THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0603

State of New Hampshire

v.

David Almeida

Appeal Pursuant to Rule 7 from Judgment
of the Second Circuit – District Division – Littleton Court

BRIEF FOR THE DEFENDANT

Stephanie Hausman
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 15337
603-224-1236
shausman@nhpd.org
(15 minutes oral argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

Other

QUESTION PRESENTED

Whether the court properly granted the motion to suppress the test results of an analysis of Almeida's blood, drawn from Almeida pursuant to his consent, but completed after Almeida withdrew his consent for analysis of the blood.

STATEMENT OF THE CASE

David Almeida was charged with driving under the influence. SB[1] 11. He filed a motion to suppress the results of testing conducted on his blood by the state laboratory. SBA 46-58. He argued that, because he had notified the State that he withdrew consent for testing before his blood had been tested, the State had no lawful basis to conduct the search, or analysis, of his blood. Id. The State objected, arguing that there was no authority to withdraw consent to test evidence seized in a pending criminal case. SBA 67-73.

After a hearing on the motion, T, the court (Mace, J.) granted the motion. SBA 40-44. The court found that Almeida had a reasonable expectation of privacy in the information contained in his blood sample prior to it being tested by the state lab. SBA 41-43.

The State filed a motion to reconsider, which the court denied. SBA 59-64.

[1] Citations to the record are as follows:
"Add." refers to the Addendum attached to this brief;
"SB" refers to the State's brief;
"SBA" refers to the Appendix to the State's brief;
"T" refers to the transcript of the hearing held on July 30, 2019.

STATEMENT OF THE FACTS

On April 6, 2019, Almeida was stopped by the Bethlehem Police. SBA 40. The police suspected he was driving under the influence, so they arrested Almeida and informed him of his administrative license suspension rights. Id. Almeida consented to give the State a sample of his blood, which was then drawn at the Littleton Regional Hospital. Id.

On April 8, 2019, Bethlehem Police brought Almeida's blood sample to the state laboratory. Id. The lab accepted the sample and logged it in according to its protocols. Id.

The sample was still awaiting testing on April 19, 2019, when Almeida, through counsel, sent a letter to the lab and the Bethlehem Police prosecutor notifying them that Almeida withdrew his consent for the State to hold and analyze his blood sample. SBA 40-41. The State received the letter that day. SBA 40. Almeida also authorized a representative from CG Labs to collect his sample from the state lab. Id.

On April 24, 2019, a representative from CG Labs went to the state lab to collect Almeida's sample. SBA 41. The state lab refused to relinquish Almeida's sample on the basis that it was "in process," by which it meant that it had received and logged the sample. Id.

The state lab analyzed Almeida's blood sample on April 25, 2019. Id.

SUMMARY OF THE ARGUMENT

The trial court correctly found that, although Almeida had initially consented to the seizure and search of his blood, after the blood was drawn, he effectively withdrew his consent for the State to retain and test his blood sample. At that point, the State had no justification to test the sample without a warrant. Almeida retained a significant privacy interest in his blood, given the vast amount of personal information that could be discovered through a search. In order to test the sample, the State needed a warrant under these circumstances. Because the State proceeded without a warrant, the testing was unconstitutional.

I. THE COURT PROPERLY GRANTED THE MOTION TO SUPPRESS THE RESULTS OF BLOOD TESTING COMPLETED AFTER ALMEIDA WITHDREW HIS CONSENT TO ANY SUCH ANALYSIS.

When reviewing a trial court's ruling on a motion to suppress, the Court accepts the trial court's "factual findings unless they lack support in the record or are clearly erroneous." State v. Perez, ___ N.H. ___ (slip op. at 4) (decided May 15, 2020). The Court reviews legal conclusions de novo. Id.

Part I, Article 19 of the State Constitution provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." The Fourth Amendment to the United States Constitution provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Evidence that is obtained in violation of those constitutional provisions is "subject to exclusion from evidence in a criminal trial." State v. Stacey, 171 N.H. 461, 464 (2018) (quotation omitted).

