THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-124

State of New Hampshire

v.

Shawn M. Minson

Appeal Pursuant to Rule 7 from Judgment
of the Cheshire County Superior Court

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTIONS PRESENTED

1. Whether the court erred in denying the motion to suppress, because the State failed to establish that the protective-sweep doctrine justified the police entry into the motel room.

Issue preserved by motion to suppress, the State's objection, the hearing on the motion, and the court's ruling. A15-A53; AD 30-44; M1 3-71.*

2. Whether the court erred in denying the motion for a new trial, thereby denying Minson an opportunity to reopen the motion to suppress in light of belatedly-disclosed information.

Issue preserved by defense motion for a new trial, the State's objection to the motion, the hearing on the motion, the court's ruling, the defense motion to reconsider, and the court's ruling denying the motion to reconsider. A54-A92; AD 45-55; M2 2-13.

* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"AD" refers to the appealed decisions, attached in the addendum to this brief;
"M1" refers to the transcript of the hearing on the motion to suppress, held on August 6, 2018;
"T" refers to the transcript of the stipulated-facts trial, held on September 20, 2018;
"M2" refers to the transcript of the hearing held on October 26, 2018; and
"S" refers to the transcript of the sentencing hearing, held on February 1, 2019.

STATEMENT OF THE CASE

In 2018, the State indicted Shawn Minson with three drug-related crimes: possession of cocaine, possession of fentanyl with intent to distribute, and possession of crack cocaine with intent to distribute. A3-A5. The defense filed a motion to suppress, arguing that the police violated the constitution in searching the motel room in which they found the drugs. A15-A23. The State objected, A24-A53, and after a hearing, M1 3-71, the court (Ruoff, J.) denied the motion. AD 30-44.

The parties subsequently resolved the charges via a stipulated-facts trial, T 3-14, thereby preserving Minson's right to appeal the denial of his motion to suppress. After the stipulated-facts trial but before sentencing, the prosecutor disclosed to the defense a belatedly-discovered police report concerning the entry and search of the motel room. That disclosure prompted Minson to file a motion for a new trial. A54-A59. The State objected, A60-A87, and the court ultimately denied the motion. AD 45-55. Minson filed a motion to reconsider, A88-A92, that the court likewise denied. A92.

For possession of fentanyl with intent to distribute, the court sentenced Minson to a stand-committed term of three to six years, with six months of the minimum suspended. S 28-29; A6-A8. The court further sentenced Minson to a

concurrent twelve-month term, for possession of cocaine. S 29-30; A12-A14. Finally, for possession of crack with intent to distribute, the court pronounced a consecutive, suspended term of six to twelve years. S 30-31; A9-A11.

STATEMENT OF THE FACTS

On November 28, 2017, state patrolman Aaron Gillis received and investigated a report of a road-rage incident involving Shawn Minson. M1 7-10. As a result of that investigation, Gillis prepared an affidavit in support of a warrant for Minson's arrest. M1 10, 44-45. He did not, however, present the affidavit at that time to a magistrate, and so no arrest warrant issued. M1 10.

On January 28, 2018, Gillis received information that Minson had sold drugs and was staying in a certain motel in Keene. M1 11, 22-26, 47. Apparently believing that the police lacked probable cause to search the motel room or arrest Minson for a drug offense, Gillis remembered and presented the November 2017 road-rage affidavit to a justice of the peace. M1 11-12, 21-22, 27-28, 46, 52-54. The justice of the peace issued an arrest warrant but dated it for the following day, January 29. M1 5, 12-13. The supervising state trooper acknowledged that, although the police had only the arrest warrant, they hoped that in the process of executing that warrant they might discover more information about Minson's drug-dealing activities. M1 55.

Five state troopers, including Gillis, gathered at the motel to arrest Minson. M1 14, 29-31, 45, 47. A sixth officer, Keene policeman Andrew Vautrin, called Minson's room from the front desk, impersonating a motel employee, to ask

Minson to come to the desk to take care of some paperwork. M1 14, 30, 47-48. When Minson opened the door to his room and stepped out, the other police officers arrested him. M1 14, 31-33, 48-49, 58.

The supervising officer, Daniel Brow, then instructed Gillis to enter Minson's room through the still-open door. M1 14-15, 33-34, 46, 51, 59. Brow testified that he ordered the entry on a protective-sweep justification, having seen through the open door that somebody in the room "bladed" – turned away from the open door. M1 49, 51, 59. He also saw that another person in the room began to move. M1 49-50, 59. Moreover, he observed that the room seemed filled with smoke. M1 50.

Inside the room, Gillis encountered three women: Jessica Johnson, Brittany Steele, and Kari Estey-Mansfield. M1 15, 34. He also saw in plain view drugs and drug paraphernalia. M1 15, 60. The police then spoke to the women, and ultimately found drugs in the possession of Johnson and Estey-Mansfield. M1 15-16, 34-43. The police arrested them and released Steele, finding no drugs on her. M1 16-17, 38-43, 60.

After securing the scene, the police withdrew to prepare and seek a warrant authorizing a search of the motel room. M1 17-18, 41-42. After a magistrate granted the warrant, the

police searched the room and found drugs, drug paraphernalia, and money. M1 18-19; A50-A51.

SUMMARY OF THE ARGUMENT

1. At the time they entered Minson's motel room, the police did not have a reasonable suspicion that a dangerous person lurked in the room. The mere presence of other people in the room does not support a reasonable suspicion that any of them are dangerous. The movements of those people, as observed by the police from the hallway, did not create such a suspicion, nor did the fact that the police had information that Minson sold drugs. Viewing all of the information in its totality, this Court must conclude that the police lacked justification to perform a protective sweep. Because that sweep led ultimately to the discovery of evidence on which the State relied to convict, this Court must reverse Minson's convictions.

2. Alternatively, the information contained in Officer Vautrin's belatedly-disclosed report requires a remand for a new suppression hearing. In ruling that the police lawfully conducted a protective sweep, the trial court relied on a finding that the police had information that Minson was selling a large amount of drugs from the motel room. Vautrin's report undermined that finding because it suggested that the police only had information that Minson made one drug sale in a nearby supermarket.

I. THE COURT ERRED IN DENYING MINSON'S MOTION TO SUPPRESS.

In seeking to suppress the items found in the motel room, Minson advanced two basic arguments. First, he contended that the arrest warrant was invalid when executed on January 28 because the magistrate dated the warrant January 29. A20. Second, he argued that the police illegally entered the motel room, contending that the facts did not support their claimed protective-sweep rationale. A20; M1 63-70. On appeal, Minson pursues only the protective-sweep argument.

As relevant to that issue, the court found that "Gillis obtained information from a cooperating individual that Mr. Minson was selling a large quantity of crack cocaine" and was staying at the motel. AD 32. In support of the "large quantity" characterization, the court cited and quoted the Gerstein affidavit filed by Trooper Bernier. AD 32. The language in Bernier's affidavit, in turn, tracked Gillis's affidavit in support of his request for a warrant authorizing a search of the motel room. A45. Gillis did not give that "large quantity" characterization at the suppression hearing.

In upholding the State's protective sweep claim, the court relied on its finding that Minson "was selling large quantities of crack cocaine from the motel room." AD 36. That circumstance, in combination with the observed movement of

people and the smoke, led the court to conclude that "it was reasonable for the troopers to suspect that a room being used for a large drug transaction with an undetermined amount of people, who were moving around and one had suddenly turned away from the troopers, may be a dangerous environment." AD 36.

