16. Trooper

Kopko informed Stacey that before he got into Trooper Montville's cruiser, Trooper Kopko would be patting him down to ensure he did not have any weapons on him. Stacey replied that Trooper Kopko could pat him down. Trooper Kopko testified that the purpose of the pat frisk was to not only check for weapons, but also other contraband, including drugs. Trooper Kopko explained that it would not be safe for Stacey to get into Trooper Montville's cruiser if he had weapons or drugs on his person.

As Trooper Kopko was patting Stacey down, he felt "a wad of something" in Stacey's left shorts pocket. Trooper Kopko did not know what the wad was and testified that it did not feel like a weapon he had felt before. Trooper Kopko asked Stacey what it was, and Stacey replied that it was cash. Trooper Kopko peeked inside Stacey's pocket to confirm, and observed a folded stack of cash. Trooper Kopko asked Stacey if he always carried that much cash on his person. Stacey said he was looking to purchase a Honda. Trooper Kopko completed his pat frisk of Stacey and found no drugs or weapons on his person. Trooper Montville then transported Stacey off of the highway. The vehicle was seized and secured at the Troop A barracks pending a search warrant.

Thereafter, Trooper Kopko resumed speed detail until approximately 9:00 p.m. when his shift ended. Trooper Kopko knew he was off work the next two days, so he called a supervisor to ask about the pending warrant application. His supervisor told him it could wait. Trooper Kopko returned to work on Sunday, July 3. He did not present the search warrant application to a judge, however, until Tuesday, July 5, 2016. Trooper Kopko explained that he did not think the situation was urgent enough to warrant bothering an on-call judge on a Sunday or holiday. He also explained that although another trooper (Trooper Montville, for example) could have prepared the

search warrant application, he did not ask another trooper to prepare the application because it was his case and he wanted to see it through to the end.

On the afternoon of Tuesday, July 5, 2016, approximately five days after seizing the vehicle, Trooper Kopko presented a search warrant application to a judge. That same day, a judge signed the warrant and Trooper Kopko executed it.

In the warrant affidavit, Trooper Kopko states that he has been a New Hampshire State Police Trooper since December 16, 2011, and has training and experience in "searches and seizure of motor vehicles," "conducting motor vehicle stops," and "drug interdiction work." (Def.'s Mot. Suppress, Ex. A ¶ 1.) Trooper Kopko then describes the events leading up to the seizure of the vehicle, including him "smell[ing] an odor of marijuana coming from [Stacey's] vehicle," observing "a stack of cash folded and wrapped in a blue rubber band" in Stacey's wallet "not inside the designated area where most people keep their cash," and seeing a "stack of money folded up" inside Stacey's shorts pocket. (*Id.* ¶¶ 3, 4, 8.) Trooper Kopko also describes how Stacey's demeanor changed and he appeared nervous once Trooper Kopko began asking him about the odor of marijuana, and later describes Stacey as appearing "very nervous" and "visibly shaking." (*Id.* ¶¶ 6, 9, 12.)

Additionally, Trooper Kopko's affidavit states that Stacey told Trooper Kopko his grandfather had recently passed away and he was travelling to his grandfather's residence in Massachusetts to help clean it out. (*Id.* ¶ 5.) However, when Trooper Kopko contacted the vehicle's owner, Ms. Mona Ford, to inform her that he was seizing her vehicle, she told Trooper Kopko "she was under the impression that [Stacey] borrowed her truck to shop for vehicles" and "did not mention anything to [Trooper

Kopko] about Stacey taking her truck down to Massachusetts to his grandfather's residence." (Id., ¶ 11.) The affidavit concludes:

Overall, I feel that there is probable cause to believe that the vehicle that Stacey was operating, 2011 Chevy Silverado (NH Reg: 3696260), contains a controlled drug(s). There was a consistent odor of marijuana coming from the vehicle. Stacey's stories were inconsistent. Stacey appeared very nervous when I questioned him about marijuana or any other drugs. I found it abnormal for someone to be carrying two separate wads of cash and in the manner it was carried. In my training and experience, someone who deals in illicit drugs exchanges larger amounts of cash.

(Id., ¶ 12.)

II. Analysis

Stacey now moves to suppress all evidence obtained as a result of the seizure and subsequent search of the vehicle he was driving, relying on his rights under Part I, Article 19 of the New Hampshire Constitution, and the Fourth and Fourteenth Amendments of the United States Constitution. Stacey challenges the seizure of the vehicle on three grounds. First, he argues that Trooper Kopko illegally patted him down and, therefore, Trooper Kopko's observation of the wad of cash in Stacey's pocket must be excised from the search warrant affidavit. Stacey contends that once this information is excised from the affidavit, the search warrant lacks probable cause. Second, Stacey asserts that the search warrant affidavit as written fails to establish probable cause. Third, Stacey maintains that "[t]he police unreasonably seized the vehicle when they possessed it without a warrant for five days pending the request for a warrant." (Def.'s Mot. Suppress at 9.)

In response, the State contends that the pat frisk was lawful, but even assuming it was not and Trooper Kopko's observations regarding the second wad of cash are

excised from the search warrant affidavit, the affidavit established probable cause to search the vehicle for drugs. The State also maintains that the five-day delay in obtaining the search warrant was reasonable.

A. Probable Cause to Search

Assuming without deciding that the pat frisk was unlawful and excising Trooper Kopko's observations regarding the wad of cash in Stacey's pocket from the search warrant affidavit, the court finds that the affidavit established probable cause to search the vehicle for drugs. "Part I, Article 19 of the State Constitution requires that search warrants be issued only upon a finding of probable cause." State v. Letoile, 166 N.H. 269, 272 (2014) (quoting State v. Ward, 163 N.H. 156, 159 (2012)). "Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." Id. (quotation omitted). To establish probable cause, "[t]he police must demonstrate in an application for a search warrant that there is a substantial likelihood that the items sought will be found in the place to be searched." Id. (quoting State v. Ball, 164 N.H. 204, 207 (2012)). "However, they need not establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result." Id.