This Court has "held that the State Constitution is often more protective of individual rights than the Federal Constitution with respect to unreasonable searches and seizures." State v. Boyer, 168 N.H. 553, 556 (2016); see also State v. Goss, 150 N.H. 46, 49-50 (2003) (rejecting holding of

California v. Greenwood, 486 U.S. 35 (1988), which found no reasonable expectation of privacy in garbage put out for collection, as State Constitution more protective); State v. Canelo, 139 N.H. 376, 386 (1995) (declining to adopt good-faith exception under State Constitution); State v. Settle, 122 N.H. 214, 218 (1982) (adopting more expansive view of standing than under Rakas v. Illinois, 439 U.S. 128 (1978)).

"A warrantless search is per se unreasonable and invalid unless it comes within one of a few recognized exceptions." State v. Cora, 170 N.H. 186, 190 (2017) (quotation omitted). "Absent a warrant, the burden is on the State to prove that the search was valid pursuant to one of these exceptions." Id. at 191 (quotation omitted). "It is well-settled that the government's withdrawal of blood from a person's body without a warrant or consent is a search and seizure under Part I, Article 19 of the New Hampshire Constitution." State v. Bazinet, 170 N.H. 680, 684 (2018) (quotation omitted); see also Birchfield v. North Dakota, 136 S. Ct. 2160, 2173 (2016). The State did not argue in this case that it had obtained a warrant to seize Almeida's blood or to search it through a laboratory analysis.

A. Almeida's consent

"A voluntary consent free of duress and coercion is a recognized exception to the need of both a warrant and probable cause." State v. Socci, 166 N.H. 464, 473 (2014)

(quotation omitted). "The burden is on the State to prove, by a preponderance of the evidence, that the consent was free, knowing and voluntary." Id. (quotation omitted).

Consent is not irrevocable, nor does it necessarily permit all intrusions the government desires.

> When the police are relying upon consent as a basis for their warrantless search, they have no more authority than they have been given by the consent. The question of the scope of consent may be stated as how far the defendant intended the consent to extend or how the police reasonably construed his consent.

State v. Saunders, 164 N.H. 342, 354 (2012). Consent may be revoked, although "the law generally requires an unequivocal act or statement of withdrawal." State v. Watson, 151 N.H. 537, 542 (2004). Just as "a prior refusal does not necessarily invalidate a subsequent consent as involuntary," State v. Patch, 142 N.H. 453, 459 (1997) (quotation omitted), prior consent does not invalidate a subsequent withdrawal of that consent.

"That a party may terminate a search by withdrawing consent is a corollary of the recognition that the subject of a consensual search determines the parameters of that search." United States v. Williams, 898 F.3d 323, 330 (3rd Cir. 2018). "Moreover, recognition of a party's right to take away the consent that he or she has conferred advances society's

interest in promoting consensual searches." Id. However, when "a suspect does not withdraw her valid consent to a search before the illegal weapon or substance is discovered, the consent remains valid and the seized illegal item is admissible." State v. Randall, 930 N.W.2d 223, 755-56 (Wis. 2019) (quotation and brackets omitted).

Issues related to consent are determined by examining the totality of the circumstances, Socci, 166 N.H. at 473, and by looking at whether "it was objectively reasonable for the officers conducting the search to believe that the defendant had consented to it." Saunders, 164 N.H. at 354 (quotation omitted). The Court will look to any consent form signed by the defendant in determining the scope of consent. Id. at 355-56. The Court will not disturb the trial court's findings on consent unless it is not supported by the record. Socci, 166 N.H. at 473.

New Hampshire enacted a law by which every driver is deemed to have given "implied consent" to testing to determine whether the person is influenced by alcohol or drugs. "Pursuant to New Hampshire's Implied Consent Law, a motor vehicle operator 'shall be deemed to have given consent' to the tests it describes when 'arrested for any offense arising out of acts alleged to have been committed while the person was driving . . . a vehicle . . . while under the influence of intoxicating liquor or controlled drugs" ("DWI").

