THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0163

State of New Hampshire

v.

Teresa Mercon

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE CARROLL COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(15-minute oral argument)

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Issue preserved by State's motion in limine, memorandum of law, and motion to reconsider.

II. Whether the trial court erred as a matter of law that proof that the prior conviction had occurred was an element of the offense. *See* RSA 263:64, I and RSA 263:64, IV.

Issue preserved by State's memorandum of law and motion to reconsider.

III. Whether the trial court exceeded its discretion in denying a motion to continue because a witness is not available.

Issue preserved by State's motion to reconsider and oral argument at February 26, 2020 hearing.

TEXT OF RELEVANT STATUTES

RSA 263:64, I.

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, IV.

Any person who violates this section by driving or attempting to drive a motor vehicle or by operating or attempting to operate an OHRV or snowmobile in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of RSA 265:79 or an equivalent offense in another jurisdiction shall be guilty of a misdemeanor. Any person who violates this section by driving or attempting to drive a motor vehicle or by operating or attempting to operate an OHRV or snowmobile in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of RSA 265-A:2, I, RSA 265-A:3, RSA 630:3, II, RSA 265:82, or RSA 265:82-a or an equivalent offense in another jurisdiction 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 within 6 months of the conviction, shall be fined not more than $1,000, and shall have his or her license or privilege revoked for an additional year. No portion of the minimum mandatory sentence of imprisonment shall be suspended by the court. No case brought to enforce this paragraph shall be continued for sentencing for longer than 35 days. No person serving the minimum mandatory sentence under this paragraph shall be discharged pursuant to authority granted under RSA 651:18, released pursuant to authority granted under RSA 651:19, or in any manner, except as provided in RSA 623:1, prevented from serving the full amount of such minimum mandatory sentence under any authority granted by title LXII or any other provision of law.

STATEMENT OF THE CASE AND FACTS

A. The Trial Court

The defendant was convicted of driving under the influence in 1997. SA[1] 67. Twenty-two years later, she was pulled over and was charged with driving after suspension with an enhancement under the prior driving under the influence charge. SA 87.

On August 13, 2019, the defendant was convicted in the Conway District Court (*Subers*, J.). SA 87-88. The court sentenced her to serve seven days. SA 87-88. She then asked for a jury trial in the Carroll County Superior Court. SA 88.

On October 16, 2019, the State filed a motion in limine asking the court to accept a certified copy of the court's case summary as "dispositive evidence" of the defendant's prior conviction for driving under the influence. SA 67. The State sought to prove that the defendant had a 1997 conviction for driving while intoxicated by introducing a certified copy of the case summary. SA 67. The State wanted to use the case summary because, consistent with its protocols, the court destroyed its 1997 files in 2007. SA 67.

On October 28, 2019, the defendant objected. SA 69. Citing no authority, the defendant contended that the State "should be required to present certified copies of the complaint, the sentencing order, an acknowledgment and waiver of rights, and a waiver of counsel form, if

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[1] Citations to the record are as follows:
"SA_" refers to the appendix to the State's brief and page number.
"T_" refers to the February 26, 2020 hearing transcript and page number.

applicable." SA 69-70. The defense then continued, stating, "[s]imply because the Circuit Court's policy is to destroy these documents within a [ten-year] window does not lessen this burden of proof." SA 70. The defense relied on the age of the conviction and stated, without proof, that case summaries were "often fraught with errors." SA 70. The defense criticized the summary because it was "not a complete record of the underlying proceeding." SA 70. The defense challenged the certified case summary as inadmissible hearsay. SA 70.

On November 6, 2019, the court held a hearing. SA 83.

Thereafter both parties filed pleadings. On November 8, 2019, the State filed a memorandum of law. SA 72. The State altered its argument somewhat, taking the position that it was not required to prove the 1997 conviction as an element of the offense. SA 74. Instead, the State contended, the conviction was simply a sentencing enhancement. SA 74.

On November 14, 2019, the defense objected. SA 83. In its objection, the defense contended that proof of the conviction was "part and parcel" of the offense. SA 84. The defendant also challenged the admissibility of the case summary as proof of the conviction. SA 85.

On January 2, 2020, the trial court denied the motion. It did so just ten days before trial. SA 62-63. Although the trial court found that the current clerk of court could testify that the case summary was "a true and accurate record" of the court's entries, the clerk could not "certify" the accuracy of the entries themselves and could not attest that the defendant's plea was knowing, voluntary, and intelligent. SA 63.

The following day, the State filed a motion to reconsider. SA 87. In the motion, the State reiterated its contention that it was not required to

prove the conviction in its case-in-chief. SA 89. The State pointed out that the trial court's order did not address this argument. SA 92. The State also argued that it was the defendant's burden to show that her plea of guilty was not knowing, voluntary, and intelligent. SA 92.

On January 10, 2020, the court held an unrecorded chambers conference. During this hearing, the State orally moved for a continuance. SA 59 n.1. The State told the court that the officer who stopped the defendant in 2019 was attending the Massachusetts State Police boot camp and could not be released to testify in New Hampshire. SA 59. Later that afternoon, the trial court issued a written order denying the continuance. It did so on the ground that the continuance "impose[d] a burden on [the defendant's] constitutional right to a speedy trial." SA 60. It found that the defendant had "explicitly asserted" this right in response to the State's motion. SA 60.

The court found that the defendant had never waived her right to a speedy trial and that the delay was not attributable to her. SA 60. It pointed out that the potential penalties were only misdemeanor penalties. SA 60, And it found that the resulting delay was because the police officer was unavailable. SA 60. The trial court did not address the request to reconsider the ruling on the motion in limine. SA 59-61. As a result of this order, the Office of the Attorney General sought, and received, an emergency stay from this Court. SA 129.

On January 15, 2020, the State moved to reconsider the trial court's order denying the motion to continue. SA 98. It also asked the trial court to rule on the outstanding motion to reconsider the ruling on the motion in limine. SA 98. The State pointed out that the fact of conviction had never

been challenged in the District Division trial. It wrote: "Transcripts from the District Court trial show that the Defendant's strategy was to fully admit to the offense and request the Court's leniency. Should that be the Defendant's defense at her jury trial, she suffers no prejudice from a delay of several months." SA 106.[2]

With respect to the motion to continue, the State pointed out that it had been in contact with the trooper and had subpoenaed him, but, because he was in the middle of recruit training, the Massachusetts State Police Academy would not release him for trial. SA 99-100. The State explained that it had not requested a continuance until January 10, 2020, because it was awaiting a ruling on the motion to reconsider the order on the case summary. SA 100. The State told the court that, unless the ruling was revised, the State could not proceed with the case. SA 100. The State pointed out that the defendant had not asserted speedy trial rights until the State had moved to continue. SA 104.

The State then argued that the defendant's speedy trial rights were not a basis to deny the continuance. SA 104. The State pointed out: (1) that the officer was unavailable for good reason; (2) that the defendant had filed a motion to suppress resulting in the continuance of the trial set for October; (3) that the defendant had only recently asserted her right to a speedy trial and only after learning that the witness would not appear; and

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[2] A copy of the transcript to which the pleading referred is found in the appendix to this brief. The State acknowledges that this transcript was not made a part of the trial court's record and this Court may wish to disregard it. The State has provided it for two reasons: (1) the State accurately represented the District Division record because the defendant testified on direct examination that she had been convicted; and (2) to the extent that the defense argued that the case summary might be inaccurate, the District Division record proved otherwise.

(4) that the defendant did not assert prejudice and the court had never found any prejudice. SA 104-07. The State then repeated its request to the court to rule on the motion to reconsider the order on the October motion in limine. SA 110.

Once this Court issued a stay (discussed below), the trial court declined to rule on the motion in limine because it claimed that it no longer had jurisdiction. SA 58. On February 24, 2020, it granted the defendant's February 6, 2020 motion to set the case for trial without ruling on the motion. SA 42.

On February 26, 2020, the trial court held a pretrial conference and the State asked the court to rule on its pending motions. T 1. The defense characterized the motion to reconsider the case summary as "moot," because the State's witness would not appear and suggested that the State was using the case summary motion as kind of a subterfuge. T 8 The defense argued that the defendant could not address her suspended license status with the Department of Motor Vehicles as long as the case was pending. T 10. She asserted her speedy trial rights. T 9.

The court said that the case was a district court case and the superior courts were mandated to move the district court cases along. T 12. The court noted that it was willing to accommodate delays for officer training or officer vacations, but that this officer was saying that he would not appear until May. T 12.

The court then went on to say that it was "troubled" by how it had learned that the officer was unavailable. T 13. The court recounted that there was a chambers conference (the unrecorded conference) and the court had ruled that the case summary was not coming in. T 13. It characterized

the State as then saying that the trial was "not happening" because the witness was not available. T 14. The court said that it was then "startled" that at 4:45 p.m., it received the stay from this Court. T 15 The stay "said nothing about the witness being unavailable." T 15. The court implied that seeking the stay was in some way inappropriate because it suggested "pigheadedness on [the court's] part" or "unfairness on [the court's] part." T 16. The court told the State that, by seeking the stay, the prosecution "effectively gave" itself a continuance. T 16.

The court then stated that it "may have been incorrect in some of how [it] evaluated" the case summary. T17. It said that to use the case summary as dispositive proof of a conviction was "going too far," but that the court's ruling that it was of no value was also "going too far." T 20. The court concluded that the case summary was not dispositive, but was admissible as "some evidence of that DWI conviction and revocation on the basis of that DWI conviction." T 25.

With respect to the State's contention that the prior conviction was simply a sentencing enhancement, the court disagreed. T 23-24. The court noted:

> [T]here are plenty of cases that - that suggest that in some cases the prior conviction is something that is for a sentencing factor, an enhancing factor, and not an element. And there are other cases that seem to say the opposite.

T 21-22. The court concluded that the prior conviction was not simply a sentencing factor because RSA 263:64, IV was "more detailed enumeration of a particular crime" that was a "different classification than a straight paragraph Roman numeral [I], driving after revocation or suspension." T

23-24. Under Section IV, the offense was "bump[ed] up" to a misdemeanor. T 24.

B. This Court

On the afternoon of January 10, 2020, the Office of the Attorney General asked this Court for an emergency stay. SA 129. The Office did so because the trial court's ruling on the certified case summary relied on the misguided view that the State bore the burden to prove that the guilty plea was constitutionally valid. SA 130. Jury selection was scheduled for January 13, 2020, which was the following Monday. SA 129. This Court granted the stay late that afternoon. SA 134, 137.

On January 17, 2020, the defendant filed a motion with this Court to reconsider the stay, alleging (in part) that the State sought the stay because its witness was unavailable. SA 134. On January 24, this Office responded that it had not sought the stay to thwart the dismissal of the case, but rather to consider whether to appeal the evidentiary ruling regarding the case summary. SA 137.

Upon learning that the trial court had refused to rule on the motion in limine because this Court had stayed the case, this Office asked this Court to remand the case to the trial court to rule on the motion to reconsider. On February 3, 2020, this Court vacated the stay and remanded the case with directions to rule on the motion to reconsider. SA 141.[3] The trial court did not on the motion until February 26, 2020. T 25.

[3] The trial court persisted in its belief that, in issuing an emergency order staying the trial, this Court had deprived it of the ability and, indeed, the responsibility of deciding the

This appeal followed.

motion to reconsider. *See* T 16 (THE COURT: "And you know, there were further pleadings. And I don't know why after the court had - at your request, had instructed me to have hands off on the case, you then filed more motions for me to rule on. I was baffled by it.").

SUMMARY OF THE ARGUMENT

I. The trial court exceeded its discretion in determining that a certified court document reflecting a guilty plea by the defendant to driving under the influence was admissible, but was not dispositive evidence of the guilty plea. The trial court's initial ruling, that the case summary was inadmissible, was also incorrect and prompted the series of events that necessitated this appeal. The fact that it revisited the ruling and issued another incorrect ruling should be viewed in this context. The certified case summary should have been admitted as dispositive evidence that the defendant had pleaded guilty twenty years earlier.

II. The trial court erred as a matter of law that proof that the prior conviction had occurred was an element of the offense. *See* RSA 263:64, I and RSA 263: 64, IV. Proof of the conviction is not an element of the offense, but is simply a sentencing enhancement. In ruling otherwise, the trial court erred.

III. The trial court exceeded its discretion in denying a motion to continue because a witness was not available. The State's sole fact witness was attending the State Police Academy in Massachusetts and, although the State had made diligent attempts to secure his presence, could not do so. In denying the State's first motion to continue, the trial court assumed that the continuance would violate the defendant's speedy trial rights, but made almost none of the requisite findings. The trial court denied the State's second motion after making statements on the record that draw into question the trial court's use of discretion in denying the motion.

ARGUMENT

I. THE RULING ON THE PROOF OF THE DEFENDANT'S PRIOR CONVICTION IS INCORRECT.

The trial court erred when it determined that a certified court document reflecting a guilty plea by the defendant to driving under the influence was admissible, but was not dispositive evidence of the guilty plea.

