THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0539

State of New Hampshire

v.

Bryan Weston Luikart

MEMORANDUM OF LAW IN LIEU OF BRIEF PURSUANT TO SUPREME COURT RULE 16(4)(b)

STATEMENT OF THE CASE

On February 5, 2018, the defendant pleaded guilty to one count of simple assault, one count of violation of a protective order, and two counts of contempt of court. NOA 13; *see also* SA 16-17.[1] The victim was the defendant's ex-wife. NOA 5. The sentencing court (*Kelly*, J.) imposed a sentence of ninety days incarceration, suspended for two years with various conditions, including a requirement to "undergo an evaluation by an accredited batterers [sic] intervention program and participate in any programming, if indicated." NOA 13; Tr.: 5.

The defendant entered the Clara Martin Center's "batterer's intervention program" and was "terminated from that program on January 24th of 2019." Tr.: 5. On February 8, 2019, the State filed a motion to

[1] References to the record are as follows:
"SA __" refers to the documents appended to this memorandum and page number.
"DB_" refers to the defendant's brief and page number.
"DBA__" refers to the appendix to the defendant's brief and page number.
"NOA__" refers to the notice of appeal and page number.
"Tr.:_" refers to the hearing transcript and the page number.

impose the suspended sentence. Tr.: 5-6. The defendant then entered another batterer's intervention program, which he successfully completed on May 30, 2019. Tr.: 6. On Thursday, February 28, 2019, the State withdrew its motion to impose. Tr.: 14.

On March 7, 2019, the State brought another motion to impose. SA 21-22. The motion was brought in response to an email sent by the defendant to the victim on Sunday, March 3, 2019. The court held a hearing and imposed a sentence of ten days. Tr.: 37. The defendant's motion to reconsider was denied. DBA 37.

This appeal followed.

STATEMENT OF FACTS

On July 23, 2019, the trial court (*Bamberger*, J.) held a hearing on the motion to impose. Tr.: 1. By stipulation with the defense, the State introduced an email written by the defendant and sent to the victim. Tr.: 4. The email, sent on March 3, 2019, Tr.: 34, read:

> If you want to be on friendly communicating terms for the best interest of [their mutual child] you might want to consider not trying to trigger the suspended sentence and not trying to continue hurting me. You are the abuser.

Tr.: 6. The State then told the court that, in its view, the email constituted witness tampering. Tr.: 6-7.

Defense counsel responded that the couple was involved in a "parenting plan in the family case." Tr.: 14. He said that the defendant believed that when the victim learned that he had been terminated from the Clara Martin program, "she immediately went to [the prosecutor] and

encouraged him to file a motion to impose." Tr.: 14. Defense counsel acknowledged that this might not have been "factually correct, but that was my client's understanding." Tr.: 14. Defense counsel continued. "what he was saying to her after he thought the matter was done with, is that maybe he didn't say it as artfully as he could have, but we should be working together rather than filing things against each other." Tr.: 14.

Defense counsel told the court that the defendant and the victim had a "long term of animosity between each other," "a tit for tat." Tr.: 17. And that the victim had "filed more than 30 pending motions without judgments." Tr.: 17. When the State objected to this characterization of the victim's actions in the family court, defense counsel responded that the information had been offered so that the court could understand what was going through the defendant's mind at the time that he sent the email. Tr.: 17-18. Defense counsel characterized the defendant's motive as that of asking the victim, "[P]lease think about not filing any more motions" that would get him "in trouble." Tr.: 18.

The court responded:

> But there's a difference between not filing any more motions and saying, and I quote, 'not trying to trigger the suspended sentence.' That's a - I think that's different than just filing a motion. That's what's concerning. It concerns me on both of the issues you've raised. One, I think it clearly goes to mental state. He clearly understood that whatever was going on, from her perspective, could cause to the basis for imposition of a suspended sentence, and it was significant enough for him to be concerned that she may attempt to trigger the suspended sentence, hence the email. I don't know how I can interpret that any other way.

Tr.: 18-19.

The court continued:

> ["T]rigger a suspended sentence[“] is not an ordinary phrase of art that's used in the populace generally. That suggests, at least a rudimentary understanding of the legal process. And that's what's disconcerting here. It's not that he said, you know, you're really not being very cooperative with me, I'd really appreciate if you'd be more cooperative.

Tr.: 19-20. The court concluded: "But that's not what he said here. He said, do not consider trying to trigger a suspended sentence if you want to work cooperatively with regard to our daughter." Tr.: 20.

Later on, the court pointed out that, although defense counsel kept using the word "please," the email was "more pointed" than that. Tr.: 22. In the court's view, the email meant:

> If you want to have a communication with me, then you'd better not trigger this, and you'd better stop trying to hurt me. There's no please, no sense of I'm trying to reach out to cooperate more fully with you, but you're making it difficult. It's much more strident than that.