Part I, Article 19 of the New Hampshire Constitution provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." A warrantless search is "*per se* unreasonable unless it comes within one of a few recognized exceptions." State v. Graca, 142 N.H. 670, 673 (1998) (citation and quotation marks omitted). The "protective sweep" doctrine describes one situation in which a warrantless search can be lawful. Graca, 142 N.H. at 673-74; State v. Smith, 141 N.H. 271, 276 (1996); see also Maryland v. Buie, 494 U.S. 325 (1990) (articulating doctrine as matter of federal constitutional law).

A protective sweep is permitted "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Graca, 142 N.H. at 674 (quoting Buie, 494 U.S. at 337). "Fundamental to any protective sweep is the officer's concern that there may be other persons present 'who are dangerous

and who could unexpectedly launch an attack.'" State v. Francis, 167 N.H. 598, 602 (2015) (quoting Buie, 494 U.S. at 327).

On appeal, this Court will "accept the trial court's factual findings unless they lack support in the record or are clearly erroneous. . . ." Francis, 167 N.H. at 602. The Court will review the trial court's legal conclusions *de novo*. Id.

Minson contends that, on the facts established at the suppression hearing, the police lacked specific and articulable suspicion that the motel room harbored somebody who posed a danger. First, the fact that other people were present in the room and reacted to the startling event of Minson's arrest by moving does not give rise to a reasonable suspicion of danger. The "[m]ere presence of a person is not sufficient, however; officers must also articulate a basis for believing that the person present is dangerous before they may conduct a sweep." State v. Davila, 999 A.2d 1116, 1134 (N.J. 2010). The Davila court proceeded to list circumstances that could justify a sweep:

> Considerations may include such obvious circumstances as preexisting police knowledge that a specific individual is a dangerous or violent criminal, combined with surprise once police are on the premises….; or overly nervous conduct, combined with inconsistent or dishonest responses to inquiries that lead police to suspect a

> dangerous individual is being concealed….

Id. None of those circumstances existed in Minson's case.

The fact that the police believed Minson to be dealing "a large quantity of crack cocaine" does not establish that the other people in his room at the moment of the arrest posed any danger. First, the confidential informant did not assert that Minson was dealing drugs out of the motel room, but only that he was staying there. M1 11, 22-24, 30.

Second, even if the police supposed that Minson was using the room as a base for his drug-dealing operations, that supposition did not support a reasonable suspicion that, after Minson's arrest, the room harbored a dangerous person. "[T]he presence or suspected presence of drugs without more does not justify a sweep, nor does the bare conjecture and bald assertion that 'guns follow drugs,' without additional facts." United States v. Keefauver, 74 M.J. 230, 236 (Ct. App. Armed Forces 2015); see also United States v. Taylor, 248 F.3d 506, 513-14 (6th Cir. 2001) (affirming protective sweep where officers had "more than just a generalized suspicion [of danger] based on allegations that Taylor was dealing drugs"). The confidential informant did not indicate that Minson worked with associates while dealing drugs, nor did the informant mention seeing Minson with any weapons. M1 26-27.

In Francis, this Court found the requisite suspicion of danger where Francis "was a convicted felon, had violated parole, had access to a gun, had a history of threatening others with his gun, and was suspected of selling heroin from his home." Francis, 167 N.H. at 603; see also Graca, 142 N.H. at 674 (affirming protective sweep where police had information that suspect had recently been arrested for armed robbery); Smith, 141 N.H. at 273-77 (affirming protective sweep where police had specific information that defendant had gun). The State introduced no comparable evidence at the suppression hearing in Minson's case. There was no evidence of any prior record, of access to a weapon, or of a history of threatening others with a gun.

When courts find the requisite articulable suspicion to justify a protective sweep, they cite circumstances for which no analog exists in Minson's case. See, e.g., United States v. Biggs, 70 F.3d 913, 916 (6th Cir. 1995) (officers had information that another person would be meeting defendant at motel room and officers knew arrestee had been arrested on two previous occasions in presence of someone possessing firearm); United States v. Henry, 48 F.3d 1282, 1284 (D.C. Cir. 1995) (informant had advised police that arrestee's "boys" or "counterparts" might be with him); United States v. Kimmons, 965 F.2d 1001, 1009 (11th Cir. 1992) (arresting agents had knowledge of conspirator whose identity and

whereabouts were unknown). As these cases indicate, the requisite circumstances can include the expected presence of a confederate of the defendant. In Minson's case, although the police saw others in the motel room, they had no reason to think those people were drug dealing associates of Minson's. Moreover, courts often rely, in affirming a protective sweep, on information that the other person suspected of being with the defendant was armed. As one court has stated:

> [W]e believe it was error for the district court to conclude that a search of the basement subsequent to Hatcher's arrest and handcuffing was justified solely because the subject of drugs is a dangerous one, dangerous for all of those persons involved in it, especially those who are on the law enforcement side.

United States v. Hatcher, 680 F2d 438, 444 (6th Cir. 1982).

The protective sweep cannot be upheld because the circumstances on which the court relied do not give rise to a reasonable, articulable suspicion that the people in the motel room posed a danger to the police. Neither can the State rely on speculation. As one court has stated:

> [A]llowing the police to justify a protective sweep on the ground that they had no information at all is directly contrary to the Supreme Court's explicit command in Buie that the police have an articulable basis on which to support their reasonable

> suspicion of danger from inside the home. 'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place.

United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996). Because the trial court thus erred in finding justified the protective sweep which led ultimately to the discovery of the drugs and other evidence supporting the prosecution of Minson, this Court must reverse.

II. THE COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL, THEREBY DENYING MINSON AN OPPORTUNITY TO REOPEN THE SUPPRESSION MOTION.

After the stipulated-facts trial, but before the court sentenced Minson, the State discovered and disclosed to the defense a report written months earlier by Keene police officer Andrew Vautrin. A54-A59. In that police report, Vautrin wrote that:

> Gillis talked with [confidential informant name redacted] [and] was able to get the information that [name redacted] bought an eight ball (Street slang for drugs) from Shawn Minson at the Price Chopper in Keene the night prior. [Name redacted] informed Trooper Gillis that Shawn was staying at the Days Inn in Keene.

A67. Two features of Vautrin's report bear emphasis here. First, Vautrin did not attribute to the confidential informant anything about Minson dealing a substantial amount of drugs. Second, because the informant purchased the drugs from Minson at a supermarket, the information did not directly link Minson's occupancy at the motel with his drug-dealing activity.

The defense filed a pleading captioned "motion for a new trial" in which the defense argued that Vautrin's belatedly-disclosed police report constituted exculpatory evidence on the issues associated with the motion to suppress. A54-A59.

In particular, the motion focused on the finding in the order denying the motion to suppress that Minson "was selling large quantities of crack cocaine from his motel room." A55. Counsel argued that Vautrin's report indicated that the police knew only of a single sale, and that even that sale happened at a supermarket rather than at the motel. Id. Thus, to the extent that the lawfulness of the protective sweep depended on information that Minson had sold "a large quantity of drugs" out of the motel room, Vautrin's report contradicted that information and thus undermined the justification for the sweep.

Because of the timing of the discovery and disclosure of Vautrin's report, the prosecutor had not yet had a chance to respond in writing when the parties briefly discussed the matter at a hearing. M2 2-13. At the hearing, the court expressed, and defense counsel agreed, that the remedy the defense sought by the motion would be a new suppression hearing. M2 12-13.

In due course, the State filed an objection. A60-A87. The State noted that the supermarket was within walking distance of the motel, and that the informant told the police that Minson was staying at that motel. A61. The State argued that Vautrin's information would not, if known at the time, have changed the ruling on the suppression motion. A62.