This Court will "review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case." *State v. Brooks,* 164 N.H. 272, 283, 56 A.3d 1245 (2012) (quotation omitted). "In determining whether a ruling is a proper exercise of judicial discretion, [this Court will] consider whether the record establishes an objective basis sufficient to sustain the discretionary decision made." *State v. Noucas*, 165 N.H. 146, 158 (2013). The proponent of the evidence must establish prejudice. *Id*.

Under *N.H. R. Ev*. 902(4)(a), "A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law—[is admissible] if the copy is certified as correct by: (A) the custodian or another person authorized to make the certification." *See also State v. Scognamiglio*, 150 N.H. 534, 539 (2004) (certified copy of conviction and mittimus sufficient to prove prior conviction).

The trial court committed three interrelated errors in ruling on the admissibility of the certified copy of the case summary. First, it delayed ruling on the motion until ten days before trial, prompting the State to seek

reconsideration because the initial ruling was incorrect. Second, it denied the State's motion to continue and did not rule on the motion in limine, prompting a request to this Court for an emergency stay. Third, it then gave an oral order finding that the case summary was admissible, but not dispositive.

First, the trial court delayed ruling on the State's October 2019 motion in limine until shortly before trial and did not rule on the motion to reconsider. This had a direct impact on the State's case. When the trial court ruled, as it did initially, that the case summary was not proof of conviction and that this proof was required for a conviction, then the State was given the choice of dismissing the case, going forward to a nearly certain acquittal, or seeking an emergency stay.

The trial court's delay in ruling contributed to its unsustainable exercise of discretion. *Cf. In re Molina*, 94 S.W.3d 885, 886 (Tex. Ct. App. 2003) ("For purposes of establishing that the trial court has abused its discretion in failing to rule on a motion, the complainant must establish that the trial court: (1) had a legal duty to perform a nondiscretionary act, (2) was asked to perform the act, and (3) failed or refused to do so.") (per curiam); *see also Commonwealth v. Vaidulas*, 741 N.E.2d 450, 453 (Mass. 2001) (The Massachusetts Supreme Judicial Court has "frequently expressed [its] preference for early rulings on motions in limine.").

The delay by itself is not dispositive. But the initial decision was wrong. In the absence of any reason to doubt that the defendant had pleaded guilty and been convicted, the trial court required the State to prove that the guilty plea was knowing, voluntary and intelligent, when proof to the contrary lay with the defendant. This was despite the fact that the

defendant had never challenged the existence of the conviction. *See In re State*, 154 N.H. 118, 125 (2006) (The defendant did not provide this Court "with any record from the trial court to indicate that he challenged the evidence presented by the State or that he challenged the existence of his conviction.").

In order to challenge her guilty plea, she would have had to file a writ of coram nobis. *See State v. Jaskolka*, 172 N.H. 468, 473 (2019) (When a defendant "seeks to withdraw a guilty plea and vacate a conviction outside the time limits governing the circuit court's jurisdiction, the writs of habeas corpus and coram nobis are the proper procedural vehicles by which a party may seek review of the proceeding at which he or she entered a guilty plea."). To warrant coram nobis relief, a defendant must show that "sound reasons exist for [her] failure to seek appropriate earlier relief." *Id.* at 474 (citation and internal quotation marks omitted). She never did this. Indeed, she admitted to the officer who stopped her that she had been convicted.

This ruling was compounded by the trial court's decision to deny the motion to continue without ruling on the motion to reconsider, prompting the request for an emergency stay. If the State had not sought a stay, the court, having ruled on Friday afternoon, would have proceeded to jury selection the following Monday and forced the State to proceed or to dismiss the charges.

In light of the court's remarks on February 26, 2020, it is hard not to conclude that the court intended to deprive the State of its opportunity to appeal the court's erroneous ruling. The court was clearly annoyed that this Court's stay arrived late in the afternoon. T 15 (This Court's stay

"characterized [the situation] as some sort of rush to trial against all rights of the State."). But timing was completely in the trial court's hands; it could have avoided the consequences of its last minute ruling by deciding the motion in November or December.

Since the only final ruling is the one in which the trial court agreed to admit the case summary for a limited purpose, this history may seem irrelevant. But it places into context the trial court's subsequent, reluctant decision on the motion to reconsider. And it also explains that the request for the stay from this Court was not to secure a continuance. It was to secure a ruling on the motion to reconsider.

To the extent that, on February 26, 2020, the trial court revised its ruling, it did not do so to the extent warranted. It essentially ruled that a court document, under seal, was not conclusive proof that the referenced court proceeding had taken place. Although the trial court acknowledged in that hearing that the destruction of documents was not the State's fault, it still declined to admit the certified case summary as dispositive.

This was an error. *See, e.g., Commonwealth v. Gonsalves,* 907 N.E.2d 237, 240 (Mass. Ct. App. 2009) (court docket sheets proof of convictions); *State v. Chandler,* 240 P.3d 159, 162 (Wash. Ct. App. 2010) (certified copies of docket sheets sufficient to prove convictions); *Clay v. Arkansas*, 584 S.W.3d 270, 275 (Ark. Ct. App. 2019) (certified copies of docket sheets admissible); *Connell v. Indiana*, 470 N.E.2d 701, 707 (Ind. 1984) ("Copies of court docket sheets, properly certified, are admissible in a habitual offender proceeding as proof of prior convictions."); *State v. Spaeth*, 556 N.W.2d 728, 733-34 (Wis. 1996) ("[I]n the absence of an admission, the State may establish prior [operating after revocation]

convictions by placing before the court reliable documentary proof of each conviction."). *See also United States v. McKenzie,* 539 F.3d 15, 19 (1st Cir. 2008) ("[A]ttested copies of electronic docket entries may be a sufficient proffer of prior conviction for sentencing proceedings before a district court."); *accord State v. Robbins*, 37 A.3d 294, 295 (Me. 2012) (applying the "presumption of regularity" to the use of a docket sheet as proof of convictions) (citing *Parke v. Raley*, 506 U.S. 20, 29 (1992)).

The State gave an adequate explanation for its inability to produce the mittimus in this case. Indeed, no one, including the court and the defendant, challenged the representation that the actual court documents had been destroyed. As a result, since the other records were unavailable, the trial court committed error in first excluding, and then limiting the evidentiary value of the docket sheets. *Cf. Chandler*, 240 P.3d at 162 ("Because the State is not required to prove unavailability [of court records] beyond a reasonable doubt, we are satisfied the State adequately explained that it was not at fault for failing to produce judgment and sentence records.").

The trial court erred first in shifting the burden to the State to prove that the guilty plea was constitutionally sound. It erred again when it agreed to admit the case summary, but only as "some proof" of conviction. In short, the trial court erred in its ruling that the certified case summary was not dispositive proof of the prior conviction.

II. PROOF OF A PRIOR CONVICTION IS NOT AN ELEMENT OF THE OFFENSE.

The trial court ruled that proof of the prior conviction for driving under the influence was an element of the offense rather than a sentencing enhancer. In ruling this way, the trial court erred.

This Court reviews a trial court's ruling on interpretations of statutes de novo. *State v. Pandelena*, 161 N.H. 326, 329 (2010). "In matters of statutory interpretation, [this Court] is the final arbiter of the legislature's intent." *Id.* (quoting *State v. Gallagher*, 157 N.H. 421, 422 (2008)). In interpreting a statute, this Court considers the intent "as expressed in the words of the statute considered as a whole." *Id.* "In interpreting a statute, [this Court will] first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *State v. Chrisicos*, 159 N.H. 405, 407 (2009). This Court will "interpret statutes in the context of the overall statutory scheme and not in isolation." *Id.* This Court will not "consider what the legislature might have said or add language that it did not see fit to include." *State v. Bernard*, 158 N.H. 43, 44 (2008). "When the language of the statute is clear on its face, its meaning is not subject to modification." *State v. Crie*, 154 N.H. 403, 407 (2006).

RSA 263:64, I 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, IV provides:

> Any person who violates this section by driving or attempting to drive a motor vehicle or by operating or attempting to operate an OHRV or snowmobile in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of RSA 265:79 or an equivalent offense in another jurisdiction shall be guilty of a misdemeanor. Any person who violates this section by driving or attempting to drive a motor vehicle or by operating or attempting to operate an OHRV or snowmobile in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of RSA 265-A:2, I, RSA 265-A:3, RSA 630:3, II, RSA 265:82, or RSA 265:82-a or an equivalent offense in another jurisdiction 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 within 6 months of the conviction, shall be fined not more than $1,000, and shall have his or her license or privilege revoked for an additional year. No portion of the minimum mandatory sentence of imprisonment shall be suspended by the court. No case brought to enforce this paragraph shall be continued for sentencing for longer than 35 days. No person serving the minimum mandatory sentence under this paragraph shall be discharged pursuant to authority granted under RSA 651:18, released pursuant to authority granted under RSA 651:19, or in any manner, except as provided in RSA 623:1, prevented from serving the full amount of such minimum mandatory sentence under any authority granted by title LXII or any other provision of law.

The elements of operating after suspension are: "(1) that the defendant's license to drive had been suspended or revoked; (2) that the defendant drove a motor vehicle after such suspension; and (3) that the defendant did so with knowledge of the revocation or suspension of his license to drive." *State v. Watkins*, 148 N.H. 760, 766 (2002) (quoting *State v. Curran,* 140 N.H. 530, 532 (1995)).

Prior convictions used solely for purposes of sentence enhancement are generally not considered elements of the underlying offense. *See State v. LeBaron*, 148 N.H. 226, 232 (2002) ("A potential sentence enhancement based on prior convictions is not punishment related to the offense itself. Nor is it punishment for the prior convictions themselves. Rather, the extended term is punishment for the defendant's recidivism.") (internal quotation marks and citation omitted); *see also Almendarez-Torres v. United States,* 523 U.S. 224, 228-48 (1998).

The defendant was charged with operating after suspension. SA 72. The State argued that, under the statute, the State must prove that the defendant "knowingly drove a motor vehicle" while her "driver's license or privilege to drive [was] suspended or revoked." SA 76. The State contended that the specific basis for the defendant's revocation was not an element to be proved to the jury. SA 77.

This makes sense. The offense, after all, involves driving a motor vehicle with a suspended license. In New Hampshire, a license may be revoked or suspended for a number of reasons, including, but not limited to: (1) taking an automobile without the owner's consent, RSA 262:12, RSA 263:58; (2) transporting open containers of alcoholic beverages, RSA 265-A:44; (3) transportation or possession of drugs in a motor vehicle, RSA 265-A:43; (4) reckless operation, RSA 265:79; (5) physical or mental incompetency to drive, RSA 263:59; For example, proof of suspension should not require the State to prove that the driver was also found mentally incompetent.

Section IV, upon which the trial court relied to add this element, lists two results from a conviction: (1) that the driver will be guilty of a

misdemeanor rather than a violation; and (2) that the driver is subject to a mandatory minimum sentence. *See* RSA 263:64, IV. Neither of these is an element of the offense. Indeed, juries are routinely instructed that the potential punishment should not affect the deliberations. *See, e.g., State v. Eldridge*, __ N.H. ___ , *6 (Feb. 19, 2020).

In sum, the trial court erred when it ruled that the State had to prove the underlying conviction in order to prove the charge of operating after suspension. The prior conviction is a sentencing enhancement and not properly placed before a jury to decide.

III. THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION TO CONTINUE.

The trial court issued two rulings on the motion to continue. In the first ruling, the court relied on the defendant's speedy trial rights, finding that these rights had never been waived and holding the officer's unavailability against the State. SA 59. On February 28, 2020, in its second ruling, the court abandoned its speedy trial rationale and offered a "discretionary" rationale. On both occasions the trial court erred.

Generally, a trial court's ruling on a motion to continue is discretionary and this Court will not overturn the trial court absent "an unsustainable exercise of discretion." *State v. Addison*, 160 N.H. 792, 795 (2010). "There are no mechanical tests to determine when due process has been violated by the denial of a continuance, but in each case the totality of the circumstances must be considered." *State v. Linsky,* 117 N.H. 866, 880 (1977). The unavailability of a witness may be a reason to continue a case. *State v. Knowles*, 131 N.H. 274, 275 (1988) (trial court did not exceed discretion in granting State's tardy motion to continue because witness was unavailable). If the witness is material, a continuance may be further justified. *State v. Carvalho*, 2015 WL 11182032, *3 (N.H. July 27, 2015) (unpublished).

In its January 15 motion to reconsider, the State explained its efforts to procure the trooper's presence. SA 100 ("The State has subpoenaed [the trooper] and contacted him several times, and has also tried to work with the Troop E State Police prosecutor to schedule [the trooper's] presence at trial."); *see also* SA 103 ("[The trooper] has a valid reason for non-

attendance, [but] the State has made every reasonable attempt to obtain his attendance nonetheless.").

The trial court denied the first request based on the defendant's speedy trial rights. In assessing a potential speedy trial violation, this Court considers four factors: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *State v. Allen*, 150 N.H. 290, 292 (2003). This Court "puts substantial emphasis" on the last two factors. *State v. Langone,* 127 N.H. 49, 55, 498 A.2d 731 (1985) (quotation omitted). "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *State v. Brooks*, 162 N.H. 570, 582 (2011) (quoting *Barker v. Wingo*, 407 U.S. 514, 531-32 (1972)). The failure to assert the right makes it "difficult for a defendant to prove that [she] was denied a speedy trial." *Barker*, 407 U.S. at 532; *see also State v. Stow*, 136 N.H. 598, 603-04 (1993) ("While defendant did not waive his right to a speedy trial by failing to assert it, his failure to pursue it actively weakens his contention that it was denied him.") (citation omitted)).