State v. Mfataneza, 172 N.H. 166, 169 (2019). The law is aimed at preventing driving under the influence while also ensuring "that an arrested individual makes an informed decision concerning whether or not to submit to a blood alcohol content test." Id. (quotation omitted). Thus, while a driver is "deemed" to have consented to a test, that test cannot take place without the driver's actual consent. RSA 265-A:14, I (if person refuses requested test, "none shall be given").

The implied consent law requires police officers to inform drivers about the consequences of their choice to consent to or refuse a test. RSA 265-A:8, I(c). Where a blood test is requested, the law also requires the State to take enough blood "to allow 2 tests; and the testing laboratory shall retain for a period of 30 days subsequent to the test conducted pursuant to RSA 265-A:4 a quantity of said sample sufficient for another test, which quantity shall be made available to the respondent or his or her counsel upon request." RSA 265-A:7, II. The State is required to provide the person with information about the process and to record the person's decision regarding whether to consent to a test on a form, titled DSMV 426. N.H. Admin. Rules, Saf-C 2803.01. The person is informed, at the time their consent is

sought, of the right to obtain a portion of their sample for private testing. Add. 35.[2]

"Statutory interpretation is a question of law, which [the Court] review[s] de novo." In re J.P., ___ N.H. ___ (slip op. at 5) (decided July 31, 2020). The Court "focus[es] on the words of the statute because they are the touchstone of the legislature's intent." Id. The Court "give[s] effect to every word of a statute whenever possible and presume[s] that the legislature did not enact superfluous or redundant words." Id. The Court cannot "ignore the plain language of the legislation." Mfataneza, 172 N.H. at 169 (quotation omitted). The Court does "not read words or phrases in isolation, but in the context of the entire statutory scheme." Id. (quotation omitted).

New Hampshire's implied consent laws acknowledge a person's right, under the circumstances at issue here, to refuse consent for sample collection and testing. This statutory scheme also recognizes the person's continuing interest in a withdrawn blood sample, by requiring the State to obtain a sufficient quantity for a private test and mandating that the sample be preserved for that purpose for

[2] While Almeida's Administrative License Suspension Rights form (DSMV 426) was not admitted in the trial court, it was the State's burden to prove that the search and seizure at issue was constitutional. "It is the burden of the appealing party . . . to provide this [C]ourt with a record sufficient to decide [the] issues on appeal." Bean v. Red Oak Property Management, Inc., 151 N.H. 248, 250 (2004).

a reasonable amount of time after the State test has been completed. Given the statutory scheme – granting a person the right to refuse testing and the right to claim the sample at a later date – New Hampshire's implied consent law mirrors traditional and constitutional concepts of consent. By recognizing the subject's ability to limit the State's access to his or her sample, the implied consent law serves to enhance its purpose – to encourage people suspected of DWI to consent to testing.

The trial court did not err in finding that Almeida consented to having his blood withdrawn. Thus, the seizure of Almeida's blood was justified by consent. The court also correctly ruled that Almeida withdrew his consent for the search of his blood. Almeida's consent granted the State the ability to withdraw his blood "in order to determine the alcohol or drug concentration in [his] system." Add. 35. Thus, Almeida consented not only to have his blood withdrawn but also to a particular future search. Before that search occurred, Almeida withdrew his consent.

"Once it has been established that a suspect has voluntarily consented to a search, it is his burden to demonstrate that he has withdrawn that consent by pointing to an act or statement that an objective viewer would understand as an expression of his desire to no longer be searched." Williams, 898 F.3d at 331. The court correctly

found that Almeida's letter to the prosecutor and state lab carried his burden to prove that he withdrew his consent to search his blood.

