THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0163

State of New Hampshire

v.

Teresa Mercon

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

BRIEF FOR THE DEFENDANT

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1. Whether the court erred in its rulings with respect to the docket summary sheet.

2. Whether the court erred in its rulings with respect to the State's motions to continue.

STATEMENT OF THE CASE AND OF THE FACTS

On Christmas Eve in 2018, State Trooper Samuel Muto stopped a car driven by fifty-four-year-old Teresa Mercon and discovered that her driver's license was suspended. SA 87.[*] In 2019, the State charged Mercon in the Third Circuit Court-District Division with operating after suspension ("OAS"). RSA 263:64 defines the crime of OAS, and the State here charged a misdemeanor variant of the crime, applicable where the reason for the license suspension was a prior conviction for driving under the influence ("DUI"). RSA 263:64, IV.

Relying on a Circuit Court-District Division docket summary sheet, the State alleged that, twenty-two years earlier, in 1997, Mercon was convicted for DUI. The State did not, however, possess originals or copies of any 1997 court filings or orders, as they were destroyed in 2007 pursuant to court policy. SA 62. All that remained was the docket summary sheet.

The OAS prosecution in Circuit Court resulted, in August 2019, in a conviction. SA 87-88. Because the offense carried a mandatory seven-day jail sentence, RSA 263:64, IV, Mercon had the right, which she invoked, to take a *de novo* appeal to Superior Court. SA 88.

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[*] Citations to the record are as follows:
"A" refers to the addendum to this brief;
"SA" refers to the appendix to the State's brief;
"SB" refers to the State's brief;
"H" refers to the transcript of the hearing held on February 26, 2020.

In October 2019, the State filed a motion *in limine* to admit the docket summary sheet as "dispositive evidence" of Mercon's 1997 conviction and sentence. SA 64-68. The defense objected, arguing both that the document should not be admitted as "dispositive evidence" and that the court should exclude the document as hearsay and as barred by the balancing test of Rule 403. SA 69-71. On November 6, 2019, the court (Ignatius, J.) convened a hearing on that motion.[1]

Three days later, the State filed a memorandum of law in support of its motion. SA 72-82. In the memorandum, the State for the first time argued that the 1997 DUI conviction constituted a sentencing factor rather than an element of a variant of OAS. SA 74-77. On that view, the State did not need to introduce, at the OAS trial, any evidence to prove the prior DUI conviction. Rather, its burden of proof would arise first at a post-trial sentencing hearing.

In the alternative, the State continued to press its initial argument that the court should admit the docket summary sheet as dispositive evidence of the prior conviction. SA 77-80. In so arguing, the State characterized the defense objection to admission of the docket sheet at the OAS trial as constituting an attack on the validity of the DUI conviction. Id. The defense, maintaining its initial objection and opposing

[1] The State has not obtained a transcript of that hearing.

the State's characterization of the DUI conviction as non-elemental, filed a response. SA 83-86.

On January 2, 2020, the court convened a final pre-trial hearing in anticipation of a trial then scheduled for jury selection on January 13.[2] SA 59. On that day, the court also issued an order on the State's motion *in limine*. SA 62-63. That order rejected the defense argument that the docket sheet constituted inadmissible hearsay but denied the State's request to introduce the docket summary sheet, noting that the clerk's certification merely shows the sheet to be an accurate record of the information contained in the Odyssey computer-filing system. The clerk's certification does not claim that the Odyssey record correctly describes the underlying-but-now-destroyed filings in the 1997 case. SA 63.

On January 3, the State filed a motion to reconsider. SA 87-97. First, noting that the court's order did not address the argument first put forward in its post-motion-hearing memorandum of law, the State repeated that argument. SA 89-92. Second, interpreting the defense objection to the admission of the docket summary sheet as a challenge to the validity, rather than the existence, of the conviction, the State argued that Mercon could not, in the OAS trial, properly challenge the validity of the 1997 DUI conviction. SA 92-95.

[2] The State has not obtained a transcript of that hearing.

