

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0599

The State of New Hampshire

v.

Abhishek Sachdev

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF
THE SUPERIOR COURT FOR THE SOUTHERN DISTRICT OF
HILLSBOROUGH COUNTY

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald
Attorney General

Stephen D. Fuller
NH Bar ID No. 14009
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
603-271-3671

(5 minutes, 3JX)

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

ISSUES PRESENTED 1

STATEMENT OF THE CASE2

STATEMENT OF FACTS4

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

I. DURING HIS INTERVIEW WITH THE DETECTIVES, THE
DEFENDANT WAS NOT RESTRAINED IN ANY WAY AND WAS
ALWAYS FREE TO LEAVE, AND THEREFORE HE WAS NEVER IN
CUSTODY FOR PURPOSES OF *MIRANDA*. 13

II. THE DEFENDANT’S CONSENT TO SEARCH WAS FREE,
KNOWING, AND VOLUNTARY WHERE HE WAS NOT IN
CUSTODY, THE DETECTIVES ACTED AT ALL TIMES IN A
CORDIAL AND NON-COERCIVE MANNER, AND THE DEFENDANT
REVIEWED AND SIGNED TWO CONSENT FORMS AFTER BEING
INFORMED THAT HE HAD THE RIGHT TO REFUSE CONSENT.....21

CONCLUSION.....26

CERTIFICATE OF SERVICE27

TABLE OF AUTHORITIES

Cases

Miranda v. Arizona, 384 U.S. 436 (1966)..... 10, 13

State v. Ford, 144 N.H. 57 (1999)..... 13

State v. Green, 133 N.H. 249 (1990)22, 23, 24

State v. Hammond, 144 N.H. 401 (1999) 14

State v. Johnson, 140 N.H. 573 (1995)..... 14

State v. Johnston, 150 N.H. 448 (2004).....22

State v. Lewis, 129 N.H. 787 (1987)..... 19

State v. Locke, 149 N.H. 1 (2002)passim

State v. McKenna, 166 N.H. 671 (2014) 14

State v. Osborne, 119 N.H. 427 (1979)22

State v. Patch, 142 N.H. 453 (1997).....23, 24

State v. Portigue, 125 N.H. 338 (1984) 19

State v. Prevost, 141 N.H. 647 (1997).....24

State v. Washburn, No. 2016-0518, slip op. at 4 (N.H. Apr. 13, 2018)21, 22

State v. Watson, 151 N.H. 537 (2004).....21, 23

Statutes

RSA 629:1 (2016).....2

RSA 631:2-a, I(a) (2016).....2

RSA 632-A:2, I(b) (2016).....2

RSA 632-A:2, I(f) (2016)2

RSA 632-A:2, I(m) (2016)2

RSA 632-A:4, I(a) (2016).....2

Constitutional Provisions

N.H. Const. pt. I, art. XIX21

U.S. Const. amend. IV21

U.S. Const. amend. XIV21

ISSUES PRESENTED

I. Whether the defendant was in custody for purposes of *Miranda* during his interview with the detectives where he was not restrained in any way and was always free to leave.

II. Whether the defendant's consent to search was free, knowing, and voluntary where he was not in custody, the detectives acted at all times in a cordial and non-coercive manner, and the defendant reviewed and signed two consent forms after being informed that he had the right to refuse consent.

STATEMENT OF THE CASE

The defendant, Abhishek Sachdev, was charged by indictment with four counts of aggravated felonious sexual assault and one count of attempted aggravated felonious sexual assault. Def. App. 1–5.¹ See RSA 632-A:2, I(b), (f), (m) (2016); RSA 629:1 (2016). The defendant was also charged by information with three counts of simple assault and one count of misdemeanor sexual assault. Def. App. 6–9. See RSA 631:2-a, I(a) (2016); RSA 632-A:4, I(a) (2016).

On March 13, 2017, the defendant filed a motion to suppress statements and evidence derived from the interview conducted with the defendant by the police on July 13, 2016. Def. App. 10–17. The State filed its opposition to the motion on March 24, 2017. Def. App. 18–32. On June 22, 2017, the Hillsborough County Superior Court, Southern District, (*Temple, J.*) issued its order denying the defendant’s motion. Def. Br. 34–53.