The issuing magistrate must "make a practical, common-sense decision whether given all circumstances set forth in the affidavit before it, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Ball, 164 N.H. at 207 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)) (quotation marks, brackets, and citation omitted). When reviewing the sufficiency of an affidavit submitted

with a warrant application, the court applies “a totality-of-the-circumstances test.” Id. (citation omitted). In doing so, the court “afford[s] much deference to the district court’s probable cause determination and will not invalidate warrants by reading the supporting affidavit in a hypertechnical sense.” Id. at 208 (quotation omitted). However, the reviewing court “may consider only the information that the police brought to the issuing court’s attention.” Letoile, 166 N.H. at 273.

Considering the totality of the circumstances, the court finds that the affidavit established probable cause to search the vehicle. Most significantly, the affidavit states that Trooper Kopko detected “an odor of marijuana coming from the vehicle,” and later describes the odor as a “consistent odor of marijuana.” (Def.’s Mot. Suppress, Ex. A. ¶¶ 4, 12.) The affidavit also includes information regarding Trooper Kopko’s training and experience in drug interdiction and traffic stops, and his approximate four-and-a-half years as a State trooper. (See id. ¶ 1.) Thus, the affidavit contains sufficient information from which a common-sense inference could reasonably be drawn that Trooper Kopko was qualified to recognize the odor of marijuana. See Ward, 163 N.H. at 162. Because Trooper Kopko was qualified to recognize the odor of marijuana and detected the odor coming from the vehicle, the court finds that the affidavit established probable cause to believe the vehicle contained marijuana. See State v. Gilson, 116 N.H. 230, 233 (1976) (“An officer with sufficient experience to recognize the odor of burning marijuana has probable cause to suspect its presence when he detects the odor within the confines of an automobile.”); see also State v. Rodriguez, 157 N.H. 100, 113–14 (2008) (Hicks, J., dissenting) (referencing a number of cases that have held that although odor alone can provide probable cause to search, it is insufficient on its own to constitute an exigent

circumstance); Johnson v. United States, 333 U.S. 10, 13 (1948) (observing that probable cause for a search warrant could be based upon odor of burning opium where the officer is “qualified to know the odor” and noting that odor “might very well be found to be evidence of most persuasive character”).¹

Moreover, there were additional facts present that added to Trooper Kopko’s suspicion that the vehicle contained marijuana. In addition to detecting the odor of marijuana coming from the vehicle, Trooper Kopko also observed a stack of cash folded and wrapped in a blue rubber band in a non-customary place inside Stacey’s wallet; and noted that when questioned about the odor of marijuana, Stacey’s demeanor changed, and he appeared nervous and continuously glanced over at the center console and a backpack on the passenger side of the vehicle. Although these observations would not be sufficient to establish probable cause on their own, see State v. Blesdell-Moore, 166 N.H. 183, 189 (2014), when combined with the information regarding the odor of marijuana, the court finds that the issuing judge had a substantial basis for concluding that probable cause to search the vehicle existed.

B. Delay in Obtaining Search Warrant

The court next considers whether the delay in obtaining the search warrant rendered the seizure of the vehicle unreasonable. When determining the reasonableness

¹ A number of federal and state courts have held that the odor of marijuana by itself can provide sufficient probable cause for the issuance of a search warrant. See, e.g., United States v. Humphries, 372 F.3d 653, 658–59 (4th Cir. 2004); United States v. Taylor, 162 F.3d 12, 21 (1st Cir. 1998); United States v. Garza, 10 F.3d 1241, 1246 (6th Cir. 1993); State v. Sisco, 373 P.3d 549, 555 (Ariz. 2016) (holding odor of marijuana sufficient to establish probable cause notwithstanding state Medical Marijuana Act); State v. Kazmierczak, 771 S.E.2d 473, 477–78 (Ga. Ct. App. 2015); State v. Barclay, 398 A.2d 794 (Me. 1979) (holding odor of marijuana smoke emanating from vehicle sufficient to establish probable cause to search although under Maine statute possession of marijuana can only give rise to a civil violation); Robinson v. State, 152 A.3d 661, 683 (Md. 2017) (holding officer had probable cause to search a vehicle where officer detected odor of marijuana coming from the vehicle despite decriminalization of possession of small amounts of marijuana); State v. Ortega, 749 N.W.2d 851, 854–55 (Minn. Ct. App. 2008); State v. Moore, 734 N.E.2d 804, 807–08 (Ohio 2000); State v. Secrist, 589 N.W.2d 387, 391 (Wis. 1999).

of a delay in securing a search warrant, the court must “balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.” Illinois v. McArthur, 531 U.S. 326 (2001); see also United States v. Burgard, 675 F.3d 1029, 1033 (7th Cir. 2012); United States v. Laist, 702 F.3d 608, 613 (11th Cir. 2012); United States v. Song Ja Cha, 597 F.3d 995, 1000 (9th Cir. 2010); Commonwealth v. White, 59 N.E.3d 369, 378 (Mass. 2016). The courts have identified several factors relevant to this inquiry, including: the “significance of the interference with the person’s possessory interest,” Laist, 702 F.3d at 613; the “strength of the state’s basis for the seizure,” Burgard, 675 F.3d at 1033; and “whether [the] police acted diligently in obtaining the warrant.” White, 59 N.E. at 378 (quotation omitted).

Here, with respect to Stacey’s possessory interest in the vehicle, the record reflects that Stacey was not the owner of the vehicle, but was simply borrowing it from Ms. Ford. The court heard no evidence as to Stacey’s possessory interest in the vehicle. Thus, it appears Stacey did not have a possessory interest in the vehicle. Moreover, the court heard no evidence to suggest that the seizure “effectively restrain[ed]” Stacey’s liberty interests. See United States v. Martin, 157 F.3d 46, 54 (2d Cir. 1998); see also United States v. Place, 462 U.S. 696 (1983) (discussing how seizure of a person’s luggage may disrupt his travel plans).