B. Analysis of his blood

"When determining whether a warrantless search may give rise to a violation of the State Constitution, [the Court] appl[ies] an expectation of privacy analysis." Bazinet, 170 N.H. at 684 (quotation omitted). "A warrantless search implicates Part I, Article 19 only if the defendant has exhibited an actual (subjective) expectation of privacy and that expectation is one that society is prepared to recognize as reasonable." Id. (quotation omitted). "The determination of whether a person has a legitimate expectation of privacy with respect to a certain area must be made on a case-by-case basis, considering the unique facts of each particular situation." State v. Smith, 169 N.H. 602, 607 (2017) (quotation and brackets omitted).

The trial court correctly held that Almeida had an actual expectation of privacy in the information contained in his blood sample. By expressing his intent to prevent any State testing and to reclaim his blood sample, Almeida manifested his actual expectation of privacy. See, e.g., Goss, 150 N.H. at 49 (by placing trash in "black plastic bags with the expectation it would be picked up by authorized persons for

eventual disposal," Goss exhibited actual expectation of privacy).

In considering whether an actual expectation of privacy is reasonable, *i.e.*, one that society is prepared to recognize as reasonable, the Court looks at whether the expectation is supported "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Boyer, 168 N.H. at 561 (quotation omitted); see also State v. Mouser, 168 N.H. 19, 24 (2015) (when considering trespass theory of Fourth Amendment violations, Court considers "social norms"); Randall, 930 N.W.2d at 759 fn. 5 (considering Health Insurance Portability and Accountability Act ("HIPAA") and State law to find society's recognition of privacy in one's medical information).

This Court has recognized a reasonable expectation of privacy when a person conceals the contents of their garbage and places it out only for purposes of collection. Goss, 150 N.H. at 50. In contrast, the Court has found a diminished expectation of privacy in automobiles, based on "their continual exposure to public scrutiny" and pervasive state regulation. Cora, 170 N.H. at 195 (quotation omitted). In addition, the Court has found no reasonable expectation of privacy in information conveyed to a third party pursuant to a contract which contained a privacy policy that allowed

dissemination under some circumstances. State v. Mello, 162 N.H. 115, 120 (2011).

This Court has recognized privacy in a person's communications, internet browsing, shopping, banking, and other "private affairs." Id. at 122. The Court has also recognized privacy in a person's "[p]ersonal letters, bills, receipts, [and] prescription bottles." Goss, 150 N.H. at 49. In addition, the Supreme Court has recognized privacy in a person's internet browsing history which "could reveal an individual's private interests or concerns – perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD." Riley v. California, 573 U.S. 373, 395-96 (2014).

A person's interest in privacy, however, is not reasonable under circumstances where a statute specifically allows medical providers to disseminate otherwise confidential information. See, e.g., State v. Davis, 161 N.H. 292, 295-99 (2010) ("By carving out an exception to the physician-patient privilege [for driving under the influence cases], the legislature has reflected the societal belief that when people drive, they encounter a diminished expectation of privacy." (quotation omitted)). Moreover, a search that can only reveal whether a substance is cocaine, which is illegal to possess, "does not compromise any legitimate interest in privacy." United States v. Jacobsen, 466 U.S. 109, 123 (1984).

Because of the vast amount of personal information that can be obtained through a blood sample, society recognizes as reasonable a privacy interest in one's blood. Missouri v. McNeely, 569 U.S. 141 (2013) ("significant privacy interests" at stake in blood evidence). Blood contains "genetic information about ancestry, family connections, medical conditions, and pregnancy." Randall, 930 N.W.2d at 773 (quotation and brackets omitted). See also Commonwealth v. Arzola, 26 N.E.3d 185, 816 (Mass. 2015) (blood "could potentially reveal more information than the identity of the source, including the source's ancestry and predisposition to medical or psychiatric conditions;" however DNA testing only reveals gender and identity).