In assessing prejudice, a trial court may consider whether the defendant has been detained while awaiting trial and the delay's effect on preparing his case. *State v. Weitzman*, 121 N.H. 83, 87 (1981) (finding no prejudice where the defendant "was not incarcerated pending trial nor was his ability to conduct his defense impaired by the delay.")

The trial court relied on the fact that the defendant had never waived her speedy trial rights. This was error. The speedy trial analysis emphasizes the assertion of those rights. That assertion came only as the

defendant realized that the State could not proceed with the trial because of the court's evidentiary ruling and the inability to get the trooper to New Hampshire. The trial court denied the motion to continue without even determining if the defendant had been prejudiced. The State properly asked the court to reconsider its ruling, applying the requisite factors. SA 101. The trial court never did.

The trial court also relied on the Superior Court Speedy Trial Policy, which requires the State to show cause why a misdemeanor charge had been pending for more than six months. SA 60. But the court never calculated the actual length of time that the case had been pending, which the State asserted was less than six months. SA 60. Indeed, aside from asserting that the case was a misdemeanor and, presumably of limited importance, and assuming prejudice without proof, the trial court made very few of the necessary findings. SA 60.

If it had, it might have realized that the speedy trial time period was not even close to elapsing. According to the State's January 15 motion to reconsider, the defendant asserted her speedy trial rights for the first time in the unrecorded chambers conference on January 10, 2020. SA 104. Up until that point, she had not pressed for a speedy trial and, in fact, had filed a motion to suppress the previous October, which delayed the trial. SA 108. In its January 15 motion, the State pointed out that, if the court excluded the time that the defendant's motion was pending, only three months and three days had elapsed. SA 109.

The court denied the State's motion to continue for a second time in February 2020. Although the February 26, 2020 oral order denying the motion to continue was couched in discretionary terms, stating that it would

not accommodate the trooper until May or June, T 26, the ruling must be taken in context. *Cf. United States v. Espinal-Almeida*, 699 F.3d 588, 607 (1st Cir. 2012) ("When we review for judicial bias, 'we consider [ ] isolated incidents *in light of the entire transcript* so as to guard against magnification on appeal of instances which were of little importance in their setting.'") (citation omitted, emphasis added).

The court's ruling on the continuance followed the court's remarks that the State was making the court look unreasonable and stubborn before this Court. T 16. *Cf. State v. Basker*, 424 P.2d 535, 540 (Kan. 1967) ("[T]he use of the term 'pigheaded' by the district judge in addressing the jury was highly improper. No juror should be subjected to censure or ridicule for adhering to his honest convictions.") (*Fatzer*, J., dissenting). In this case, the court belittled the State's honest convictions that the impaired driving conviction was not an element of the offense and that the certified case summary was sufficient proof of the conviction. *Cf. State v. Benson*, 559 S.W.2d 55 (Mo. Ct. App. 1977) (noting that the trial court has a duty to maintain "order and decorum in the courtroom," but it must do so without "subject[ing] counsel to 'contempt or ridicule'") (citation omitted)).

The court also implicitly criticized the State for taking an interlocutory appeal. *See, e.g.*, T 15 (THE COURT: "And I was further, I have to say startled when at, you know, 4:45 that afternoon we got a copy of what the Supreme Court had issued…"); 25 (THE COURT: "[T]he suggestion that there should always be for any ruling, there always has to be built in enough time to take a case on an interlocutory appeal, is a rough way to try cases"); 25-26 (THE COURT: "I don't know what your view really is, that there should always be, you know, a 30-day period of appeal

or something after every ruling before it [can] go to trial."); 26 (THE COURT: "I don't see any party as having an automatic assumption that they always are going to have enough time to go to the Supreme Court on an interlocutory basis for any issue that they think is important."). Notably, the court made these remarks after changing its view on the admissibility of evidence that proved a fact that it had ruled was essential to the State's case.

The comments also ignored the fact that the State has a statutory right to appeal an adverse ruling of this sort. *See* RSA 606:10, III(d) ("An appeal may be taken by the state in criminal cases… from the superior court to the supreme court from:… (d) Any other order of the court prior to trial if, either because of the nature of the order in question or because of the particular circumstances of the case, there is a reasonable likelihood that such order will cause either serious impairment to or termination of the prosecution of any case."). Since the court's rulings on the case summary would have resulted in the termination of the prosecution, a fact of which the trial court was well aware, chastising the State for taking this avenue was statutorily unsound.

The court also observed that motions in limine were often "last-minute motions" and that the time for an interlocutory appeal could not be "built in." T 25. While this is certainly true, it was not true in this case. The order was late because the court acted at the "last-minute," not because either party filed pleadings close to trial.

The court also displayed an unhappiness with the case. It characterized the case as baffling. *See* T 30 (THE COURT: "This entire case has been odd… I'm just baffled by this case, I have to say… I guess, I

shouldn't say anymore. I just – it's -- it surprises me."). Although "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," they may if the rulings "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Bader*, 148 N.H. 265, 271 (2002). While the State is not using this appeal as a means to seek recusal, the court's comments put its use of discretion in denying the continuance in a clearer light.

Indeed, the court's delays in ruling on the admissibility of the certified copy of the case summary throws the problem into sharp relief. The court delayed ruling on the admissibility until the eve of trial twice. On the second occasion, despite having had the pending motion to reconsider for well over a month, the court again ruled shortly before trial. The court seemed annoyed and perplexed that it could be perceived as engaging in a "rush to trial against all rights of the State," T 16, but that was the likely result, even if it was not the court's intent.

In light of this record, the trial court exceeded its discretion in denying the motion to continue so that the State could obtain the presence of its witness and determine whether to pursue an appeal. The court's remarks undercut any presumption of fairness. This Court should reverse the trial court's ruling.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the judgment of the trial court.

The State requests a 15-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

August 3, 2020

/s/Elizabeth C. Woodcock
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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 brief contains approximately 6,742 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.

August 3, 2020 */s/Elizabeth C. Woodcock*
Elizabeth C. Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Allison H. Schwartz, Esquire, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 3, 2020 *<u>/s/Elizabeth C. Woodcock</u>*
Elizabeth C. Woodcock

APPENDIX TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
96 Water Village Rd., Box 3
Ossipee NH 03864

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF JURY TRIAL

FILE COPY

Case Name: **State v. Teresa Mercon**
Case Number: **212-2019-CR-00181**

You are ORDERED to appear for the following events at Carroll Superior Court at: 96 Water Village Rd., Box 3 Ossipee NH 03864.

Charge ID	Statute	Description
1588115C	263:64,IV	Drive after Rev/Sus 265:79 or DUI

Event:	Date:	Time:
Final Pretrial	February 26, 2020	9:00 AM
Jury Selection	March 09, 2020	9:00 AM
Jury Trial	Trial Week: Week of 3/09/2020	

FINAL PRETRIAL — At the Final Pretrial all changes of plea will be taken and non-evidentiary motions will be heard. No plea agreement will be considered after this date unless the court finds exceptional circumstances exist. Thereafter the case will be tried or disposed of as a 'naked plea'. Defendant must be present.

FAILURE TO APPEAR — Failure to appear as scheduled will result in **bail forfeiture** and an **arrest warrant** issued for defendant's arrest. Appeal cases will have **bail forfeited** and the **case remanded** to the District Court for disposition.

New Trial Schedule

If you will need an interpreter or other accommodations for this hearing, please contact the court immediately.

Please be advised (and/or advise clients, witnesses, and others) that it is a Class B felony to carry a firearm or other deadly weapon as defined in RSA 625.11, V in a courtroom or area used by a court.

BY ORDER OF THE COURT

February 24, 2020

Abigail Albee
Clerk of Court

(405)
C: Allison H. Schwartz, ESQ; Carroll County Attorneys Office

Filed
File Date: 1/15/2020 3:44 PM
Carroll Superior Court
E-Filed Document

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

TERESA MERCON

Docket no. 212-2019-CR-00181

STATE'S MOTION TO RECONSIDER DENIAL OF CONTINUANCE AND FOR RULING ON OUTSTANDING MOTION TO RECONSIDER

The State of New Hampshire, by its counsel, Thomas Palermo, respectfully requests that this Court reconsider its denial of the State's oral Motion to Continue, made on the morning of January 10, 2020, and that the Court issue an order on the outstanding Motion to Reconsider regarding the admissibility of the case summary. The State asserts the following in support thereof.

BACKGROUND

1. The Defendant, Teresa Mercon, is charged with one count of Operating after Suspension in violation of RSA 263:64, where the suspension was the result of a DWI conviction. This matter is an appeal from the Conway District Court for a jury trial de novo, and was scheduled for jury selection on January 13, 2020, prior to a stay being issued by the New Hampshire Supreme Court.

2. On October 16, 2019, the State filed a Motion in Limine with the Court requesting the admission of a certified case summary of the Defendant's DWI conviction at trial. The State filed this Motion because it believed that, in order to prove the charge of Operating

after Suspension, it needed to prove that the suspension was the result of a DWI conviction. However, court records of that conviction have been destroyed, pursuant to District Court records retention policy. See District Court Administrative Order 2006-05. The State concluded that admitting a case summary at trial was the most probative, least prejudicial way to prove the prior conviction. The Defendant objected to the Motion on October 28, arguing that the case summary could not be proved to be accurate, did not demonstrate that the Defendant made a knowing, intelligent, and voluntary waiver of her rights at the time of conviction, and was inadmissible hearsay.

3. After a hearing on the State's Motion, and after receiving a supplemental Memorandum of Law filed by the State and an additional Objection filed by the Defendant, the Court ruled on January 2, 2020, that the case summary was inadmissible because it did not demonstrate that the Defendant made a knowing, intelligent, and voluntary waiver of her rights when she was convicted in 1997.

4. On January 3, the State filed a Motion to Reconsider, asserting much of the same case law that it had in its memorandum, and noting that the Court, in its Order, neither acknowledged nor responded to any of the case law that the State cited in arguing for the admissibility of the case summary.

5. On January 10, the Friday before jury selection, the Court held an off-the-record, in-chambers conference regarding the State's Motion to Reconsider. While the State and the Defendant argued their positions on reconsideration, the Court did not make a ruling, and indicated that it would not have a ruling until that afternoon at the earliest.

6. At that point, the State indicated to the Court that it could not currently go forward with jury selection regardless because it could not obtain the presence of its sole witness,

Trooper Samuel Muto. Trooper Muto had alerted the State in December that he is no longer employed with the New Hampshire State Police, that he is now employed by the Massachusetts State Police, and that he is currently at the Massachusetts State Police Academy for a recruit training program. It would be extremely disruptive to his training to leave the program to attend this trial.

7. The State has subpoenaed Trooper Muto and contacted him several times, and has also worked with the Troop E State Police prosecutor to attempt to schedule Trooper Muto's presence at the trial. Despite its best efforts, however, the State has exhausted its options and has been unable to obtain his attendance at any time before he completes recruit training. The State thus orally requested a continuance at the in-chambers conference.

8. The State did not request a continuance until January 10 because the trial could not go forward regardless, given that there is an outstanding order on the Motion to Reconsider, and it could not go forward anyway if it were not permitted to submit the case summary as evidence of the Defendant's DWI conviction. At that point, however, the State recognized that the Court was notwithstanding prepared to call an entire prospective jury in that Monday, and brought the Trooper's absence to the Court's attention to indicate that there was no possible way the trial could go forward.

9. The Court indicated that it would consider the State's oral request for a continuance; however, the Defendant then objected, claiming her speedy trial rights for the first time in the pendency of this appeal.

10. By Order released the afternoon of January 10, the Court denied the State's request for a continuance. The Court did not rule on the State's outstanding Motion to Reconsider, which was the original purpose of the in-chambers hearing.

11. The State now respectfully requests reconsideration of the Court's denial of continuance, and a ruling on the outstanding Motion to Reconsider.

THE COURT DID NOT COMPLETE ITS ANALYSIS OF THE DEFENDANT'S SPEEDY TRIAL RIGHTS IN DENYING THE STATE'S MOTION TO CONTINUE

12. In denying a continuance, the Court began an analysis of whether the Defendant's right to a speedy trial would be violated by continuing the trial to a later date when Trooper Muto is available.

13. The Court found that the continuance would result in a delay of eight months between the Defendant's appeal and the date of her trial, and ruled that this is a "presumptively prejudicial amount of time" for a delay of the trial. The Court explained its reasoning by stating that this is a trial on a misdemeanor charge and that the delay is attributable to the State, rather than the Defendant.

14. The State asserts, however, that the Court did not complete its analysis of the speedy trial issue at hand, and that if it had, it would or should have found in favor of the State.

15. "In determining whether a defendant's right to a speedy trial has been violated under the State Constitution, we apply the four-part test articulated in *Barker v. Wingo*... The test requires us to balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *State v. Brooks*, 162 N.H. 570, 581 (2011).

