

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0413

The State of New Hampshire

v.

Sean F. Stacey

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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ISSUE PRESENTED

Whether the superior court erred in denying the defense's motion to suppress evidence obtained through a search warrant procured five days after the initial seizure where the defendant had an impersonal and finite possessory interest in the vehicle and the trooper applied for the warrant on the first business day following his scheduled time off and a state holiday.

STATEMENT OF THE CASE

The defendant, Sean Stacey, was indicted on July 28, 2016, with two counts of possession of a controlled drug; one as a felony and one as a class A misdemeanor. NOA.¹ See RSA 318-B:2 (2017). Prior to trial, the defendant moved to suppress the drugs found in the vehicle, arguing that Trooper Kopko's five-day delay in obtaining a warrant after initially seizing Ford's truck was unreasonable under the New Hampshire and federal constitutions. DA 12, 20-21. The State objected. DA 30.

Following an April 26, 2017 motions hearing, the trial court (*Fauver, J.*) denied the defendant's motion to suppress. DA 1-11.

Following a July 16, 2017 bench trial (*Howard, J.*), the defendant was convicted of both counts and sentenced to the New Hampshire State Prison for a suspended period of two to five years and an imposed twelve-month sentence to the House of Corrections following the defendant's appeal. NOA 2. This appeal followed.

¹ References to the record are as follows:
"DA" refers to the defendant's appendix;
"DB" refers to the defendant's brief;
"T" refers to the transcript of the motion hearing held on April 26, 2017; and
"NOA" refers to the Notice of Appeal

STATEMENT OF FACTS

A. Evidence at the Motion Hearing

On the evening of June 30, 2016, New Hampshire State Police Trooper Jordan Kopko was working a “speed detail” on the Spaulding Turnpike in Dover, New Hampshire. T 4–5. While observing southbound traffic, Trooper Kopko saw a truck that appeared to be speeding. T 5. After he confirmed that the vehicle was traveling almost 20 miles per hour over the posted speed limit, Trooper Kopko stopped the truck. T 5–6. Trooper Kopko approached the truck and asked the defendant—the sole occupant of the vehicle—to provide his license and registration. T 6.

While outside the driver’s side window, Trooper Kopko detected a strong odor of marijuana coming from the vehicle. T 6–7. Trooper Kopko described the smell as that of “packed marijuana,” as opposed to burnt marijuana. T 7. When the defendant removed his driver’s license from his wallet, Trooper Kopko observed “a lot of cash wrapped in a rubber band.” T 7–8.

While discussing the speeding violation, Trooper Kopko noted that the defendant did not appear to be nervous. T 8. However, when Trooper Kopko asked about the marijuana smell, the defendant become nervous, stopped making eye contact with him, and repeatedly glanced at the vehicle’s center console and a backpack on the passenger’s side of the vehicle. T 8–9.

At some point during this conversation, Trooper Kopko learned that the vehicle belonged to Mona Ford, not the defendant. T 14. Also, although the defendant initially said that he was going to Massachusetts to clean up his recently deceased grandfather's home, he later stated that he was "looking to purchase a Honda." DA 26.

Believing there was probable-cause that the vehicle contained marijuana, Trooper Kopko asked the defendant for consent to search the vehicle. T 9. The defendant refused. T 9. Trooper Kopko then told the defendant that he was calling for a tow truck to remove and secure the vehicle while he applied for a warrant and that he was free to leave the scene. T 9.

While the defendant arranged for a ride, New Hampshire State Police Trooper Michelle Montville arrived and gave the defendant a ride. T 11-12. After the vehicle was towed, Trooper Kopko completed his speed detail. T 12-13.

At the time of the seizure, Trooper Kopko knew that judges were available at any time to review warrant applications, but understood that "on-call" judges were only used for "true emergencies." T 20-21. Also, Trooper Kopko was unaware if Trooper Montville could have applied for a search warrant on his behalf at the time. T 20.

Knowing he was not working the next two days, he was returning on a Sunday, and the following day was a state holiday (the Fourth of July), Trooper

Kopko contacted his supervisor for guidance on when to apply for a search warrant. T 13. The supervisor directed Trooper Kopko not to apply for a warrant at that time. T 13, 20–21.

Trooper Kopko also informed Ford that he had seized her vehicle pending a search warrant. DA 26. Ford said she had lent the defendant her vehicle to shop for a car. DA 26. She did not mention that she had let the defendant go to Massachusetts with her vehicle. DA 26.