On January 10, at an unrecorded chambers conference convened for the purpose of hearing the State's January 3 motion to reconsider, the parties argued their respective positions on the docket-sheet issue. SA 99. When the court indicated that it would not have a ruling until that afternoon at the earliest, but signaled its inclination to deny the State's motion, the State orally moved to continue the trial. See SA 59 (court order referring to the oral motion); SA 99-100 (State pleading describing the hearing); H 13-14 (court recounting its memory of the hearing).

As grounds to continue, the prosecutor, for the first time, disclosed that Trooper Muto, although subpoenaed, had informed the State in December that he would be unavailable to testify because he had enrolled in mandatory training to become a Massachusetts State Trooper. SA 59, 100. Further, the State indicated that Muto would, for that reason, be unavailable "at least" until April 2020. Id. In a later pleading, the prosecutor explained that the State had not requested a continuance prior to January 10, "because the trial could not go forward regardless, given that there was an outstanding order on the Motion to Reconsider, and it could not go forward anyway if [the State] were not permitted to submit the case summary as evidence of the Defendant's DWI conviction." SA 100. Only upon learning that the court intended to proceed with jury selection on January 13 did the

State first disclose Muto's unavailability. Id. The State "brought the Trooper's absence to the court's attention to indicate that there was no possible way the trial could go forward." Id. The defense objected to the request to postpone the trial. SA 59.

In a written order, the court denied the State's motion to continue. SA 59-61. The court concluded that the State's requested continuance was not "in the interests of justice." SA 60. In so ruling, the court cited reasons associated with Mercon's right to, and interest in, a speedy trial. Id.

The State then filed papers in this Court seeking an emergency stay of trial proceedings to allow it to appeal the trial court's ruling on the docket-sheet issue. SA 129-31. This Court initially granted the State's motion to stay the proceedings, prompting the defense, on January 17, to file a motion to reconsider. SA 132-36. On January 24, the State filed a response to that motion. SA 137-42. On February 4, this Court vacated the stay of Superior Court proceedings. SA 114-15.

Meanwhile, in the Superior Court, on January 10 after the chambers conference, the Clerk contacted the parties to ascertain whether to go forward with jury selection as scheduled on January 13. SA 134. The prosecutor replied that, "based on the court's ruling [denying the continuance], they would not be able to proceed to jury selection as

scheduled." SA 134. When this Court granted the State's request for an emergency stay, the Superior Court cancelled the January 13 jury selection. Id.

Though Superior Court proceedings had by then been stayed by order of this Court, the State, on January 15, filed in the Superior Court a motion seeking reconsideration of the denial of the continuance and, with respect to the docket-sheet-admissibility issue, a ruling on the State's January 3 motion to reconsider. SA 43-58, 98-113. The continuance-focused part of the motion challenged aspects of the court's speedy-trial analysis. SA 101-10. On January 21, the court issued a notation order indicating that it "cannot rule on this motion" because all Superior Court proceedings had been stayed by this Court's January 10 order. SA 58.

Two days after this Court vacated the stay, Mercon filed, in Superior Court, a motion to schedule the case for jury selection. SA 114-15. The State objected, arguing that the court should decide the pending motions to reconsider, referring to the January 3 motion on the docket-sheet issue and to the January 15 motion on the continuance of the trial. A40-A41. On February 20, the court issued an order stating that it would schedule a hearing on the status of the case as soon as the docket permitted. SA 114. On February 24, the court issued a scheduling order setting February 26 for the

final pre-trial, March 9 for jury selection, and trial for the week of March 9. SA 42.

At the hearing on February 26, the State asked the court to rule on the docket-sheet and continuance issues. H 5-6. The prosecutor explained that, in the event of adverse rulings, the State would seek to appeal. H 7.

The defense argued its position on the merits of the continuance issue. H 8-11. The court then denied the State's motion to reconsider, finding that the circumstances did not justify waiting so long for Muto to make himself available. H 11-16. The court also cited, in support of the ruling, the State's failure to make known earlier its problem with Muto's availability. H 13-14. The prosecutor defended its delay, saying that the other pending issues would have made it impossible to go forward to trial in any event. H 15. The court reminded the prosecutor that the court, not the prosecutor, controls the trial calendar. H 15-16.