In January 2019, the court issued an order denying the defense motion. AD 45-55. The analytical part of the order began by describing the defense as having "conflated two issues in its attempt to have this Court revisit its suppression order." AD 51. The order proceeded to analyze the claim first through the prism of a challenge to the knowing and intelligent character of Minson's waiver of his right to a jury trial, made at the stipulated-facts trial. AD 51-53. The court next addressed the claim as a motion for new trial on the basis of newly discovered evidence. AD 53-55.

In its waiver analysis, the court described the defense motion as, in essence, seeking to withdraw Minson's stipulation to facts. AD 52. In that connection, the court cited State v. McGurk, 157 N.H. 765, 774 (2008), for the proposition that a court may construe a motion for a new trial as a request to withdraw a guilty plea. Id. The court reasoned:

> Whether the Court addresses the defendant's motion as a motion for a new trial or as a request to withdraw a guilty plea, the Court would not reach its suppression order; the Court's denial of the motion to suppress still stands regardless of the legal avenue.

AD 53. To the last sentence, the Court added the following footnote:

> Even if styled as a motion to reconsider the suppression order, there is nothing in the report that would have impacted

> the Court's analysis in denying the motion to suppress. Officer Vautrin's report is generalized, quite brief, and does not articulate anything that the Court could discern as impeaching the evidence introduced at the hearing on the motion to suppress. In fact, the report is substantially corroborative of the State's evidence.

AD 53 n.2.

In essence, therefore, the court denied the motion on the merits of the question whether Vautrin's report warranted reconsideration of the ruling on the suppression motion. See also AD 54 (expressing understanding of the motion as "focus[ing] on the speculative and retrospective effect the report could have had on the Court's suppression order"); AD 55 (recognizing defense to be arguing that Vautrin's report would have been favorable at suppression hearing "because it contradicts that the police had knowledge that the defendant was selling large quantities of crack cocaine from his motel room. . . .").

In the last part of its analysis, the order focused on the potential significance of Vautrin's information at a trial, rather than at a suppression hearing. AD 54-55. After again noting that the defense motion, despite its caption, focused more on the effect of the information at a suppression hearing rather than at a trial, the court found that the report "would not have been favorable" to the defense at a trial. AD 54. On

appeal, Minson does not claim that the evidence would have been favorable at trial. He rather presses only the claim that the evidence would have been favorable at the suppression hearing.

The defense filed a motion to reconsider. A88-A92. In that motion, counsel argued that the court had failed to acknowledge the applicability of the Brady doctrine to pre-trial suppression litigation. The motion further elaborated on the assistance Vautrin's report would have lent to Minson's suppression argument. A90-A91. The court denied the motion to reconsider by a notation order. A92.

On appeal, Minson contends, contrary to the court's ruling, that the court should have re-opened the suppression hearing to permit the introduction of further evidence in light of Vautrin's report. Minson contends that, after such a re-opened hearing, the evidence in its totality would require the court to grant his motion to suppress. This brief incorporates by reference herein the points and authorities set out in the first argument above.

As noted above, the court, in ruling on the suppression motion, relied in part on its finding that the police had information that Minson was selling a large quantity of crack cocaine from the motel room. To the extent that that information supported the police decision to conduct a protective sweep of the motel room, the ruling on the

suppression motion would be different upon an evidentiary record establishing that the police had no such information.

In that circumstance, the police could point only to information that a person in the room had "bladed," that one or two other people were visible in the room, that the room was smoky, and that Minson had, the day before, at a nearby supermarket, sold an eight-ball of drugs. For all the reasons stated above in the first argument, that information would not have justified a reasonable suspicion that the room, after Minson's arrest, harbored a dangerous person.

The information in Vautrin's report tended to contradict the claim that the police had information that Minson was selling a large quantity of drugs from the motel room. First, Vautrin's information indicated that only a single sale of a modest amount had taken place. Second, his information indicated that that sale happened at a nearby supermarket, rather than at the motel room. Information about a single sale somewhere else does not support the claim that the police had information about a substantial quantity of drugs being sold from the motel room.

Insofar as the order criticized the presentation of Minson's claim in a motion for a new trial, this Court must reject its reasoning. Given the case's post-trial/pre-sentencing posture when the State belatedly disclosed Vautrin's report, counsel had to ask for a re-opened

suppression hearing in a format that acknowledged that procedural posture. In substance, counsel requested first the reopened consideration of the suppression issue. If, upon that further review, the court reached a different conclusion about the suppression motion's merits, counsel asked the court to vacate the conviction by ordering a new trial. In that way, the motion appropriately presented the issues raised by Vautrin's report.

To the extent that the court relied on the procedures associated with a stipulated-facts trial as justifying a denial of the motion, this Court must reject that reasoning also. This Court has long recognized the validity of stipulated-facts trials as a mechanism by which a defendant can preserve a pre-trial issue for appellate review. See, e.g., State v. Mfataneza, 172 N.H. 166 (2019) (adjudicating appeal from stipulated-facts trial); State v. Newcomb, 161 N.H. 666, 669 (2011) (same); State v. Blake, 146 N.H. 1 (2001) (same); State v. Smith, 132 N.H. 756 (1990) (same); State v. Stevens, 121 N.H. 287 (1981) (same). Stipulated-facts trials necessarily require the defendant to stipulate that the State could prove certain facts, for such trials involve the waiver of the rights – to a jury, to confront witnesses, etc. – that would test the proof of those facts.

A ruling denying Minson's motion based only on the essential stipulations would, if applied consistently, eliminate

stipulated-facts trials as a tool for enabling an appeal while avoiding a jury trial. If those essential stipulations defeat Minson's post-trial claim, they would equally defeat his initial suppression motion. Such reasoning, thus, would destroy stipulated-facts trials as a mechanism for preserving issues for appeal. Good reason exists to preserve that mechanism. Without stipulated-facts trials, defendants desiring to appeal a pre-trial suppression ruling would have to put the State and the court to the trouble and expense of a full jury trial.

For these reasons, if the Court does not grant relief under Minson's first argument, it must remand the case for a re-opened suppression hearing, and for subsequent further proceedings consistent with the need for such a hearing.

CONCLUSION

WHEREFORE, Mr. Minson respectfully requests, on the basis of the first claim, that this Court reverse his conviction. Alternatively, he requests, on the basis of the second claim, that this Court remand for a new suppression hearing.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decisions were in writing and are appended to the brief.

This brief complies with the applicable word limitation and contains 4282 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ *Christopher M. Johnson*
Christopher M. Johnson

DATED: November 5, 2019

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

State of New Hampshire

v.

Shawn Minson

No. 213-2018-CR-00043

ORDER ON MOTION TO SUPRESS

Defendant Shawn Minson has been charged with possession of a controlled drug (cocaine), possession with intent to dispense (fentanyl), and possession with intent to dispense (crack cocaine). He now moves to suppress physical evidence and statements made by the Defendant and others. The State objects. The Court held a hearing on August 6, 2018. For the following reasons, Defendant's motion to suppress is DENIED.