On Tuesday, July 5, 2016, Trooper Kopko applied for a search warrant at the Lebanon District Division. T 19. The court (*Bamberger, J.*) approved the search warrant application. DA 27.

B. The Trial Court's Order

By order dated May 12, 2017, the trial court (*Fauver, J.*) denied the defendant's motion to suppress. The court held that when balancing "the privacy-related and law enforcement-related concerns," it could not "find that the five-day delay was so long that the seizure was unreasonable." DA 9–10 (internal quotation omitted). In reaching its conclusion, the court considered several factors, including (1) the significance of the delay's interference with the defendant's possessory interest, (2) the strength of the State's basis for the seizure, and (3) whether the Trooper Kopko acted diligently in obtaining the warrant. DA 8–9.

The court found that the defendant had no possessory interest in the vehicle. DA 9. In support of its finding, the Court noted that “the record reflects that [the defendant] was not the owner of the vehicle, but was simply borrowing it” and there was “no evidence as to [the defendant’s] possessory interest.” DA 9. Additionally, the court found that no evidence was presented “to suggest that the seizure effectively restrained [the defendant’s] liberty interests.” DA 9 (internal quotations and brackets omitted).

The trial court found that Trooper Kopko’s basis for the seizure “was strong,” citing his “probable-cause to believe the vehicle contained drugs.” DA 9. The trial court also found that Trooper Kopko acted diligently in obtaining a warrant because he “began preparing the search warrant application and the warrant was issued” on his first day back following a two-day work absence, a Sunday, and the Fourth of July. DA 10. The court concluded that “[w]hen considering all the circumstances of this case, the court cannot find that the five-day delay was so long that the seizure was unreasonable.” DA 10.

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that the five-day delay in obtaining a warrant for the vehicle was not unreasonable. The court balanced the State's interest in seizing a vehicle containing drugs against the limited and impersonal interest the defendant had in Ford's truck, and correctly concluded that the five-day delay was reasonable.

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE DEFENDANT HAD ONLY AN IMPERSONAL AND FINITE POSSESSORY INTEREST IN FORD'S VEHICLE AND TROOPER KOPKO APPLIED FOR A WARRANT ON THE FIRST BUSINESS DAY AFTER RETURNING TO WORK AND FOLLOWING A STATE HOLIDAY.

The defendant now suggests that the trial court erred by denying his motion to suppress evidence found during the search of Ford's vehicle. DB 6.

Specifically, the defendant argues that his possessory interest in the vehicle and liberty interest in traveling were "seriously impair[ed]" by the five-day delay and that Trooper Kopko did not act diligently when he made "no effort to obtain a warrant within a reasonable time." DB 9.

The Court's review of a trial court's ruling on a motion to suppress is bifurcated: "accept[ing] the trial court's factual findings unless they lack support in the record or are clearly erroneous, and ... review[ing] legal conclusions *de novo*." *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014). Federal cases may aid this Court in its analysis. *See State v. Ball*, 124 N.H. 226, 232-33 (1983). However, "[b]ecause the State Constitution is at least as protective in this area as the Federal Constitution, [this Court] need not engage in a separate federal analysis." *State v. Wallace*, 146 N.H. 146, 148 (2014).

Both the federal and state constitutions protect all persons from unreasonable search and seizures. *Bailey v. United States*, 568 U.S. 186, 189

(2013); *Blesdell-Moore*, 166 N.H. at 187. An officer may seize a person’s property without a warrant when probable cause to search exists and the officers reasonably believe that contraband or other evidence may be destroyed or removed before a search warrant could be obtained. *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978). Although constitutional at its inception, a delay in obtaining a warrant following a warrantless seizure can sometimes violate the Fourth Amendment. See *United States v. Johnson*, 806 F.3d 1323, 1340 (11th Cir. 2015) (the purpose of requiring timely obtainment of a search warrant is to “avoid interfering with a continuing possessory interest for longer than is reasonably necessary, in case the search reveals no evidence” of a crime); *United States v. Christie*, 717 F.3d 1156, 1162 (10th Cir. 2013) (“[w]hat, after all, is ‘reasonable’ about police seizing an individual’s property on the ground that it potentially contains relevant evidence and then simply neglect for months or years to search that property”).

