THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0603

State of New Hampshire

v.

David Almeida

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
2ND CIRCUIT— DISTRICT DIVISION — LITTLETON

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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(15-minute argument requested)

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ISSUES PRESENTED

I. Whether the defendant had a reasonable expectation of privacy in the drawn blood.

II. Whether two of the arguments presented in the State's brief are preserved.

STATEMENT OF THE CASE AND FACTS

The State relies on its brief for the procedural history and factual background.

SUMMARY OF THE ARGUMENT

The defendant contends that he had a reasonable expectation of privacy in his drawn blood. DB 18.[1] In support of this contention, he argues that this Court has recognized a reasonable expectation of privacy in a number of cases. DB 18-20. This argument fails because the defendant consented to the blood draw and did not withdraw that consent until well after the sample had been taken and brought to the laboratory. In support of this contention, he directs this Court to the implied consent statute that requires the blood sample to be large enough to allow for two tests: one by the State and one by the driver. DB 27. But the statute does not recognize a separate privacy right in the sample provided to the State for testing.

Contrary to the defendant's assertions, DB 28-29, the State preserved its arguments before the trial court. The concept of standing is included in that of a reasonable expectation of privacy, a concept that the trial court included in its ruling and that the State addressed in its motion to reconsider. Further, although the State did not specifically tell the trial court that a motion for return of property was the appropriate means of securing the return of the blood sample, it unequivocally told the Court that the "demand notice" was not the appropriate vehicle.

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[1] "DB __" refers to the defendant's brief and page number.
"SBA __" refers to the appendix of the State's brief and page number.

ARGUMENT

I. THE DEFENDANT HAD NO ONGOING PRIVACY INTEREST IN THE DRAWN BLOOD.

The defendant notes that this Court has recognized a privacy interest in "a person's communications, internet browsing, shopping, banking, and other 'private affairs.'" DB 20 (citing *State v. Mello*, 162 N.H. 115, 122 (2011)). But once information is "voluntarily disclosed," no privacy interest remains. *Id.* By way of analogy, if the defendants in *Riley v. California*, 573 U.S. 373 (2014), had assented to a download of their cell phones, they could no longer assert a privacy interest in the content of the downloaded evidence that they had provided to the police.

The defendant also contends that "the implied consent law grants [the defendant] a continuing interest in his blood sample that persists for thirty days past the State's testing." DB 30. Under RSA 265-A:7, II, he has a right, at his own expense, to seek testing of one-half of the drawn blood. Nothing in the statute, however, gives him the authority to prevent the State from examining its half of the sample. Indeed, the statute specifically mentions that the blood draw must be of "sufficient quantity to allow 2 tests." It also requires the laboratory to "retain for a period of 30 days… 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 (emphasis added). The statute does not require the laboratory to relinquish the entire sample upon the defendant's demand, nor does it recognize a constitutionally protected privacy interest in the sample that the laboratory is required to preserve.

II. THE ARGUMENTS REGARDING STANDING AND THE MOTION FOR RETURN OF PROPERTY ARE PRESERVED.

The defendant contends that two of the State's arguments are not preserved for review. DB 28-29. He contends that the State did not preserve the argument that he lacked standing because he no longer had a privacy interest in his blood. DB 28-29. And he argues that the State never argued that a motion for return of property was the appropriate vehicle to demand the return of the blood sample and the State cannot do so here. DB 29.

First, the State did argue that the defendant had no reasonable expectation of privacy in the blood drawn as the result of his consent. SBA 62 ("[O]nce blood is extracted, there is no reasonable expectation that it will be returned."), SBA 63 ("The defendant in this case did not have a reasonable expectation of privacy in the toxicological information collected under his own consent.").

Standing includes the concept of a reasonable expectation of privacy. *See State v. Boyer*, 168 N.H. 553, 557 (2016) ("A defendant may have standing based upon: (1) being charged with a crime in which possession of an item or thing is an element, which confers automatic standing; or (2) having a legitimate expectation of privacy in the place searched or the item seized."). In other words, an individual who lacks a reasonable expectation of privacy has no standing to object to the search.

"To claim standing based upon a legitimate expectation of privacy, a defendant must establish both: (1) a subjective expectation of privacy in the place searched or the item seized; and (2) that his subjective expectation is legitimate because it is 'one that society is prepared to recognize as reasonable." *Id.* (internal quotation marks and citation omitted).

In short, by arguing that the defendant had no reasonable expectation of privacy in the drawn blood, the State argued that he did not have standing to object to the toxicology test. *See United States v. Aguirre*, 839 F.2d 854 (1988) ("Before embarking upon the merits of a suppression challenge, a criminal defendant must show that he had a reasonable expectation of privacy in the area searched and in relation to the items seized…. Unless and until the 'standing' threshold is crossed, the *bona fides* of the search and seizure are not put legitimately into issue.") (citations omitted)).

Moreover, the trial court relied on the reasonable expectation of privacy to convey standing to the defendant. SBA 41. The court acknowledged that the defendant's subjective expectation of privacy was clear, but the objectively reasonable expectation of privacy was a "closer call." SBA 41. The trial court, therefore, had the opportunity to consider the standing question and, indeed, relied on it in reaching its conclusion.

The defendant also contends that the State never argued that the appropriate vehicle for contesting the blood analysis was a motion for return of property. DB 29. This may be true. But the State did argue that the "demand notice" sent by the defendant's lawyer was hardly an appropriate means of retrieving the sample. *See* SBA 67 ("[T]here is no statutory authority behind a "Notice of Withdrawal of Consent"…"), SBA 72 ("The State did not consider the 'Notice' to be an invitation to seek a warrant as warrant applications are not an adversarial procedure."), SBA 72 (seeking a warrant would have been an "inappropriate use of this Court's time"). The State's observation in its brief that the notice was not appropriate, and that other means existed, was simply a statement of the obvious. And that point

was made clear to the trial court. *See State v. Ayer*, 150 N.H. 14, 21 (2003) ("When trial courts have an opportunity to rule on issues and to correct errors before they are presented to the appellate court, the preservation requirement is satisfied.").

The State's "motion for return of property" argument, therefore, does not serve any purpose other than to illustrate its argument that the defendant notice was improper and that there were other channels he could have used.

CONCLUSION

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

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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September 9, 2020

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief contains approximately 1,267 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.

September 9, 2020 */s/Elizabeth C. Woodcock*
Elizabeth C. Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's reply brief shall be served on Deputy Chief Appellate Defender Stephanie Hausman, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

September 9, 2020 */s/Elizabeth C. Woodcock*
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