Here, the DNA in Almeida's blood contained information about his ancestry, family connections, genetic predispositions, and gender at birth. For transgender people, people from socially disadvantaged ethnic groups, and people with genetic components to their medical and psychiatric conditions, this information can be highly personal. Moreover, blood can be tested to determine whether the person has any drugs, including prescription medications, in their system. This too can reveal sensitive medical information. For all these reasons, this Court must recognize, as the trial court did, the reasonable privacy

interests a person has in their blood and the information that can be revealed through its analysis.

The Court must then balance the privacy interest against the governmental interest. In arenas where police need to act swiftly to preserve evidence, the Court is more apt to find a warrantless search or seizure reasonable. See, e.g., Cora, 170 N.H. at 196-97 (need to obtain evidence at risk of loss in a mobile vehicle); McNeely, 569 U.S. at 152 (need to seize blood to preserve evidence of blood alcohol).

Here, however, there was no need to act swiftly. The alcohol and drug information contained in Almeida's blood was preserved once it was collected. Randall, 930 N.W.2d at 771 fn. 12. Once Almeida withdrew consent to analyze his blood, the State was justified in seizing his blood temporarily for purposes of obtaining a warrant to search it. Stacey, 171 N.H. at 464-65.

The State erroneously characterizes this situation as involving only one search or seizure to which Almeida consented at the time of the blood draw. While this Court has not had occasion to consider whether seizure of an item and its later analysis are distinct government intrusions, the Supreme Court has.

In considering the legality of laws criminalizing the refusal to consent to breath and blood testing, the Court considered each type of test separately. Birchfield, 136 S. Ct.

at 2176-78. It did so because of the difference in invasiveness of the sample collection, and also because the search of each type of sample involves different privacy concerns. Id.

> [A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC [blood alcohol content] reading. Even if the law enforcement agency is precluded from testing the blood for any other purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

Id. at 2178. See also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) (considering intrusion inherent in sample collection, as well as "further invasion" of privacy interests when sample analyzed).

The Court has not hesitated to consider each step leading to analysis of a blood sample as implicating the Fourth Amendment. In Skinner, the Court separately considered the seizure of the railway employee while a sample was collected, the physical intrusion to obtain the sample, and the "ensuing chemical analysis." Id. at 616-18. Also, in Jacobsen, 466 U.S. 109, the Court considered independent constitutional justifications for law enforcement officers' brief seizure of a package at a Federal Express office, the search of

the package, the seizure of a small amount of white powder contained therein for the purposes of field testing it for the presence of cocaine, and that field test.

> In this case, the federal agents' invasions of respondents' privacy involved two steps: first, they removed the tube from the box, the plastic bags from the tube and a trace of powder from the innermost bag; second, they made a chemical test of the powder. Although we ultimately conclude that both actions were reasonable for essentially the same reason, it is useful to discuss them separately.

Id. at 118; see also id. at 120-22 (separately considering agents' seizure of package for purpose of searching it); id. at 124 (separately considering reasonableness of seizure, or permanent destruction of, a portion of the sample of white powder to perform field test). See also Schmerber v. California, 384 U.S. 757, 767 (1966) (withdrawing a sample of blood "plainly constitute[s]" a search of the person and "depend[s] antecedently upon [a] seizure[] of [the person]" which also implicates the Fourth Amendment).

When the blood draw and the testing of the blood sample are justified by the same constitutional ground, no separate analysis of the two searches is required. See, e.g., Bazinet, 170 N.H. at 686 (blood obtained and analyzed under the exception to the physician-patient privilege found in RSA

329:26); Skinner, 489 U.S. 602 (railway employees' blood obtained and analyzed under "special needs" exception to warrant requirement); State v. Fawcett, 877 N.W.2d 555 (Minn. Ct. App. 2016) (blood obtained and analyzed pursuant to warrant). However, where the seizure and search cannot be justified on the same basis, courts consider whether the second act is justified under some other basis. See, e.g., Riley, 573 U.S. 373 (warrant required to search cell phone seized during search incident to arrest); United States v. Chadwick, 433 U.S. 1 (1977), abrogated by California v. Acevedo, 500 U.S. 565 (1991) (as applied to containers found in automobiles pursuant to an automobile search), (warrant required to search locked luggage seized during search incident to arrest).