16. "The first factor, the length of the delay, is a triggering mechanism: we do not consider the remaining factors unless the delay is presumptively prejudicial." *Id.* "...[W]e held in *State v. Bain* that where a defendant charged with a misdemeanor is not in jail, we do not

consider a pretrial delay of fewer than six months to be presumptively prejudicial." *State v. Allen*, 150 N.H. 290, 294 (2003).

17. The Defendant appealed her District Court conviction in August of 2019. When the Court denied the State's oral request for a continuance on January 10, 2020, the appeal had been at the pretrial stage for approximately five months. Therefore, the State's request for a continuance should have been granted in the first place, since there was no presumptively prejudicial delay for the purposes of speedy trial and would not be for another month. The proper ruling would have been to grant the State a thirty-day continuance and then re-approach the speedy trial issue.

18. However, even if we assume, for the purposes of argument, that the Court should weigh future speedy trial issues in determining whether or not a present speedy trial issue exists, and that a presumptively prejudicial delay now exists, the Court is still required to complete the analysis that is triggered by the delay. "[T]he length of the delay is not necessarily the determinative factor in evaluating whether there has been a violation of the defendant's right to a speedy trial... In balancing delay against other factors, we are mindful that the right to a speedy trial is relative, and must be considered with regard to the practical administration of justice." *State v. Fellers*, 2015-0014, 2015 WL 11077952, at *1 (N.H. Sept. 18, 2015)

19. "The second factor requires that we assess why the trial was delayed, to which party the delay is attributable, and how much weight to give the delay." *Brooks*, 162 N.H. at 582.

20. While it is true that "trial delays arising from the failure of law enforcement personnel to appear in court accordingly are to be held against the State," this consideration is geared

more strongly towards "instances where no reasonable justification for the failure to appear is offered." *State v. Lagone*, 127 N.H. 49, 54 (1985).

21. Although the arresting officer is currently unavailable to testify, his non-appearance is due to the fact that he is in training to become a Massachusetts State Trooper and he is, quite literally, not permitted to leave the Recruit Training Academy during the week. "The day begins at 5:30 AM with physical training. The recruit then attends academic courses until 8:00 PM. The recruits then have study and personal time until lights out at 9:30 PM... On Friday evenings, recruits may go home and return Monday morning for training." *Recruit Training Academy*, Mass.gov, https://www.mass.gov/service-details/recruit-academy-training (last visited January 13, 2020). Being forced to leave the Academy for a day or more to testify in northern New Hampshire would be extremely disruptive to Trooper Muto's training, and although his non-appearance may technically be attributable to the State, Trooper Muto has a valid reason for non-attendance, and the State has made every reasonable attempt to obtain his attendance nonetheless.

22. "This court puts substantial emphasis on the latter two of the *Barker* factors." *Brooks*, 162 N.H. at 582 (quotations omitted).

23. The Court is correct that the Defendant has asserted her right to a speedy trial; however, that is not the end of the analysis. The Court must "consider the strength of a defendant's assertion of his right to a speedy trial." *Id.* A defendant's assertion of his right to speedy trial is stronger the earlier he asserts it. *State v. Lamarche*, 157 N.H. 337, 343 (2008). For example, where a defendant waited "approximately ten months from the date of his indictment to raise this claim... [t]he fact that the defendant waited so long to pursue his

right to a speedy trial means that although the factor weighs in his favor, it does not do so heavily." *Id.*

24. The State stresses that the Defendant was originally scheduled to select a jury to hear her appeal on October 7, 2019. Were the Defendant truly concerned with her right to a speedy trial, as she now asserts, she could have conducted and concluded her trial over three months ago. Instead, the Defendant waived her claim to a speedy trial by filing a Motion to Suppress, thus putting a substantive hearing on the docket and delaying her trial by over a month, to November 18.

25. Furthermore, the Defendant had not once asserted her right to a speedy trial until immediately after learning that the State's witness would be unavailable. She made this assertion orally, in an off-the-record in-chambers conference, in response to the State's request for continuance. The Defendant has never before explicitly stated or impliedly behaved as if she were concerned with her right to a speedy trial. It is concerning that the Defendant, who could have pursued and resolved this trial in early October, has instead waived speedy trial and delayed resolution with substantive motions and attempts to suppress evidence, and only now, immediately after learning of the State's witness unavailability and when the State requested its first continuance in good faith, demanded fulfillment of her right to a speedy trial. While this act may technically be an assertion of that right, it is weak and dissonant with her previous behavior, and should not weigh heavily in her favor.

26. "The last factor requires us to determine whether and to what extent the defendant suffered prejudice." *Allen*, 150 N.H. at 294. The State notes that the Court did not

consider this factor in its January 2 Order, and respectfully requests that the Court give this factor appropriately strong attention in its reconsideration.

27. "Although we typically require a defendant to demonstrate actual prejudice from a delay to prevail on a speedy trial claim, when a defendant does not – or cannot – articulate the particular harm caused by delay, we inquire whether the length and reason for the delay weigh so heavily in the defendant's favor that prejudice need not be specifically demonstrated." *State v. Locke*, 149 N.H. 1, 8 (2002). Factors here can include "whether the delay resulted in an oppressive pretrial incarceration, anxiety, or an impaired defense." *Brooks*, 162 N.H. at 583.

28. "The passage of time, and the resulting impairment of memories, is insufficient to establish prejudice." *State v. Eaton*, 162 N.H. 190, 198 (2011).

29. "Analysis of the prejudice factor also requires a re-examination of the State's actions because if the State pursues a defendant with 'reasonable diligence,' then a speedy trial claim is likely to fail, regardless of the length of delay, as long as the defendant cannot show specific prejudice to his defense." *Locke*, 149 N.H. at 9 (quoting *Doggett v. U.S.*, 505 U.S. 647, 656 (1992)).

30. The State would first note that the Defendant has never specifically described or demonstrated an actual prejudice from the delay to her trial. She has simply broadly asserted her speedy trial rights and left it upon this Court to determine whether or not, and how, that right has been violated.

31. The Defendant is not incarcerated and has, at no point since filing her appeal, been incarcerated while awaiting this trial. Therefore, any delay to the trial does not cause or result in oppressive, or any, pretrial incarceration.

32. The Defendant suffers no impaired defense as a result of delay in the trial. There is no risk of witness unavailability, since the only person who could possibly testify in her defense is herself – she and the arresting officer were the only individuals on scene, and the only ones with personal, relevant knowledge of the incident. And if the Defendant plans to not present any testimony, she cannot claim that her defense would be impaired by delay.

33. Transcripts from the District Court trial show that the Defendant's strategy was to fully admit to the offense and request the Court's leniency. Should that be the Defendant's defense at her jury trial, she suffers no prejudice from a delay of several months.

34. Although the Defendant may claim anxiety from the pretrial period, that anxiety alone does not create prejudice leading to a violation of her speedy trial right. "Although the facts of... the anxiety presumed to attend criminal charges are not to be ignored, they do not reach a level of great importance over a span of ten months. What is important is the want of any indication of actual prejudice to the conduct of the defense. The defense lost no witnesses, and no memories appear to have faded during the time in question." *State v. Tucker*, 132 N.H. 31, 33 (1989).

35. Also consider: "Nor does the record disclose any significant prejudice to the defendant caused by the twelve-month wait. He was free on bail... and although he was surely anxious about the outcome of the pending proceedings, there is no indication that he suffered more than any defendant normally does... Hence, we conclude that there is no sufficient reason to find unreasonable delay in bringing the case to trial." *State v. Colbath*, 130 N.H. 316, 320 (1988).

36. The State would also propose that the anxiety "presumed to attend criminal charges" while awaiting disposition is lessened when the Defendant has already had a final disposition to her charges, and is now waiting for disposition of her appeal. The Defendant has already been convicted and sentenced, and thus knows the result of the charges against her. At this point, she is requesting continuation of the judicial process and, from her perspective, her circumstances can only improve – either her conviction is affirmed and she must carry out her sentence, or it is overturned and she is free to go. The situation is significantly different in terms of anxiety from a defendant who is facing new charges against him without final resolution.

37. Finally, during the five-month pendency of this appeal, the State has pursued the Defendant with "reasonable diligence." The State has made no delays in bringing the Defendant to trial until now; in fact, the Defendant has delayed her own trial more than the State has by filing substantive motions requesting suppression of various pieces of evidence and testimony. The State filed one Motion in Limine on October 16, but did so in an effort to reduce delay by determining the admissibility of evidence a month before the scheduled trial, rather than immediately before or during trial. The State has not, until January 10, requested a continuance, and the State only requested this continuance because it had no other options after making every reasonable effort to obtain the attendance of its only witness. The State has, in every sense of the phrase, pursued the Defendant with reasonable diligence in attempting to bring this matter to trial and conclusion. "Since the State prosecuted this case with reasonable diligence, and because the defendant has not demonstrated actual prejudice, his speedy trial claim must fail." *Locke*, 149 N.H. at 10.

THE DEFENDANT HAS CREATED SEVERAL DELAYS IN HER OWN CASE THAT CANNOT COUNT TOWARDS SPEEDY TRIAL ANALYSIS

38. As noted above, in this appeal, the Defendant has actually delayed her own trial more than the State has. This trial was originally scheduled for October, and then for November, and most recently for January; however, the Defendant has filed two motions/objections to suppress evidence and testimony, which have created substantial delays in bringing her appeal to a conclusion.

39. Returning to the second factor of the *Barker* test, the Court must "assess why the trial has been delayed, to which party the delay is attributable, and how much weight to give the delay." *Allen*, 150 N.H. at 294. "In considering the second factor, we initially discount any delays that were prompted by the defendant because he cannot take advantage of delay that he has occasioned." *Id.*

40. The Federal Speedy Trial Act states the following:

> **(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:**
>
> **(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –**
>
> **(A) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;**
>
> ...
>
> **(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.**

18 U.S.C.A. § 3161 (2008)

41. The Defendant's request for appeal in this Court is dated August 15, 2019. The Court issued its order denying continuance on January 10, 2020. 4 months and 26 days have elapsed in that time.

42. However, on September 10, 2019, the Defendant filed a Motion to Suppress Statements with this Court. A hearing was held on that Motion on October 4, and the Court issued an order on November 5, 2019. 1 month and 25 days elapsed in that period, attributing 30 days to the period during which the Motion was under advisement. Therefore, the total, non-tolled time that has passed for the Defendant's speedy trial right is 3 months and 3 days. This matter could therefore be continued for almost three months before the Defendant would even have a presumptively prejudicial delay to trigger the speedy trial analysis in the first place.

43. On October 16, 2019, the State filed a Motion in Limine to Admit Case Summary as Dispositive Evidence. The State did not have to file this Motion, and merely did so to save time that would otherwise inevitably have been spent arguing the admissibility of the case summary during or immediately before the trial. However, the Defendant took this opportunity to file an Objection seeking to suppress the case summary and deny the State admission of it, for various reasons. The Defendant's Objection was filed on October 28, the Court held a hearing on November 6, and a final Order was issued January 2. Attributing 30 days to the period during which the Motion was under advisement, and subtracting the redundant days between October 28 and November 5, exactly 1 month elapsed during this period.

44. If the above time is also excluded from the Defendant's speedy trial calculation, the appeal has been pending for 2 months and 3 days.

45. Even if the Court were to count the period between October 28 and January 2 as attributable to the State, the Defendant's speedy trial objection is still three months short of being presumptively prejudicial to trigger the speedy trial analysis. The Defendant cannot object to, and this Court should not deny, a continuance on the basis of speedy trial when this matter is still several months short of being ripe to trigger the *Barker* analysis in the first place.

THE COURT HAS NOT YET RULED ON AN OUTSTANDING SUBSTANTIVE MOTION IN THIS MATTER

46. Following the Court's Order dated January 2, the State filed a Motion to Reconsider. That Motion is still outstanding, as the Court has not, as of this writing, ruled on it.

47. The result of the Court's Order dated January 10, which the State is herein requesting reconsideration on, is that the State cannot proceed with trial on this matter. The State currently has no witness to present, the reasons for which are described above. But even if the State did have Trooper Muto present, it still could not proceed with trial because of the outstanding Motion to Reconsider. If this matter were to have proceeded to jury selection on January 13, as it was originally scheduled to, the Court would have needed to either publish its Order on the outstanding Motion the Friday before, or on the morning of – or else, administratively continue the trial. And even if the Court had published the Order on one of those two days, the State then would have had to request a continuance anyway because the Court would have left the State fewer than 72 hours, weekend included, to review the Order and consider its trial strategy in light of the Order.

48. The accumulated result of the route this matter has taken is that the State is left in the untenable position of needing to request a continuance in every possible situation. And he Court's denial of the State's request requires the State to either plea down a charge for which the Defendant was convicted of, and has repeatedly admitted full guilt to, for reasons not related to the facts of the case or the Defendant's guilt or innocence, or to dismiss the charge altogether. And because the State cannot proceed further with the matter, the result of the Court's denial is that a substantive motion is left outstanding and without response.