After a three-day trial on June 6–8, 2017, the jury found the defendant guilty on two of the counts of aggravated felonious sexual assault and one count of simple assault. The jury found him not guilty on the other charges. The court sentenced the defendant on September 22, 2017. For aggravated felonious sexual

¹ References to the transcript of the hearing on the defendant’s motion to suppress, held on April 24, 2017, will be made as “Mot. Tr. ___.”

References to the transcript of the defendant’s trial will be made as “Tr. ___.”

References to the defendant’s brief will be made as “Def. Br. ___.”

References to the court’s order on the motion to suppress, appended to the defendant’s brief, will be made as “Def. Br. Add. ___.”

References to the defendant’s appendix will be made as “Def. App. ___.”

References to the attachments to the notice of appeal will be made as “NoA Att.”

assault, the court sentenced the defendant to a term of ten to twenty years in the State Prison, with the possibility of two years of the minimum suspended if the defendant participated in the sexual offender program. NoA Att. For the simple assault, the court sentenced the defendant to a term of twelve months, all suspended for ten years, with conditions. NoA Att. This appeal followed.

STATEMENT OF FACTS

On July 13, 2016, Detective Frank Lombardi of the Nashua Police Department's Special Investigative Division was assigned to investigate a report of a sexual assault. Mot. Tr. 4-5. To that end, Det. Lombardi interviewed the victim. Mot. Tr. 5. During that interview, the victim described the defendant and told the detective that she had met the defendant at a new Cricket Wireless Store at the corner of Main and Water streets in Nashua. Mot. Tr. 6. She also said that another man, named Diego, had been in the store on the night of assault. Mot. Tr. 7. The victim also gave the detective a description of the defendant's car, which had a vanity plate. Mot. Tr. 6. The victim told the detective that she had been at the Racing Mart with the defendant, so after the interview, the detective went to the Racing Mart to get the recording of the store's video surveillance. Mot. Tr. 7.

Later that day, Det. Lombardi and Detective Christopher DiTullio went to the Cricket Wireless store at 83 Main Street. Mot. Tr. 8, 65. The store was not yet open for business, but looked as though it would soon be ready. Mot. Tr. 9. There, the detectives met the defendant and Diego Gomez. Mot. Tr. 9, 65, 66.

The detectives were in plain clothes, consisting of a shirt and tie and dress pants. Mot. Tr. 11, 66. They had badges around their necks, their weapons holstered on their hips, and handcuffs stored on their belts at their backs. Mot.

Tr. 11, 66-67. The men showed the detectives around the store and the offices in the back. Mot. Tr. 11. The detectives told the two men that they were investigating an incident from the previous night at that store, and asked the men whether they would come voluntarily to the police department to give statements. Mot. Tr. 10, 12. The conversation was very cordial, and both men agreed to do so. Mot. Tr. 11, 12, 67.

The officers asked the two men if they could drive themselves there, and they said they could. Mot. Tr. 12. Det. Lombardi suggested that they take separate cars in case one finished earlier than the other and wanted to leave. Mot. Tr. 12. Gomez locked the store, and the detectives called for a patrol officer to watch the store while the two detectives, the defendant, and Gomez went to the police station. Mot. Tr. 13, 68.

At the police department, the defendant and Gomez entered through the main lobby and signed in as visitors at 5:15 p.m. Mot. Tr. 15, 17, 69. No restraints were used on either man. Mot. Tr. 15. Also, they were not asked to check their belongings, and the defendant kept his keys and cell phone with him. Mot. Tr. 18. All four men went upstairs to the detective bureau's waiting area. Mot. Tr. 19. There, the detectives asked the defendant to wait while they spoke to Gomez first. Mot. Tr. 19-20. They told the defendant that he should just knock on the door if he needed anything or if he wanted to leave. Mot. Tr. 20. While in the waiting

area, the defendant was free to watch TV or leave if he wanted to. Mot. Tr. 20–21. The door was not locked. Mot. Tr. 20.

After about 25 or 30 minutes, the detectives finished their interview with Gomez. Mot. Tr. 22, 70. Det. DiTullio led Gomez back to the main lobby, and Det. Lombardi asked the defendant to come into the interview room. Mot. Tr. 23, 70. It was a smaller room, with a small, square table and chairs on three sides of the table. Mot. Tr. 23, 71. The defendant sat in the chair farthest from the door because that was the chair that the camera was trained on. Mot. Tr. 24, 72. There was no lock on the door. Mot. Tr. 24. The defendant filled out a victim-witness background sheet. Mot. Tr. 25.