FACTS

On November 28, 2017, Cynthia Buckley called a motor vehicle complaint into the New Hampshire State Police, reporting that a car had passed her unlawfully, tried to force her off the roadway, and, at one juncture, had exited his vehicle. (Gillis Aff. Supp. Arrest Warrant ¶ 2.) In her written report, Ms. Buckley stated that she was traveling north on Route 10 from Keene to Gilsum when she observed headlights "way in the distance" but that, within minutes, a vehicle was driving on her "butt." (Id. at ¶ 4.) Ms. Buckley slowed down as she came down a hill and the vehicle passed her. (Id.) Assuming the vehicle was gone, and having lost sight of the vehicle, Ms. Buckley turned on her high beams and turned left onto Main Street in Gilsum. (Id.) Ms. Buckley stated that after she turned, she observed the same vehicle stopped and a male party exited

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the vehicle and screamed, "what the fucks your problem." (Id.) Ms. Buckley then passed the vehicle and travelled further, and she was passed by the vehicle in a no-passing zone. (Id. at ¶ 5.) The vehicle, being in front of Ms. Buckley, then slowed to a rate of 5 miles per hour and appeared it was going to allow Ms. Buckley to pass but cut her off. (Id.) Ms. Buckley stated that, as she continued driving, the vehicle "brake checked" her again. (Id.) The vehicle drove left of the center of the road and Ms. Buckley attempted to pass the vehicle, but the vehicle drove toward hers, almost pushing her off of the road. (Id.) Ms. Buckley stated that she then pulled into a driveway and waited until she could no longer see the vehicle's taillights. (Id.)

Ms. Buckley provided registration information of the vehicle involved, which came back to a vehicle registered to Mr. Minson. (Id. at ¶ 2.) Later on the day of this incident, State Trooper Aaron Gillis made contact with Mr. Minson and observed the aforementioned vehicle in Mr. Minson's driveway. (Id. at ¶ 3.) Mr. Minson admitted to being on his way home from work during the time the events Ms. Buckely reported had occurred, and he admitted that an incident had occurred with another operator. (Id.) Mr. Minson admitted to passing a vehicle, and he said he thought the operator may have been "drunk" and that the vehicle had "high beamed him," at which time Mr. Minson slowed down to approximately 10 miles per hour. (Id.) Mr. Minson said, regarding the operator, "she was an asshole." (Id.) When asked about his having been left of the center of the roadway during his interaction with the operator, Mr. Minson admitted he was. (Id.) Trooper Gillis asked Mr. Minson if he exited the vehicle and Mr. Minson paused, lowered his head and looked left, and answered in the negative. (Id.) Trooper

Gillis testified at the hearing that, within the following week, he had drafted a warrant affidavit for the offenses of reckless operation and reckless conduct for Mr. Minson.

Sixty-one days later, on January 28, 2018, Trooper Gillis obtained information from a cooperating individual that Mr. Minson was selling a large quantity of crack cocaine and was staying at the Days Inn in Keene. (Bernier Aff. ¶ 6.) Trooper Gillis contacted Officer Andrew Vautrin of the Keene Police Department ("KPD") and advised him of the information he had about Mr. Minson. (Id. at ¶ 7.) Officer Vautrin informed Trooper Gillis that he had observed Mr. Minson's vehicle parked at the Days Inn, which is located near the New Hampshire State Police Troop C barracks, and had confirmed it was Mr. Minson's vehicle through a motor vehicle registration check. (Id. at ¶ 8.)

That same day, January 28, 2018, Trooper Gillis secured an arrest warrant for Mr. Minson for the crimes of reckless conduct and reckless operation based on the November 28, 2017 incident involving Ms. Buckley. (Id. at ¶ 9; State Obj., Arrest Warrant.) Later that day, Officer Vautrin and troopers from the New Hampshire State Police Troop C responded to the Days Inn and advised the Days Inn clerk of the arrest warrant for Mr. Minson. (Bernier Aff. ¶ 10.) The troopers and Officer Vautrin learned that Mr. Minson was staying in Room #231 on the second floor. (Id.) Officer Vautrin asked the clerk to contact Mr. Minson via the telephone and request Mr. Minson to respond to the front desk. (Id. at ¶ 11.) Troopers and Sergeant Daniel Brow went to the second floor and intercepted Mr. Minson at the open doorway of Room 231, advising him of the arrest warrant and arresting him. (Id. at ¶ 12.)

While Trooper Gillis and Sergeant Brow were taking custody of Mr. Minson, Sergeant Brow observed three women inside the motel room moving about, one of

whom quickly turned away from Sergeant Brow, turning her back to the door and to the troopers. (Id. at ¶ 13.) Troopers went into the motel room while Mr. Minson was being handcuffed, and they observed a large "wad" of money on the center of the made bed, as well as a plastic baggie containing what appeared to be crack cocaine. (Id. at ¶¶ 14–15.) One of the women, Jessica Johnson, was asked if she had any identification, and she said she did and pointed to her purse on the bed. (Id. at ¶ 16.) Trooper Gillis asked her if it was OK for him to retrieve her identification from her purse, and she said yes. (Id.) As Trooper Gillis moved toward the purse, which was open and unzipped, he observed a plastic baggie containing what appeared to be crack cocaine inside the purse. (Id.) Ms. Johnson confirmed that it was crack cocaine and that it belonged to her. (Id.)

Another woman in the room, Kari Estey-Mansfield, also advised that her identification was in her purse, and Trooper Gillis asked if she consented to him obtaining her identification from her purse, to which she replied that she had marijuana in her purse but consented to Trooper Gillis retrieving her license. (Id. at ¶ 17.)

The third woman in the room, Brittany Steele, was identified and left the room, and she was not in possession of any weapons or any contraband. (Id. at ¶ 18.)

The motel room was secured and Trooper A. Caraballo arrived on scene to continue securing the motel room while a search warrant was obtained. (Id. at ¶ 19.) Mr. Minson, Ms. Johnson, and Ms. Estey-Mansfield were taken into custody and transported to the KPD, where they were informed of their Miranda rights and were interviewed separately. (Id. at ¶ 20.) During her interview, Ms. Estey-Mansfield advised Trooper Gillis that she had purchased heroin from Mr. Minson in the motel room but that

she had not yet paid for it due to the arrival of the police. (Id. at 21.) During Ms. Johnson's interview, she said that the crack cocaine in her purse was given to her by Mr. Minson for free. (Gillis Aff. Supp. Search Warrant ¶ 21.) She explained that Mr. Minson reached out to her via Facebook Messenger and told her he had illicit drugs, and she said she was picked up by one of Mr. Minson's "Runners," who took her to the Days Inn. (Id.) She also said that Mr. Minson was keeping the drugs in a safe within the room, which he had locked after he handed out drugs to Ms. Estey-Mansfield, Ms. Steele, and herself. (Id.) She explained that Mr. Minson had held out about three "eight balls of crack cocaine" in his hand and said he was running "low." (Id.) She also said that the baggie of crack cocaine that was on the bed had belonged to Ms. Steele, who had thrown the baggie on the bed upon seeing the police. (Id.)

Following the execution of the search warrant that was based on the above information, a quantity of heroin and crack/cocaine was located in the Days Inn room. (Id. at ¶ 22.)

ANALYSIS

I. Protective Sweep

Mr. Minson argues that entry into the motel room violated his rights under Article 19 of the New Hampshire Constitution. (Def.'s Mot. Suppress ¶ 21.) The troopers that entered the motel room, Mr. Minson argues, were not in reasonable fear for their safety such that they would be permitted to enter the room without a warrant, and Mr. Minson argues that the evidence only reflects that the troopers entered the room and spoke to the women rather than drawing their weapons.