On the other hand, Trooper Kopko’s interest in holding the vehicle was strong, as he had probable cause to believe the vehicle contained drugs. See Burgard, 675 F.3d at 1033 (“The state has a stronger interest in seizures made on the basis of probable cause than in those resting only on reasonable suspicion.”).

Finally, with respect to the diligence factor, the vehicle was seized after 6:45 p.m. on Thursday, June 30, 2016. After the vehicle was towed, Trooper Kopko resumed speed detail until his shift ended at approximately 9:00 p.m. Trooper Kopko was then off work the next two days. He returned to work on a Sunday, and the following day was a holiday. On July 5, 2016, Trooper Kopko began preparing the search warrant application and the warrant was issued that same day. Thus, the five-day delay between the seizure and the warrant's issuance was largely attributable to Trooper Kopko's schedule and the fact that his first two days back at work fell on a Sunday and a holiday. See Martin, 157 F.3d at 54 (finding eleven-day delay reasonable in part because it included two weekends and the Christmas holiday).


The court recognizes that Trooper Kopko likely could have obtained the warrant sooner, for example, by asking another trooper to prepare the warrant application. However, "police imperfection is not enough to warrant reversal. With the benefit of hindsight, courts can almost always imagine some alternative means by which the objectives of the police might have been accomplished, but that does not necessarily mean that the police conduct was unreasonable." Burgard, 675 F.3d at 1035. When considering all the circumstances of this case, the court cannot find that the five-day delay was so long that the seizure was unreasonable. See Laist, 702 F.3d at 616–19 (twenty-five day delay reasonable); Burgard, 675 F.3d at 1034–35 (six-day delay not unreasonable); United States v. Stabile, 633 F.3d 219, 235–36 (3d Cir. 2011) (three-month delay reasonable). Accordingly, the court finds that the seizure of the vehicle was not unreasonable.

III. Conclusion

For the reasons stated herein, Stacey's motion to suppress is DENIED.

So ordered.

5-12-17
Date



Peter H. Fauver
Presiding Justice

2/24/17

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

State of New Hampshire

V.

Sean Stacey

16-CR-649

MOTION TO SUPPRESS

NOW COMES the defendant, Sean Stacey, by and through his attorney, Wade Harwood, Esq. and respectfully requests that this Honorable Court suppress evidence found through illegal seizure of the car Mr. Stacey was driving. This request is made pursuant to Part I, Article 19 of the New Hampshire Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution.

In support of this Motion, it is stated:

FACTS¹

1. Mr. Stacey is charged with two counts of possession of a controlled drug.
2. On Thursday, June 30, 2016, Trooper Jordan Kopko stopped Mr. Stacey for speeding. Trooper Kopko observed Mr. Stacey driving 75 mph in a posted 55 mph zone on Route 16 in Dover.
3. Trooper Kopko asked Mr. Stacey for his license and registration. When Mr. Stacey "retrieved his driver's license from his wallet, [Trooper Kopko] noticed that he had a stack of cash folded and wrapped in a blue rubber band." Disc. 33. Trooper Kopko "detect[ed] an odor of marijuana coming from the vehicle." Id.

¹ All facts are taken from discovery provided by the State.

4. Trooper Kopko asked Mr. Stacey about the odor. Mr. Stacey “stated that he did not know why [Trooper Kopko] smelled an odor of marijuana coming from his vehicle.” Id. At this point, Mr. Stacey “appeared nervous,” stopped making eye contact, and “looked over at a back pack that was on the passenger side floor.” Id.

5. Trooper Kopko asked for permission to search the car. Disc. 34. Mr. Stacey refused. Id. Trooper Kopko informed Mr. Stacey that he intended to seize the car and apply for a search warrant. Mr. Stacey indicated “that he would like [Trooper Kopko] to apply for a search warrant.” Id.

6. Given that Mr. Stacey was on the side of Route 16, he was offered “a courtesy transport to one of the next exits.” Id. Before the “courtesy transport,” Trooper Kopko “informed [Mr. Stacey] that [Kopko] would be patting him down to assure that he did not have any weapons on his person.” Id.

7. While patting Mr. Stacey down, Trooper Kopko felt “a wad of something in [Mr.] Stacey’s left shorts pocket.” Id. When asked what it was, Mr. Stacey indicated that it was money. Trooper Kopko “peeked into the pocket and noticed a stack of money folded up.” Id.

8. Trooper Kopko seized the car. On the afternoon of Tuesday, July 5, 2016, Trooper Kopko presented a search warrant to Judge Bamberger for a signature.² The judge signed the warrant, and Trooper Kopko executed it on July 5, 2016. Disc. 7. During the search, Trooper Kopko found what is alleged to be drugs.

² The affidavit in support of the warrant is dated July 3, 2016. Disc. 34. The warrant itself is dated July 5, 2016. Disc. 31. Further, Trooper Kopko’s report indicated that he presented the warrant on the afternoon of July 5, 2016, a time when he was at the court “for a scheduled trial on a separate matter.” Disc. 28. Given that July 5, 2016 was a Tuesday, there would not have been a trial scheduled on Sunday, July 3, 2016.

ARGUMENT

9. Part I, Article 19 of the New Hampshire Constitution states that “[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions.” The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, similarly states that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

10. Under these provisions, a search pursuant to a warrant is reasonable only if the warrant is based on a magistrate’s finding of probable cause. State v. Carroll, 131 N.H. 179, 184 (1988). In order for a Court to find probable cause to issue a search warrant, an affiant must present the Court with “sufficient facts and circumstances to establish a substantial likelihood that the evidence or contraband sought will be found in the place to be searched.” State v. Cannuli, 143 N.H. 149, 151-152 (1998). “Probable cause to search exists ‘if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction’.” State v. Canelo, 139 N.H. 376, 380 (1995).