The interview began at 5:52 p.m. Mot. Tr. 26. Det. Lombardi confirmed with the defendant that he was there voluntarily, and reminded him that he was not under arrest and that he could stop the interview and leave at any time. Mot. Tr. 27, 61. He also told the defendant that the door was just closed for privacy. Mot. Tr. 27, 72.

The defendant still had his phone with him, and at the beginning of the interview, he took a brief phone call. Mot. Tr. 28, 73. The interview remained conversational and “even keel” throughout. Mot. Tr. 28. At no point did either detective raise his voice or restrain the defendant in any way. Mot. Tr. 28–29. At

no point did the defendant ask to leave. Mot. Tr. 29, 74. The defendant also did not make any incriminating statements. Mot. Tr. 29, 75.

The defendant told the detectives that he and Gomez had taken the victim into the store because she was walking barefoot and cold, and she had scratches on her. Def. Br. Add. 4. She had some beer with the defendant and Gomez, and when they ran out, the defendant went to a store to buy more beer and condoms. Def. Br. Add. 4. After he returned, the victim drank more beer and became sick. Def. Br. Add. 4. She fell asleep after vomiting. Def. Br. Add. 4. The defendant volunteered the fact that the victim had kissed him, but he also said that nothing else had happened between them. Mot. Tr. 30–31, 76. Indeed, he did not reciprocate the kiss because she had vomited and was “too fucked up.” Def. Br. Add. 5.

Det. Lombardi asked him what he would say if Det. Lombardi had “evidence to suggest otherwise,” and the defendant asserted that he was telling the truth. Def. Br. Add. 5. The defendant said that he had a wife, and Det. Lombardi assured him that he was not going to talk to his wife. Mot. Tr. 31; Def. Br. Add. 5. The defendant then asked whether he could speak to a lawyer. Mot. Tr. 32, 77. Det. Lombardi told him that that was fine and that he could do so. Mot. Tr. 32; Def. Br. Add. 5. The detectives then stopped questioning the defendant. Mot. Tr. 32, 77.

At that point, Det. Lombardi explained that the police were going to take photographs and collect evidence at his store. Mot. Tr. 32. He explained that the police could seek a search warrant, or they could search with his consent. Mot. Tr. 32. Det. Lombardi explained that it was his choice whether to give consent, and the defendant had no reservations about providing consent. Mot. Tr. 32-33, 78. He did ask the detective whether he would be able to open for business the next day, and Det. Lombardi told him that he assumed that it would have no effect on his being able to open for business. Mot. Tr. 34; Def. Br. Add. 6.

Det. Lombardi went over the consent form with the defendant. Mot. Tr. 35. The first line of the form explained the defendant's right to refuse to consent to a search. Mot. Tr. 35. They went over the form at least twice before the defendant signed it. Mot. Tr. 35-36.

Det. Lombardi then explained that they wanted to take buccal swabs from the defendant to test for DNA. Mot. Tr. 37. He explained that they wanted it for comparison to other evidence they might find. Mot. Tr. 38. The defendant didn't want to consent to that, and Det. Lombardi said that was fine. Mot. Tr. 38. Det. Lombardi told the defendant that they would get their things together to process the store, and ended the interview at 6:11 p.m. Mot. Tr. 39.

Det. Lombardi stepped out of the room and spoke to Det. DiTullio for about five minutes about getting a search warrant for buccal swabs, penile swabs,

pubic combings, fingernail clippings, and the defendant's clothes. Mot. Tr. 40. He then re-entered the room and explained to the defendant that they were going to seek a search warrant for those items. Mot. Tr. 40. At that point, without any threats or promises, the defendant volunteered that he would consent. Mot. Tr. 40-41. They then reviewed another consent form, which the defendant signed at 6:30 p.m. Mot. Tr. 41-42. Det. Lombardi then took the buccal swabs from the defendant. Mot. Tr. 43.

The detectives then drove the defendant to Southern New Hampshire Medical Center for the other searches. Mot. Tr. 43-44. They were in an unmarked car, and the doors were not locked. Mot. Tr. 44, 82. The defendant had no reservations about cooperating with the search. Mot. Tr. 45. After a SANE [Sexual Assault Nurse Examiner] collected the evidence, the detectives drove the defendant back to the police department. Mot. Tr. 49.