In addition, where the seizure and the search implicate separate constitutional interests, courts consider them separately. See, e.g., Maryland v. King, 569 U.S. 435, 463-64 (2013) (considering collection of DNA sample and analysis of the sample separately because those acts implicate different personal and privacy interests); Bazinet, 170 N.H. at 686 (Court separately considered constitutional implications of seizure, done by private party, and search, done by State). However, where the Court is not asked to consider separate acts as each implicating the Fourth Amendment, it has not separately considered a justification for each. See, e.g., Schmerber, 384

U.S. 757 (finding blood draw justified under exigent circumstances exception but not separately considering analysis of blood).

This case is not controlled by Bazinet. In that case, the defendant's blood was seized by hospital personnel for purposes of medical treatment. Bazinet, 170 N.H. at 682. The police seized, and the state lab tested, Bazinet's blood sample under RSA 329:26, the exception to the physician-patient privilege. Id. at 682-86. Because the statute abrogated Bazinet's privacy interests in the blood, the State testing did not implicate Part I, Article 19, since society did not recognize as reasonable his interest in the sample under these circumstances. Id. Bazinet does not answer the question raised here – whether a subject maintains a reasonable privacy interest in his or her blood sample consensually given to the State.

Courts have sometimes upheld the warrantless analysis of blood samples because the government is only searching the blood for discrete information that does not convey much personal information. See, e.g., King, 569 U.S. at 444-45 (upholding use of blood sample to create DNA profile when law prohibited use of blood for any other reason and profile did not reveal relevant genetic information); Randall, 930 N.W.2d at 773-74 (blood drawn from DWI suspect can only legally be tested for alcohol and drug concentration and court found "nothing in the record" to suggest State would engage in "general rummaging" through blood for other information).

While New Hampshire's implied consent law, RSA 265-A:4, and the exception to the physician-patient privilege in RSA 329:26, allow State testing related to DWI cases, the State has not always confined its testing for this purpose. See, e.g., Bazinet, 170 N.H. at 683-88 (State seized defendant's blood under RSA 329:26 and conducted toxicological and DNA analysis of sample).

While other courts have found no right to withdraw consent to analysis of a blood sample after a consensual blood draw, they have not uniformly done so. In Randall, 930 N.W.2d 223, the court upheld the constitutionality of the analysis through a hodge-podge of rationales: finding only one search, relying on the search incident to arrest rationale, and finding no reasonable expectation of privacy in one's blood alcohol content when arrested for DWI. The Wisconsin court did not find any greater protection in its state constitution than provided by the Fourth Amendment. Id. at 753. In People v. Woodard, 909 N.W.2d 299 (Mich. Ct. App. 2017), the Michigan court similarly found only one search and no reasonable expectation of privacy in one's blood alcohol content. The court relied, in part, on Michigan's implied consent law, which does not contain a provision requiring the state to retain the sample for the defendant. Id. at 319-92; M.C.L.A. 257.625a. See also State v. Simmons, 605 S.E.2d 846 (Ga. Ct. App. 2004) (finding no right to withdraw consent

to testing). However, in United States v. Dease, 71 M.J. 116 (C.A.A.F. 2012), the court found the defendant had a privacy interest in his urine and could withdraw his consent to testing before the testing was conducted. The court found a privacy interest in the urine because its "evidentiary value" was "only ascertainable after chemical analysis" and in that way was similar to a computer hard drive. Id. at 120-21.