I. Illegally obtained evidence cannot form the basis for probable cause and must be excised from the affidavit in support of the warrant.

11. In this case, the affidavit failed to establish probable cause to search the car.

12. When evidence is obtained in violation of a defendant’s constitutional rights, it is not only the direct use of that evidence that is prohibited; derivative use of the evidence is also prohibited. See Wong Sun v. United States, 371 U.S. 471 (1963). This is because the “essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired

shall not be used before the Court but that it *shall not be used at all.*" Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (emphasis added). "Proscribing the derivative use of illegally obtained evidence serves the objective of deterring future unlawful police conduct, by denying the police the benefit of all of the products of that conduct." Gravel, 135 N.H. at 181.

13. Evidence that is obtained illegally cannot be used to establish probable cause for a search warrant. State v. Salsman, 112 N.H. 138, 141 (1972) ("If... the evidence... was obtained through the illegal entry by government agents or persons acting in their behalf in violation of defendants' fourth amendment rights it may not be used to support the issuance of the warrant."). See also Gravel, 135 N.H. 181 (holding that information obtained in violation of *Miranda* cannot be used as basis for a search warrant); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (holding that information obtained during an illegal search cannot form the basis for a subpoena); Commonwealth v. Benoit, 382 Mass 210, 213 (1981) ("statements obtained in violation of a defendant's right to counsel under the Sixth Amendment to the United States Constitution may not be used for the purpose of establishing probable cause sufficient to validate a subsequent search."); United States v. Finucan, 708 F.2d 838, (1st Cir. 1983) (holding that evidence gathered during interviews must be suppressed when illegally seized documents guided the postal inspector in deciding who to interview and what questions to ask). This conclusion is required in order to deter police misconduct. Gravel, 135 N.H. 181. The Court noted that "[t]o allow the police the freedom to disregard the requirements of *Miranda* and thereby risk losing only the direct product of such action, but not the evidence derived from it, would not only not deter future *Miranda* violations but might well tend to encourage them." Id., at 183. That rationale holds true in a Fourth Amendment context as well as the Miranda context. To allow the police to conduct an illegal

search and subsequently use the evidence found in that search to obtain a search warrant would provide an incentive for the police to violate citizens' constitutional rights.

14. When evaluating whether derivative evidence must be suppressed, the test is more than simply whether "but for" the illegal search the evidence would have come to light. The test is whether the evidence "has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." State v. Cobb, 143 N.H. 638, 650 (1999). Part 1, Article 19 "places the parties in the position they would have been in had there been . . . no violation of the defendant's constitutional right to be free of searches [and seizures]." Canelo, 139 N.H. 376, 387. Therefore, when evidence is tainted by the initial illegality, it must be suppressed and cannot be considered in support of a search warrant.

15. Trooper Kopko illegally patted down Mr. Stacey. "It has long been recognized that a police officer, for self-protection and safety, may conduct a pat down search for weapons of a suspect the officer reasonably believes or suspects may be armed. The Supreme Court has made clear, however, that the so-called Terry doctrine does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." State v. Koons, 137 N.H. 365, 367 (1993) (internal citations and quotations omitted). Here, Trooper Kopko had no basis to believe that Mr. Stacey was armed. Consequently, he had no authority to pat him down.

16. Trooper Kopko informed Mr. Stacey that he would pat him down "to assure that he did not have any weapons." Disc. 34. "When the police are relying upon consent as a basis for their warrantless search, they have no more authority than they have been given by the consent." State v. Saunders, 164 N.H. 342, 354 (2012). Assuming, *arguendo*, that Mr. Stacey consented to this search, Trooper Kopko exceeded that consent when he looked into Mr. Stacey's pocket after

feeling “a wad of something.” Disc. 34. Trooper Kopko ultimately determined that this was a wad of cash folded up. Id. A wad of cash could not have reasonably been mistaken for a weapon.

17. Trooper Kopko violated Mr. Stacey’s rights in one of two ways: either by patting him down without a basis to believe he was armed, or by exceeding the scope of any consent that Mr. Stacey may have given. Either way, paragraph eight must be excised from the affidavit.

II. Because the Supporting Affidavit Fails to Establish Probable Cause as Required by the Fourth and Fourteenth Amendments to the United States Constitution and Part I, Article 19 of the New Hampshire Constitution, All Evidence Obtained During the Unconstitutional Search of the Car Must be Suppressed.

A. Once Paragraph Eight is Excised, The Remaining Affidavit Fails to Establish Probable Cause.

18. The affidavit fails to establish probable cause. It indicates that the trooper smelled “an odor of marijuana” coming from the car. Warrant, attached as Exhibit A, ¶3. It does not indicate whether this was the odor of fresh or burnt marijuana. See State v. Rodriguez, 157 N.H. 100, 104 (2008) (discussing the difference between the odor of burning marijuana and the “smell of stale or older burned marijuana”). If the odor was that of burned marijuana, while it may be reasonable suspicion to ask Mr. Stacey about the odor, it would not rise to the level of probable cause that there was still marijuana in the car. See Id. at 106-107 (finding that the smell of “burning marijuana” creates exigent circumstances because that act of burning the marijuana destroys the evidence).

19. There was nothing in the affidavit to indicate how strong the odor was. A weak odor of burnt marijuana might indicate that some has been smoked in the car some time ago. It might indicate that someone had smoked marijuana and then gotten into the car, leaving some of the smell. Neither of those situations would indicate a reasonable likelihood that there was currently marijuana in the car.

20. The affidavit notes that Mr. Stacey had a “stack of cash folded and wrapped in a blue rubber band.” Exhibit A, ¶4. It does not indicate the size of this stack. It does not indicate what denomination the outermost bill was. The value of two identically sized stacks of money could differ by orders of magnitude depending on whether they were one dollar bills or one hundred dollar bills. In short, there is nothing in the affidavit to indicate how much money Mr. Stacey was carrying. It should also be noted that carrying cash is perfectly legal.

