

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0371

State of New Hampshire

v.

John Gates

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

REPLY BRIEF FOR THE DEFENDANT

Christopher M. Johnson
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 15149
603-224-1236
(15 minutes oral argument)

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QUESTION PRESENTED

Whether the court erred by denying the motion to suppress the boots, because Gates had a reasonable expectation of privacy in the vestibule and utility closet.

Issue preserved by defense motion to suppress, the State's objection, the hearing on the suppression motion, the defense motion to reconsider, the State's objection, and the court's rulings. AD 31-46; A9-A23; M 1-269; R 3-10.*

* Citations to the record are as follows:

"A" refers to the separate appendix filed with Gates's opening brief;

"AD" refers to the supplement attached to the opening brief containing the orders from which Gates appeals;

"DB" refers to the designated page of Gates's opening brief;

"M" refers to the consecutively-paginated transcript of the two-day suppression hearing, held on August 30 and September 12, 2018;

"R" refers to the transcript of the hearing on the motion to reconsider, held on January 24, 2019;

"SB" refers to the designated page in the State's brief;

"T" refers to the consecutively-paginated transcript of the seven-day trial, held in March and April, 2019.

STATEMENT OF THE CASE AND FACTS

In his opening brief, Gates contends that the trial court erred in denying his motion to suppress the boots found in the utility room, because Gates had a reasonable expectation of privacy in the vestibule and utility room. DB 14-27. In its brief, among other points offered in opposition to a reasonable expectation of privacy, the State cites evidence introduced at trial, rather than at the suppression hearing. SB 15, 18, 19, 22. In addition, with respect to the vestibule claim, the State argues that the absence of the filing of an affidavit with Gates's motion "should be fatal to his claim." SB 15. This reply brief addresses those two points.

I. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE BOOTS FOUND IN THE UTILITY CLOSET, AND ALL EVIDENCE DERIVED FROM THE BOOTS.

A. The Court must reject the State's argument based on Superior Court Rule 94 and the absence of an affidavit.

Citing Superior Court Rule 94,¹ the State argues that the lack of an accompanying affidavit signed by a person with personal knowledge of the facts should defeat Gates's claim of error in the denial of the motion to suppress. SB 15. The affidavit rule seems intended to serve the goal of enabling trial courts to decide whether to hold an evidentiary hearing on a motion to suppress, by forecasting the extent to which facts relevant to the motion will be disputed. The rule does not erect a rigid bar precluding a court from holding a hearing or deciding the merits of a motion. See State v. Bean, 120 N.H. 946, 947-48 (1980) (noting that, under Superior Court Rule 94, trial court has discretion to rule on suppression motion even when not strictly compliant with the rule). Here, the trial court exercised its discretion to rule on the suppression motion on its merits. Therefore, the lack of an affidavit had no lasting significance.

Moreover, even if the lack of an affidavit could have significance on appeal after a merits-based ruling in the trial court, the ordinary preservation rules still apply. Here, those

¹ Currently located at N.H. Rules of Criminal Procedure, Rule 15(b)(2)(C).

rules would require the State, at trial, to have objected to the motion to suppress on the ground that no adequate affidavit accompanied the motion. See, e.g., State v. Willis, 165 N.H. 206, 223 (2013) (applying preservation obligation to State, with respect to arguments it makes on appeal); State v. Boyle, 148 N.H. 306, 309 (2002) (same). Because the State at trial did not do so, the State cannot prevail on the argument on appeal.

B. The Court must reject the State's argument to the extent based on evidence elicited only at trial.

On several occasions in the argument section of its brief, the State cites evidence elicited at trial. SB 15, 18, 19, 22. At one point, the State cites the defense theory at trial as contradicting the argument made in the suppression motion. SB 21-22. This Court must reject arguments relying on evidence at trial. In State v. Gordon, 161 N.H. 410, 414 (2011), this Court observed that because “the trial court ruled upon the admissibility of the challenged evidence before trial, [this Court will] consider only the offers of proof presented at the pretrial hearing.” See also State v. Nightingale, 160 N.H. 569, 573 (2010) (same). The Court “so limit[s its] review to avoid the pitfall of justifying the court’s pre-trial ruling upon the defendant’s response at trial to the evidence.” Gordon, 161 N.H. at 414. For that reason here, this Court must reject

any argument based on evidence other than that introduced at the pre-trial suppression hearing.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in Mr. Gates's opening brief and those to be offered at oral argument, Mr. Gates requests that this Court reverse his convictions.

This brief complies with the applicable word limitation and contains fewer than 1100 words.

Respectfully submitted,

/s/ Christopher M. Johnson

By _____
Christopher M. Johnson, #15149
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

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: July 3, 2020