Once they were back at the department, the detectives thanked the defendant for his time and cooperation. Mot. Tr. 49. Det. Lombardi made sure the defendant had his contact information in case he wanted to speak to him again. Mot. Tr. 49. With that, the defendant got in his car and left. Mot. Tr. 49, 84.

On March 13, 2017, the defendant filed a motion to suppress his statements and evidence derived from the interview. Def. App. 10-17. He argued that the tenor of the conversation changed when the police's questions became accusatory

and they told him that there was evidence to suggest that his narrative was not true, and that at that point, the interview became custodial for the purpose of his *Miranda* rights. Def. App. 13–15. He also argued that all questioning should have ceased when he asked to consult with an attorney. Def. App. 15–16. Finally, he argued that his consent to conduct the searches was not knowing and voluntary. Def. App. 16.

In its order denying the defendant’s motion to suppress, the court concluded that, under the totality of the circumstances, the defendant was never in custody, and therefore the police had no obligation to give the defendant his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Def. Br. Add. 14–15. The court emphasized several pertinent facts in its analysis: that the defendant voluntarily drove himself to the police department; that he entered through the front lobby and signed in as a visitor; that he dealt with only two detectives, who were in plain clothes and kept their weapons holstered at all times; that the defendant was told that he could stop the interview at any time and was free to leave; that the detectives were always cordial and never raised their voices; that the interview was generally not accusatory, and once it did become accusatory, the defendant stopped the interview and asked to consult an attorney; and that the interview lasted only about twenty minutes. Def. Br. Add. 12–14.

The court also concluded that the defendant's consent to search his business and his person was free, knowing, and voluntary. Def. Br. Add. 15-16. On this point, the court emphasized that he was not in custody, that he signed two consent forms, that Det. Lombardi clearly explained to him that he had the right not to consent, and that the defendant's demeanor showed that his consent was not coerced. Def. Br. Add. 16-17. The court also found that the defendant's consent was not rendered involuntary by the fact that the police had explained to him that his store might not open in time if they had to seek a warrant. Def. Br. Add. 18-19.

SUMMARY OF THE ARGUMENT

I. The defendant was never in custody for purposes of *Miranda* during his interactions and interview with the police on July 13, 2016. As the totality of the circumstances demonstrates, the police never restrained the defendant's freedom of movement to any degree that would constitute "custody." The defendant drove himself to the police station and signed in as a visitor. He spoke with only two detectives, who were in plain clothes and who kept the conversation cordial. The interview lasted only nineteen minutes, and took place in an unlocked room. The detectives ensured several times that the defendant understood that he was free to leave and had the right not to consent. The defendant had his keys and phone with him the entire time. And finally, at the end of the encounter, the defendant left the police department. Therefore, he was never in "custody" for purposes of *Miranda*.

II. The defendant's consent to search was free, knowing, and voluntary. The detectives were cordial at all times with the defendant; they did not raise their voices, make any promises or threats, or do anything to suggest that compliance was required. The defendant was not in custody, and Det. Lombardi informed the defendant that he was free to leave. The defendant also signed two consent forms after Det. Lombardi explained to the defendant that he had the right to refuse to give consent.

ARGUMENT

I. DURING HIS INTERVIEW WITH THE DETECTIVES, THE DEFENDANT WAS NOT RESTRAINED IN ANY WAY AND WAS ALWAYS FREE TO LEAVE, AND THEREFORE HE WAS NEVER IN CUSTODY FOR PURPOSES OF *MIRANDA*.

The defendant argues that he was subjected to a “custodial” interrogation, such that the police were required to give him his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and therefore that his statements and derived evidence should have been suppressed. Def. Br. 17. Because the defendant attacks the admission of his entire statement at trial, Def. Br. 17, he apparently places the time that he was in custody at the beginning of the interview with the police. *See* Def. Br. 17. The defendant relies on both the federal and state constitutions to make his claim. Def. Br. 17. In this context, “the [f]ederal [c]onstitution affords no greater protection than the [s]tate [c]onstitution with regard to the defendant’s rights under *Miranda*” *State v. Ford*, 144 N.H. 57, 63 (1999).