In assessing the reasonableness of a delay, courts “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” *United States v. Place*, 462 U.S. 696, 703 (1983). When balancing these interests, courts account for the specific Fourth Amendment interests affected and “the practical consequences of the delay.” *United States v. Johnson*, 990 F.2d 1129, 1132 (9th Cir. 1993).

- A. **The impact of the delay was minimal because any possessory interest the defendant had in the borrowed truck was impersonal, finite in time, and subordinate to Ford’s ownership interest.**

On appeal, the defendant complains that the trial court “incorrectly relied on the car belonging to [Ford] to downplay the impact of the five day long seizure.” DB 11. Specifically, the defendant argues that the trial court unjustly undermined his possessory interest because “[t]here was no testimony put forth ... to indicate how frequently [the defendant] drove the car or how long he had borrowed it.” DB 11.

The court correctly undermined the harm of the delay because the defendant possessed a limited and finite interest in the borrowed vehicle. Because the defendant’s interest in the vehicle was not enduring, the five-day seizure did not interfere with a continuing possessory interests that the delay doctrine seeks to protect. *Johnson*, 806 F.3d at 1340. Similarly, because any interest the defendant had in the vehicle was not personal, but rather subordinate to Ford’s ownership interest, the delayed warrant procurement inflicted minimal harm on the defendant. *Christie*, 717 F.3d at 1163. Therefore, the trial court’s finding that the delay was constitutional is sound because the defendant held an impersonal and determinate interest in the vehicle.

A delay in procuring a warrant must be reasonable because “[i]n the ordinary case, the sooner the warrant issues, the sooner the *property owner’s*

possessory right can be restored if the search reveals nothing incriminating.” *Johnson*, 806 F.3d at 1340 (emphasis added); *see also United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009). Consequently, a delay in obtaining a warrant can only harm a possessory right to the extent it existed during that time period. *Johnson*, 806 F.3d at 1340 (“any delay—no matter the length—cannot interfere with possessory rights that do not exist”). In other words, a finding that a delay was unreasonable assumes that the harmed possessory interest existed for the duration of the delay. *See id.* at 1340 (“We demand expediency in obtaining a search warrant to search seized evidence in order to avoid interfering with a *continuing possessory interest* for longer than reasonably necessary so the person with the possessory interest can *continue to enjoy that interest.*” (Emphasis added.)). Therefore, if a person did not hold a continuing interest in a seized item, he cannot logically claim to have suffered harm from a delayed warrant procurement. *Id.* (the principle of returning seized items in a reasonable timeframe is to ensure that “the person with the possessory interest can continue to enjoy that interest”).

The State recognizes that when an owner of a car has lawfully lent it to another person, that person will then have a constitutionally recognized possessory interest in the vehicle. *See, e.g., United States v. Jefferson*, 925 F.2d 1242, 1250 (10th Cir. 1991) (“[t]his case is distinguishable from the cases where an owner of

a car has lawfully loaned the car to an accused, thereby entrusting him with the right to enjoy a possessory interest in the car in the owner's absence"); *United States v. Miller*, 821 F.2d 546, 548-49 (11th Cir. 1987) (a defendant who borrows a car from a friend may assert an expectation of privacy); *United States v. Griffin*, 729 F.2d 475, 483 n.11 (7th Cir), *cert denied*, 469 U.S. 830 (1984) (defendant who borrows a car from his brother has a protectable privacy right); *United States v. Williams*, 714 F.2d 777, 779 n.1 (8th Cir. 1983) (defendant who occasionally borrowed a vehicle from the owner and obtained permission from the owner to use the vehicle on the day the vehicle was searched had a protectable privacy interest in the vehicle); *see also United States v. Sugar*, 322 F. Supp. 2d 85, 94 (D. Mass. 2004) ("[g]enerally speaking, persons who borrow cars have standing to challenge searches of the borrowed vehicle").

However, when accounting for the harm a delay in obtaining a warrant inflicts, the interests held by a borrower are undermined by their limited and impersonal nature. *See Johnson*, 806 F.3d at 1340. In this case, the record supports a finding that the defendant's interest was limited to a single night of car shopping. It is uncontested that the defendant borrowed the vehicle. T 14. Additionally, the record only supports the conclusion that the defendant borrowed Ford's truck to shop for a car because it is the only account corroborated by both the defendant and Ford. DA 26 (the defendant "stated that he was looking to purchase a Honda"

and Ford “was under the impression that he borrowed her truck to shop for vehicles”). Although the defendant also stated that “he was going to his grandfather’s ... residence in Massachusetts,” Ford did not corroborate this statement. *See* DS 25–26 (“[Ford] did not mention anything to me about [the defendant] taking her truck down to Massachusetts.”). Therefore, the only logical conclusion the record supports is that the seizure interrupted the defendant’s limited permission to temporarily use Ford’s truck. *See State v. Robbins*, 170 N.H. 292, 295 (2017) (this Court will “accept the trial court’s factual findings unless they lack support in the record or are clearly erroneous.”).