CONCLUSION

49. The Court should reconsider its denial of the State's request to continue on the basis of a complete and fair analysis of the speedy trial issue. Even putting aside the Defendant's own delays of her trial, there simply is not a prejudicial effect on the Defendant by granting the State's request. If the trial were delayed until April, May, or even June at the absolute latest, this eight-to-ten month period between appeal and trial does not create a conceivable prejudice on the Defendant, and the Defendant cannot specifically demonstrate any prejudice to her. The State has made every reasonable effort to obtain the presence of its witness, and has in every sense of the phrase pursued its case with reasonable diligence. The Defendant suffers no impaired defense by the delay, faces no oppressive (or any) period of incarceration, does not lose any witness testimony, and suffers no more anxiety than any other defendant normally would.

50. The State's position is bolstered further when the Defendant's own delays are taken into account. At most, slightly over three months have accumulated towards a presumptively prejudicial delay; if both substantive motions are construed against the Defendant, about

five weeks have elapsed. The Court should not rule against the State on an assertion of speedy trial when this matter has already been delayed by the Defendant far more than it has by the State, and when the Defendant suffers absolutely no conceivable prejudice as a result of a further delay.

51. Lastly, even if the State had not moved to continue on the basis of Trooper Muto's absence, this trial could not have proceeded forward because the Court has not ruled on the State's outstanding Motion to Reconsider. If the Court did release a ruling before jury selection, it would have come on the absolute eve of -- fewer than six business hours before. The State then inevitably would have had to request a continuance to review the Order and consider its trial strategy and options for appeal -- including contacting the New Hampshire Attorney General's Office, if necessary. The State requested to continue the trial at the in-chambers conference not just because its witness was unavailable, but because it expected that the continuance would also allow the Court additional time to release an Order on the outstanding Motion. However, the Court denied the continuance, and in doing so forced the State into the untenable position of dismissing the case entirely while its Motion was still outstanding.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Reconsider its denial of the State's oral Motion to Continue jury selection; and

B. Release an order on the State's outstanding Motion to Reconsider; and

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

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its counsel,

January 15, 2020

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(603) 539-7769

CERTIFICATE OF SERVICE

I, Thomas Palermo, certify that a copy of this Motion was forwarded to Allison Schwartz, counsel for the Defendant in this matter, on January 15, 2020.

January 15, 2020

Thomas Palermo

The court cannot rule on this motion. All action is stayed by order of the New Hampshire Supreme Court in accordance with the petition filed by the State of New Hampshire. See Order of Supreme Court dated January 10, 2020 in Docket 2020-0020.

Clerk's Notice of Decision
Document Sent to Parties
on 01/22/2020

Honorable Amy L. Ignatius
January 21, 2020

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

State of New Hampshire

v.

Teresa Mercon

Docket No. 212-2019-CR-181

ORDER

The defendant is charged with operating after suspension (RSA 263:64) and jury selection scheduled for Monday, January 13, 2020. The court held a chambers conference with counsel on the morning of Friday, January 10, 2020 for the purpose of addressing a motion for reconsideration that the State filed on January 3, 2020.[1] (See court index #17 (requesting reconsideration of ruling on State's motion in limine); see also court index #18 (order)).

During the meeting in chambers, the State informed the court that it is unable to go forward with trial at this time because its chief witness—former New Hampshire State Trooper Samuel Muto—is unavailable. The State represented that it has subpoenaed Mr. Muto to appear for trial. However, Mr. Muto has informed the State that he will not appear because he is currently in training to become a Massachusetts State Trooper. The State indicated that Mr. Muto may remain unavailable into at least April 2020. Based on these circumstances, the State orally requested that trial be continued. Defense counsel objected, asserting Ms. Mercon's right to speedy trial. For the reasons explained below, the State's motion to continue is DENIED.

[1] The conference in chambers was not held on the record. At the beginning of the meeting, the court informed counsel that they were not on the record and invited them to request otherwise. The court proceeded after neither attorney made such a request or stated an objection. The court also notes that defense counsel appeared telephonically.

In ruling on a motion to continue, the court must exercise sound discretion to determine whether a continuance is in the interest of justice. See State v. Barham, 126 N.H. 631, 640 (1985); Super. Ct. Crim. R. 15(b)(4). Based on the circumstances here the State's requested continuance is not in the interest of justice.

First, the State's request imposes a burden on Ms. Mercon's constitutional right to a speedy trial—a right she has explicitly asserted in objecting to the State's motion. See State v. Perron, 122 N.H. 941, 950 (1982). Continuing trial into April 2020 or beyond would result in a delay of more than 8 months from the time that Ms. Mercon filed her de novo appeal in this court in August 2019. Under the court's Speedy Trial Policy, this is a presumptively prejudicial amount of time for Ms. Mercon to await trial on a single charge that may or may not rise to a misdemeanor level offense. See Super. Ct. R. Appendix (Superior Court Speedy Trial Policy) (explaining that the State must show cause as to why a misdemeanor case pending 6 months should not be dismissed for lack of a speedy trial); see also State v. Colbath, 130 N.H. 316, 319 (1988) (pointing to Speedy Trial Policy's time standards as consistent with time over which presumptive prejudice arises for purposes of speedy trial analysis).

Several factors weigh against imposing this burden on Ms. Mercon's right to speedy trial under the circumstances of this case. For one, the delay here is not attributable to Ms. Mercon as she has never waived her right to speedy trial in this matter. Additionally, the pending charge is subject to no more than misdemeanor penalties. See State v. Cole, 118 N.H. 829, 831 (1978) (noting that misdemeanor level of offense was a factor that contributed to unconstitutional delay). Finally, the additional delay that would result from a continuance is attributable to the unavailability of a police officer who acts as an agent of the State. See State v. Langone, 127

N.H. 49, 54 (1985) (holding that "trial delays arising from the failure of law enforcement personnel to appear in court . . . are to be held against the State").

For all of these reasons, the court finds that the State's request for a continuance is not in the interest of justice. Accordingly, the State's motion to continue is DENIED.

So Ordered.

January 10, 2020

Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/10/2020

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

State of New Hampshire

v.

Teresa Mercon

212-2019-CR-181

ORDER

The defendant is charged with operating after suspension. Suspension of her license was a consequence of a 1997 conviction for driving while intoxicated ("DWI"). The case is scheduled for jury selection on January 13, 2019. Pending before the court is the State's request to introduce evidence of the defendant's 1997 DWI conviction through a certified record of the District Court's docket sheet, to which the defendant objects. The parties each filed initial and supplemental pleadings on whether the certified docket listing is admissible to prove the prior conviction. Upon consideration, the court finds and rules as follows.

The State argues that because the conviction is so old there are no original records from the 1997 conviction. The District Court appropriately destroyed them in 2007, in accordance with record retention policies. What is available is the docket listing of the 1997 case, which the current clerk of the Circuit Court has certified as a true and accurate representation of what the electronic docket listing contains. According to the State, this is sufficient, under the circumstances, to establish that the defendant was convicted in 1997 of driving while intoxicated.

The defense objects, arguing docket listings are often incomplete or inaccurate, and the clerk has no firsthand knowledge to affirm that the entries are accurate. Further, there must be some evidence the defendant made a knowing and intelligent waiver of her rights, including the understanding that conviction could lead to subsequent consequences. The defendant also argues the document is inadmissible hearsay.

The court does not agree that the document is inadmissible hearsay. That being said, the certified record of the Odyssey entries is not the equivalent of evidence that the defendant made a knowing, intelligent waiver of her rights, particularly as to collateral consequences of the conviction. The current clerk can only certify that the Odyssey printout is a true and accurate record of the Odyssey entries. The clerk is unable to certify to the accuracy of the Odyssey entries and cannot attest to whether the defendant was informed of her rights and made a knowing, intelligent and voluntary waiver.

The State's notice of intent to introduce a certified record of the Odyssey record of the defendant's 1997 DWI case is DENIED.

So Ordered.

January 2, 2019

Amy L. Ignatius
Presiding Justice

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

TERESA MERCON

Docket no. 212-2019-CR-00181

STATE'S MOTION IN LIMINE TO ADMIT CASE SUMMARY AS DISPOSITIVE EVIDENCE

The State of New Hampshire, by its counsel, Thomas Palermo, requests that this Court permit the admission at trial of a certified copy of the District Court case summary for the Defendant's original Driving while Intoxicated charge as dispositive evidence of the Defendant's conviction and sentencing for that charge. The State asserts the following in support thereof:

1. The Defendant, Teresa Mercon, is charged with one count of Operating after Suspension, where the license suspension stems from a Driving while Intoxicated conviction.
2. In order to prove that the Defendant was convicted and sentenced for Driving while Intoxicated, the State must submit evidence of the Defendant's conviction.
3. The New Hampshire District Courts' data destruction policy states that "all records and sound recordings pertaining to any DWI conviction, including pleas, shall be retained for ten years from the date of conviction." See District Court Administrative Order 2006-05.
4. The Defendant was convicted of DWI in 1997. Per the District Courts' policy, records of that conviction were destroyed in 2007.
5. Where the records of the Defendant's conviction were destroyed, but the Defendant is alleged to have not completed the sentencing requirements of that conviction and now

has new charges relating to that conviction, the State asserts that the attached case summary (which the State possesses a certified copy of) is admissible as dispositive evidence of the Defendant's conviction and sentencing. The case summary identifies the Defendant by a former name, notes the offense, the fact of conviction, and the date of conviction, and describes the sentence the Defendant received.

WHEREFORE, the State requests that this Honorable Court:

A. Permit the admission at trial of the case summary of the Defendant's DWI conviction as dispositive evidence of the conviction and sentencing; and

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

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its counsel,

October 16, 2019

Thomas D. Palermo, Esq.
NH Bar #271593
Assistant County Attorney
Carroll County Attorney's Office
PO Box 218
Ossipee, NH 03864
(603) 539-7769

CERTIFICATE OF SERVICE

I, Thomas Palermo, certify that a copy of this Motion was forwarded to Allison Schwartz, counsel for the Defendant in this matter, on October 16, 2019.

October 16, 2019

Thomas Palermo

3RD CIRCUIT - DISTRICT DIVISION - CONWAY

CASE SUMMARY

CASE NO. 430-1997-CR-01667

State Vs. Teresa A. Wiggin

§ Location: 3rd Circuit - District Division - Conway
§ Judicial Officer: Albee, Pamela D
§ Filed on: 11/05/1997
§ Appear by: 12/02/1997

CASE INFORMATION

Offense	Statute	Deg	Date	Case Type: DWI 1st Offense
Jurisdiction: Conway				
1. Z (Repealed)DUI Drugs/Liquor;Excess Alcohol Concentration ACN: 007025J974300166701 Arrest: 10/24/1997	265:82	UNKN	10/24/1997	Case Status: 12/02/1997 Closed

Related Cases
430-1997-CR-01668 (Cross Reference)

PARTY INFORMATION

Defendant — **Wiggin, Teresa A**
581 East Conway Rd.
Center conway, NH 03813
DOB: 02/07/1964 Age: 33
DL: NH 02WNT64071

Officer - Local Police — **Conway Police Dept.**
P.O. Box 538
Center Conway, NH 03813
DOB: 05/27/1970

DATE	EVENTS & ORDERS OF THE COURT	INDEX
11/05/1997	Memo from Case Screen *97-CR-01667: DWI-1st fine 350.00+70.00=420.00 lic revok 90days .14 1-29-98 tp pd in full; Case Filing Type: Original Filing; Orig. Case Type: 102; Arresting PD: CPD*	
12/02/1997	**Arraignment on Complaint** (Judicial Officer: Converted, No Judge in Sustain) *Date Sched: 11/5/1997*	
12/02/1997	**Disposition** (Judicial Officer: Albee, Pamela D) 1. Z (Repealed)DUI Drugs/Liquor;Excess Alcohol Concentration Finding of Guilty	
12/02/1997	**Sentence** (Judicial Officer: Converted, No Judge in Sustain) 1. Z (Repealed)DUI Drugs/Liquor;Excess Alcohol Concentration Sentence Converted from Sustain Condition - Adult: 1. Fine, Sent Amount: 420 , 12/02/1997, Active 12/02/1997 Condition - Adult: 1. License Suspension - 90 days, 12/02/1997, Active 12/02/1997	

FINANCIAL INFORMATION

DATE		
	Defendant Wiggin, Teresa A	
	Total Charges	420.00
	Total Payments and Credits	420.00
	Balance Due as of 8/6/2019	0.00

A True Copy Attest
Elaine J. Lowe
Clerk

3RD CIRCUIT - DISTRICT DIVISION - CONWAY

CASE SUMMARY

CASE NO. 430-1997-CR-01667

A True Copy Attest:

Elaine J. Lovell
Clerk

THE STATE OF NEW HAMPSHIRE

CARROLL,SS. **SUPERIOR COURT**

The State of New Hampshire

v.

Teresa Mercon

212-2019-CR-181

OBJECTION TO STATE'S MOTION IN LIMINE TO ADMIT CASE SUMMARY AS DISPOSITIVE EVIDENCE

NOW COMES the defendant, Teresa Mercon, by and through her counsel, Allison H. Schwartz, Esq., Public Defender, and hereby objects to the State's Motion In Limine to Admit Case Summary as Dispositive Evidence. Ms. Mercon's objection is based upon Part I, Article 15 of the New Hampshire Constitution, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Rules 403 and 801 of the New Hampshire Rules of Evidence.