“The ultimate determination of custody is a mixed question of law and fact.” *State v. Locke*, 149 N.H. 1, 6 (2002). “Although [this Court] will not overturn the factual findings of the trial court unless they are contrary to the manifest weight of the evidence, [it will] review the ultimate determination of custody *de novo*.” *Id.* (brackets omitted) (quoting *Ford*, 144 N.H. at 63).

“Custody entitling a person to *Miranda* protections during interrogation requires formal arrest or restraint on freedom of movement of the degree

associated with formal arrest.” *Id.* (quoting *State v. Hammond*, 144 N.H. 401, 403–04 (1999)). “In the absence of formal arrest, the trial court must determine whether a suspect’s freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect’s position would have understood the situation.” *Id.* (quoting *Hammond*, 144 N.H. at 404). “The court should consider, among other things, the ‘suspect’s familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview’s duration and character.’” *Id.* (quoting *Hammond*, 144 N.H. at 404).

This Court has emphasized that “[t]he location of questioning is not, by itself, determinative: a defendant may be ‘in custody’ in his own home, but not ‘in custody’ at a police station.” *State v. Johnson*, 140 N.H. 573, 578 (1995) (citations omitted); accord *State v. McKenna*, 166 N.H. 671, 685 (2014). Thus, that the interview took place in an interview room at a police station is not enough to demonstrate that the defendant was in custody. The totality of the circumstances in this case demonstrates that there was no custody for purposes of *Miranda* when the defendant answered the detectives’ questions and gave his consent to search.

The instant case has similarities with the facts in *State v. Locke*. In that case, two detectives appeared at the defendant’s door, “displayed their badges, identified themselves and stated they were investigating an incident that had

occurred in Portsmouth.” *Locke*, 149 N.H. at 4. Locke agreed to go to the police station with them to give a statement. *Id.* On the way, the officers told Locke that “he was not in custody and that he was free to leave at any time. [Locke] stated that he understood.” *Id.*

They arrived at State Police Headquarters at 10:05 p.m. [Locke] walked without assistance into the unlocked building. He and the officers rode an elevator to the third floor and entered a polygraph room. The room was about eight by ten feet. [Locke] sat in an “overstuffed chair” with Detective Ronchi in front of and facing him, and Sergeant Yeardi to the left of the detective.

At first, [Locke] denied being in Portsmouth on the night of the murder. Detective Ronchi responded that he did not believe his story. He said that he was investigating a homicide and asked [Locke] to sign a form consenting to a search of his home. After the detective read the form aloud and explained its meaning, [Locke] stated that he understood the form, and he signed it at approximately 10:30 p.m.

Id.

Locke changed his story, and then said that he “didn’t want to be involved in this.” *Id.* A detective again told him that he was free to leave. *Id.* Locke stayed, however, and so the conversation continued. *Id.* “The detective stated again that he did not think that [Locke] was being truthful.” After being confronted with more incriminating evidence, Locke “asked if he had any rights. The detective responded that he was not in custody and free to leave, again pointing to the door. The defendant neither left nor asked to leave or be driven home.” *Id.* at 5. Locke then gave a different account, which the detectives still did not believe. *Id.*

The interview continued for several hours, during which the police arranged a meeting between Locke and a co-suspect. *Id.* Locke's final statement occurred at approximately 1:30 a.m., which was 3½ hours after he had arrived at the police station. *Id.*

On these facts, this Court held that Locke was never in custody. *Id.* at 6–7.

[Locke] was clearly not in custody at the beginning of his questioning. He went to police headquarters by his own agreement and without physical restraint. Two plain-clothes officers questioned [Locke]. They did not display their weapons, and [Locke] was not handcuffed.

Nor was [Locke] in custody at any time during the course of the interview. The record does not support [Locke's] argument that the character and tone of the interview substantially changed after [Locke] admitted to participating in the robbery. The interview's duration was not excessive: it lasted for three and one-half hours. There was no evidence of shouting or harsh tones at any time during the interview, and [Locke] was never restrained.

....

While Detective Ronchi persistently told [Locke] that he did not believe him, he also reminded [Locke] that he was not in custody, and he told [Locke] on at least three occasions that he was free to leave. There is no evidence that [Locke] did not voluntarily accompany Detective Ronchi to the second interview room.

Given the repeated advice that he was free to leave, [this Court] conclude[d] that a reasonable person in [Locke's] position would not believe he was restrained to the degree associated with formal arrest.

Id.