Accordingly, the delay’s impact on the defendant’s interest lasted only a few hours, not five days. *See Johnson*, 806 F.3d at 1340. While courts normally “police[] the temporal delay in obtaining a search warrant because each passing day infringes possessory interests protected by the Fourth Amendment,” this Court need only assess the reasonableness of a delay in obtaining a warrant in the immediate hours following Trooper Kopko’s seizure. *See United States v. Stabile*, 633 F.3d 219, 234–35 (3rd Cir. 2011). In doing so, the only reasonable conclusion is that a delay of a few hours inflicted little, if any, harm on the defendant’s possessory interest.

When measuring the impacts of a delayed warrant procurement, courts consider whether a defendant held a personal or private connection to the seized

item. Through this inquiry, a more accurate assessment can be made of the real-world consequences of a seizure.

For example, when authorities seize a home, courts find that they are not simply removing people from a structure, but rather “invad[ing] the precious interest of privacy summed up in the ancient adage that a man’s house is his castle.” *United States v. Weaver*, 808 F.3d 26, 38–39 (D.C. Cir. 2015) (internal brackets and citation omitted).

In some cases, applying an individualized assessment to the same item can result in different conclusions about the impact of a delay. For example, the *Mitchell* Court found a three-week delay in obtaining a warrant for a seized computer unreasonable because personal computers are “the digital equivalent of its owner’s home, capable of holding a universe of private information.” *Mitchell*, 565 F.3d at 1351–53. Comparatively, the *Stabile* court found a three-month delay reasonable for a personal computer when the defendant waited eighteen months before asking for its return. *Stabile*, 633 F.3d at 235–36 (because the defendant raised no objection to the seizure either at the time or in the subsequent months, “Stabile’s actions undermine[d] his argument”). Therefore, while courts are mindful of the personal and private nature of some non-residential items, a defendant’s indifference may undermine such concerns.

In other instances, coexisting possessory interests in a seized item can undermine the degree of prejudice experienced by a defendant. For example, the *Christie* Court found that where the defendant raised no objection to the initial warrantless seizure and her husband—co-owner of the computer—consented to its seizure, “the degree of prejudice appears in an altogether different—and paler—light.” *Christie*, 717 F.3d at 1163. Therefore, the harm of a delay in obtaining a warrant is diluted when an item’s co-owner does not object to law enforcement’s initial or ongoing warrantless seizure. *See id.*

Applying these guideposts, any harm Trooper Kopko’s delay caused the defendant was negligible because any interest he had in the borrowed vehicle was impersonal and subordinate to Ford’s primary ownership interest. Unlike a residence or a personal laptop—secure domains containing private and personal information—no sacrosanct relationship existed between the defendant and the borrowed truck. *See United States v. Song Ja Cha*, 597 F.3d 995, 1002–03 (9th Cir. 2009); *Mitchell*, 565 F.3d at 1351–53. The delay in obtaining a warrant did not “invade [a] precious interest of privacy,” but rather impacted the defendant’s use of another’s property. *See Weaver*, 808 F.3d at 38–39.

The delay’s impact on the defendant is similarly undermined because Ford, the vehicle’s sole owner, did not object to Trooper Kopko’s 5-day warrantless seizure. DA 26. Like in *Christie*, where the impacts of a delay were undermined

by the indifference of the seized items' co-owner, any harm to the defendant's Fourth Amendment interests was diminished by the lack of protest from Ford. *See Christie*, 717 F.3d at 1162. In fact, because the defendant's interests in the vehicle were not equal, but inferior to Ford's, the delay's harm is undermined to a greater extent than in *Christie. Id.* Therefore, the delay caused nominal harm because the defendant's interests in the truck expired a few hours later, he had no personal connection to the vehicle, and neither he nor Ford protested the five-day warrantless seizure.