Here, the Court should find that a second search occurred when the State analyzed Almeida's blood and that Almeida had a privacy interest in the blood that society is prepared to recognize as reasonable. Here, the State asked for and obtained Almeida's consent to withdraw his blood for the purpose of testing it. However, Almeida clearly withdrew his consent before any testing took place. His blood contained private information that society protects; thus, his expectation of privacy was reasonable. The governmental interests here do not support searching his blood without consent and without a warrant. The State had ample opportunity to seek a warrant for the evidence they sought and there was no danger that evidence would dissipate before a warrant could be obtained.

C. State's other arguments

Because Almeida has a privacy interest in the information obtainable from his blood sample, he has standing to object to the analysis done on his blood. "A

defendant may have standing based upon . . . having a legitimate expectation of privacy in the place searched or the item seized." Boyer, 168 N.H. at 557. Moreover, the State did not raise standing in the trial court. "It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial." Bean, 151 N.H. at 250. Finally, the State treated Almeida as having standing over his blood sample when it returned the remainder of it to Almeida's agent after the State had completed its testing. SBA 65.

The State also argues for the first time on appeal that Almeida's only recourse in the situation was to file a motion to return property. The State did not preserve this issue for the Court's review. Bean, 151 N.H. at 250.

Finally, Almeida did not abandon his blood sample. "Abandonment is determined based upon evidence of a combination of act and intent." State v. Howe, 159 N.H. 366, 372 (2009) (quotation omitted). "Intent is to be ascertained from what the actor said and did since intent, although subjective, is determined from objective facts at hand." Id. (quotation omitted). "Also relevant are where and for what length of time the property is relinquished and its condition." Id. (quotation and brackets omitted).

"Whether property has been abandoned is generally a question of fact." Id. The Court "will uphold the fact finder's determination regarding abandonment unless it is clearly

erroneous." Id. The Court's "review of the trial court's legal conclusions . . . is *de novo*." Id.

In Howe, the defendant was told he had one week to remove his belongings or his landlord would dispose of them. Id. at 369-70. The defendant removed some of his things within that week but left others without indicating any intent to return for them. Id. at 372. The Court found, from Howe's actions, that he had abandoned the remaining items. Id. at 373. In contrast, the Court found in State v. Westover, 140 N.H. 375 (1995), that the defendant had not abandoned a sweatshirt and T-shirt he tossed outside of a store before entering. "While the possibility of a generalized intent to return to the property at some time does not per se preclude a finding of abandonment, there must be a significant dissociation of the property from the defendant for a finding of abandonment." Id. (citation omitted). See also Dease, 71 M.J. at 121 (no abandonment of sample that defendant consented to give police but later requested return of when he withdrew consent for government testing).

Here, the implied consent law grants Almeida a continuing interest in his blood sample that persists for thirty days past the State's testing. That Almeida actually asserted his interest in the sample within the time frame established by statute for his continuing interest in the sample shows

that he did not abandon the sample. The trial court correctly rejected the State's abandonment argument.

D. Conclusion

The trial court correctly found that, although Almeida had initially consented to the seizure and search of his blood, he effectively withdrew that consent. At that point, the State had no justification to test the sample without a warrant. Almeida had significant privacy interests in the information obtainable from his blood. Under these circumstances, the State was required to obtain a warrant to analyze the blood. This Court should affirm.

CONCLUSION

WHEREFORE, David Almeida respectfully requests that this Court affirm the decision of the trial court.

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

This brief complies with the applicable word limitation and contains under 6000 words.

Respectfully submitted,

By /s/ *Stephanie Hausman*
Stephanie Hausman, 15337
Deputy 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 has been timely provided to Daniel E. Will, Solicitor General; Benjamin W. Maki, Assistant Attorney General; Elizabeth C. Woodcock, Assistant Attorney General; and the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ *Stephanie Hausman*
Stephanie Hausman

DATED: August 20, 2020

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

425285

STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
DIVISION OF MOTOR VEHICLES

23 Hazen Drive, Concord, NH 03305

John J. Barthelmes
Commissioner of Safety
Elizabeth A. Bielecki
Director of Motor Vehicles