In support of this Objection, the following is stated:

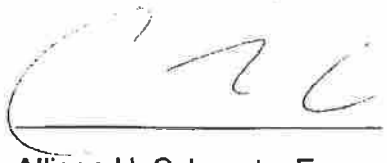
1. Ms. Mercon faces one count of Operating After Suspension for a Driving While Intoxicated Conviction dating back to 1997, twenty years ago.
2. The State filed a Motion in Limine seeking to admit a case summary as dispositive evidence that Ms. Mercon was in fact convicted of Driving While Intoxicated and sentenced for that charge.
3. The State's request should be denied.
4. First, the State has an obligation to prove that Ms. Mercon was in fact under suspension for DWI at the time she allegedly drove on December 24, 2018. In order to meet this burden, the State should be required to present certified copies

of the complaint, the sentencing order, an acknowledgement and waiver of rights form and a waiver of counsel form, if applicable. Simply because the Circuit Court's policy is to destroy these documents within a 10 year window does not lessen this burden of proof. The above-documents are crucial in this case because of how dated Ms. Mercon's conviction is and the fact that the jury will be left to decide whether Ms. Mercon was compliant with her underlying sentence.

5. The Case Summary that the State has provided should not be admitted as dispositive evidence for several reasons. First, the case summary sheets is simply a report of information input by an employee at the Court. These summary sheets are often fraught with errors. Because the original documents were destroyed, there is no way to verify that the case summary is accurate.
6. An attestation by the clerk does not change that analysis. The seal can only verify that this is the case summary that the Court has in this particular matter, not that its an accurate reflection of Ms. Mercon's conviction and sentence.
7. Moreover, it is not a complete record of the underlying proceeding. At the conclusion of the trial, the jury will be permitted to see the various items listed in the summary. In isolation, this information is misleading and will allow the jury to guess or speculate what it actually means and whether Ms. Mercon was compliant with the terms of her sentence contrary to N.H. Rule of Evidence 403.
8. Finally, the case summary sheet is hearsay under N.H. Rule of Evidence 801.

WHEREFORE, for the above-stated reasons, Ms. Mercon respectfully requests that this Honorable Court deny the State's request to admit the case summary information as dispositive evidence of Ms. Mercon's underlying conviction and sentence.

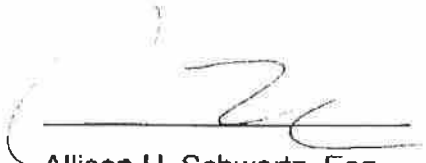
Respectfully submitted,



Allison H. Schwartz, Esq.
Bar ID #20132
N.H. Public Defender
408 Union Avenue
Laconia, NH 03246
(603) 524-1831

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this 28th day of October 2019 to the Thomas Palermo, Esq.



Allison H. Schwartz, Esq.

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

TERESA MERCON

Docket no. 212-2019-CR-00181

STATE'S MEMORANDUM OF LAW IN REGARDS TO MOTION IN LIMINE

The State of New Hampshire, by its counsel, Thomas Palermo, submits the following Memorandum of Law, written in consideration of the State's Motion in Limine and the questions and concerns of this Court following the Motion Hearing.

BACKGROUND

The statute under which the defendant, Teresa Mercon, is being charged, RSA 263:64 ("Driving After Revocation or Suspension"), states the following:

> **I. 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.**
>
> **IV. … Any person who violates this section by driving or attempting to drive a motor vehicle or by operating or attempting to operate an OHRV or snowmobile in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of RSA 265-A:2, I, RSA 265-A:3, RSA 630:3, II, RSA 265:82, or RSA 265:82-a or an equivalent offense in another jurisdiction shall be guilty of a misdemeanor and shall be sentenced to imprisonment for a period of not less than 7 consecutive 24-hour periods to be**

> **served within 6 months of the conviction, shall be fined not more than $1,000, and shall have his or her license or privilege revoked for an additional year.**
>
> N.H. Rev. Stat. Ann. § 263:64 (eff. 2013).

The defendant was convicted in 1997 of a violation of RSA 265:82. That statute was repealed on January 1, 2007, but on the date of her conviction, the statute was "RSA 265:82. Driving Under Influence of Drugs or Liquor; Driving With Excess Alcohol Concentration." RSA 263:64, IV, therefore, serves as a penalty enhancement upon conviction of a violation of RSA 263:64 when the defendant's suspension or revocation was due to a prior conviction for DUI/DWI.

In order to prove the charge with the penalty enhancement, the State must prove that the defendant's license was suspended because she was convicted in 1997 of DUI in violation of RSA 265:82. However, because this conviction happened twenty-two years ago, the District Court records of this conviction were destroyed on or about late 2007, according to the Amended District Court Administrative Order 2006-05.

The State has sought to admit a certified copy of the District Court case summary, which serves as record that the Defendant was charged with, and convicted of, DUI in violation of RSA 265:82 in December of 1997. That summary is admissible in this Court under the New Hampshire Rules of Evidence 803(8) and 902(4). This Court has requested information regarding any law or precedent that would support the proposition that the State need only admit evidence of the conviction to prove the elements as described above. The Court also expressed interest in any supporting law which might prove that the State need not prove that the defendant had counsel or waived her right to counsel at the time of the prior conviction.

DISCUSSION

The State brought this case summary to the Court's attention because it believed that introducing the case summary at trial was the proper way to prove its case-in-chief, complete with the penalty enhancement of the DUI conviction. However, upon further research, the State would first argue that it does not need to submit evidence of the prior conviction at trial at all, since the prior conviction is a predicate condition for penalty enhancement at sentencing – not an element of the State's case-in-chief. Instead, the State submits that it should only have to prove at trial that the defendant committed the elements of Operating After Suspension. If the defendant is convicted, this Court would thereafter be able to consider evidence of the defendant's prior conviction as part of its sentencing decision.

State v. Thompson saw a defendant convicted of DWI subsequent, with enhanced penalties. *State v. Thompson*, 164 N.H. 447, 448 (2012). On appeal, the defendant argued that RSA 265-A:18 required the State to prove, as part of its case-in-chief, the existence of the prior DWI convictions in order to prove that he had committed a subsequent DWI. *Id.* The New Hampshire Supreme Court disagreed:

> **There is no dispute that the State must prove all of the elements of an offense beyond a reasonable doubt. However, the United States Supreme Court has essentially held that a sentence enhancing statute based, in part, on prior convictions, is merely a penalty provision and does not create a separate crime or constitute a separate element of a crime. The DWI statute requires proof of prior conviction not as an element of the present charge, but rather as a predicate condition for enhancement of the sentence upon conviction for the present offense. Because prior convictions are sentencing factors and not elements of a subsequent DWI charge, the State need not prove them in its case-in-chief. ...**

> **After consideration of the United States Supreme Court's decisions in *Apprendi v. New Jersey* and *Almendara-Torres*, we abandoned the rule applied in *Doucet* [which required the State to prove prior conviction in its DWI subsequent case-in-chief]. We now adhere to the rule that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, whether the statute calls it an element or a sentencing factor, must be submitted to a jury, and proved beyond a reasonable doubt...**
>
> **Importantly, the DWI statute interpreted in *Cardin* expressly required the State not only to allege prior convictions in the complaint, but also to prove them. After *Cardin* was decided, however, the legislature eliminated the express requirement that prior convictions be proven. Because RSA 265-A:18, IV, the current statute, does not contain such an express requirement, *Cardin* does not control our analysis.**
>
> *Thompson*, 164 N.H. at 449-50 (emphasis added).

State v. LeBaron states that prior convictions are "as typical a sentencing factor as one might imagine." *State v. LeBaron*, 148 N.H. 226, 230 (2002). The Supreme Court there quoted the United States Supreme Court in saying that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, whether the statute calls it an element or a sentencing factor, must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 231 (emphasis added). The Court then quoted itself from a previous case, saying that "to hold that the [New Hampshire] Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as going to the punishment only." *Id.* Prior convictions "do[] not relate to the commission of the offense itself," and "potential sentence enhancement based on prior convictions is not punishment related to the offense itself. Nor is it punishment for the

prior convictions themselves. Rather, the extended term is punishment for the defendant's recidivism." *Id* (quotations omitted).

It is worth noting that the defendant in *LeBaron* cited a number of cases which supported "the proposition that the State must allege and prove a prior conviction if conviction of the subsequent offense carries a heavier penalty." *Id.* at 232. The Court's response: "To the extent these cases may be inconsistent with our holding herein, they are overruled." *Id.*

State v. McLellan again referenced the United States Supreme Court when it stated that a "sentence enhancing statute based, in part, on prior convictions, is merely a penalty provision and does not create a separate crime or constitute a separate element of a crime," and "[t]herefore, a prior conviction need not be alleged in the indictment, and generally need not be proved beyond a reasonable doubt as part of the crime charged." *State v. McLellan*, 146 N.H. 108, 113 (2001). See also *State v. Almendarez-Torres v. United States*, 523 U.S. 223, 243-44 (1998) ("[T]he Court said long ago that a State need not allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was necessary to bring the case within the statute. That conclusion followed, the Court said, from the distinct nature of the issue, and the fact that recidivism 'does not relate to the commission of the offense, but goes to the punishment only, and therefore … may be subsequently decided.")

RSA 263:64 requires, for the charge of Operating After Suspension, that the State prove that the Defendant knowingly drove a motor vehicle in New Hampshire while his or her driver's license or privilege to drive is suspended or revoked. The addition of the enhanced penalty for driving after a suspension resulting from a DUI conviction is an entirely separate section of the statute. Its only purpose is to create an enhanced penalty for Operating After Suspension based

on the prior conviction which led to the suspension. It does not require the State to notate the prior conviction in the complaint, and it does not require the State to prove the prior conviction in its case-in-chief. The State would, therefore, submit that it does not need to prove the prior conviction to the jury at all – rather, the prior conviction is to be considered by this Court solely as part of the sentencing hearing which would take place following a conviction.

IN THE ALTERNATIVE

If the Court does find that the State must prove the fact of the prior conviction as part of its case-in-chief, the State submits the following case law to support its Motion in Limine.

In ***State v. Buckwold***, the defendant attempted to defeat a charge of Habitual Offender by moving to suppress two of three prior convictions for motor vehicle evidence that the State presented. *State v. Buckwold*, 122 N.H. 111, 112 (1982). The defendant claimed that he had not effectively waived his right to counsel and had not knowingly pleaded guilty to the offenses in the two prior convictions he sought to suppress. *Id.* In response, the State produced "certified abstracts" in order to prove the prior convictions. *Id.* A "certified abstract" in this case was a summary of the defendant's motor vehicle record, and considered neither the defendant's representation by counsel for the prior convictions nor any waiver he made of his right to counsel. See *State v. Canney*, 132 N.H. 189, 190 (1989).

The New Hampshire Supreme Court held that "[t]he abstracts are prima facie evidence that the defendant was duly convicted of prior offenses." *Buckwold*, 122 N.H. at 112. "In the absence of sufficient evidence produced by the defendant to rebut the State's prima facie case, the State need not submit additional evidence to sustain its burden of proof that the prior convictions were valid. Once the State produced certified abstracts of the defendant's prior

convictions, the defendant had the burden of proving that he was not duly convicted of the prior offenses." *Id.*

In ***State v. Ward***, the defendant attempted to have the State's case of Habitual Offender dismissed by claiming that the State had not proved that he was represented by counsel or waived his right to counsel at the time of his prior convictions. *State v. Ward*, 118 N.H. 874 (1978). The New Hampshire Supreme Court responded that "[i]f it were evident from the record, or if the defendant had presented evidence which placed in dispute the question of whether he had been represented by counsel, the burden would have then been upon the State to prove representation by counsel or a knowing and intelligent waiver of that right... The defendant introduced no evidence to show that this was an invalid waiver." *Id.* at 877. "Indeed, all the defendant did was make a general denial to the effect that he had not been afforded any of his constitutional rights at the time of any prior conviction. This unfounded proffer is insufficient. When the defendant challenges the validity rather than the existence of a prior conviction, he, and not the State, must 'go forward with evidence which would have put in issue the question of whether he had previously been represented by counsel.'" *Id.* at 877-78.

In ***In re State***, the defendant was found guilty of DWI, and the trial court then requested that the parties brief whether or not the defendant had a valid prior DWI conviction which could serve as the basis for an enhanced penalty. *In re State*, 154 N.H. 118, 119 (2006). The State presented certified copies of the complaint, sentencing order, and the defendant's driving record and criminal history. *Id.* The defendant argued that the State could not use those documents to prove his prior conviction because the State did not include an appearance of counsel or waiver of right to counsel form, or any documents indicating that he had been advised of his right to counsel. *Id.* at 119-20.