Tr.: 22.

The trial court then ruled:

> I must say that I find the language in this email to be threatening. I believe that it was your client's intent to make it clear that if you go forward with trying to trigger this suspended sentence, then our communication is going to be adversely affected. And further, he didn't say he was being hurt; he said stop trying to continue hurting me. And I understand the emphasis you have on his emotional response to what he views is her attempts to hurt her (sic), but I think this email is sufficient to grant the State's motion, at least generally.

Tr.: 26.

The victim told the court that the email that the State had introduced was "a series of nine emails that [the defendant] sent [her] within an hour on that same evening. And the type of communication [was] not unlike many, many other communications" he had sent, "although this one rose to a different level." Tr.: 29. She said that she was "often the target of his verbal abuse and other forms of abuse." Tr.: 30. She said that there was "no way" "to continue towards a healthy co-parenting relationship" if she continued to receive emails like the one that the State had introduced. Tr.: 30.

Defense counsel countered that the defendant was a professor at the medical school and could be terminated if he received a 90-day sentence. Tr.: 33. Defense counsel said that the defendant was on leave at the time of the hearing. Tr.: 33.

The defendant told the court that it was never his intention to threaten the victim. Tr.: 34. He said that he thought that he was "a great parent" but that he was "afraid to co-parent" with the victim. Tr.: 34. He told the court that he knew that the motion to impose had been dropped on February 28, 2019. Tr.: 34. He said that he was sorry and that he did not want to be back in the courtroom again. Tr.: 35.

After hearing from both counsel, the victim, and the defendant, the court imposed a sentence of ten days, with the balance of the sentence extended for another twelve months. Tr.: 37. The court then told the defendant:

> This can never happen again. If this happens again, you need to understand that it's not going to be 10, 20, 30, 40; it's going to be the balance of the 80 days. And if it comes to fruition there's a criminal matter, particularly of this sort, then

> you can expect that you'll be spending a substantial amount of time in jail and possibly time in prison, so you need to be cognizant.

Tr.: 37.

ARGUMENT

THE EVIDENCE SUPPORTING THE IMPOSITION OF THE SUSPENDED SENTENCE WAS SUFFICIENT.

The defendant contends: (1) that the "mere possibility" that a motion to impose might be filed was insufficient to satisfy the immediacy requirement of RSA 641:5, I; (2) that the State failed to prove that the defendant knew that an official proceeding was pending or about to be instituted; and (3) that the State failed to prove that the defendant attempted to induce the victim to withhold testimony or information. DB: 12, 25, 36.

To prevail on a challenge to the sufficiency of the evidence, a defendant must show that no rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *State v. Craig*, 167 N.H. 361, 369 (2015). This Court examines the evidence in the context of all the evidence, not in isolation. *Id.* Further, the fact finder may draw reasonable inferences from facts proved. *Id.* at 369-70. Because a challenge to the sufficiency of the evidence raises a claim of legal error, this Court's standard of review is *de novo. Id.* at 370. The evidence is viewed in the light most favorable to the prevailing party. *State v. Stanin*, 170 N.H. 644, 648 (2018).

A person is guilty of witness tampering if:

> Believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:
> (a) Testify or inform falsely; or
> (b) Withhold any testimony, information, document or thing…

RSA 641:5, I(a), (b). "'Official proceeding' means any proceeding before a legislative, judicial, administrative or other governmental body or official authorized by law to take evidence under oath or affirmation including a notary or other person taking evidence in connection with any such proceeding." RSA 641:1, II.

The evidence was clear that the defendant and the victim were engaged in an ongoing court case involving their minor child. Indeed, at the hearing on the motion to impose, defense counsel told the court that the couple was involved in a "parenting plan in the family case." Tr.: 14. It was also clear that the defendant, at the time that he sent the email, knew that his criminal case was ongoing.

In that regard, the timing of the first motion to impose, the motion's withdrawal, and the defendant's email are significant. The prosecutor filed the first motion to impose on February 8, 2019. Attached to the February 8, 2019 motion to impose was a January 24, 2019 letter from the Clara Martin Center. SA: 20. The letter, addressed to the defendant, gave notice that the center was dismissing the petitioner from the program. SA: 20. The staff wrote that the defendant that the defendant was non-compliant for failing to comply with his rules of treatment. SA: 20. These included: (1) that he acknowledge that he needed help as a result of "past violence/abuse towards others; (2) that he agree to accept feedback from facilitators and

group members; (3) that he refrain from abusive and violent behaviors; and (4) that he agree to learn skills to avoid "violent/abusive behavior patterns." SA: 20. At some point thereafter, the defendant filed notice with the court that, on February 19, 2019, he had entered a different program. Tr.: 5-6. In response, on Thursday, February 28, 2019, the State withdrew the motion to impose. Tr.: 13-14.