The defendant subsequently argues that the New Hampshire's "automatic standing" doctrine absolves the need to establish the extent of his possessory interest in the borrowed vehicle. DB 11. Specifically, the defendant asserts that even if he had "only borrowed the car for the evening," the delay was still unreasonable because "Part 1, Article 19 confers automatic standing to challenge a search or seizure." DB 11 (arguing that automatic standing makes it "irrelevant" if his interests were impacted).

The State does not contest the defendant's standing to litigate his motion to suppress. However, because the automatic standing doctrine only addresses a defendant's ability to "contest" a seizure, the doctrine provides no insight into or resolution of "the significance" of a delay's impact on a person's Fourth Amendment or Article 19 interests. *See United States v. Laist*, 702 F.3d 609, 613

(11th Cir. 2012); *State v. Gonzalez*, 143 N.H. 693, 696–97 (1999). Therefore, because courts must calculate the significance of the impact a delay in obtaining a warrant has on and individuals’ possessory interests, the issue of who may or may not challenge a seizure is irrelevant. *Id.* In this case, applying the principle of “automatic standing” to the Court’s delay analysis is inapt, however, because the doctrine provides no insight into the extent or nature of the defendant’s possessory interests in Ford’s truck. *See State v. Sidebotham*, 124 N.H. 682, 686–87 (1984).

The defendant also asks this Court to find that the five-day seizure “seriously impair[ed]” his liberty interests. DB 11. The defendant then likens the harm of seizing Ford’s vehicle for five days to that of a warrantless residential seizure. DB 9–11. As to the first argument, the defendant’s reliance on *Place* to suggest that the delay impacted his liberty interest is inapt because *Place* involves the constitutional impacts of a prolonged *Terry*-type seizure of luggage, not a vehicle seizure based on probable cause. *Place*, 462 U.S. at 709; *see Lee v. City of Chicago*, 330 F.3d 456, 464 (7th Cir. 2003). The defendant’s subsequent analogy to warrantless seizures of personal residences is also misplaced because of the qualitative differences between residential and vehicle seizures. *See Song Ja Cha*, 597 F.3d at 1002.

The defendant cites *Place* for the proposition that “the constitution proscribes shorter time limits on seizures which impact an individual’s ability to

travel than on other seizures of personal property.” DB 9. *Place*, however, merely analyzes the liberty impacts of a prolonged *Terry* stop. Specifically, *Place* found that because a traveler experienced ninety minutes of uncertainty during a *Terry* seizure about the immediate fate of his seized luggage, the stop unreasonably impacted his liberty interest in traveling given the brief and limited authority for such investigations. *Place*, 462 U.S. at 709.

Conversely, this Court must assess the Fourth Amendment and Article 19 impacts between Trooper Kopko’s initial seizure and eventual warrant procurement. In doing so, it is clear that the defendant was not “effectively restrain[ed]” as contemplated by *Place* because Trooper Kopko informed the defendant within minutes of the traffic stop of his intent to tow and impound the vehicle. See *Lee*, 330 F.3d at 464 (finding that because *Place* “deal[t] only with the transformation of a momentary, investigative detention into a seizure [it] has no application after probable-cause to seize has been established”). *But see Sandoval v. County of Sonoma*, 72 F. Supp. 3d 997, 1004 (N.D. Cal. 2014) (“*Place* stands squarely for the claim that a seizure reasonable at its inception can become unconstitutionally unreasonable due to its duration.”)

How authorities effect warrantless seizures can dictate which constitutional interests are impacted. See *Place*, 462 U.S. at 709. For example, in *Place*, DEA agents seized a traveler’s luggage they suspected contained drugs through a *Terry*

stop investigation. Had agents performed a proper *Terry* stop, they would have informed the traveler within minutes of their intent to either return his possessions or seek a search warrant. *See id.* at 702. Instead, ninety minutes passed before the agents established probable-cause to seize the luggage, a period that “effectively restrain[ed]” the traveler “in order to remain with his luggage or ... arrange for its return.” *Id.* at 709–10 (“we have never approved a seizure of the person for the prolonged 90 minute [*Terry* stop] involved here”). Therefore, when an officer fails to quickly confirm or dispel his suspicion of criminal activity through a *Terry* stop investigation, the prolonged uncertainty about the ultimate conclusion of the investigation “effectively restrain[s]” a defendant’s liberty interest in continuing with his itinerary. *Id.*

Here, because the defendant experienced no uncertainty concerning the immediate fate of the vehicle, his liberty to travel was not “effectively restrain[ed].” *Id.* at 708–10. The defendant held no hope or belief that the vehicle would be returned after a brief investigation. Instead, the defendant immediately began making arrangements for transportation after Trooper Kopko informed him that he was impounding the truck and seeking a warrant. T 12. Therefore, unlike *Place*, where it was unclear for ninety minutes whether the defendant could continue traveling with his luggage, the defendant did not stay on the Turnpike in order to “remain with [the vehicle] or arrange for its return.” T 9, 12.