21. Nervousness does not provide a reasonable articulable suspicion. State v. Blesdell-Moore, 166 N.H. 183, 188 (2014). “[I]t [is] impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.” Id. (quoting United States v. Smith, 263 F.3d 571, 594 (6th Cir. 2001)). See also Joyce, 159 N.H. at 447 (nervousness and deceptive responses were not reasonable suspicion); United State v. Dapolito, 713 F.3d 141, 144-53 (1st Cir. 2013) (defendant’s fidgeting, “fight-or-flight” stance, statement which officer believed was deceitful, and officer’s belief that something “wasn’t adding up” did not establish a reasonable articulable suspicion); Thomas v. State, 420 S.W.3d 195, 197-204 (Tex. Crim. Supp. 2013) (finding no reasonable suspicion despite defendant being “exceptionally nervous having an “explanation of her trip that did not seem logical”); Ferrante, 962 N.E.2d 388 (no reasonable suspicion where defendant was “nervous and her hands were shaking” and her explanation of her travel was “odd”).

22. The fact that Mr. Stacey was nervous does not create probable cause to believe that there are drugs in the car, nor does his nervousness combined with an unidentified amount of money in his wallet.

B. The affidavit as written fails to establish probable cause.

23. Assuming, *arguendo*, that nothing is excised from the affidavit, the affidavit as written fails to establish probable cause. There is nothing in paragraph eight to indicate the size of the stack of money in Mr. Stacey's pocket. There is nothing to indicate denomination of the outermost bill. There is nothing whatsoever to indicate how much money Mr. Stacey had in his pocket. Likewise, there is nothing to indicate how much he had in his wallet. When Mr. Stacey was asked about the money, he provided a reasonable explanation—he was looking to purchase a Honda. Exhibit A, ¶8.

24. There is nothing in the affidavit to indicate that Mr. Stacey's explanation was not accurate and truthful. Although the affidavit asserts that Mr. Stacey's "stories were inconsistent," there are no inconsistencies contained in the affidavit. The affidavit also indicates that based on Trooper Kopko's training and experience, "someone who deal in illicit drugs exchanges larger amounts of cash." Exhibit A, ¶12. The affidavit merely says larger amounts of cash, but does not say larger than what. It also fails to give any indication of how much cash Mr. Stacey had. Further, though it states that Trooper Kopko "found it abnormal for someone to be carrying two separate wads of cash" it does not indicate that this is based on the trooper's training and experience. *Id.* Indeed the affidavit waits until the next sentence to reference the trooper's training and experience. *Id.* It does not state that the trooper's training and experience would indicate that a drug dealer is likely to carry multiple wads of cash. Even if such a conclusion were warranted, it would still not provide probable cause to believe there were currently drugs in that car. *See State v. Silvestry*, 136 N.H. 522 (1992) (probable cause that a person is a drug dealer does not automatically establish probable cause that drugs are present in his home).

25. Because the warrant failed to establish probable cause to believe that there would be drugs in the car, the warrant should not have been granted. Accordingly, any evidence obtained when the warrant was executed must be suppressed.

III. The police unreasonably seized the vehicle when they possessed it without a warrant for five days pending the request for a warrant.

26. Trooper Kopko seized the car for the purpose of obtaining a search warrant. Assuming, *arguendo*, such a seizure was valid for that limited purpose at its inception, it was unreasonable to seize the vehicle for more than five days pending a search warrant application. Warrantless searches and seizures are per se unreasonable, unless they fall within the narrow confines of a judicially crafted exception. Craveiro, 155 N.H. 423, 426 (2007). The burden of establishing that a seizure falls within one of these exceptions is on the State. Id.

27. In the present case, the police were permitted to briefly interfere with Mr. Stacey's possessory interest in the vehicle to obtain a warrant. As noted in United States v. Place,

In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, **if the exigencies of the circumstances demand it.**

United States v. Place, 462 U.S. 696, 701 (1983) (citation omitted) (emphasis added).

28. In Illinois v. McArthur, 531 U.S. 326 (2001), the police excluded a resident from his trailer home while the police sought a search warrant. The Court examined whether a short term seizure of the trailer is "reasonable" under the federal constitutional prohibitions on unreasonable search and seizure. Rather than set forth "a per se rule of unreasonableness," the Court indicated it must "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." Id. At 331. The Court ultimately concluded "the police imposed the restraint for a limited period of time, namely, two hours." Id. The Supreme Court held that "[a]s far as the record reveals, this time period was **no longer than reasonably necessary** for the police, acting

with diligence, to obtain the warrant... Given the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible." Id. (emphasis added).

29. In the present case, the police kept the car for five days before seeking a warrant. The factual portion of the warrant affidavit (¶3-11) does not refer to any investigation occurring after Thursday, June 30, 2016. The police had the car in their possession at the Troop A barracks on Thursday night. Retaining the car without seeking a warrant until the following Tuesday afternoon, July 5, 2016, was unreasonable as it was far longer than necessary for the police to obtain a warrant. Accordingly, the seizure was unreasonable under both the State and Federal Constitutional prohibitions on unreasonable search and seizure, and the results of the search must be suppressed.

WHEREFORE, Mr. Stacey respectfully requests that this Honorable Court:

- A. Suppress all evidence obtained through the execution of the search warrant in this case; or
- B. Hold a hearing on this Motion; and
- C. Grant such further relief as justice requires.