On Sunday, March 3, 2019, the defendant sent the email to the victim. From this sequence of events, the defendant knew that the motion to impose had been filed and then withdrawn. It was also clear that, at the time that he sent the email, he understood that he was still under court supervision because he had taken steps to enroll in a new program to avoid the imposition of sentence.

Although there was evidence that the defendant's actions had prompted his termination from the program, leading the State to act, his lawyer told the court that the defendant still blamed the victim. *See* Tr.: 14 (The defendant believed that the victim "immediately went to [the prosecutor] and encouraged him to file a motion to impose."). If it was true that defendant believed that the victim could "trigger" his suspended sentence, he clearly understood that proceedings could be imminent if he failed to satisfy the terms of his suspended sentence. *Cf. Commonwealth v. Figueroa*, 982 N.E.2d 1173, 1179 (Mass. 2013) (An "investigation of a possible parole violation is a 'criminal proceeding.'"); *United States v. Ramos*, 731 Fed. Appx. 329, 331 (5th Cir. 2018) (witness tampering where threats obstructed investigation into violation of supervised release).

The defendant threatened the victim so that she would withhold any information that might lead the prosecutor to file a second motion to

impose. Since he believed that she had done it once, he threatened her so that she would not do it again. *Cf. State v. Carr*, 167 N.H. 264, 275-76 (2015) (telling a witness to tell the police "you don't know anything" constituted witness tampering); *see also State v. Clarke*, 117 A.3d 1045, 1046 (Me. 2015) (witness tampering where the defendant told the witness that he "should be quiet and not say anything, [he] didn't know anything"). If he did not know that he continued to be under supervision, and that failure to comply with the terms of his supervision could result in an "official proceeding," then the defendant's email makes no sense. He knew that he continued to be under court supervision as demonstrated by his request that she remain silent about future infractions. He admitted as much when he referred to her silence as a way of avoiding "trigger[ing] the suspended sentence" and "hurting" him. Tr.: 6.

The email implicitly threatened the victim through the family court proceeding. The email threatened the "friendly communicating terms for the best interest of [their mutual child]," if she tried to "trigger" the suspended sentence. Tr.: 6. The context is important because the email was sent in response to an email sent by the victim updating the defendant on their child's progress. SA: 23. The entire exchange was attached to the State's pleading. SA: 23. In that context, it is clear that the defendant was threatening the victim that he could use the ongoing family court proceedings to refuse to cooperate with her if she reported his noncompliance with the conditions set in the criminal case. *Cf. State v. Kazulin*, 121 Wash. App. 1033, 2004 WL 958052, *5 (Wash. Ct. App. May 4, 2004) (witness tampering where defendant intended to induce the victim "to comply with his requests by suggesting that he would present testimony

that could threaten her custody of their children if she failed to do what he asked") (unpublished).

The defendant's counsel explained as much to the court, telling it: "[M]y client understands the parenting plan in the family case. It's stated the parents should be *working cooperatively* in order to raise their child." Tr.: 14. In that light, the defendant's choice of words is significant. When he wrote, "[i]f you want to be on friendly communicating terms," he was clearly referring to the parenting plan. His threat was that if she reported his noncompliance, he would tell the family court that she was not working cooperatively. Indeed, given the opportunity to address the court, the defendant complained that co-parenting with the victim was not easy. Tr.: 34-35.

Although the defendant contends that the State did not prove that the defendant attempted to "induce the victim to withhold testimony, information, documents, or things from law enforcement," DB: 29, the State proved exactly that. His lawyer's representation that the defendant "had reason to believe that [the victim] had interfered improperly with his counseling at the Clara Martin Center and that she had caused the first motion to impose to be filed in bad faith," DB: 29, is only a representation. No evidence was introduced that the victim had interceded. And although he asserted that he blamed the victim, he seemed to be willing to make any representation that would shift the blame. For example, he blamed the Clara Martin Center and filed a complaint against the place, but did not acknowledge that he had received a letter critical of his attitude. The email to the victim was simply more of the same behavior. Tr.: 6 (Email: "You are the abuser."); *see also* SA: 23.

In short, the evidence was sufficient that the defendant knew that there was more than a "mere possibility" that his suspended sentence could be imposed if the court learned of the non-compliance with the court's conditions. The evidence was sufficient to show that, if the victim reported his non-compliance, the State would file a motion to impose, just as it had the previous February. And the evidence was sufficient to prove that, in light of their ongoing issues with their minor child, threatening non-cooperation in the family court proceedings could be an effective way of buying the victim's silence. The trial court made no error. Its judgment should be affirmed.