Much of the balance of the hearing addressed the docket-sheet issue. H 17-25. On that issue, the court amended its prior ruling excluding the docket sheet. The court ruled that the docket sheet would be admissible as evidence of the existence of the DUI conviction, but it continued to deny the State's request to have the docket sheet recognized as "dispositive" evidence of that element. H 19-21, 27. The court next decided the question of whether the 1997

DUI conviction functioned as an element or as a sentencing factor, ruling that it constituted an element. H 21-25.

Having thus decided the pending issues, the court turned next to consider the matter of scheduling the trial. H 25-31. The defense asked that the trial remain on the calendar for March 9. H 27. The State asked to put the trial off to the month's second jury-trial week, the week of March 23, to allow the State time to consider whether to appeal. H 28. Granting the State's request, the court agreed to schedule the trial for the week of March 23. H 30. The State then appealed to this Court.

SUMMARY OF THE ARGUMENT

1. The trial court correctly ruled that, while the State could introduce the docket summary sheet as evidence proving the existence of the prior DUI conviction, the State was not entitled to any declaration that that evidence was "dispositive" of the element. A court may not direct a verdict on an element against a defendant in a criminal case.

In addition, the court correctly ruled that RSA 263:64, IV, defines the existence of a prior DUI conviction that led to license suspension as an element of the misdemeanor offense, rather than as a sentencing factor. That being the case, the State must prove the element in its case-in-chief at trial.

2. The trial court did not unsustainably exercise its discretion in denying the State's motions for continuances. In this OAS case, the State sought a continuance that would last several months because a police officer prioritized his training to become a Massachusetts state trooper and had declared his intention not to honor a subpoena. Nothing in that circumstance compelled the court to exercise its discretion in favor of that delay.

I. THE COURT CORRECTLY DECIDED THE ISSUES ASSOCIATED WITH THE DOCKET SUMMARY SHEET.

The litigation associated with the docket summary sheet presents two appellate issues. First, the State claimed the right to introduce the sheet as "dispositive evidence" of the DUI conviction. While in the end it ruled that the State could introduce the docket summary sheet, the court refused to accept the characterization of the sheet as dispositive of the element. Section A below addresses that issue.

Second, after the motion hearing, the State for the first time contended that the license suspension's basis in a DUI conviction constituted a sentencing factor, rather than an element, such that the State need not prove the conviction during its case-in-chief. The court ruled that the DUI conviction is an element the State must prove. Section B addresses that issue.

A. The docket summary sheet's evidentiary status.

Although initially the court excluded the docket summary sheet from evidence, the court later amended its order to permit the State to introduce the sheet. At that point, the court disagreed with the State only with respect to the State's preferred characterization of the evidence as "dispositive" of the element. The court correctly refused to declare the evidence dispositive.

Counsel understands the word "dispositive," in this context, to mean "conclusive" or "irrebuttable." Nowhere does the State indicate any other intended sense and, given that the State ultimately prevailed on the issue of the sheet's admissibility, the fact that the State continues to quarrel with the evidentiary ruling suggests that it hopes to have the jury instructed that, on the basis of the sheet, the jury must or should[3] find proven the element alleging that Mercon had a prior DUI conviction.

This Court has long recognized that the

> very essence of "trial by jury" is the right of each juror to weigh the evidence for himself, and in the exercise of his own reasoning faculties, determine whether or not the facts involved in the issue are proved. And if this right is taken from the juror—if he is not allowed to weigh the evidence for himself—is not allowed to use his own reasoning faculties, but, on the contrary, is obliged to accept the evidence at the weight which others have affixed to it, and to return and affirm a verdict . . . of the truth of which he has reasonable doubts—then, very clearly, the substance, the very

[3] Even an instruction telling the jury that the existence of the conviction is presumed from the docket sheet's contents would be improper, State v. Boggs, 171 N.H. 115, 123 (2018), as would an instruction commenting on the strength of the evidence. State v. Euliano, 161 N.H. 601, 608 (2011) (cautioning courts to refrain from remarks "which could in any way be interpreted as going to the weight of testimony or the defendant's guilt or innocence").