Respectfully submitted,



Wade Harwood
NH Bar #17703
Sisti Law Offices
387 Dover Road
Chichester, New Hampshire 03258
(603) 224-4220

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been forwarded this 24th day of February, 2017 to Lauren Di Giovanni, Esq. Strafford County Attorney's Office



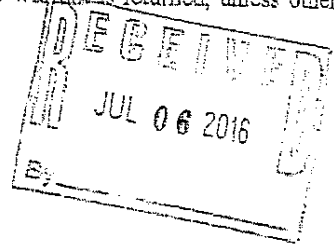
Wade Harwood, Esq.

Exhibit A

APPLICATION FOR SEARCH WARRANT and SUPPORTING AFFIDAVIT

(This application and affidavit to be detached by Justice issuing warrant and filed separately with the court to which the warrant is returnable.)

Instructions: A person seeking a search warrant shall appear personally before any justice, associate justice or special justice of the municipal, district or superior court and shall give an affidavit in substantially the form hereinafter prescribed. The affidavit shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and the affidavit may be supplemented by oral statements under oath for the establishment of probable cause. The person issuing the warrant shall retain the affidavit and shall make notes personally of the substance of any oral statements under oath supplementing the affidavit or arrange for a transcript to be made of such oral statements. The person issuing the search warrant shall deliver the affidavit and the notes or transcript within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court of record.



THE STATE OF NEW HAMPSHIRE

Strafford, SS
(county)

Dover Court
July 5 2016
(Month / Day) (Year)

I, Trooper Jordan Kepko *[Signature]* being duly sworn, depose and say:
(Name of applicant)

1. I am A New Hampshire State Police Trooper currently assigned to Troop A barracks in Epping, NH
(describe position, assignment, office, etc.)

2. I have information, based upon:

(describe source, facts indicating reliability and credibility of source and nature of information: if based on personal knowledge, so state)

See the attached Affidavit.

(Use this additional sheet for Item No. 2, if necessary)

See the attached Affidavit.

3. Based upon the foregoing information (and upon my personal knowledge) there is probable cause to believe that the
(strike out if not applicable)

property hereinafter described Marijuana or controlled drug analog

(has been stolen, etc.)

and may be found in the vehicle that was driven by Sean Stacey (DOB: 5/23/1979); 2011 Chevy Silverado (Silver) NH: 3696260
(in the possession of A.B. or any other person)

at premises of the NHSP-Troop A Barracks- 315 Calef Hwy Epping, NH 03042
(identify)

4. The property for which I seek the issuance of a search warrant is the following:

(here described the property as particularly as possible)

Marijuana and/or controlled drug analog.

Wherefore, I request that the court issue a warrant and order of seizure, authorizing the search of, 2011 Chevy Silverado

NH Reg: 3696260 located at the NHSP-Troop A Barracks- 315 Calef Hwy Epping, NH 03042.
(identify premises and the persons to be searched)

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court;
together with such other and further relief that the court may deem proper.

Trooper Jordan K. Kopko
(Name)

Then personally appeared the above named _____

Trooper Jordan K. Kopko

and made oath that the foregoing affidavit by him subscribed is true.

Before me this _____

5th

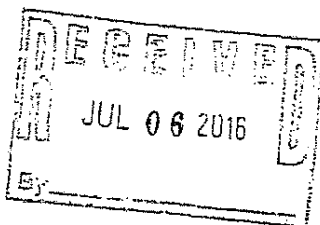
(Day)

day of _____

JULY

July 2016

(Month / Year)



Justice of the 2nd Circuit Court

STATE OF NEW HAMPSHIRE

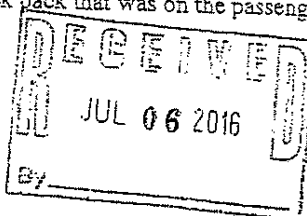
Strafford, SS

DOVER DISTRICT COURT

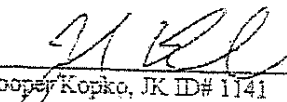
AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

I, Jordan K. Kopko, being sworn now depose and say as follows:

1. I am employed by the State of New Hampshire, Department of Safety, Division of State Police as a State Police Trooper, currently holding the rank of Trooper 1. I have been employed by the Division of State Police as a State Police Trooper since December 16, 2011. I am a certified police officer in the State of New Hampshire, having successfully completed the 157th NH Police Academy in April 2012. After graduating from the Police Academy, I completed the FTO (Field Training Officer) process. During the FTO phase, I gained training and experience in searches and seizures of motor vehicles. On October 23, 2014 I attended a search and seizure class at the Newport Police Department. Lt. Ferry and Sgt. Hall of the New Hampshire State Police led the training. The training involved drug interdiction stop scenarios, writing proper search warrants, and officer safety. In June 2014, I became a Field Training Officer. Throughout my career thus far, I have had training and experience in conducting motor vehicle stops and drug interdiction work.
2. That my general duties include traffic enforcement and law enforcement patrol functions, assess situations to determine probable cause for search and arrest, perform rescue functions during emergencies, process and transport prisoners, and gather information and write investigative reports.
3. On Thursday, ^{JKK} 6/30/2016 at approximately 1845 hours, I conducted a motor vehicle stop on Route 16 SB in Dover, NH just north of exit 8W. The reason for the stop was because the operator was traveling at 75 mph in a 55 MPH zone. I approached the vehicle, identified myself and requested the driver's license and registration. While the driver was searching for the requested documentation, I could detect an odor of marijuana coming from the vehicle.
4. The lone occupant produced his license and the vehicle's registration. The driver had a NH driver's license: Sean STACEY (DOB: 5/23/1979). The vehicle, 2011 Chevy Silverado (NH Reg: 3696260), was registered to Mona J. FORD (DOB: 7/6/1959). When STACEY retrieved his driver's license from his wallet, I noticed that he had a stack of cash folded and wrapped in a blue rubber band. The cash was folded up in his wallet and not inside the designated area where most people keep their cash. STACEY never provided me with a logical explanation as to why he kept his money in that manner.
5. I asked STACEY why he was traveling 20 mph over the speed limit. He stated that he was passing a vehicle and that he thought he was still in the 65 mph zone. I also asked STACEY where he was headed. He informed me that he was going to his grandfather's (who recently passed away) residence in Massachusetts. STACEY said that his family was preparing to sell the residence and that he was going down there to help clean the residence out.
6. Next, I asked STACEY about the marijuana odor. He stated that he did not know why I smelled an odor of marijuana coming from his vehicle. Once I started asking questions to STACEY about the odor of marijuana, his demeanor changed and he appeared nervous. At first, he would speak to me and make eye contact with me, but once I asked about the odor of marijuana, STACEY would not keep eye contact with me and he continuously looked over at a back pack that was on the passenger side floor and his center console.