"[W]hen the entry is made into an individual's private dwelling, where there exists a 'strong expectation of privacy and protection from government intrusion,' the requirement of a warrant is 'particularly stringent.'" Id. (quoting State v. Theodosopoulos, 119 N.H. 573, 580 (1979)). Warrantless entries are "per se unreasonable" and illegal, unless the entry is made pursuant to one of a few recognized exceptions. State v. Santana, 133 N.H. 798, 803 (1991). "One such exception is known as a protective sweep, which is intended to ensure that law enforcement officers can 'protect themselves from harm' at the scene of an arrest." State v. Francis, 167 N.H. 598, 602 (2015) (quoting State v. Smith, 141 N.H. 271, 276 (1996)). "A 'protective sweep' is a quick and limited search of premises." Id. (quoting Maryland v. Buie, 494 U.S. 325, 327 1990). "[It] occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." Buie, 494 U.S. at 333. An officer's concern that there may be persons present who are dangerous or could unexpectedly launch an attack is fundamental to a protective sweep. Francis, 167 N.H. at 602.

> [A] protective sweep's scope is narrowly confined to a cursory visual inspection of those places in which a person might be hiding, and confined in duration to a period no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

Buie, 494 U.S. at 341. A protective sweep is justified in connection with an arrest in spaces not immediately adjoining the place of arrest only if a reasonably prudent officer would believe based upon specific and articulable facts that this specific exigency exists. Francis, 167 N.H. at 602–03.

The facts concerning the troopers' entry into the motel room are not in dispute. While Mr. Minson was being taken into custody, Sergeant Brow observed people moving inside the motel room and one of them turned away from him quickly. (Bernier Aff. ¶ 13.) In his testimony, Trooper Brow characterized this action as the woman blading herself. Trooper Brow testified that in addition to the woman who bladed herself, one of the other women was moving around in the room as well, which caused him concern. Trooper Brow also testified that the motel room was full of smoke. And, the troopers had information from a cooperating individual that Mr. Minson was selling large quantities of crack cocaine from the motel room.

These articulated facts caused the officers "concern that there may be other persons present 'who are dangerous and who could unexpectedly launch an attack.'" Francis, 167 N.H. at 602. It was reasonable for the troopers to suspect that a room being used for a large drug transaction with an undetermined amount of people, who were moving around and one had suddenly turned away from the troopers, may be a dangerous environment.

Both Trooper Gillis and Sergeant Brow testified at the hearing, and neither said that they had observed weapons in the motel room before going in, or after; nor did they go into the motel room with weapons drawn. However, the fact that the troopers did not draw their weapons when entering the motel room is not relevant to their reasonable suspicion of danger; Mr. Minson has provided no authority that troopers' drawing their weapons is indicative of a suspicion of danger, nor will this Court find that entering a room without their weapons drawn indicates the troopers did not believe there was a

danger in the room. Finding otherwise would encourage police to draw their weapons in every instance they have a suspicion of danger or are conducting a protective sweep.

There are specific and articulable facts before the Court of why the troopers believed that a protective sweep was necessary: people were moving inside the room, including one woman who had quickly turned away from Sergeant Brow toward the inside of the motel room. Francis, 167 N.H. at 602–03. There are thus sufficient articulable facts to support that the troopers' protective sweep was reasonable to ensure that the women moving around and turning away from them were not posing a danger. Id. at 603; Buie, 494 U.S. at 341. The State has therefore met its burden to show that a protective sweep was warranted.

II. Arrest Warrant Validity

Mr. Minson challenges the arrest warrant's validity in two ways. First, he points out that the arrest warrant was dated January 29, 2018 when the warrant was obtained and the arrest occurred on January 28, 2018, rendering it invalid. (Def.'s Mot. Suppress ¶ 20.) Second, Mr. Minson argues that the troopers' seeking a warrant for his arrest for an event approximately two months prior was a pretext to entering the Days Inn motel room. (Id. at ¶ 22.)

a. Date on Warrant

Mr. Minson argues that the arrest warrant was not valid because of the discrepant dates. (Def.'s Mot. Suppress ¶ 20.) The State responds that the discrepancy in dates was a scrivener's error and that the justice of the peace who signed the warrant clearly found probable cause existed. (State's Obj. 5.)

The justice of the peace who signed the warrant, Lorena Werner, testified at the hearing and said she did not recall the warrant in question, but did not contest its validity or state that she dated the warrant for January 29, 2018 intentionally. She testified that she has been a justice of the peace for ten years and has issued probably more than a thousand warrants during her time as a justice of the peace, and that she follows the same procedure each time she issues an arrest warrant. Her procedure, she explained, is she will read the supporting affidavit; she will then sign the supporting affidavit, the complaint, and the warrant; and will swear the officer to the supporting affidavit. When asked if she has ever signed a warrant effective on a date different than the day on which she swore the officer to the affidavit, she replied, "Never." When asked about the arrest warrant for Mr. Minson, she confirmed that she signed it and that she swore the officer to the supporting affidavit, but that she had no other recollection about the warrant.

The facts before the Court about the specific warrant in question and its issue date are therefore few, but Ms. Werner's testimony lends more support to concluding that the issue date was a scrivener's error rather than an intentional one-day delay by Ms. Werner. First, issuing a warrant that was valid for the following day based on the undisputed facts surrounding Mr. Minson's arrest—specifically that Trooper Gillis was obtaining the warrant to arrest Mr. Minson at the Days Inn, where he knew Mr. Minson was at that very moment—is less probable than the chance that a scrivener's error occurred.

Second, dating an arrest warrant for the following day, despite knowing where the defendant was at that moment, is an unusual act that Ms. Werner would likely recall,

yet she testified she had no such recollection of the specific warrant nor of intentionally dating the warrant for the following day. There was no evidence that Ms. Werner intentionally wrote the date of the following day, and no argument for why she would have done so.

Third, it is undisputed that Trooper Gillis had the issued warrant in his possession when he executed the warrant. Because the warrant was already issued and immediately executed and there is no evidence that it was intended to be executed the following day, the circumstances indicate the date was written in error. See People v. Deveaux, 561 N.E.2d 1259, 1264–65 (Ill. App. 1990) (finding that search warrant with a time of issuance nearly 12 hours after time it was actually executed was a "technical irregularity" because of officer's uncontroverted testimony that he possessed the warrant before he entered the apartment evidenced the warrant was issued prior to the search); see also People v. Stokes, 364 N.E.2d 300, 302 (Ill. App. 1977) (citations omitted) ("[A]lthough matters declared under oath which are the basis of a finding of probable cause for the issuance of a search warrant by a judicial officer may not be controverted by extrinsic testimony, the demonstration of what is obviously a clerical error is not precluded.").

Lastly, there is no evidence or argument to support why Ms. Werner would have dated the arrest warrant for the following day unless there was a triggering event that needed to occur. See State v. Canelo, 139 N.H. 376, 381–82 (explaining the requirements for an anticipatory search warrant). Rather, the affidavit submitted in support of the arrest warrant contained only facts about the reckless operation and reckless conduct incidents with Ms. Buckley; nothing in the affidavit involved a triggering

event or an indication that a warrant would be needed for January 29 rather than January 28. (See Gillis Aff. Supp. Probable Cause ¶¶ 1–5.) The Court also notes that the date on the arrest warrant is unrelated to the facts supporting the arrest warrant.

The Court finds that the undisputed facts, the circumstances of obtaining and executing the arrest warrant, and the lack of contradicting evidence support concluding that the discrepant dates are a result of a scrivener's error. The discrepancy did not invalidate the arrest warrant.

b. Pretext

Mr. Minson also argues that the troopers' seeking a warrant for his arrest for an event approximately two months prior was a pretext to entering the Days Inn motel room. (Id. at ¶ 22.) The State replies that the statutes of limitation for both charges in the arrest warrant—reckless conduct and reckless operation—had not yet run when the warrant was issued therefore it was valid independent form any pretext. (State's Obj. ¶ 19.)