> essence, of "trial by jury" will be taken away and its form only will remain.

State v. Lapointe, 81 N.H. 227, 230-31 (1927).

Therefore, the constitutional right to trial by jury encompasses the principle that trial courts may not direct verdicts against defendants in criminal cases, "no matter how overwhelming the evidence." Sullivan v. Louisiana, 508 U.S. 275, 277 (1993); Rose v. Clark, 478 U.S. 570, 578 (1986). That doctrine bars courts, over defense objection, from directing a jury to find for the prosecution on any element. State v. Kousounadis, 159 N.H. 413, 427-29 (2009); State v. Curran, 140 N.H. 530, 532 (1995). Thus, a trial court lacks the power to declare any item of evidence to be "dispositive" against the defendant on any element.

The State's brief on this issue first focuses on the timing of the court's ruling, and attributes to the court a purpose to hinder the State's appellate rights. SB 17-19. Under the circumstances here, because the court ultimately ruled in the State's favor on admissibility, the timing of that ruling had no lasting significance on the evidentiary issue. Moreover, nothing in the case's procedural history supports the contention that the trial court ever abandoned its proper posture of neutrality.

The State next cites authority for the proposition that a defendant may not, in a subsequent trial, impose on the State

the burden of proving the validity of a prior conviction, at least without first advancing a *prima facie* case for its invalidity. SB 19. That authority does not apply here. To prove the prior-DUI element, the State must prove the *existence* of the DUI conviction. Mercon acknowledges that the State need not, until confronted with evidence to the contrary, prove also its *legal validity*. In seeking to introduce the docket sheet as "dispositive" evidence, the State sought to satisfy, beyond all dispute, its burden of proving the *existence* of that prior conviction. For the reasons stated above, no evidence, no matter how persuasive, ever supports a court in directing a jury, over defense objection, to find an element of a charged crime.

Finally, the State cites several cases in support of its position. SB 20-21. All are distinguishable. Some of the cases stand merely for the proposition that a docket sheet is admissible. See, e.g., Clay v. State, 584 S.W.3d 270 (Ark. App. 2019); Connell v. State, 470 N.E.2d 701, 707 (Ind. 1984). As described above, the trial court ruled that the State could introduce it.

Others of the cited cases stand for the proposition that a docket sheet can constitute *sufficient* evidence of guilt. See, e.g., Commonwealth v. Gonsalves, 907 N.E.2d 237, 240 (Mass. App. 2009); State v. Chandler, 240 P.3d 159, 161-62 (Wash. App. 2010); State v. Spaeth, 556 N.W.2d 728, 733-34

(Wis. 1996). Mercon has no quarrel with that proposition. It may happen at a trial that, on the strength of a docket sheet alone or in conjunction with other evidence, the jury finds the element proven. But the possibility that some item of evidence will persuade the jury does not mean that the State is entitled to an instruction directing the jury to find an element proven on the basis of that evidence.

None of the cases holds that a court can admit evidence as "dispositive" of an element. For all the reasons stated above, this Court must reject the State's claim to the contrary.

B. Proof of the existence of the prior DUI conviction and its link to the license suspension constitutes an element of the offense that the State must prove in its case-in-chief.

The dispute about whether, in the OAS statute, the prior DUI conviction constitutes an element or a sentencing factor raises first a question of statutory interpretation. If the statute's language manifests an intention to treat the fact as an element, then it is an element, even though a differently-worded statute could have treated it as a sentencing factor. Second, if, and only if, the statutory-interpretation inquiry yields the conclusion that the legislature intended the fact to be treated as a sentencing factor, a question of constitutional

interpretation arises. In that circumstance, a court must consider whether the Constitution permits the fact in question to be treated as a sentencing factor. In separate sections below, this brief sets forth those two alternative arguments.

i. The statutory-interpretation claim.