CONCLUSION

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

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD
Attorney General

April 21, 2020

/s/*Elizabeth C. Woodcock*
Elizabeth C. Woodcock
N.H. Bar ID No. 18837
Assistant Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF COMPLIANCE

I, Elizabeth E. Woodcock, hereby certify that pursuant to Rule 16(4)(b) of the New Hampshire Supreme Court Rules, this brief contains approximately 2,902 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 21 2020 /s/*Elizabeth C. Woodcock*
Elizabeth Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's memorandum of law in lieu of brief shall be served on Gary Apfel, Esquire, counsel for the defendant, through this Court's electronic filing system.

April 21, 2020 /s/*Elizabeth C. Woodcock*
Elizabeth Woodcock

APPENDIX
TABLE OF CONTENTS

Acknowledgement of Rights-Class A Misdemeanor-February 5, 2018…..16

State's Motion to Bring Forward and Impose Suspended Sentence-
February 8, 2019……..18

State's Motion to Bring Forward and Impose Suspended Sentence-
March 7, 2019……..21

State's Objection to Defendant's Motion to Reconsider-
August 9, 2019…….....24

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **2nd Circuit - District Division - Lebanon**

Case Name: **Bryan Luikart**

Case Number: **457-2017-CR-1104** (if known) , 17-538, 17-1626, 18-151

ACKNOWLEDGMENT OF RIGHTS - CLASS A MISDEMEANOR

I, Bryan Luikart of Lebanon, NH

have been charged in the **Lebanon District Division** with the following offense(s):

simple assualt, violation of protective order, contempt (2)

The statements made below shall apply to each and every complaint, if there be more than one, to which I intend to plead guilty or no contest.

If I am not a citizen of the United States, I understand that conviction of the crime(s) for which I intend to plead GUILTY or NO CONTEST may have immigration consequences, including but not limited to, deportation from the United States, exclusion from admission into the United States, or denial of naturalization pursuant to the laws of the United States.

I understand that the complaint is one accusing me of a Class A Misdemeanor(s), and that I have the right to be represented by a lawyer of my own choosing and at my own expense, and that if I am unable to afford a lawyer the Court will appoint one for me subject to an order of reimbursement based on my ability to pay.

☑ I am represented by **George Ostler**, a lawyer admitted to practice in New Hampshire. I am satisfied with my lawyer and all explanations have been clear.

☐ I do not want a lawyer. I understand and know what I am doing. I hereby waive my right to a lawyer. I understand that I do not have to plead GUILTY or NO CONTEST and that even after signing this form I still do not have to plead GUILTY or NO CONTEST.

I understand that by pleading GUILTY or NO CONTEST to the charge(s) that I am giving up the following constitutional rights as to the charge(s):

MY RIGHT to a speedy and public trial

MY RIGHT to see, hear and question all witnesses. This gives me the opportunity and right to confront my accusers and cross-examine them myself or through my attorney

MY RIGHT to present evidence and call witnesses in my favor and to testify on my own behalf

MY RIGHT to remain silent and not testify at a trial

MY RIGHT to have the Judge *ORDER* into court all evidence and witnesses in my favor.

MY RIGHT not to be convicted unless the State proves that I am guilty beyond a reasonable doubt with respect to all elements of the charge(s), which have been explained to me.

MY RIGHT to keep out evidence, including confessions, illegally obtained.

MY RIGHT to a trial before a jury and my right to appeal issues of law to the Supreme Court.

I GIVE UP ALL THE ABOVE RIGHTS OF MY OWN FREE WILL. I understand that by pleading GUILTY or NO CONTEST I am admitting to or not contesting the truth of the charge(s) against me in the complaint(s) and that on the Judge's acceptance of my GUILTY or NO CONTEST plea, a conviction(s) will be entered against me.

Case Name: Bryan Luikart

Case Number: 457-2017-CR-1104

ACKNOWLEDGMENT OF RIGHTS CLASS A MISDEMEANOR

No force has been used upon me, nor have any threats been made to me, by any member of the Prosecutor's Office or anyone else to have me enter this plea of GUILTY or NO CONTEST.

No promises have been made to me by any member of the Prosecutor's Office or anyone else in an effort to have me enter this plea of GUILTY or NO CONTEST to the charge(s), except as follows:

90 days GCHOC all suspended for 2 years,special conditons of sentnce are attached, each concurrent, ____ days pretrial confinement

However, I understand that the Judge is not bound by the Prosecutor's recommendation as to sentence, and that I may withdraw my plea if the Judge exceeds the limits of a negotiated plea.

I understand, as a consequence of my plea of GUILTY or NO CONTEST, that the Judge may impose any sentence deemed appropriate in the Judge's sole discretion, subject to a maximum penalty of one year in jail and a $2,000 fine for each offense.

I understand that if I am convicted of stalking under RSA 633:3-a and have one or more prior stalking convictions in this state or another state when the second or subsequent offense occurs within seven years following the date of the first or prior offense, I shall be guilty of a CLASS B FELONY.