"Prior convictions obtained when a defendant was not represented by counsel and did not knowingly and intelligently waive his right to counsel cannot be used as the basis for an enhanced sentence." *Id.* at 121. "If it is evident from the record, or if the defendant presents evidence that places in dispute the question of whether he was represented by counsel, the burden is then upon the State to prove representation by counsel or a knowing and intelligent waiver of that right." *Id.* at 122. "However, where nothing in the record of the prior conviction raises the presumption of either lack of counsel or an invalid waiver of that right, it is incumbent on the defendant, not the state, to go forward with evidence which puts in issue the question of whether he had previously been represented by counsel." *Id* (quotations omitted). "The defendant cannot satisfy this burden by merely arguing that the State has failed to prove representation." *Id* (emphasis added). "[A] silent record alone is insufficient to render a prior conviction invalid… the defendant was required to present evidence that he was not represented by counsel at the time of the prior conviction." *Id.* Until a defendant successfully carries his burden of calling doubt upon the validity of a prior conviction, a trial court errs "in imposing any burden upon the State to prove the validity of the defendant's prior conviction." *Id.* at 123.

In ***State v. Desbiens***, the defendant attacked a charge of possession of a controlled drug, second offense, by claiming that his plea in the prior conviction was not voluntary and intelligent. *State v. Desbiens*, 117 N.H. 433, 435 (1977). "Assuming, arguendo, that the defendant may proceed in this manner, his challenge would be in the nature of a collateral attack. It is clear that ordinarily in a collateral attack the initial burden of going forward with evidence is upon the petitioner." *Id.* The Supreme Court then found that the "defendant made only the conclusory allegation that his plea 'was not voluntarily and intelligently made.' Nowhere in the motion is there any specific allegation as to how defendant's understanding or volition with

respect to the plea was in fact deficient." *Id.* at 436. "In the absence of such specifics, placing the burden on the state to show that the plea was not voluntary and understanding is tantamount to placing on the state the burden of proving the negative of the many ways in which the plea might be defective." *Id.*

The State would first note that Ms. Mercon has not denied that she was previously convicted of DWI in 1997 – in other words, she is not contesting the existence of the conviction. As expressed at the Motion Hearing, therefore, the defendant's contention is that the State must prove that the 1997 conviction was valid, in that it was made knowingly, intelligently, and voluntarily, after having been apprised of her right to counsel and either consulting with counsel or waiving the right. This is evidenced by the defendant's claim that the State must provide copies of the acknowledgement and waiver of rights from the sentencing, the waiver of counsel form, etc. The defendant is making a collateral attack upon the original conviction.

The above cases clearly demonstrate that the defendant is incorrect in her understanding of the State's burden of proof and of her own burden of proof. A defendant cannot force the State into the burden of proving the validity of a previous conviction with "a general denial to the effect that he had not been afforded any of his constitutional rights at the time of any prior conviction." *Ward*, 118 N.H. at 877. "When the defendant challenges the validity rather than the existence of a prior conviction, he, and not the state, must go forward with evidence which would have put in issue the question of whether he had been previously represented by counsel." *Id.* at 878 (quotations omitted). The burden of providing evidence is on the party making the collateral attack – the defendant. *Desbiens*, 117 N.H. at 435.

CONCLUSION

The State submits that it is not required to prove, as an element of its case-in-chief, the prior conviction. RSA 263:64 describes the elements of Operating After Suspension in its first paragraph. It is not until the fourth paragraph that it describes sentence enhancement for suspension resulting from a DWI conviction, and that paragraph describes absolutely no requirement that the State include the prior conviction in the complaint or in the elements to be proven at trial. Nothing in RSA 263:64 requires that the State prove the fact of the prior conviction beyond a reasonable doubt. The only reasonable conclusion, therefore, is that the prior conviction is a penalty enhancement to be considered at sentencing following conviction of a charge of Operating After Suspension.

Even if this Court were to hold the State to the burden of proving the prior conviction as part of its case-in-chief, the defendant's argument that the State must also prove the validity of the prior conviction is incorrect and misplaced. The defendant has produced no evidence that the prior conviction was invalid. The defendant has not even made a specific denial that the prior conviction was valid, as other defendants have done in precedential Supreme Court cases. The defendant has merely claimed that the State did not prove the validity of the prior conviction, and demanded that the State prove the negative that the conviction was not invalid. This is improper, and the New Hampshire Supreme Court has repeatedly said that it is improper. If the defendant wishes to claim that the prior conviction was invalid, it is the defendant's responsibility to put forth evidence of its invalidity. The defendant may not demand that this burden be shifted to the State, and the State is not responsible for meeting a challenge that the Defendant has not properly raised.

WHEREFORE, the State requests that this Honorable Court:

1. Find that the State does not need to prove the fact of the prior conviction as an element of its case-in-chief, but rather may submit evidence of the prior conviction at sentencing following a conviction; or
2. In the alternative, grant the State's Motion in Limine and permit the admission of a certified copy of the case summary describing the Defendant's prior conviction as dispositive evidence of the conviction; and
3. Grant such other relief as this Court deems appropriate.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its counsel,

November 8, 2019

Thomas D. Palermo, Esq.
NH Bar #271593
Assistant County Attorney
Carroll County Attorney's Office
PO Box 218
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CERTIFICATE OF SERVICE

I, Thomas Palermo, certify that a copy of this Memorandum of Law was forwarded to Allison Schwartz, counsel for the defendant in this matter, on November 8, 2019.

November 8, 2019

Thomas Palermo

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THE STATE OF NEW HAMPSHIRE

CARROLL,SS. SUPERIOR COURT

The State of New Hampshire

v.

Teresa Mercon

212-2019-CR-181

RESPONSE TO STATE'S MEMORANDUM OF LAW IN REGARDS TO MOTION IN LIMINE

NOW COMES the defendant, Teresa Mercon, by and through her counsel, Allison H. Schwartz, Esq., Public Defender, and hereby responds to the State's Memorandum of Law in Regards to Motion in Limine that was filed with this Court on November 8, 2019.

1. Ms. Mercon is charged with one count of Operation After Suspension under N.H. RSA 263:64, IV. More specifically, the State's complaint that was filed on January 30, 2019 alleges that on December 24, 2018, Ms. Mercon allegedly violated N.H. RSA 263:64, IV when she, "did knowingly drive a vehicle in the State of New Hampshire while her license was suspended by the Director of the Division of Motor Vehicles on or about December 2, 1997 for driving while intoxicated.
2. The Defense incorporates its prior Objection and arguments made at the Hearing held before this Court on November 6, 2019.
3. In its Memorandum of Law In Regards to Motion in Limine, the State first argues that section IV of RSA 263:64 is simply a penalty enhancement and that they only need to prove the prior DWI conviction at the time of sentencing. The State

further argues that a case summary sheet is sufficient to prove this "penalty enhancement." The State's argument has inherent flaws.

4. First, the State cites several recent cases discussing prior convictions in the context of DWI and Habitual Offender prosecutions. None of these cases are directly on point and they do not lessen the State's burden of proof or change the analysis in the instant case.
5. Ms. Mercon is charged with Operating After Suspension while her license is suspended for a DWI conviction. This isn't merely a sentencing enhancement, it is part and parcel of the allegation. The State must prove that the reason she is under suspension is due to a DWI conviction. Without proof of the DWI conviction in its case in chief, it's a completely separate crime and at most, a violation-level offense.
6. Contrary to the State's claim, it is necessary to notate the prior conviction in the complaint. As stated above, without the prior conviction, it would only be a violation. Additionally, the complaint would be defective because Ms. Mercon would be left without proper notice of when her license was allegedly suspended or why it was allegedly suspended.
7. In their alternative request, the State cites to cases dealing with Habitual Offender charges. Once again, this is not persuasive. Proving the "certified convictions" that were the basis for the Habitual Offender certification is a completely different, separate issue. All the State is required to prove in a Habitual Offender case is that the person was certified at the time that operation

occurred. There is no mention of the basis of the certification in the statute nor is that taken into consideration at the time of sentencing.

8. Overall, the State's logic is flawed and the cases that are cited in the Memorandum are not relevant to the analysis. If the Court were to accept the proposition that the prior DWI conviction is simply a "sentencing enhancement", Ms. Mercon would exercise her right to a trial on a violation-level offense where the maximum penalty is a fine and then at sentencing, could face mandatory jail time. This does not comport with Part I, Article 15 of the New Hampshire Constitution or the Fifth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, for the above-stated reasons, Ms. Mercon requests that:

a) This Court reject the State's argument that they are not required to prove the DWI in its case in chief and only need to present such evidence at sentencing; and

b) Deny the State's Motion in Limine to permit the admission of a certified copy of a case summary as dispositive evidence of Ms. Mercon's prior conviction.

Respectfully submitted,

/s/ Allison Schwartz

Allison H. Schwartz, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this 14th day of November 2019, to Assistant Carroll County Attorney, Thomas Palermo, Esq.

/s/ Allison Schwartz

Allison H. Schwartz, Esq.

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

TERESA MERCON

Docket no. 212-2019-CR-00181

STATE'S MOTION TO RECONSIDER ORDER DATED JANUARY 2, 2020

The State of New Hampshire, by its counsel, Thomas Palermo, requests that this Court reconsider its Order in this matter, dated January 2, 2020. The State asserts the following in support thereof.

BACKGROUND

1. The Defendant, Teresa Mercon, is charged with one count of Operating After Suspension in violation of RSA 263:64. The charge stems from an incident where the Defendant was driving a vehicle on December 24, 2018, and was pulled over by Trooper Samuel Muto of the New Hampshire State Police. Trooper Muto ran the Defendant's information through his cruiser's SPOTS terminal and discovered that her license was suspended. The license suspension stemmed from a DWI charge brought against the Defendant in 1997, to which she pled guilty. The Defendant confirmed this when she told Trooper Muto that she did not currently have a license, and that she had gotten a DWI in 1997 and never took the alcohol course that was required to have her license reinstated.
2. The Defendant proceeded through a bench trial in the Conway District Court on August 13, 2019. The District Court (Subers, J.) found her guilty and, in accordance with the

penalty enhancement outlined in RSA 263:64, IV, sentenced her to seven consecutive days in the House of Corrections.

3. The Defendant now appeals for a jury trial de novo in this Court.

4. The State originally believed that the proper way to prove its case-in-chief at trial was to prove, as an element of the offense, that the Defendant was previously convicted of DWI.

5. The New Hampshire District Courts' data retention policy mandates the destruction of all records and sound recordings from DWI convictions, including pleas, ten years after the date of conviction. See District Court Administrative Order 2006-05. As such, the court records pertaining to this conviction were destroyed in 2007.

6. The State has sought to admit a certified District Court case summary of this conviction as dispositive evidence of the conviction. However, by Order dated January 2, 2020, this Court denied the admission of the case summary, ruling that the summary did not demonstrate that the Defendant was aware of her constitutional rights and made a knowing, intelligent, and voluntary waiver of her rights for the plea in that conviction.

7. The State has since rescinded its position that it must prove the prior conviction as an element of its case-in-chief at trial, and has outlined this in this Motion and in its earlier Memorandum of Law. However, the State also believes that the issue surrounding the admission of the case summary will continue to be a problem, since the State will still need to utilize the summary at sentencing if the Defendant is convicted at trial.

8. The State therefore respectfully requests that the Court reconsider its ruling, and presents the following arguments in support of its position.

9. The State also respectfully requests an expedited response to this Motion, as jury selection is scheduled for January 13.

THE STATE IS NOT REQUIRED TO PROVE THE FACT OF THE PRIOR CONVICTION AS AN ELEMENT OF ITS CASE-IN-CHIEF

10. The State first reasserts its primary argument from the Memorandum of Law that it delivered to this Court: that it need not prove the prior conviction as an element of its case-in-chief at trial. Instead, the State should only have to prove at trial that the Defendant committed the elements of Operating After Suspension. The Court did not acknowledge or respond to this argument in its Order, which is why the State now argues it again.

11. The New Hampshire Supreme Court has said that prior convictions are "as typical a sentencing factor as one might imagine." *State v. LeBaron*, 148 N.H. 226, 230 (2002). They "do[] not relate to the commission of the offense itself," and "potential sentence enhancement based on prior convictions is not punishment related to the offense itself. Nor is it punishment for the prior convictions themselves. Rather, the extended term [of imprisonment] is punishment for the defendant's recidivism." *Id.* at 231. Therefore, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, whether the statute calls it an element or a sentencing factor, must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* (emphasis added).

12. The Supreme Court reaffirmed this in *State v. Thompson* when it said:

> **There is no dispute that the State must prove all of the elements of an offense beyond a reasonable doubt. However, the United States Supreme Court has essentially held that a sentence enhancing statute based, in part, on prior convictions, is merely a penalty provision and does not create a separate crime or constitute a separate element of a crime. The DWI statute requires proof of prior conviction not as an element of**

> **the present charge, but rather as a predicate condition for enhancement of the sentence upon conviction for the present offense. Because prior convictions are sentencing factors and not elements of a subsequent DWI charge, the State need not prove them in its case-in-chief.**
>
> ...
>
> **After consideration of the United States Supreme Court's decisions in *Apprendi v. New Jersey* and *Almendara-Torres*, we abandoned the rule applied in *Doucet* [which required the State to prove prior conviction in its DWI subsequent case-in-chief]. We now adhere to the rule that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, whether the statute calls it an element or a sentencing factor, must be submitted to a jury, and proved beyond a reasonable doubt.**
>
> *State v. Thompson*, 164 N.H. 447, 449-50 (2012) (emphasis added).