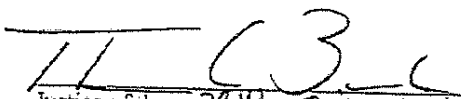


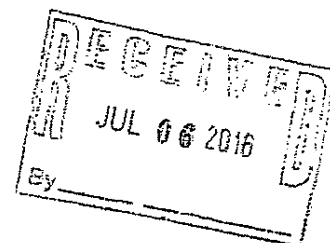
7. I asked STACEY if he would give me consent to search the vehicle. He stated that he would not. I told him that the second option would be for me to seize the vehicle and he would be free to leave until I applied for a search warrant and presented it before a Judge. STACEY said that he would not consent to me searching his vehicle and that he would like me to apply for a search warrant.
8. Trooper M. MONTVILLE arrived on scene and offered to provide STACEY with a courtesy transport to one of the next exits off of Route 16. Before STACEY sat in Trooper MONTVILLE'S cruiser I informed him that I would be patting him down to assure that he did not have any weapons on his person. I felt a wad of something in STACEY'S left shorts pocket. I asked him what that wad was. He said it was his money. I peeked into the pocket and noticed a stack of money folded up. This was an additional stack of money to the one STACEY had folded up in his wallet. I asked STACEY if he always carried that much cash on his person. He stated that he was looking to purchase a Honda. I asked him what he did for work and he stated that he was a roofer.
9. When STACEY was sitting roadside on the guard rail, he was visibly shaking and appeared very nervous.
10. Trooper MONTVILLE provided STACEY with a courtesy transport off of exit 8. I followed the Lafayette tow truck to the barracks. The vehicle was secured at the Troop A barracks pending this search warrant.
11. I called the vehicle owner, Mona FORD, and informed her that her vehicle had been towed pending a search warrant. FORD was aware that STACEY had her vehicle, but she was under the impression that he borrowed her truck to shop for vehicles. FORD did not mention anything to me about STACEY taking her truck down to Massachusetts to his grandfather's residence.
12. Overall, I feel that there is probable cause to believe that the vehicle that STACEY was operating, 2011 Chevy Silverado (NH Reg: 3696260), contains a controlled drug(s). There was a consistent odor of marijuana coming from the vehicle. STACEY'S stories were inconsistent. STACEY appeared very nervous when I questioned him about marijuana or any other drugs. I found it abnormal for someone to be carrying two separate wads of cash and in the manner it was carried. In my training and experience, someone who deals in illicit drugs exchanges larger amounts of cash.
13. The vehicle is currently at the NHSP-Troop A barracks in a secure bay and I wish to search the vehicle in its entirety to confirm that Sean STACEY was operating a motor vehicle with marijuana inside (violating RSA 265-A:43).


 Trooper Kopko, JK ID# 1141

Then personally appeared the above named Trooper Jordan K. Kopko and made oath that the foregoing affidavit by him subscribed is true.

Before me this 3 day of July, 2016


 Justice of the Peace
 District Court



WARRANT
The State of New Hampshire

Stafford, SS Dover District Court
To the Sheriffs of our several counties, or their deputies, any State Police Officer, or any Constable or Police Officer of any city or town, within our State.

Proof by affidavit (supplemented by oral statements under oath) having been made this day before

Thomas E. Bamberger
(name of person authorized to issue warrant)

by

Trooper Jordan K. Kopko of the New Hampshire State Police
(names of person or persons whose affidavits have been taken)

that there is

probable cause for believing that: Evidence of the crime of acts prohibited and transporting drugs in a motor vehicle.
(certain property which has been stolen, embezzled, or fraudulently obtained; OR is intended for use or has been used as the means of committing a crime; OR is contraband; OR is evidence of the crime to which the probable cause upon which this search warrant is issued relates.)

Marijuana and/or marijuana drug analog

may be found in the possession of 2011 Chevy Silverado, color: silver, NH Reg: 3696260 (owned by Mona FORD, DOB: 7/6/59)
(identify)

at premises located at NHSP-Troop A barracks, 315 Calef Hwy., Epping, NH 03042.
(specify)

We therefore command you in the daytime (or at any time of the day or night) to make an immediate search of 2011 Chevy Silverado, Color: Silver, NH Reg: 3696260.
(identify premises)

Currently located at the NHSP-Troop A Barracks and
(occupied by A.B.)

of the person of The vehicle was driven by Sean STACEY (DOB: 5/23/79) and is owned by Mona FORD (DOB: 7/6/1959).
(A.B. and any other identifiable individuals with respect to whom probable cause has been established by the affidavit

or supplementary testimony.) for the

following property: (describe property)

Marijuana and/or marijuana drug analog

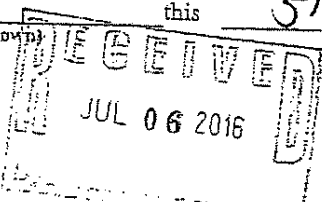
and if you find any such property or any part thereof to bring it and the person in whose possession it is found before _____ at

(court having jurisdiction)

(location)

Dated at Lebanon this 5TH day of July 2016
(city or town) (Day) (Month / Year)

(court seal)



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Justice of the 2ND Circuit Court

RECEIVED
MAR 08 2017

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

daw
SUPERIOR COURT
DOCKET NO.: 219-2016-CR-649

STATE OF NEW HAMPSHIRE

V.