"The interpretation of a statute is a question of law, which [this Court] review[s] *de novo*." State v. Mfataneza, 172 N.H. 166, 169 (2019). When called upon to interpret a statute, this Court looks first to the language of the statute, construing it if possible in accord with its plain and ordinary meaning. State v. Horner, 153 N.H. 306, 309 (2006). "During this exercise, [the Court] can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include." Mfataneza, 172 N.H. at 169. Further, the Court interprets "statutes in the context of the overall statutory scheme and not in isolation." State v. Moran, 158 N.H. 318, 321 (2009). To that end, the Court aims to "effectuate the statute's overall purpose and to avoid an absurd or unjust result." State v. Paige, 170 N.H. 261, 264 (2017).

The statute in question is RSA 263:64. Paragraph I of that statute provides:

> No person shall drive a motor vehicle in this state while the person's driver's license or privilege to drive is suspended or revoked by action of the director or the justice of any court in this state, or competent authority in the out-of-state jurisdiction where the license was issued.

RSA 263:64, I. By its plain terms, that paragraph merely enacts a prohibition on certain conduct. It does not purport to characterize the conduct as a crime or as a violation.

Paragraphs II and III address the legal effect of circumstances that might theoretically fall outside paragraph I's prohibition. Thus, paragraph II speaks to the circumstance in which the person has a license on the effective date of the suspension. The paragraph provides that evidence that notice of the suspension was sent to the person's last known address shall constitute *prima facie* evidence that the person was notified of the suspension. Paragraph III addresses the circumstance in which a person obtains an out-of-state driver's license after the revocation of a New Hampshire driver's license.

Finally, in paragraph IV, the legislature begins to distinguish between criminal and violation versions of the prohibition, and as for the criminal versions, between misdemeanor and felony variants, setting forth the elements of each variant. Accordingly, the paragraph opens by

declaring the essential elements of one misdemeanor variant: "[a]ny person who violates this section by driving . . . during the period of suspension or revocation of his or her license [for reckless driving] shall be guilty of a misdemeanor."

Next, paragraph IV defines a second misdemeanor variant, applicable in the circumstance that the driver's license was suspended for certain other offenses, including DUI. The paragraph's second sentence sets out all the elements of this variant of the crime:

> [a]ny person who violates this section by driving . . . during the period of suspension or revocation of his or her license [for a variety of offenses, including DUI] shall be guilty of a misdemeanor and shall be sentenced to imprisonment for a period not less than 7 consecutive 24-hour periods...."

RSA 263:64, IV.

Paragraph V lends support to the supposition that paragraph IV defines the elements. It enacts a definition of the element of "period of suspension or revocation," "as used in paragraph IV and for purposes of paragraph IV only." RSA 263:64, V.

Paragraph V-a(a) enacts a class B felony version of the offense, applicable when the suspended driver "is involved in a collision resulting in death or serious bodily injury," provided that the suspended driver's "unlawful operation

caused or materially contributed to the collision." RSA 263:64, V-a(a). A flaw in the State's argument that these paragraphs enact only sentencing elements is the consequence that the "collision," "death or serious bodily injury," and "caused or materially contributed" elements would likewise be intended just as sentencing factors. Paragraph V-a(b) enacts an exception to the class B felony variant, characterizing the offense as a misdemeanor where the driver's license was suspended for violation of a provision in RSA 263:14, enacting special rules for original and youth-operator licenses.

Paragraph VI defines as a misdemeanor the act of driving after suspension where "the person has had one or more prior convictions for driving after revocation or suspension . . . within the 7 years preceding the date of the second or subsequent offense." RSA 263:64:VI. Finally, paragraph VII separates the above-described criminal variants of OAS from the non-criminal, violation variant by providing that any act of driving while suspended that is not otherwise defined as a felony or misdemeanor shall be a violation.