Should the complaint be one of a CLASS A MISDEMEANOR theft of property not exceeding $1000, following two convictions upon such a charge, a third offense is chargeable as a FELONY.

I further understand that if the complaint against me represents a major motor vehicle conviction this conviction will count against me should the Director of Motor Vehicles review my driving record for Habitual Offender status. Three major convictions or a combination of major and minor offenses over a five year period is necessary to certify a person as a Habitual Offender. As a consequence of being declared a Habitual Offender, I would lose my license to operate a motor vehicle for 1 to 4 years. I realize that if I am found to be a Habitual Offender, it is my responsibility, at the end of that period, to petition the Director of the Division of Motor Vehicles to restore my privilege to drive a motor vehicle. I understand that if I were to operate a motor vehicle during that four-year period, or at any time before my privilege to drive a motor vehicle is restored, then I would subjecting myself to a mandatory prison terms of not more than 5 years.

I understand the nature of the charge(s) against me and the maximum punishment that may be imposed. I am not under the influence of alcohol or drugs.

I understand the entire contents of the Acknowledgment of Rights and I freely and voluntarily sign this form below. I also understand that I may have a copy of this form upon request.

Highest Educational Grade Completed PhD

2-5-18
Date

Defendant

As counsel for the defendant, I have thoroughly explained to the defendant all the above, including the nature of the charge, the elements of the offense which the State must prove beyond a reasonable doubt, the maximum and minimum penalties, and the possible immigration consequences of entering a plea of guilty or no contest. I believe the defendant fully understands the meaning of this Acknowledgment and Waiver of Rights, that s/he is not under the influence of drugs or alcohol, and that s/he knowingly, intelligently and voluntarily waives all of his/her rights as set forth in this form.

Date

Counsel for the Defendant

I hereby certify that I have examined the defendant concerning the plea entered in this case. Based upon that examination I find that the defendant understands the nature of the charge(s), the minimum and maximum penalties which may be imposed therefore, and the elements of the offense(s); and I find that the defendant is not under the influence of drugs or alcohol, and that the waiver of each right set forth on this form is made intelligently, knowingly and voluntarily. I further find there is a factual basis for the defendant's plea.

2/5/18
Date

Signature of Judge

John J. Kuhn

Printed Name of Judge

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

2nd CIRCUIT COURT –
DISTRICT DIVISION – LEBANON

Docket No. 452-2017-CR-538
452-2017-CR-1104
452-2017-CR-1469

STATE OF NEW HAMPSHIRE

FILE COPY

v.

BRYAN LUIKART

STATE'S MOTION TO BRING FORWARD AND IMPOSE SUSPENDED SENTENCE

NOW COMES the State of New Hampshire, by and through the Lebanon Police Department, Benjamin E. LeDuc, Esquire, and moves to bring forward and impose suspended sentence, and states as follows in support thereof:

1. Upon information and belief, on or about February 5, 2018, Bryan Luikart (hereinafter the "Defendant"), pled guilty to several charges, and was sentenced as part of a fully negotiated resolution.

2. He was sentenced, in part, to three (3) months in the House of Corrections. All of the three (3) months were suspended. The suspension was conditioned, in part, upon two (2) years of good behavior and completion of an accredited batterers intervention program evaluation, and a requirement to complete any programming that was recommended.

3. Upon information and belief, the defendant completed the required evaluation, but has been terminated from the programming due to violating the rules of his required treatment; as such, the defendant is in violation of the terms of his suspended sentence. See attached letter from Clara Martin Center.

4. A suspended sentence may be revoked "upon proof by a preponderance of the evidence of a violation of the condition upon which the sentence was suspended." *Id.* "Good behavior" is defined as "conduct conforming to the law." *State v. Budgett*, 146 N.H. 135, 139 (2001). However, a suspended sentence need not expressly state that committing a crime will trigger its imposition because such conditions are "so basic and fundamental that any reasonable person would be aware of [it]." *Id.* at 138. Indeed, imposition of a previously suspended sentence is appropriate whenever the Court finds facts, by a preponderance of evidence, to warrant the conclusion that the trust underlying the defendant's suspended sentence was misplaced. *Stapleford v. Perrin*, 122 N.H. 1083 (1982).

5. "To impose a suspended or deferred sentence on the ground that the defendant has violated…[a] condition of good behavior, a trial court must find that the defendant engaged in criminal conduct." *State v. Kelly*, 159 N.H. 390, 391 (2009) (citing *State v. Auger*, 147 N.H. 752, 753 (2002)). The State satisfies its burden of proof, by a preponderance of the evidence, "either by establishing the fact of a criminal conviction for the acts which constitute the violation or by proof of the commission of the underlying acts." *Id.* (citing *State v. Gibbs*, 157 N.H. 538, 540 (2008)).