The Court understands Mr. Minson's argument that the timing of obtaining the arrest warrant was not coincidentally aligned with Trooper Gillis' learning of Mr. Minson's involvement with an alleged drug transaction. It is unquestionable that Trooper Gillis obtained the arrest warrant only after, and because, he had obtained that information was learned. However, nothing about this motivation invalidates the facts and probable cause underlying the arrest warrant. The arrest warrant was entirely based on the facts supporting the reckless conduct and reckless operation charges; Mr. Minson does not allege that the facts in the affidavit fail to allege probable cause. Rather, he alleges that the "circumstances" supporting the arrest warrant were "stale."

Because Mr. Minson was arrested with a warrant, the underlying facts of which he does not contest, there is no need for analysis of exigent circumstances; however, its reasoning in the inquiry applies. The "presence or absence of an ample opportunity for getting a search warrant" is pertinent to an inquiry of whether exigent circumstances existed when a warrant was not obtained. Santana, 133 N.H. at 805 (quoting United States v. Rabinowitz, 339 U.S. 56, 84 (1950) (Frankfurter, J., dissenting), quoted in Theodosopoulos, 119 N.H. at 581). Implicit in this consideration is an acknowledgment that an officer does not have to obtain a search warrant at the point probable cause is established. Id. "[A] police officer is not required to obtain a search warrant as soon as probable cause is established." Massua, 2016 WL 7011361, at *2.

In the absence of exigent circumstances, Trooper Gillis was not required to obtain an arrest warrant temporally to when probable cause arose. Under RSA 625:8, a statute of limitations is tolled at the moment a warrant is issued, and a court may not inquire into the reasonableness of the timing of a warrant's execution. State v. Maxfield, 167 N.H. 677, 680 (2015); see RSA 625:8, V & VI(b). Because there is no obligation or time limit in which an officer must execute an arrest warrant, and because the statutes of limitations had not run on either charge for which the warrant was issued, the Court finds the arrest warrant was valid. Santana, 133 N.H. at 805. That Trooper Gillis' motivation for obtaining the arrest warrant was based on facts not contained in its supporting affidavit has no effect on the warrant's validity.

III. Suppression of Statements

Mr. Minson seeks to suppress the statements from the women who were in the Days Inn motel room, which were used to support the search warrant that the troopers obtained to search the motel room after the protective sweep. The statements the women made concerned Mr. Minson's possession, sale, and distribution of the drugs. (Gillis Aff. Supp. Search Warrant ¶¶ 21–22.) Mr. Minson argues that because the protective sweep was unlawful, the evidence garnered from it must be suppressed and should not have been used in the search warrant affidavit.

"The 'fruit of the poisonous tree' doctrine requires the exclusion from trial of evidence derivatively obtained through a violation of Part I, Article 19 of the New Hampshire Constitution." State v. Cobb, 143 N.H. 638, 649–50 (1999) (quoting State v. Tinkham, 143 N.H. 73, 75 (1998)). "If the evidence in question has been obtained only through the exploitation of an antecedent illegality, it must be suppressed." Id. (quoting State v. Cimino, 126 N.H. 570, 573 (1985)).

Having found that the protective sweep was lawful, supra Part I, the women's statements Mr. Minson seeks to suppress were not fruits of any violations of his privacy; the protective sweep was a lawful search, and the women's statements made upon their arrest as a result of that sweep were therefore also lawful. United States v. Levesque, 625 F. Supp. 428, 438 (D.N.H. 1985), aff'd, 879 F.2d 853 (1st Cir. 1989) ("[W]here there has been no illegal search and seizure, as in the instant case, there is no 'poisonous tree' from which tainted 'fruit' may be harvested."); State v. Socci, 166 N.H. 464, 471 (2014) (quoting State v. Barkus, 152 N.H. 701, 706 (2005)) ("We have recognized that the doctrine applies when 'the primary illegality [is] a Fourth Amendment violation.'").

The Court recognizes that verbal evidence such as the women's statements could be subject to suppression if they were derived from an illegal search. Wong Sun v. United States, 371 U.S. 471, 485 (1963) ("[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."). If the protective sweep was an illegal search, the Court would next determine whether the statements had "been come at by . . . means sufficiently distinguishable to be purged of the primary taint." Socci, 166 N.H. at 471. However, the Court is not bound to apply this analysis to determine whether the evidence the defendant seeks to suppress is a "fruit" if no illegal search has occurred. See State v. Socci, 166 N.H. 464, 472 (2014) (noting trial court did not analyze "whether the taint of this illegality had been purged prior to the defendant's consent" because it had found "that no illegal search had occurred"). Therefore, the women's statements that were contained in the affidavit supporting the search warrant were not obtained in violation of Mr. Minson's rights and will not be excluded.

CONCLUSION

The Court has determined that Mr. Minson's rights under Article 19 of the New Hampshire Constitution have not been violated. The arrest warrant obtained by Officer Gillis was proper and based on sufficient facts and probable cause. Also, the Court finds that the inaccurate date on the search warrant was a scrivener's error that does not invalidate the warrant. The protective sweep of the motel room was a result of the troopers' reasonable suspicion of danger based on articulable facts, and therefore was

proper; and thus the statements the women gave, assumingly derived from the protective sweep, were not "fruits" of an improper search subject to suppression.

For these reasons, Mr. Minson's motion to suppress is DENIED.

SO ORDERED.

8-27-18
DATE

David W. Ruoff
Presiding Justice

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. SUPERIOR COURT

State of New Hampshire

v.

Shawn Minson

No. 213-2018-CR-00043

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

After a trial by stipulated facts, defendant Shawn Minson was convicted of one count of possession of the controlled drug cocaine, one count of possession with intent to dispense the controlled drug fentanyl, and one count of possession with intent to dispense the controlled drug crack cocaine. The defendant now moves for the Court to vacate his conviction and grant a new trial. The defendant alleges that a police report that the prosecution did not provide until five days after trial but before sentencing constitutes previously undisclosed favorable evidence that would have affected this Court's decision on the defendant's motion to suppress and thus warrants a new trial. For the following reasons, the defendant's motion is DENIED.

FACTS

The parties stipulated to the facts elicited at the hearing on the defendant's motion to suppress, which were as follows. On November 28, 2017, Cynthia Buckley called a motor vehicle complaint into the New Hampshire State Police, reporting that a car had passed her unlawfully, tried to force her off the roadway, and, at one juncture, had exited his vehicle. (Gillis Aff. Supp. Arrest Warrant ¶ 2.) In her written report, Ms.

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1/9/19
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Buckley stated that she was traveling north on Route 10 from Keene to Gilsum when she observed headlights "way in the distance" but that, within minutes, a vehicle was driving on her "butt." (Id. at ¶ 4.) Ms. Buckley slowed down as she came down a hill and the vehicle passed her. (Id.) Assuming the vehicle was gone, and having lost sight of the vehicle, Ms. Buckley turned on her high beams and turned left onto Main Street in Gilsum. (Id.) Ms. Buckley stated that after she turned, she observed the same vehicle stopped and a male party exited the vehicle and screamed, "what the fuck[']s your problem." (Id.) Ms. Buckley then passed the vehicle and travelled further, and she was passed by the vehicle in a no-passing zone. (Id. at ¶ 5.) The vehicle, being in front of Ms. Buckley, then slowed to a rate of 5 miles per hour and appeared it was going to allow Ms. Buckley to pass but cut her off. (Id.) Ms. Buckley stated that, as she continued driving, the vehicle "brake checked" her again. (Id.) The vehicle drove left of the center of the road and Ms. Buckley attempted to pass the vehicle, but the vehicle drove toward hers, almost pushing her off of the road. (Id.) Ms. Buckley stated that she then pulled into a driveway and waited until she could no longer see the vehicle's taillights. (Id.)