In support of its characterization of these variant-defining circumstances as sentencing factors rather than elements, the State first quotes a line from State v. Watkins, 148 N.H. 760, 766 (2002), to the effect that the elements of

OAS are: 1) the suspension of the license; 2) the act of driving; and 3) knowledge of the license suspension. SB 23. In Watkins, however, the Court had no reason to focus on the question presented here, concerning whether a prior DUI conviction constitutes an element or a sentencing factor. Rather, the Court made the above-quoted statement in a discussion about whether OAS is a lesser-included offense of driving while certified as an habitual offender. That listing of the OAS elements served only to illustrate the point that "both the greater and the lesser offenses have a knowledge requirement." Watkins, 148 N.H. at 766. A sentence thus taken out of context cannot answer the issue presented here.

More pertinent are cases in which courts have confronted the question of whether the legislature intended a given statutorily-specified fact to be an element or a sentencing factor. The factors identified in such cases weigh in favor of construing the DUI conviction here as an element.

First, unlike the statute construed in State v. LeBaron, 148 N.H. 226 (2002), nothing in the language of RSA 263:64 indicates that the prior DUI conviction is a sentencing factor. In LeBaron, the statute in question stated that

> Notwithstanding paragraph I, any person who qualifies under [a statute] who does not have a conviction under [another statute] or any misdemeanor or felony motor vehicle convictions pursuant to [the motor vehicle title],

> *shall not be subject to the minimum mandatory provisions of paragraph I.…*

LeBaron, 148 N.H. at 229 (quoting statute) (emphasis added). In the emphasized words, that statute expressly contemplated the presence or absence of the prior convictions as excusing or invoking a specific *sentencing provision* – the minimum mandatory term. This Court relied on that feature in characterizing the prior conviction as a sentencing factor. Id. at 229-30.

RSA 263:64, IV, does not use such exclusively sentence-referring language. Rather, in relevant part it states:

> . . . . Any person who violates this section by driving or attempting to drive a motor vehicle [or OHRV] in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of [several specified statutes, including the DUI statute] shall be guilty of a misdemeanor and shall be sentenced to imprisonment for a period not less than 7 consecutive 24-hour periods to be served . . . . [further specification of sentencing terms].

RSA 263:64, IV. Crucially, and unlike the statute at issue in LeBaron, this statute specifies the elements of the crime, as well as the features of the sentence. Cf. LeBaron, 148 N.H. at 229 ("Paragraph III, on the other hand, recites no prohibited conduct, but rather begins with the language

'notwithstanding paragraph I,' indicating that it sets forth an exception to an otherwise applicable rule").

It is significant also that paragraph IV not only mentions the fact in question here – the prior DUI conviction – but also places it in its list of the crime's other elements: 1) driving; and 2) a license under suspension. In Harris v. United States, 536 U.S. 545, 552 (2002), the Supreme Court noted the significance of that detail to the interpretive question: "Federal laws usually list all offense elements in a single sentence and separate the sentencing factors into subsections."

The LeBaron Court went on to consider whether, notwithstanding that statute's plain language treating the prior conviction as a sentencing factor, constitutional doctrines might nevertheless require it to be treated as an element. LeBaron, 148 N.H. at 231-32. Citing Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court rightly held that the Constitution allows states to define prior convictions as sentencing factors, even when they increase the maximum penalty for an offense. However, nothing in Apprendi *requires* states to treat prior convictions as sentencing factors, and if a statute makes a prior conviction an element, the Constitution does not block that choice.

RSA 263:64, IV, lists the elements of the crime charged against Mercon. That list includes the prior DUI conviction.

Because the statute thus plainly intends the prior conviction to be an element, this Court must affirm the trial court's ruling to that effect.

ii. The constitutional argument.

If, contrary to the argument presented above, the court concludes that the statutory language purports to describe a sentencing factor, a constitutional question arises about the validity of that choice given the right to trial by jury. See U.S. Const. amends. VI, XIV; N.H. Const. pt. I, art. 15. Apprendi sets out the applicable basic rule and the potentially-relevant exception. In that case, the Supreme Court held that

> Other than the fact of a prior conviction, any fact that that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi, 530 U.S. at 489.

Here, RSA 263:64, IV, plainly increases the maximum penalty. A defendant whose license was not suspended for a DUI conviction (or for any of the other statutorily-specified reasons) commits only a violation and is subject only to non-incarceration sanctions. RSA 263:64, VII. The question, therefore, is whether the element here falls within the recidivist, prior-conviction exception recognized in Apprendi.