SEAN STACEY

STATE'S OBJECTION TO THE DEFENDANT'S MOTION TO SUPPRESS

Now comes the State of New Hampshire, by and through the office of the Strafford County Attorney, and Motions this Court to consolidate the following cases for trial, and in support thereof states:

1. Sean Stacey ("the defendant") stands charged with Felony Possession of a Controlled/Narcotic Drug, and Misdemeanor A Possession of a Controlled/Narcotic Drug, stemming from an incident on 6/30/16.
2. The defendant seeks to suppress evidence on the basis that the seizure of the evidence was done in violation of the State and Federal Constitutions.
3. The State objects for the reasons stated herein.

FACTS

4. June 30, 2016 New Hampshire State Trooper Kopko ("Trooper Kopko) conducted a motor vehicle stop in Dover after observing the a vehicle driving 75 MPH in a 55 MPH zone. Trooper Kopko make contact with the driver of the vehicle, later identified as the defendant.
5. When the defendant opened his wallet to produce his driver's license, Trooper Kopko noticed that the defendant had a large wad of cash folded with a blue rubber band in an area of his wallet that was not where cash is normally kept.
6. The defendant was unable to explain why he kept his cash there. Later, the defendant indicated that he had cash on his person because he was interested in buying a car.
7. Trooper Kopko noticed an odor of marijuana coming from the vehicle. Trooper Kopko questioned the defendant about it, and the defendant became nervous, and continuously looked over at a backpack that was on the passenger side floor of the car.
8. Trooper Kopko asked for permission to search the vehicle, and the defendant refused.

9. Trooper Kopko decided to apply for a search warrant for the vehicle, and seized the vehicle. Trooper Kopko completed the search warrant on July 5, 2016.
10. New Hampshire State Trooper Montville (“Trooper Montville”) arrived on scene to assist and to give the defendant a courtesy transport. Prior to allowing the defendant into Trooper Montville’s cruiser, Trooper Kopko patted the defendant down to search for weapons. Trooper Kopko felt a large wad in the defendant’s pocket, which the defendant stated was money. Trooper Kopko peeked into his pocket and found a large stash of cash.

ARGUMENT

- a. *The Defendant gave the Troopers Consent to search him Before he got into Trooper Montville’s cruiser.*
11. “Part I, Article 19 of the New Hampshire Constitution protects against unreasonable searches and seizures. Under Part I, Article 19, warrantless searches are *per se* unreasonable unless they fall within the narrow confines of a judicially crafted exception. One such exception exists where the officer has consent to search the property.” *State v. Saunders*, 164 NH 342, 353-55 (2012) (internal citations omitted).
12. “When the police are relying upon consent as a basis for their warrantless search, they have no more authority than they have been given by the consent. The question of the scope of consent may be stated as how far the defendant intended the consent to extend or how the police reasonably construed his consent.” *Id.*
13. “To determine whether a search has exceeded the scope of the permission granted, we ask whether under the circumstances surrounding the search, it was objectively reasonable for the officers conducting the search to believe that the defendant had consented to it.” *Id.* (internal citations omitted).
14. Trooper Kopko searched the defendant to ensure that he was not bringing any contraband into Trooper Montville’s cruiser. The defendant gave his consent to be searched prior to entering Trooper Montville’s cruiser, and did not withdraw his consent to have his pocket searched.
15. It is reasonable for Trooper Kopko to assume that the consent to search extended to the defendant’s pockets, because Trooper Kopko told the defendant that he would be searching him prior to entering his cruiser. Trooper Kopko looked in the defendant’s pocket to confirm that there was no weapon in the defendant’s pocket.
16. Therefore, Trooper Kopko had valid consent to search the defendant, and did not exceed the scope of the consent, and the search of the defendant’s pocket was reasonable.

- b. *Even if the officer's exceeded the Scope of their consent when searching the defendant, and Paragraph Eight is Excised, the Remaining Affidavit Establishes Probable Cause.*
17. "Probable cause exists if the person] of ordinary caution would be justified in believing that what is sought will be found in the place to be searched ... and that what is sought, if not contraband or fruits or implements of a crime, will aid in a particular apprehension or conviction. To obtain a search warrant, the police must show that at the time of the application for the warrant there is a substantial likelihood of finding the items sought; they need not establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result." *State v. Bradberry*, 129 NH 68, 73 (1986).
18. In this case, if paragraph eight were excised from the warrant, the search warrant still has enough facts to amount to probable cause to search the vehicle. Trooper Kopko noticed the smell of marijuana coming from the vehicle, noticed a large wad of cash in the defendant's wallet in an area not where cash is not normally kept, the defendant appeared nervous, and kept looking at his backpack on the floor of his car.
19. Nervousness alone will not support a finding of probable cause to search. However, in this case, nervousness was one of several factors, including the smell of marijuana inside the defendant's vehicle, nervousness, a large sum of cash in an unusual spot in the defendant's wallet. Those facts, taken together, support a finding of probable case.
20. Therefore, even if paragraph eight were stricken from the warrant, Trooper Kopko still had probable cause.
- c. *The seizure of the vehicle was not unreasonable.*
21. Trooper Kopko did not draft a search warrant sooner because of his schedule at the time. Trooper Kopko acted with due diligence in applying for the search warrant as soon as he could.

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Grant the State's Motion to Consolidate; and
- B. Grant any other relief as justice may require.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE



Lauren Di Giovanni
NH Bar #266110

March 3, 2017

Assistant County Attorney
Strafford County Attorney's Office
259 County Farm Road, Suite 201
Dover, New Hampshire 03280
(603) 749-2808

I hereby certify that a copy of the foregoing has this day been forwarded to Attorney Wade Harwood, Esq., counsel for the defendant.



Lauren Di Giovanni
Assistant County Attorney