Ms. Buckley provided registration information of the vehicle involved, which came back to a vehicle registered to Mr. Minson. (Id. at ¶ 2.) Later on the day of this incident, State Trooper Aaron Gillis made contact with Mr. Minson and observed the aforementioned vehicle in Mr. Minson's driveway. (Id. at ¶ 3.) Mr. Minson admitted to being on his way home from work during the time the events Ms. Buckely reported had occurred, and he admitted that an incident had occurred with another operator. (Id.) Mr. Minson admitted to passing a vehicle, and he said he thought the operator may have

been "drunk" and that the vehicle had "high beamed him," at which time Mr. Minson slowed down to approximately 10 miles per hour. (Id.) Mr. Minson said, regarding the operator, "she was an asshole." (Id.) When asked about being of the center of the roadway during his interaction with the operator, Mr. Minson admitted he was. (Id.) Trooper Gillis asked Mr. Minson if he exited the vehicle and Mr. Minson paused, lowered his head and looked left, and answered in the negative. (Id.) Trooper Gillis testified at the hearing that, within the following week, he had drafted a warrant affidavit for the offenses of reckless operation and reckless conduct for Mr. Minson.

Sixty-one days later, on January 28, 2018, Trooper Gillis obtained information from a cooperating individual that Mr. Minson was selling a large quantity of crack cocaine and was staying at the Days Inn in Keene. (Bernier Aff. ¶ 6.) Trooper Gillis contacted Officer Andrew Vautrin of the Keene Police Department ("KPD") and advised him of the information he had about Mr. Minson. (Id. at ¶ 7.) Officer Vautrin informed Trooper Gillis that he had observed Mr. Minson's vehicle parked at the Days Inn, which is located near the New Hampshire State Police Troop C barracks, and had confirmed it was Mr. Minson's vehicle through a motor vehicle registration check. (Id. at ¶ 8.)

That same day, January 28, 2018, Trooper Gillis secured an arrest warrant for Mr. Minson for the crimes of reckless conduct and reckless operation based on the November 28, 2017 incident involving Ms. Buckley. (Id. at ¶ 9; State Obj., Arrest Warrant.) Later that day, Officer Vautrin and troopers from the New Hampshire State Police Troop C responded to the Days Inn and advised the Days Inn clerk of the arrest warrant for Mr. Minson. (Bernier Aff. ¶ 10.) The troopers and Officer Vautrin learned that Mr. Minson was staying in Room #231 on the second floor. (Id.) Officer Vautrin

asked the clerk to contact Mr. Minson via the telephone and request Mr. Minson to respond to the front desk. (Id. at ¶ 11.) Troopers and Sergeant Daniel Brow went to the second floor and intercepted Mr. Minson at the open doorway of Room #231, advising him of the arrest warrant and arresting him. (Id. at ¶ 12.)

While Trooper Gillis and Sergeant Brow were taking custody of Mr. Minson, Sergeant Brow observed three women inside the motel room moving about, one of whom quickly turned away from Sergeant Brow, turning her back to the door and to the troopers. (Id. at ¶ 13.) Troopers went into the motel room while Mr. Minson was being handcuffed, and they observed a large "wad" of money on the center of the made bed, as well as a plastic baggie containing what appeared to be crack cocaine. (Id. at ¶¶ 14–15.) One of the women, Jessica Johnson, was asked if she had any identification, and she said she did and pointed to her purse on the bed. (Id. at ¶ 16.) Trooper Gillis asked her if it was OK for him to retrieve her identification from her purse, and she said yes. (Id.) As Trooper Gillis moved toward the purse, which was open and unzipped, he observed a plastic baggie containing what appeared to be crack cocaine inside the purse. (Id.) Ms. Johnson confirmed that it was crack cocaine and that it belonged to her. (Id.)

Another woman in the room, Kari Estey-Mansfield, also advised that her identification was in her purse, and Trooper Gillis asked if she consented to him obtaining her identification from her purse, to which she replied that she had marijuana in her purse but consented to Trooper Gillis retrieving her license. (Id. at ¶ 17.)

The third woman in the room, Brittany Steele, was identified and left the room, and she was not in possession of any weapons or any contraband. (Id. at ¶ 18.)

The motel room was secured and Trooper A. Caraballo arrived on scene to continue securing the motel room while a search warrant was obtained. (Id. at ¶ 19.) Mr. Minson, Ms. Johnson, and Ms. Estey-Mansfield were taken into custody and transported to the KPD, where they were informed of their Miranda rights and were interviewed separately. (Id. at ¶ 20.) During her interview, Ms. Estey-Mansfield advised Trooper Gillis that she had purchased heroin from Mr. Minson in the motel room but that she had not yet paid for it due to the arrival of the police. (Id. at 21.) During Ms. Johnson's interview, she said that the crack cocaine in her purse was given to her by Mr. Minson for free. (Gillis Aff. Supp. Search Warrant ¶ 21.) She explained that Mr. Minson reached out to her via Facebook Messenger and told her he had illicit drugs, and she said she was picked up by one of Mr. Minson's "Runners," who took her to the Days Inn. (Id.) She also said that Mr. Minson was keeping the drugs in a safe within the room, which he had locked after he handed out drugs to Ms. Estey-Mansfield, Ms. Steele, and herself. (Id.) She explained that Mr. Minson had held out about three "eight balls of crack cocaine" in his hand and said he was running "low." (Id.) She also said that the baggie of crack cocaine that was on the bed had belonged to Ms. Steele, who had thrown the baggie on the bed upon seeing the police. (Id.)

Following the execution of the search warrant that was based on the above information, a quantity of heroin and crack/cocaine was located in the Days Inn room. (Id. at ¶ 22.) The parties have stipulated that the suspected drugs found during the search of the defendant's hotel room were sent to the state forensic laboratory for testing. (Stip. Plea.) Also, over 29 grams of fentanyl, over 13 grams of crack cocaine,

and the presence of cocaine found in two bag fragments were in the safe in the room. (Id.)

The defendant moved to suppress the physical evidence discovered in the hotel room and statements made by the defendant and the others. (Def.'s Mot. Suppress ¶ 20.) This Court heard both parties at the suppression hearing on August 6, 2018 and denied the defendant's motion to suppress. The Court then held a bench trial on the stipulated facts contained above on September 20, 2018 and found the defendant guilty on all three charges. Five days later, the State provided the defense with a police report from Officer Vautrin.[1] (Vautrin Report.) In its correspondence to the defense, the State has explained that it did not receive this report from Vautrin until September 25 because Vautrin had not received the State's emails, and he was only prompted to check his email and provide the police report when he encountered counsel at a grand jury proceeding. (State's Obj., Attachment.)

ANALYSIS

In his motion for a new trial, the defendant argues that if the withheld evidence was considered at the suppression hearing, the Court would have granted the motion to suppress and, thus, the withheld evidence would have been favorable to the defendant's trial because the verdict "was based on evidence that the court decided not to suppress," and "[h]ad the court heard the new evidence and suppressed the evidence, the verdict would have been different." (Def.'s Mot. New Trial ¶ 4.) Specifically, the defendant argues that his waiver of his right to a jury trial and other rights in favor of pursuing a trial by stipulated facts "was based on his assumption that he had obtained

[1] Officer Vautrin's report is attached to the State's objection to the motion for new trial. The Court refers to the report as "Vautrin Report."

and reviewed all exculpatory evidence within the possession of the State," and that "[t]he failure to disclose Officer Vautrin's report makes Mr. Minson's waiver of his rights not knowing." (Id. at ¶ 11.) In making these assertions, the defendant's motion concerns his waiver of a jury trial and not solely the evidence presented at the bench trial.