The facts of the instant case are far less suggestive of custody than the facts in *Locke*. Indeed, the facts in this case clearly demonstrate a lack of custody. First,

the detectives asked the defendant and Gomez if they would voluntarily come to the police department and give statements. Mot. Tr. 10, 12. The defendant drove himself to the police department in his own car. Mot. Tr. 12. At the police station, he signed in as a visitor, was not asked to surrender his keys or his phone, and was asked to wait in an unlocked waiting room, where he was free to watch TV, use his phone, or even leave the police department. Mot. Tr. 18, 20–21.

After about 25 minutes, the defendant was invited into the interview room. Mot. Tr. 23. The door was not locked, and Det. Lombardi explained to the defendant that it was closed only for privacy. Mot. Tr. 27. Det. Lombardi confirmed once again that the defendant was there voluntarily; he reminded him that he was not under arrest and that he could leave at any time. Mot. Tr. 27, 61. The defendant kept his phone with him, and even briefly took a call. Mot. Tr. 28. At no point during the interview did either detective raise his voice or restrain the defendant in any way. Mot. Tr. 28–29.

When Det. Lombardi questioned the defendant's version of events, the defendant asserted that he was telling the truth, and then asked if he could consult with a lawyer. Def. Br. Add. 5; Mot. Tr. 32. Det. Lombardi told him that that was fine and the detectives stopped questioning him. Mot. Tr. 32, 77. It was at that point that the detectives explained what their next steps were going to be. The entire interview had lasted about nineteen minutes.

The defendant gave consent to search the store without reservation, but clearly understood his right not to do so, since he initially withheld consent to the buccal swabs and other requests. Mot. Tr. 39. Even after he gave consent to the other searches, the entire conversation with the detectives at the police department had lasted only a bit longer than half an hour. *See* Mot. Tr. 42. And finally, after the detectives drove the defendant back to the police department from the hospital, the defendant left the police department and drove away. Mot. Tr. 49.

The fact that the defendant drove himself to the police station and signed in as a visitor; that he dealt with only two detectives, who kept the conversation cordial; the short duration of the interview; the fact that it was in an unlocked room; the detective's statements to the defendant reminding him that he was free to leave and that he had the right not to consent; the fact that he was allowed to keep his keys and phone with him; and the fact that he left the police department at the end of the encounter, taken together, all lead to the conclusion that the defendant's freedom of movement was never restrained to the degree associated with a formal arrest. Therefore, he was never in "custody" for purposes of *Miranda*.

The defendant argues that the superior court overlooked certain facts when it determined that he was not in custody. Def. Br. 18. For example, he argues that the police did not honor his request when he told them twice that he wanted to

consult with an attorney. Def. Br. 18–19. He argues that each time he asked for a lawyer, instead of giving him that opportunity, the police returned to their request—which the defendant terms a “demand”—for his consent to search. Def. Br. 19.

As the superior court pointed out, however, the police do not have an obligation to stop speaking to the defendant so long as he is not in custody. *See* Def. Br. Add. 14–15 (citing *State v. Lewis*, 129 N.H. 787, 797 (1987); *State v. Portigue*, 125 N.H. 338, 345 (1984)). Even so, when the defendant asked about a lawyer, the detectives stopped questioning him about the assault and turned to explaining their next course of action. When the defendant initially declined to consent to the bodily searches and wanted to consult with a lawyer, they told him that that was fine. There was no coercion or restraint put on the defendant, and certainly none that would amount to “custody.”

The defendant also takes issue with the court’s characterization of the interview as short. Def. Br. 21. The defendant signed into the police department at 5:15 p.m. Mot. Tr. 17. The defendant’s interview began at 5:52 p.m. Mot. Tr. 26. The recording of the interview was turned off at 6:11 p.m. Mot. Tr. 39. And the last consent form was signed at 6:30 p.m. Mot. Tr. 41–42. Altogether, the defendant had been at the police department for 75 minutes, and had been interviewed for only 19 minutes. *Cf. Locke*, 149 N.H. at 6 (questioning totaled 3½ hours).

The defendant wants to stretch this time period to include the first appearance of the detectives at his store, as well as the travel time between the store and the police department, Def. Br. 21, during which he was alone in his own car and certainly had time to consider his situation. Again, the detectives had made it very clear, both at the store and several times at the police station, that his cooperation was completely voluntary, and that he could stop talking to them and leave at any time.