6. Because the defendant failed to comply with the Court's sentencing order when he failed to complete the recommended programming, the State respectfully requests that this Court impose the defendant's suspended sentence.

WHEREFORE, the State requests that this Honorable Court:

A. Grant the State's motion and impose the defendant's suspended sentence;
B. Hold a hearing on the matter if necessary; and
C. Grant any other relief deemed proper and just.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

February 8, 2019

Benjamin E. LeDuc, Esq.
New Hampshire Bar # 20348
Prosecutor
Lebanon Police Department
36 Poverty Lane
Lebanon, NH 03766
(603) 448-1212

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State's pleading has on this date been forwarded to the defendant at 17 Pasture Lane, Lebanon, NH 03784.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

February 8, 2019

Benjamin E LeDuc
Prosecutor

Clara Martin Center
Over 50 years of *People Helping People*

Mr. Bryan Luikart
17 Pasture Ln.
Lebanon, NH 03784

January 24, 2019

Dear Mr. Luikart,

This letter is a review your progress in the Clara Martin Center's Domestic Violence Accountability Program (DVAP). You were assessed for eligibility to participate in DVAP on 03.15.2018 and 03.21.18. You began group on 07.11.2018. As of 01.23.2019, you had attended 23 DVAP group sessions. You engaged in behaviors within the group that were consistent with your pattern of past abuse and have been unable to be redirected from these behaviors. The treatment team's decision is that you, Mr. Luikart, will be terminated from DVAP for violating the rules of treatment. Below is a list of specific areas in which you were non-compliant:

1. I acknowledge that I need help due to past violence/abuse towards others.
2. I agree to accept feedback from facilitators and group members to help me reduce risk of harming myself and/or others.
3. I agree to refrain, and understand I will be dismissed from group, from engaging in any abusive or violent behaviors throughout the duration of my treatment, including, but not limited to the following behaviors, if I do:
    - Verbal and/or emotional abuse
    - Threatening or intimidating behaviors
4. I agree to learn and practice skills to intervene in my violent/abusive behavior patterns.

Your participation in DVAP is terminated as of 01.24.2019; however, you may continue to access substance abuse/mental health services with the Clara Martin Center.

If you have questions or concerns regarding the decision made by the treatment team, you are encouraged to file a complaint, or call (802) 295-1311 and ask for support with filing a complaint .

Respectfully,

Amanda Maurier, MSW, CADC, QMHP

Alan Gelfant, MA

Dawn Littlepage, LCMHC, Clinical Director

P.O. Box G
Randolph, VT 05060-0167
802-728-4466
fax: 802-728-4197

P.O. Box 278
Bradford, VT 05033-0278
802-222-4477
fax: 802-222-3242

P.O. Box 816
Wilder, VT 05088-0816
802-295-1311
fax: 802-295-1312

www.claramartin.org

2

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

2nd CIRCUIT COURT –
DISTRICT DIVISION – LEBANON

Docket No. 452-2017-CR-538
452-2017-CR-1104
452-2017-CR-1469

STATE OF NEW HAMPSHIRE

FILE COPY

v.

BRYAN LUIKART

STATE'S MOTION TO BRING FORWARD AND IMPOSE SUSPENDED SENTENCE

NOW COMES the State of New Hampshire, by and through the Lebanon Police Department, Benjamin E. LeDuc, Esquire, and moves to bring forward and impose suspended sentence, and states as follows in support thereof:

1. Upon information and belief, on or about February 5, 2018, Bryan Luikart (hereinafter the "Defendant"), pled guilty to several charges, and was sentenced as part of a fully negotiated resolution.

2. He was sentenced, in part, to three (3) months in the House of Corrections. All of the three (3) months were suspended. The suspension was conditioned, in part, upon two (2) years of good behavior and completion of an accredited batterers intervention program evaluation, a requirement to complete any programming that was recommended, and a limited no contact order with Sarah Heidebrecht.

3. Undersigned counsel recently filed a Motion to Impose the defendant's suspended sentence. Upon information and belief, the defendant recently sent an e-mail to Ms. Heidebrecht, which the State contends is a violation of the no contact order and/or the condition of good behavior. Said e-mail is clearly intended to use Mr. Luikart's civility and willingness to cooperate regarding co-parenting their mutual child as an inducement and/or threat against Ms. Heidebrecht to drop the State's Motion to Impose.[1] See attached e-mail.