The defendant has conflated two issues in an attempt to have this Court revisit its suppression order, or at least to speculate how Officer Vautrin's report would have affected the suppression issue in relation to the bench trial. First, the defendant seeks to have Officer Vautrin's report, as previously undisclosed evidence, produce a new trial; second, the defendant seeks to upend his waiver of his right to a jury trial by alleging it was not knowing and intelligent. These are two separate issues. The Court addresses how these issues are separate by first analyzing the defendant's waiver to a jury trial.

I. Waiver Issue

A trial of stipulated facts is a device that avoids the necessity for a full trial and the waiver-forfeiture consequences that attend a nolo or guilty plea. 5 Crim. Proc. § 21.6(c) (4th ed.).

> Under this procedure, . . . the defendant enters a plea of not guilty, after which the case is submitted to the judge for decision upon the preliminary hearing transcript or other statement of facts agreed to by the parties. If, as is likely, the judge finds the defendant guilty, the defendant will have retained his usual right to appeal. This means, for example, that if defendant's pretrial motion to suppress was denied, he is not foreclosed from raising that issue on appeal.

Id. A defendant does not waive all of his or her rights when agreeing to a trial by stipulated facts, but does waive the right to a jury trial.

In regard to a knowing waiver of the right to a jury trial, the New Hampshire Supreme Court stated that "the New Hampshire Constitution does not require a colloquy prior to every trial stipulation." State v. Jaroma, 139 N.H. 611, 614 (1995). When a defendant agrees to trial by stipulated facts, if the facts stipulated to the elements necessary for conviction such that the stipulated facts were the "functional equivalent of a guilty plea," the Court must "ensure the defendant's understanding of the stipulation or his acquiescence to its use." Id. at 615.

Given the New Hampshire law regarding a trial to stipulated facts and the defendant's waiver of the right to a jury trial, the Court must analyze the facts to which a defendant has stipulated that resulted in a conviction. Here, the defendant stipulated to all facts elicited at the suppression hearing. These stipulated facts provided more than enough evidence to make the stipulations the functional equivalent of a guilty plea. In arguing that the defendant did not knowingly waive his rights because Officer Vautrin's report was withheld, the defense effectively seeks to withdraw the defendant's stipulation to facts. The defendant's motion for new trial confirms this, as it states that the defendant "waived his trial rights and allowed the court to enter a guilty finding based on a stipulated offer of proof." (Def.'s Mot. New Trial ¶ 11.) Therefore, the Court could properly analyze the defendant's motion for new trial as a withdrawal of a guilty plea rather than a motion for new trial. See State v. McGurk, 157 N.H. 765, 774 (2008) (construing the defendant's motion for new trial, in which defendant argued new evidence "changed the status of the evidence," as a request to withdraw a guilty plea). However, the defendant has not stated such a request, nor as he articulated a request for a new trial, despite the motion's caption. According to his motion, the defendant

seeks for the Court to determine that Officer Vautrin's report would have affected its suppression order, not that the report would have directly affected the bench trial. (Def.'s Mot. New Trial ¶¶ 1–2, 5–6, 8–11.)

Whether the Court addresses the defendant's motion as a motion for new trial or as a request to withdraw a guilty plea, the Court would not reach its suppression order; the Court's denial of the motion to suppress still stands regardless of the legal avenue.[2] Because the defendant has moved for a new trial in form, even if not in substance, and because the defendant has been provided previously undisclosed evidence, the Court will apply the standard for a motion for a new trial. The Court notes that neither option would provide the remedy that the defendant appears to seek. If the defendant decides to seek to withdraw the stipulated facts, the functional equivalent of withdrawing a guilty plea, and if the Court granted the withdrawal,[3] the Court's suppression order would still stand while the defendant's charges would be set for a new trial.

II. New Trial

"A new trial may be granted in any case when through accident, mistake or misfortune, justice has not been done and a further hearing would be equitable." RSA 526:1. The decision of whether to grant a new trial lies within the sound discretion of the trial court. Burroughs v. Wynn, 117 N.H. 123, 125–26 (1977). The burden on a motion for new trial is as follows:

[2] Even if styled as a motion to reconsider the suppression order, there is nothing in the report that would have impacted the Court's analysis in denying the motion to suppress. Officer Vautrin's report is generalized, quite brief, and does not articulate anything that the Court could discern as impeaching the evidence introduced at the hearing on the motion to suppress. In fact, the report is substantially corroborative of the State's evidence.

[3] "It is within the trial court's discretion to allow the withdrawal of a guilty plea." State v. McGurk, 157 N.H. 765, 774 (2008).

> Once the defendant proves that the evidence is favorable, the next issue is whether the State knowingly withheld the evidence. If the defendant carries this burden, there is a presumption that the evidence is material and the burden shifts to the State to prove, beyond a reasonable doubt, that the undisclosed evidence would not have affected the verdict. If, however, the defendant fails to prove the State *knowingly* withheld the evidence, then the defendant retains the burden to prove that the evidence is material. When the defendant retains the burden to prove materiality, we apply the federal standard; i.e., the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

State v. Etienne, 163 N.H. 57, 88–89 (2011) (quoting State v. Shepherd, 159 N.H. 163, 170–71 (2009)) (citations omitted). Thus, if favorable evidence was withheld but not knowingly, the defendant retains the burden and must show the evidence was material. Id. "The withheld evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" State v. Dewitt, 143 N.H. 24, 33 (1998) (quoting State v. Laurie, 139 N.H. 325, 328 (1995)).

As noted above, the defendant has not argued that Officer Vautrin's report was favorable to the defendant's case at trial but rather focused on the speculative and retrospective effect the report could have had on the Court's suppression order. Also as stated, the defendant's motion raises a separate issue regarding his waiver of his right to a jury trial, which is not relevant to a motion for new trial. Therefore, the defense has failed to raise any basis for a new trial.

Notwithstanding the defendant's failure to explain how Officer Vautrin's report would have been favorable to the defendant at trial, rather than at the suppression hearing, the Court now addresses the question, but nonetheless finds that the report would not have been favorable. The defendant asserted that the report would have

been favorable to the defendant during the suppression hearing because it contradicts that the police had knowledge that the defendant was selling large quantities of crack cocaine from his motel room, and that it contradicts the State's assertion that the search of the hotel room was a protective sweep because of timing. (Def.'s Mot. New Trial ¶¶ 5–6.) These issues are only relevant to the unaffected and undisturbed suppression issue. And, the Court does not find that the report would have otherwise been favorable to the defendant at the bench trial. The report does not contradict or elaborate on any of the evidence relevant to the defendant's conviction; indeed, the defense has not asserted that it does.

Neither does the Court find that a new trial would be equitable. As the defense appears to understand, Officer Vautrin's report would have no bearing on the issues relevant to the defendant's charges and conviction. The fact that Officer Vautrin did not receive the State's emails in time to provide the report before the bench trial, a mistake that RSA 526:1 accounts for, does not change that his report is irrelevant to the facts at trial.

Thus, the Court finds that the defendant has failed to meet its burden to show that the previously undisclosed evidence, Officer Vautrin's report, would have been favorable to his trial and the motion for new trial is DENIED.

SO ORDERED.

1-9-19
DATE

David W. Ruoff
Presiding Justice