The answer to that question requires a precise characterization of the element. Here, to convict, it is not enough for the State to prove that Mercon had a prior DUI conviction. Rather, it must also prove that the prior DUI conviction was *the cause* of the license suspension. RSA 263:64, IV, in pertinent part defines the crime as committed by a person who drives "during the period of suspension or revocation of his or her license or driving privilege *for a violation of*" one of the specified statutes. (Emphasis added). That statutory language creates not only a requirement of proof of a prior DUI conviction, but also a requirement of proof that the prior DUI conviction *led to* the suspension of the driver's license. Thus, it creates a causation element that falls outside the Apprendi prior-conviction exception.

This circumstance distinguishes Mercon's constitutional argument from the constitutional argument raised and rejected in LeBaron. In that case, the relevant statute – the habitual offender law – merely required the State, when seeking an enhanced sentence, to prove that the defendant had the requisite prior conviction. The statute did not oblige the State further to prove that that prior conviction *led to* the defendant's certification as an habitual offender. See LeBaron, 148 N.H. at 228-29 (quoting pertinent statutes).

Moreover, that circumstance removes this prior-conviction-that-caused-license-suspension element from the

reach of the logic of the Apprendi prior-conviction exception. In justifying the exception, the Apprendi Court noted, among other factors, that "recidivism does not relate to the commission of the offense." Apprendi, 530 U.S. at 488 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998)). Here, by contrast, the prior conviction does relate to the commission of the offense, in that it has to have been the reason for the license suspension.

In addition, the Apprendi Court noted as a further reason for the prior-conviction exception the fact that the existence of the prior conviction was not contested. Apprendi, 530 U.S. at 488. A constitutional rule applicable across many cases cannot depend on the facts that happen to be disputed in one particular case. The Court's point, therefore, reflects the sense that elemental facts not proven on the face of a court record, even when those facts relate to a prior conviction, do not fall within the prior-conviction exception. See Shepard v. United States, 544 U.S. 13, 25 (2005) (plurality opinion) ("While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record . . . to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute"). In Mercon's case, the elemental fact is not merely the existence of the prior DUI conviction, but also its causal connection with her suspended-license

status twenty-two years later. Because the element thus requires more than mere proof of the prior conviction, the element falls outside the scope of the Apprendi exception.

For these reasons, even if the statute's language indicated an intention to enact a sentencing factor, Mercon's constitutional rights to trial by jury compel the conclusion that the circumstance must be treated as an element.

II. THE COURT PROPERLY DENIED THE STATE'S MOTIONS FOR CONTINUANCES.

Courts possess the inherent authority to control their dockets. See, e.g., In re G.G., 166 N.H. 193, 196 (2014) (recognizing "court's inherent authority to control its own proceedings"). A "trial judge has the authority to determine the manner and procedure by which a case will be tried, except where limited by statute, court rule, or constitutional fiat." Id. at 197 (quoting State v. Fecteau, 140 N.H. 498, 504 (1995)). Indeed, "[i]f the presiding justice is to be more than a mere automaton at the game of litigation . . . and is expected to assist in dealing with the problems of congestion, delay and calendar control in [her] court [she] should not be deprived of all muscular power to deal with problems effectively." Garabedian v. Donald William, Inc., 106 N.H. 156, 158 (1965). Ultimately, a "trial court has broad discretion in managing the proceedings before it." Achille v. Achille, 167 N.H. 706, 713 (2015).

Consistent with that necessary trial court authority, the "decision to grant or deny a motion for a continuance is within the sound discretion of the trial court." State v. Czekalski, 169 N.H. 732, 740 (2017). This Court therefore "will not overturn that decision unless it constitutes an unsustainable exercise of discretion." Id.