4. A suspended sentence may be revoked "upon proof by a preponderance of the evidence of a violation of the condition upon which the sentence was suspended." *Id.* "Good behavior" is defined as "conduct conforming to the law." *State v. Budgett*, 146 N.H. 135, 139 (2001). However, a suspended sentence need not expressly state that committing a crime will

[1] Significantly, Ms. Heidebrecht has no control over whether the State decides to file or declines to file Motions to Impose. Despite what the defendant appears to believe, undersigned counsel made the decision to proceed with the original criminal action against the defendant, the first motion to impose, and now this second motion to impose independent of Ms. Heidebrecht's opinions. Veiled or unveiled threats or inducements made by the defendant toward Ms. Heidebrecht will not assist the defendant's cause; rather, it may lead to further criminal charges.

trigger its imposition because such conditions are "so basic and fundamental that any reasonable person would be aware of [it]." *Id.* at 138. Indeed, imposition of a previously suspended sentence is appropriate whenever the Court finds facts, by a preponderance of evidence, to warrant the conclusion that the trust underlying the defendant's suspended sentence was misplaced. *Stapleford v. Perrin*, 122 N.H. 1083 (1982).

5. "To impose a suspended or deferred sentence on the ground that the defendant has violated…[a] condition of good behavior, a trial court must find that the defendant engaged in criminal conduct." *State v. Kelly*, 159 N.H. 390, 391 (2009) (citing *State v. Auger*, 147 N.H. 752, 753 (2002)). The State satisfies its burden of proof, by a preponderance of the evidence, "either by establishing the fact of a criminal conviction for the acts which constitute the violation or by proof of the commission of the underlying acts." *Id.* (citing *State v. Gibbs*, 157 N.H. 538, 540 (2008)).

6. Because the defendant failed to comply with the Court's sentencing order when he failed to complete the recommended programming, the State respectfully requests that this Court impose the defendant's suspended sentence.

WHEREFORE, the State requests that this Honorable Court:

A. Grant the State's motion and impose the defendant's suspended sentence;
B. Hold a hearing on the matter if necessary; and
C. Grant any other relief deemed proper and just.

March 7, 2019

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

Benjamin E. LeDuc, Esq.
New Hampshire Bar # 20348
Prosecutor
Lebanon Police Department
36 Poverty Lane
Lebanon, NH 03766
(603) 448-1212

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State's pleading has on this date been forwarded to the Attorney Kevin Carr, counsel for the defendant.

March 7, 2019

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

Benjamin E LeDuc
Prosecutor

Message Report

The OurFamilyWizard® website
1302 2nd St NE Suite 200
Minneapolis, MN 55413
http://www.OurFamilyWizard.com
Info@OurFamilyWizard.com

Sarah Heidebrecht generated this report on 03/03/19 at 08:41 PM. All times are listed in America/New_York timezone.

Message: 1 of 1

Date: 03/03/2019 8:22 PM

From: Bryan Lulkart

To: Sarah Heidebrecht (First View: 03/03/2019 8:36 PM)

Subject: RE: Ice skating

If you want to be on friendly communicating terms for the best interest of Nova you might want to consider not trying to trigger the suspended sentence and not trying to continue hurting me. You are the abuser.

On Sun, 03/03/19 at 8:14 PM, Sarah Heidebrecht wrote:
To: Bryan Lulkart
Subject: Ice skating
Nova did awesome on ice skates. Even several attempts without support.

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

2nd CIRCUIT COURT –
DISTRICT DIVISION – LEBANON

Docket No. 452-2017-CR-538
452-2017-CR-1104

STATE OF NEW HAMPSHIRE

v.

FILE COPY

BRYAN LUIKART

STATE'S OBJECTION TO DEFENDANT'S MOTION TO RECONSIDER

NOW COMES the State of New Hampshire, by and through the Lebanon Police Department, Benjamin E. LeDuc, Esquire, and objects to Bryan Luikart's (hereinafter the "defendant") motion to reconsider, and states as follows in support thereof:

1. On or about April 14, 2017 the defendant assaulted Sarah Heidebrecht, and on and between June 23 through July 19, 2017, the defendant violated the protective order put in place to protect Ms. Heidebrecht.
2. On or about February 5, 2018, the defendant pled guilty to these acts and was sentenced, in part, to three (3) months in the House of Corrections, all of which was suspended, conditioned on two (2) years of good behavior.
3. On or about March 3, 2019, the defendant sent an e-mail to Ms. Heidebrecht. Based on this e-mail, the State filed a Motion to Impose the defendant's sentence. A hearing was held on or about July 23, 2019 (Bamberger, J.).
4. At the hearing, the parties agreed to proceed by offer of proof and by way of exhibits. There were no objections to any exhibits from either party. After the hearing, the Court held orally that the State had met its burden by a preponderance of the evidence, and found that the defendant had violated the terms of good behavior (Bamberger, J.). The Court imposed ten

(10) days of the suspended sentence, but stayed the sentence pending the defendant's appeal; a similar written order followed (Bamberger, J.).