The defendant also contends that “the impact” of confiscating Ford’s vehicle are akin to “keeping him out of his home.” DB 10. Warrantless residential seizures are, however, vastly different from seizures of borrowed property both in terms of the interests impacted and the real-world consequences.

Courts apply “heightened constitutional protection[s]” when assessing the reasonableness of a delay in procuring a residential search warrant because such seizures impact the privacy and sanctity of the home. *Song Ja Cha*, 597 F.3d at 1002–03. This enhanced protection is logical since “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *Payton v. New York*, 445 U.S. 573, 583–84 (1980) (citing *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); see *Song Ja Cha*, 597 F.3d at 1002; see also *Weaver*, 808 F.3d at 38–39 (finding that when officers enter a residence, they “invade the precious interest of privacy summed up in the ancient adage that a man’s house is his castle.”) (internal brackets and citation omitted). Special protections for personal residences are also reasonable given the indignity individuals suffer when displaced from their home. *Song Ja Cha*, 597 F.3d at 1002 (because the defendant was “rendered homeless” when authorities excluded him from his home for 48 hours, “the poignant facts of this case demonstrate why Fourth Amendment possessory and privacy interests are greatly affected by the seizure of a dwelling.”) Therefore, because homes are personal and private

sanctuaries, warrantless residential seizures represent a unique and exceptional infringement on a person's Fourth Amendment interests. *See Payton*, 445 U.S. at 583-84.

While the seizure of Ford's vehicle deprived the defendant of his ability to "shop for a Honda," such harm pales in comparison to the indignity of law enforcement seizing one's home. T 14. The seizure did not impact any cherished privacy interests of the defendant. Nor, practically speaking, did the seizure cause the defendant to suffer the public humiliation of being temporarily homeless. *See Song Ja Cha*, 597 F.3d at 1002; *Johnson*, 990 F.2d at 1132 (finding that the significance of the length of time for detention of property depends on "the practical consequences of the delay"). Instead, the seizure of Ford's vehicle infringed on the defendant's ability to run errands. Therefore, no meritorious argument can be made that the impacts of seizing a personal residence are akin to confiscating a borrowed car.

B. The trial court correctly found that Trooper Kopko's five-day delay was reasonable.

The defendant contends that Trooper Kopko "could have applied for a warrant within hours had [he] acted diligently." DB 6. Instead, the defendant argues, "Trooper Kopko did not see the need to apply for a search warrant before he had two days off," and "[o]nce he 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.” DB 8–9. However, because courts regularly excuse temporary delays attributable to work schedules and holidays, Trooper Kopko acted diligently by applying for the warrant on the first business day following his time off and the Fourth of July holiday.

As stated by the defendant, law enforcement must obtain a warrant within hours of an initial warrantless seizure of a home. DB 10 (“[c]ases involving circumstances similar to *McArthur* are measured in hours, not days”). *See, e.g., Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (two-hour delay was reasonable); *United States v. Perez-Diaz*, 848 F.3d 33, 41 (1st Cir. 2017) (three-hour delay was reasonable); *Song Ja Cha*, 597 F.3d at 1000, 1002–03 (26.5-hour delay was unreasonable “even when the police officers were extraordinarily diligent and worked tirelessly around the clock in their pursuit of a search warrant”); *United States v. Legette*, 260 F. App’x 247, 251 (11th Cir. 2008) (four-hour delay was reasonable). As discussed above, courts are intolerant of excessive delays with personal residences because of the heightened protections afforded to the home and the practical effect of displacing its residents. *See Song Ja Cha*, 597 F.3d at 1002–03.

However, reasonable delays in obtaining warrants for non-residential property range from days to months. For example, despite containing highly personal information, courts regularly find weeks- and months-long delays for cell

phones and computers constitutional. *E.g.*, *Christie*, 717 F.3d at 1164 (five-month delay for a personal computer was reasonable); *Stabile*, 633 F.3d at 235–36 (three-month delay for a computer hard drive was reasonable); *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998) (eleven-day delay for a computer was reasonable). While law enforcement could theoretically obtain warrants within hours of seizing non-residential personal property, courts have simply never demanded such expediency.