Fundamentally, the prosecutor here wanted a continuance because a police witness, although subpoenaed, indicated that he would be unavailable to testify at the January trial, and would remain unavailable until at least April. Trial courts have often denied requests for continuances based on an asserted need to obtain more information. See, e.g., State v. Addison, 160 N.H. 792, 794-96 (2010); State v. Hood, 127 N.H. 478, 481-82 (1985); State v. Monahan, 125 N.H. 17, 27 (1984); State v. Taylor, 118 N.H. 859, 860-61 (1978). In Taylor, for example, the defendant sought a continuance until such time as the co-defendant would be willing to testify. Trial calendars are not governed by the whims of witnesses, and this Court affirmed the denial of the continuance.

The State contends that the trial court could have granted the continuance without violating Mercon's constitutional right to a speedy trial. SB 27-28. That may well be true, but a court has the discretion to deny a State's request for a continuance even when granting it would not violate the defendant's constitutional rights. The State does not hold so broad an entitlement to the granting of its requests for a continuance.

The fact that the trial court thought through the continuance issue initially by reference to speedy-trial concerns does not render unsustainable its exercise of

discretion. Concerns about the length of the pre-trial delay are proper for a court to consider, in deciding whether to grant a continuance. See, e.g., Moore v. Aksten, 123 N.H. 220, 221 (1983).

Equally unavailing is the State's renewed contention that the trial court abandoned neutrality and tried to hinder the State's appellate rights. SB 29-31. As described above, the procedural history of the case does not support that characterization. Moreover, when the court denied the State's second request for a continuance to await Muto's decision to make himself available, the court did grant the State's request to postpone the trial for an additional week, to allow the State to contemplate whether to appeal. H 28-30.

In the end, the State's request for a continuance centered more on Trooper Muto's unavailability than on the State's desire to appeal the court's pre-trial rulings. Even if the court had ruled in the State's favor on the docket sheet issues, it would still have sought the continuance because the State needed Muto's testimony to prove its case, he being the officer who stopped Mercon's car and could testify to the driving element of OAS.

In a misdemeanor appeal in an OAS prosecution, the State, despite knowing of the problem in December, announced just days before the January jury selection that it needed a continuance lasting at least into April because a

police officer prioritized his training to become a Massachusetts state trooper and had declared his intention not to honor a subpoena. Nothing in these circumstances compelled the trial court to grant the State's request for a continuance. This Court must affirm the trial court's rulings.

CONCLUSION

WHEREFORE, Ms. Mercon respectfully requests that this Court affirm the judgment of the trial court.

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

This brief complies with the applicable word limitation and contains approximately 6010 words.

Respectfully submitted,

By /s/ *Christopher M. Johnson*
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CERTIFICATE OF SERVICE

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

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

DATED: December 30, 2020

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

TERESA MERCON

Docket no. 212-2019-CR-00181

STATE'S OBJECTION TO DEFENDANT'S MOTION TO SCHEDULE CASE FOR JURY SELECTION

The State of New Hampshire, by its counsel, Thomas Palermo, objects to the Defendant's Motion to Schedule Case for Jury Selection in this matter. The State asserts the following in support thereof:

1. The Defendant, Teresa Mercon, is charged with one count of Operating After Suspension.
2. This matter was stayed from further proceedings by the New Hampshire Supreme Court on January 10, 2020, to permit the Court to rule on two outstanding motions from the State.
3. Because the Court cited the stay in postponing ruling on the motions, the Supreme Court lifted the stay and remanded the matter to this Court specifically for the Court to rule on the motions.
4. The Defendant has now filed a motion requesting almost-immediate jury selection.
5. This matter cannot proceed to jury selection because there are two outstanding motions without rulings. The Supreme Court specifically remanded this matter to the Court for rulings on those motions.

WHEREFORE, the State requests that this Honorable Court:

A. Deny the Defendant's Motion for Jury Selection; and

B. Grant such other relief as this Court deems appropriate.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its counsel,

February 10, 2020

Thomas D. Palermo, Esq.
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Assistant County Attorney
Carroll County Attorney's Office
PO Box 218
Ossipee, NH 03864

CERTIFICATE OF SERVICE

I, Thomas Palermo, certify that a copy of this Objection was forwarded to Allison Schwartz, counsel for the Defendant in this matter, on February 10, 2020.

February 10, 2020

Thomas Palermo