Date of Arrest: 4/6/2019
Date of Service:
Date of Birth: 03/01/1967
License #: 03AAD67011 State NH
Summons #:

Name: David A. Almeida
[AND ALIASES]
Mailing Address: 897 Main Street, Bethlehem
New Hampshire 03574

I. ADMINISTRATIVE LICENSE SUSPENSION RIGHTS/VIOLATIONS AND MISDEMEANORS
PLEASE INDICATE ☐ 16+ Passenger ☐ OHRV ☐ CMV ☐ CDL ☐ HAZMAT ☐ BOAT

1. You have been arrested for an offense arising out of acts alleged to have been committed while you were driving under the influence of alcohol or drugs.
2. You are being asked to submit to a test or tests, at the discretion of a law enforcement officer, in order to determine the alcohol or drug concentration in your system. You may be asked to perform a breath, blood, or urine, or physical test, or any combination of these.
3. You have the right to an additional test or tests of blood taken by a person of your own choosing at your own expense. Upon your request, you will be given the opportunity for such additional test(s). You also have the right to obtain a portion of our sample of your blood for testing at your own expense.
4. If you submit to a blood, urine or breath test which shows an alcohol concentration of 0.08 or more (or if you are under age 21, of 0.02 or more), your New Hampshire driver's license/operating privileges, non-resident operating privilege, and boating privileges in this state will be suspended.
5. If you refuse to take a test or tests, the refusal can be admissible in court.
6. If you refuse to submit to a test requested by the officer, your New Hampshire driver's license/operating privileges, non-resident operating privilege, and boating privileges in this state will be suspended.
7. I have been informed of these rights.
   David A Almeida
   Defendant
8. ☑ I agree to the requested testing. ☐ I refuse the requested testing.
   David A Almeida
   Defendant

☐ Defendant refused to sign (check if applicable)

Officer/Witness

II. ORDER OF SUSPENSION **THIS IS YOUR OFFICIAL NOTICE OF SUSPENSION**

☐ FAILURE TO SUBMIT - Because you failed to submit to testing, the Department of Safety hereby suspends your driving and boating privileges, effective thirty (30) days from today.

☐ ILLEGAL LEVEL - Because the tests which were taken indicated an alcohol concentration of 0.08 percent or more (or 0.02 or more, if you are under 21), the Department of Safety hereby suspends your driving and boating privileges, effective thirty (30) days from today.
Results indicated _____ percent alcohol concentration in your system.

III. SURRENDER OF NEW HAMPSHIRE DRIVER'S LICENSE

By law, the officer is required to take your NH license. (If license is not included, indicate reason): Blood test.

MAY 08 2019

IV. TEMPORARY DRIVING PERMIT NH-DMV-FR

☐ This entire notice is valid as a temporary driving permit. However, it shall become invalid if detached, defaced or a suspension, revocation or expiration takes effect within the period of issue. Valid only through 12:01 am thirty (30) days after date of service (see above).

☒ No temporary permit issued because operator does not have a valid New Hampshire license or did not surrender his New Hampshire license.

V. OFFICER'S REPORT

I, Kelly Lewis (officer's name) of the Bethlehem Police Department 2155 Main Street Bethlehem, NH 0557 (complete/current mailing address)

hereby swear that I requested a test pursuant to RSA 265-A:4 and that David Almeida (Driver's name)

☐ Refused to submit to testing. ☒ Submitted to testing which disclosed an alcohol concentration of .157 percent.

☒ I received blood/urine test results on 5/2/19 (date).

Kelly Lewis
(Officer's Signature)

Personally appeared and sworn to before me this 3rd day of May, year 2019

April D. Hibbard
(Notary Public/Justice of the Peace or Commissioner of Deeds)

APRIL D. HIBBARD
STATE OF NEW HAMPSHIRE
MY COMMISSION EXPIRES AUG 2022
NOTARY PUBLIC

DEPT. OF SAFETY COPY

DSMV428 (Rev. 05/17)