Indeed, in cases of non-residential property, courts often permit temporary delays attributable to work schedules and local magistrate practices. For example, in *Davis*, an officer seized the defendant’s cell phone on a Friday but, due in part to his understanding that “local magistrates prefer not to sign non-emergency ... warrants” on the weekend, he waited until Monday to apply for the warrant. *United States v. Davis*, 2016 U.S. Dist LEXIS 80780, *14 (E.D. Pa. 2016). The *Davis* court concluded that although a warrant could have been obtained over the weekend, the officers “acted with appropriate diligence” when they applied for the warrant on the first available business day. *Id.*; *see also United States v. True*, 2017 U.S. App. LEXIS 19445, *3 (6th Cir. 2017) (delay was reasonable when the officer “did not immediately seek a search warrant because it was late on a Friday and did not want to bother the judges over the weekend.”) Holiday-related delays are also considered reasonable. *E.g.*, *Martin*, 157 F.3d at 54 (upholding an

eleven-day delay that “included two weekends and the Christmas holiday, which would explain the difficulty in promptly obtaining the warrant”); *United States v. Gorshkov*, 2001 U.S. Dist. LEXIS 26306, *3 n.3 (W.D. Wash. 2001) (upholding an eleven-day delay due in part to Thanksgiving).

However, when an officer anticipates an extended delay due to his schedule, it is unreasonable for him not to seek assistance in obtaining a warrant sooner. *Mitchell*, 565 F.3d at 1353. For example, the *Mitchell* Court found a three-week delay unreasonable when it was caused in part by the agent’s two-week out-of-state training. *Id.* at 1351. The court found the “excuse” for the multi-week delay insufficient when the training could have been postponed or other agents could have sought a warrant. *Id.* at 1352.

Therefore, so long as authorities do not effectively abandon their efforts, modest delays attributable to local schedules and practices are considered reasonable. *See Mitchell*, 565 F.3d at 1353; *True*, 2017 U.S. App. LEXIS 19445 at *3.

Trooper Kopko’s five-day delay was reasonable because he applied for the warrant on the first business day following his time off and a state holiday. While in hindsight, the trooper could have worked overtime or “bother[ed] a judge” on a holiday weekend, there were no exigent circumstances to seek a warrant over the weekend. Moreover, no demands were made by either the defendant or Ford for

the immediate return of her vehicle. *See United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012) (“it can be revealing to see whether the person from whom the item was taken ever asserted a possessory claim to it—perhaps by checking on the status of the seizure or looking for assurances that the item would be returned”). Also, while most cases of reasonable delays involving personal property last weeks or months, Trooper Kopko obtained a warrant within days for property that did not belong to the defendant. Therefore, the Trooper acted diligently in seeking the warrant.

CONCLUSION

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

The State requests a fifteen-minute oral argument.

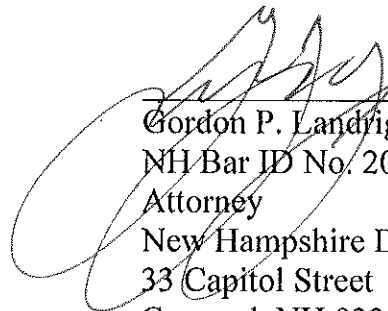
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon MacDonald
Attorney General

March 19, 2018



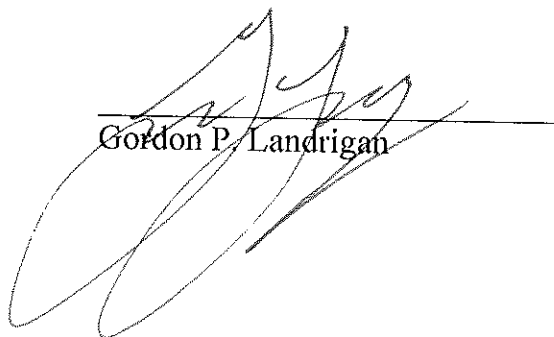
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CERTIFICATE OF SERVICE

I, Gordon P. Landrigan, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Wade Harwood, by first-class mail postage prepaid, at the following address:

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March 19, 2018


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