And finally, when Det. Lombardi suggested that they had evidence that contradicted the defendant's account, that is when the defendant asked to consult with an attorney—hardly the response of someone who felt coerced into cooperating with the police. The defendant did not change his story during that interview, however, and said merely that he was married. Nothing suggests that he no longer believed that he could terminate the interview and leave. On the contrary, he initially refused consent to the bodily searches, demonstrating that he believed the detective's statement that he was free not to consent.

As demonstrated above, the defendant's freedom of movement was never restrained to the degree associated with a formal arrest until he was actually arrested nine days after the interview. Therefore, the superior court's order denying the defendant's motion to suppress must be affirmed.

II. THE DEFENDANT’S CONSENT TO SEARCH WAS FREE, KNOWING, AND VOLUNTARY WHERE HE WAS NOT IN CUSTODY, THE DETECTIVES ACTED AT ALL TIMES IN A CORDIAL AND NON-COERCIVE MANNER, AND THE DEFENDANT REVIEWED AND SIGNED TWO CONSENT FORMS AFTER BEING INFORMED THAT HE HAD THE RIGHT TO REFUSE CONSENT.

The defendant claims that his rights under part I, article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution were violated on the grounds that his consent to search his store and his person was not free, knowing, and voluntary. Def. Br. 24. The superior court gave careful consideration to the defendant’s arguments on this point, and properly rejected the claim. This Court must do so as well.

“A voluntary consent free of duress and coercion is a recognized exception to the need for both a warrant and probable cause.” *State v. Watson*, 151 N.H. 537, 540 (2004); *accord State v. Washburn*, No. 2016-0518, slip op. at 4 (N.H. Apr. 13, 2018). “The burden is on the State to prove, by a preponderance of the evidence, that the consent was free, knowing and voluntary.” *Watson*, 151 N.H. at 540; *accord Washburn*, slip op. at 4. “Voluntariness is a question of fact, based on the totality of the circumstances.” *Watson*, 151 N.H. at 540; *accord Washburn*, slip op. at 4. This Court “will disturb the trial court’s finding of consent only if it is not supported by the record.” *Watson*, 151 N.H. at 540; *accord Washburn*, slip op. at 4. Here, the record supports the superior court’s conclusion that the defendant

gave his consent to search both his store and his person freely, knowingly, and voluntarily.

As the superior court found, and as described in greater detail above, the detectives in this case were cordial at all times, they did not raise their voices or display their weapons, and they made no promises or threats to the defendant. To the contrary, they carefully went over two consent-to-search forms with the defendant, and ensured that he understood that he had the right to refuse to give consent. *See* Def. Br. Add. 6–7. As demonstrated in section 1, above, the defendant was not in custody, and knew that he was free to leave at any time. Based on these facts, the record supports the conclusion that the defendant’s consent was free, knowing, and voluntary.

In its caselaw, this Court has pointed out several facts that go far toward showing that consent is knowing and voluntary. These facts include the use of a consent form, *see State v. Johnston*, 150 N.H. 448, 454 (2004), the officers’ cordiality and non-coercive manner, *see id.*; *State v. Green*, 133 N.H. 249, 259 (1990), the officers’ informing the defendant that he has the right to refuse consent, *see State v. Osborne*, 119 N.H. 427, 433 (1979), and the lack of custody, *see Green*, 133 N.H. at 259–60.² All these factors are present in the instant case.

² As argued above, there was no violation of the defendant’s *Miranda* rights in this case. Nevertheless, it is important to note that even if a defendant’s *Miranda* rights have been violated, there is no “presumption of coercion when assessing the voluntariness of consent to search.” *State v. Washburn*, No. 2016-0518, slip op. at 4 (N.H. Apr. 13, 2018). Indeed, even if the defendant here had been in custody, the facts that would have defined that custody would not necessarily have rendered his consent to search coerced. *Id.* at 5; *see*

Therefore, the lower court’s conclusion that the defendant’s consent was free, knowing, and voluntary, must be affirmed.