5. On August 2, 2019, the State received a Motion to Reconsider from the defendant; the State objects.

6. A motion to reconsider "shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present...." N.H. Rules of Criminal Procedure, Rule 43. "To preserve issues for an appeal to the Supreme Court, an appellant must have given the Court the opportunity to consider such issues; thus, to the extent that the Court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal." *Id.*

7. In the Motion to Reconsider, the defendant contends that the Court has overlooked, misapprehended, or misunderstood two (2) points in coming to the conclusion that the defendant committed the crime of Witness Tampering and violated the terms of good behavior. First, the defendant contends that "there was no evidence offered at the hearing that Mr. Luikart believed that a proceeding was pending or about to be instituted at the time of his e-mail." Defendant's Motion Paragraph 11. Then, the defendant argues that the evidence did not support the conclusion that the defendant "attempted to induce Ms. Heidebrecht to withhold testimony, information, documents, or things from law enforcement or prosecutorial authorities." Defendant's Motion Paragraph 12.

8. To commit the crime of Witness Tampering, the defendant need not be subjected to an official proceeding, nor does there need to be a real investigation pending, nor one that is

actually about to be instituted. What is relevant, is what the defendant *believed.*

9. A person commits the crime of witness tampering if they (a) believe that an official proceeding or investigation is pending or about to be instituted, and (b) they attempt to induce or otherwise cause a person to testify or inform falsely, withhold any testimony, information, document or thing. See N.H. Rev. Stat. § 641:5 (2019).

10. On the one hand, the defendant argues that he had no reason to believe there was a Motion to Impose investigation or proceeding imminently coming because he was aware that the State had withdrawn its first Motion to Impose several days prior. See Defendant's Motion Paragraphs 2-7. However, on the other hand, the defendant argues that he was imminently fearful of Ms. Heidebrecht because he believed that she was "victimizing him through the criminal justice system." See Defendant's Motion Paragraphs 13.

11. Considering the evidence and exhibits submitted at the July 23, 2019 Motion to Impose Hearing, there is no doubt that the defendant *believed* that there was a further investigation or official proceeding that was imminent because of his own interpretation of Ms. Heidebrecht's actions. *Id.* Furthermore, despite the defendant's contention that he merely "wanted to co-parent successfully with Ms. Heidebrecht, and he thought the best way to do this was for them not fight each other through the legal process" in Paragraph 13 of his Motion to Reconsider, there is no doubt about what the defendant's intentions *actually* were.

12. The defendant seems to misapprehend or overlook, rather than the court, that the State submitted both oral argument and an e-mail from the defendant as evidence of both points. The defendant's e-mail, as the court noted on the record, cannot be read any other way.

> "If you want to be on friendly communicating terms for the best interest of Nova [their minor child] you might want to consider not trying to trigger the suspended

sentence and not trying to continue hurting me. You are the abuser." See attached Exhibit 1.

13. Furthermore, the burden of proof in this Motion to Impose Hearing is preponderance of the evidence, not beyond a reasonable doubt. The Court, after considering all of the evidence before it, ruled appropriately, that the State had met its burden and proved by a preponderance of the evidence that the defendant believed that Ms. Heidebrecht was pushing for an investigation and/or motion to impose hearing, and that to deter her from doing so, he threatened to harm her relationship with their mutual child if she was not deterred. This was a violation of the terms of good behavior.

14. Because the court did carefully consider all facts before it in the context of all relevant laws before making its decision, the defendant's Motion to Reconsider should be denied.

WHEREFORE, the State requests that this Honorable Court:

A. Deny the Defendant's Motion for Reconsideration without a hearing;
B. Hold a hearing on the matter if necessary; and
C. Grant any other relief deemed proper and just.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

August 9, 2019

Benjamin E. LeDuc, Esq.
New Hampshire Bar # 20348
Prosecutor
Lebanon Police Department
36 Poverty Lane
Lebanon, NH 03766
(603) 448-1212

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State's Pleading has on this date been forwarded to Attorney Apfel, counsel for the defendant.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

August 9, 2019

Benjamin E LeDuc
Prosecutor

Message Report

The OurFamilyWizard® website
1302 2nd St NE Suite 200
Minneapolis, MN 55413
http://www.OurFamilyWizard.com
Info@OurFamilyWizard.com

Sarah Heidebrecht generated this report on 03/03/19 at 08:41 PM. All times are listed in America/New_York timezone.

Message: 1 of 1

Date: 03/03/2019 8:22 PM

From: Bryan Lulkart

To: Sarah Heidebrecht (First View: 03/03/2019 8:36 PM)

Subject: RE: Ice skating

If you want to be on friendly communicating terms for the best interest of Nova you might want to consider not trying to trigger the suspended sentence and not trying to continue hurting me. You are the abuser.

On Sun, 03/03/19 at 8:14 PM, Sarah Heidebrecht wrote:
To: Bryan Lulkart
Subject: Ice skating
Nova did awesome on ice skates. Even several attempts without support.