The facts in this case compare favorably with the facts in *State v. Green*, 133 N.H. 249 (1990). In that case, Green was taken into protective custody, and taken to a police station. *Green*, 133 N.H. at 258. This Court first determined that he was not in custody for purposes of *Miranda*, despite being taken to an interview room toward “the end of his protective custody and without many of his possessions.” *Id.* There, he was “told and understood that the police had no evidence or charges against him, that he was not under arrest, that he was sober and no longer in protective custody, and that he was free to go without answering any questions.” *Id.* “Green was not physically restrained, and the tone of the interview was relaxed, non-accusatory, and informal.” *Id.*

Green then claimed that his subsequent consent to search his truck was involuntary. *Id.* at 259. This Court, however, rejected that claim based on the fact that “the officers did not threaten, frighten, intimidate, or in any other way coerce Green’s consent to search the truck.” *Id.* This Court made the point that “[a]lthough Green initially refused consent, prior refusal does not necessarily invalidate a subsequent consent as involuntary.” *Id.* “Moreover, Green no longer refused consent once the officers explained to him the nature of their investigation

also State v. Patch, 142 N.H. 453, 459 (1997) (“Custody alone has never been enough in itself to demonstrate a coerced consent to search.” (Ellipsis omitted.) (Quoting *United States v. Watson*, 423 U.S. 411, 424 (1976.)).

and promised not to use anything found in the truck against him as evidence of another crime.” *Id.* For similar reasons, this Court should reject the defendant’s claim here.

The defendant argues that stationing an officer at his store while he was being interviewed at the police station, and the detectives’ failure to honor his request to consult with counsel, rendered his consent coerced. Def. Br. 24, 29–30. Indeed, he characterizes the detectives’ explanation to him that, if he refused consent, they would seek a search warrant as a “threat” to “close down the [d]efendant’s business” Def. Br. 28.

The defendant’s comparison of the conversation in the instant case to a threat by government agents to take a person’s child away should be easily dismissed. As the superior court noted, Def. Br. Add. 18, “[i]nforming the defendant of viable alternatives ... does not necessarily vitiate consent.” *State v. Patch*, 142 N.H. 453, 459 (1997). Nor does a prior refusal. *State v. Prevost*, 141 N.H. 647, 650 (1997). It is true that the defendant was concerned about opening his store on time, *see* Def. Br. Add. 6, but the detectives never threatened to “close down the [d]efendant’s business” Def. Br. 28. Rather, the defendant brought up the subject by asking the question. Def. Br. Add. 6. In response, Det. Lombardi assured him that the police just needed to go in to take some photos and gather whatever evidence was in there. Mot. Tr. 32; Def. Br. Add. 6.

Regardless, the police were going to be present at the store in either case, so the defendant could not avoid a brief police presence by giving his consent, as opposed to requiring the police to seek a warrant. In any event, Det. Lombardi never told him, or suggested, that his consent was required in order to him to open for business. Mot. Tr. 32–33. Thus, the defendant’s claim that the detectives somehow threatened him is not supported by the record.

Finally, the superior court did not, as the defendant argues, “minimize[] the [d]efendant’s requests to speak with a lawyer,” either with respect to the request for a DNA sample or at any other time. *See* Def. Br. 29–30. Rather, the court correctly found that because the defendant was not in custody for purposes of *Miranda*, the conversation with the defendant regarding his consent to search violated no right of the defendant’s. *See* Def. Br. Add. 11–12, 17. Furthermore, it was clear that the defendant understood his right to refuse, because he initially did so with respect to the bodily search. Mot. Tr. 38. When the defendant did consent to the search, he did so on his own accord, without any threats or promises from the detectives. *See* Mot. Tr. 40–41. For all these reasons, the defendant’s consent was free, knowing, and voluntary.

CONCLUSION

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

The State requests a five-minute oral argument on the 3JX docket.

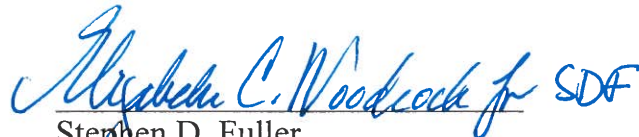
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General

May 30, 2018



Stephen D. Fuller
NH Bar ID No. 14009
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
603-271-3671

(5 minutes, 3JX)

CERTIFICATE OF SERVICE

I, Stephen D. Fuller, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, James D. Rosenberg, by first-class mail postage prepaid, at the following address:

James D. Rosenberg, Esquire
Shaheen & Gordon, PA
107 Storrs Street
P.O. Box 2703
Concord, NH 03302-2703

May 30, 2018


Stephen D. Fuller