13. The Supreme Court has been explicitly, foundationally definite with its words in creating this precedent. "The defendant cites a line of cases... for the proposition that the State must allege and prove a prior conviction if conviction of the subsequent offense carries a heavier penalty. To the extent these cases may be inconsistent with our holding herein, they are overruled. *LeBaron*, 148 N.H. at 232 (emphasis added).

14. The Supreme Court has also repeatedly referenced the United States Supreme Court in creating this precedent; for example, "the United States Supreme Court essentially held that a sentence enhancing statute based, in part, on prior convictions, is merely a penalty provision and does not create a separate crime or constitute a separate element of a crime. Therefore, a prior conviction need not be alleged in the indictment, and generally need not be proved beyond a reasonable doubt as part of the crime charged." *State v. McLellan*, 146 N.H. 108, 113 (2001).

15. RSA 263:64 reads, in pertinent part,

> **I. 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.**
>
> **IV. ... Any person who violates this section by driving or attempting to drive a motor vehicle or by operating or attempting to operate an OHRV or snowmobile in this state during the period of suspension or revocation of his or her license or driving privilege for a violation of RSA 265-A:2, I, RSA 265-A:3, RSA 630:3, II, RSA 265:82, or RSA 265:82-a or an equivalent offense in another jurisdiction shall be guilty of a misdemeanor and shall be sentenced to imprisonment for a period of not less than 7 consecutive 24-hour periods to be served within 6 months of the conviction, shall be fined not more than $1,000, and shall have his or her license or privilege revoked for an additional year.**
>
> N.H. Rev. Stat. Ann. § 263:64 (eff. 2013).

The defendant was convicted in 1997 of a violation of RSA 265:82. That statute was repealed on January 1, 2007, but on the date of her conviction, the statute was "RSA 265:82. Driving Under Influence of Drugs or Liquor; Driving With Excess Alcohol Concentration." RSA 263:64, IV, therefore, serves as a penalty enhancement upon conviction of a violation of RSA 263:64 when the defendant's suspension or revocation was due to a prior conviction for DWI.

16. RSA 263:64 requires, for the charge of Operating After Suspension, that the State prove that the Defendant knowingly drove a motor vehicle in New Hampshire while his or her driver's license or privilege to drive is suspended or revoked. The addition of the enhanced penalty for driving after a suspension resulting from a DWI conviction is an entirely separate section of the statute. Its only purpose is to create an enhanced penalty for Operating After Suspension based on the prior conviction which led to the

suspension. It does not require the State to notate the prior conviction in the complaint, and it does not require the State to prove the prior conviction as an element of its case-in-chief. The State therefore submits that it does not need to prove the prior conviction to the jury at all, and would ask that this Court rule as such, given that this argument was not acknowledged in the Court's January 2 Order.

IT IS THE DEFENDANT'S BURDEN TO SHOW THAT SHE DID NOT MAKE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HER RIGHTS AT THE PRIOR CONVICTION

17. This Court has repeatedly stated that it is troubled by the idea that the certified case summary does not demonstrate a knowing, intelligent, and voluntary waiver by the Defendant of her rights at the time of the conviction. However, the State must point out again that it is the Defendant's burden, if she believes that there was not a knowing, intelligent, and voluntary waiver at the time of conviction, to proffer evidence to support that assertion. It is not the State's burden to prove the validity of the conviction.

18. In *State v. Ward*, the defendant did not challenge the existence of prior convictions on his record but argued "that the State failed to prove that he was afforded his constitutional right to counsel at that time." *State v. Ward*, 118 N.H. 874, 877 (1978). "If it were evident from the record, or if the defendant had presented evidence which placed in dispute the question of whether he had been represented by counsel, the burden would have then been upon the State to prove representation by counsel or a knowing and intelligent waiver of that right." *Id.* "The record does not raise any such dispute... Indeed, all the defendant did was make a general denial to the effect that he had not been afforded any of his constitutional rights at the time of any prior conviction." *Id.* at 877-

78. "This unfounded proffer is insufficient. When the defendant challenges the validity rather than the existence of a prior conviction, he, and not the state, must go forward with evidence which would have put in issue the question of whether he had been previously represented by counsel." *Id.* at 878 (emphasis added).

19. "Prior convictions obtained when a defendant was not represented by counsel and did not knowingly and intelligently waive his right to counsel cannot be used at the basis for an enhanced sentence." *In re State*, 154 N.H. 118, 121 (2006). "However, where nothing in the record of the prior conviction raises the presumption of either lack of counsel or an invalid waiver of that right, it is incumbent on the defendant, not the state, to go forward with evidence which puts in issue the question of whether he had previously been represented by counsel." *Id.* at 122. "The defendant cannot satisfy this burden by merely arguing that the State has failed to prove representation." *Id.* (emphasis added).

20. "We conclude that because the defendant in this case did not allege or present any evidence that he had not been represented by counsel at the time of the prior conviction, he failed to satisfy his initial burden of calling into question the validity of his prior conviction. Accordingly, the trial court erred in placing the burden upon the State to prove the validity of the defendant's prior conviction." *Id.* at 123 (emphasis added).

21. "The defendant relies on *Boykin v. Alabama*, in which the United States Supreme Court held that a guilty plea cannot stand unless there is an affirmative showing on the record that the plea was entered voluntarily and understandingly." *State v. Desbiens*, 117 N.H. 433, 435 (1977). We note that the defendant does not contest the existence of the prior conviction herein... Rather, the defendant seeks to undermine the conviction itself. Assuming, arguendo, that the defendant may proceed in this manner, his challenge would

be in the nature of a collateral attack. It is clear that ordinarily in a collateral attack the initial burden of going forward with evidence is upon the petitioner." *Id.*

22. "...[D]efendant made only the conclusory allegation that his plea was not voluntarily and intelligently made. Nowhere in the motion is there any specific allegation as to how defendant's understanding or volition with respect to the plea was in fact deficient." *Id.* at 436 (quotations omitted). "In the absence of such specifics, placing the burden on the state to show that the plea was voluntary and understanding is tantamount to placing on the state the burden of proving the negative of the many ways in which the plea might be defective." *Id.* (emphasis added). "This would be a waste of time on the part of all concerned, since it takes only a minimal effort by the defendant to specify the alleged substantive defects in his plea." *Id.* "We conclude that it was incumbent on the defendant to make his conclusory allegations specific before the state is put to the burden of showing that the plea met constitutional standards." *Id.* (emphasis added). "This the defendant could have accomplished either by amending his motion or actually introducing evidence." *Id.*

23. "Because the ultimate question is the voluntariness and understanding of the plea, the defendant is not relieved from alleging how the plea failed to meet these requirements. The sound administration of justice requires that the allegations state the specific manner in which the plea was in fact involuntary or without understanding." *Id.* at 437.

24. The Defendant has never challenged the notion that she was, in fact, convicted of DWI. Her argument has consistently been a collateral attack – she claims that the State has not and cannot show that her plea in the conviction was knowing and intelligent. And this Court has several times now indicated that it is troubled by this prospect. But the New

Hampshire Supreme Court has repeatedly said, as shown in the line of cases above, that it is the Defendant, not the State, who bears the burden of demonstrating that her prior conviction was not knowing, intelligent, and voluntary. If the Defendant wishes to make a collateral attack on the prior conviction without denying that the prior conviction exists, she must present evidence that the plea in the prior conviction was improper. The Defendant may not simply throw up a broad denial that she was afforded her constitutional rights and then demand that the State prove the negative that the prior conviction was not improperly pled to.

CONCLUSION

25. The State is not required to prove the prior conviction as an element of its case-in-chief at trial. The New Hampshire Supreme Court has repeatedly ruled that penalty enhancements based on prior convictions do not create a separate crime (i.e., Operating After Suspension, DWI, is not a separate crime from Operating After Suspension), nor does it create a separate element of the crime. The State does not have to introduce evidence of the prior conviction at trial and does not have to prove the prior conviction to a jury beyond a reasonable doubt. The only burden the State bears is proffering the prior conviction to the trial court as part of its sentencing argument following a conviction at trial.

26. Furthermore, if and when the State proffers that prior conviction at sentencing, the State is not required to prove that the prior conviction was knowingly, intelligently, and voluntary pled to unless the Defendant puts forth specific evidence that it was not knowingly, intelligently, and voluntarily pled to. The New Hampshire Supreme Court

has established, clearly and definitely, that the Defendant cannot make a successful collateral attack on a prior conviction with a broad and general denial that she was not afforded her constitutional rights at the time of the prior conviction. If the Defendant wants to argue that her plea to the prior conviction was not knowing and intelligent, she bears the burden of proffering evidence that it was not knowing and intelligent. It is error to put that burden on the State instead of the Defendant.

WHEREFORE, the State requests that this Honorable Court:

A. Reconsider its Order dated January 2, 2020, and find that the State is neither required to prove the Defendant's prior conviction at trial, nor is it required to prove the validity of the prior conviction unless the Defendant proffers evidence that it was not valid; and

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

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its counsel,

January 3, 2020

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CERTIFICATE OF SERVICE

I, Thomas Palermo, certify that a copy of this Motion was forwarded to Allison Schwartz, counsel for the Defendant in this matter, on January 3, 2020.

January 3, 2020

Thomas Palermo

Filed
File Date: 1/15/2020 3:44 PM
Carroll Superior Court
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THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

TERESA MERCON

Docket no. 212-2019-CR-00181

STATE'S MOTION TO RECONSIDER DENIAL OF CONTINUANCE AND FOR RULING ON OUTSTANDING MOTION TO RECONSIDER

The State of New Hampshire, by its counsel, Thomas Palermo, respectfully requests that this Court reconsider its denial of the State's oral Motion to Continue, made on the morning of January 10, 2020, and that the Court issue an order on the outstanding Motion to Reconsider regarding the admissibility of the case summary. The State asserts the following in support thereof.

BACKGROUND

1. The Defendant, Teresa Mercon, is charged with one count of Operating after Suspension in violation of RSA 263:64, where the suspension was the result of a DWI conviction. This matter is an appeal from the Conway District Court for a jury trial de novo, and was scheduled for jury selection on January 13, 2020, prior to a stay being issued by the New Hampshire Supreme Court.

2. On October 16, 2019, the State filed a Motion in Limine with the Court requesting the admission of a certified case summary of the Defendant's DWI conviction at trial. The State filed this Motion because it believed that, in order to prove the charge of Operating

after Suspension, it needed to prove that the suspension was the result of a DWI conviction. However, court records of that conviction have been destroyed, pursuant to District Court records retention policy. See District Court Administrative Order 2006-05. The State concluded that admitting a case summary at trial was the most probative, least prejudicial way to prove the prior conviction. The Defendant objected to the Motion on October 28, arguing that the case summary could not be proved to be accurate, did not demonstrate that the Defendant made a knowing, intelligent, and voluntary waiver of her rights at the time of conviction, and was inadmissible hearsay.

3. After a hearing on the State's Motion, and after receiving a supplemental Memorandum of Law filed by the State and an additional Objection filed by the Defendant, the Court ruled on January 2, 2020, that the case summary was inadmissible because it did not demonstrate that the Defendant made a knowing, intelligent, and voluntary waiver of her rights when she was convicted in 1997.

4. On January 3, the State filed a Motion to Reconsider, asserting much of the same case law that it had in its memorandum, and noting that the Court, in its Order, neither acknowledged nor responded to any of the case law that the State cited in arguing for the admissibility of the case summary.

5. On January 10, the Friday before jury selection, the Court held an off-the-record, in-chambers conference regarding the State's Motion to Reconsider. While the State and the Defendant argued their positions on reconsideration, the Court did not make a ruling, and indicated that it would not have a ruling until that afternoon at the earliest.

6. At that point, the State indicated to the Court that it could not currently go forward with jury selection regardless because it could not obtain the presence of its sole witness,

Trooper Samuel Muto. Trooper Muto had alerted the State in December that he is no longer employed with the New Hampshire State Police, that he is now employed by the Massachusetts State Police, and that he is currently at the Massachusetts State Police Academy for a recruit training program. It would be extremely disruptive to his training to leave the program to attend this trial.

7. The State has subpoenaed Trooper Muto and contacted him several times, and has also worked with the Troop E State Police prosecutor to attempt to schedule Trooper Muto's presence at the trial. Despite its best efforts, however, the State has exhausted its options and has been unable to obtain his attendance at any time before he completes recruit training. The State thus orally requested a continuance at the in-chambers conference.

8. The State did not request a continuance until January 10 because the trial could not go forward regardless, given that there is an outstanding order on the Motion to Reconsider, and it could not go forward anyway if it were not permitted to submit the case summary as evidence of the Defendant's DWI conviction. At that point, however, the State recognized that the Court was notwithstanding prepared to call an entire prospective jury in that Monday, and brought the Trooper's absence to the Court's attention to indicate that there was no possible way the trial could go forward.

9. The Court indicated that it would consider the State's oral request for a continuance; however, the Defendant then objected, claiming her speedy trial rights for the first time in the pendency of this appeal.

10. By Order released the afternoon of January 10, the Court denied the State's request for a continuance. The Court did not rule on the State's outstanding Motion to Reconsider, which was the original purpose of the in-chambers hearing.

11. The State now respectfully requests reconsideration of the Court's denial of continuance, and a ruling on the outstanding Motion to Reconsider.

THE COURT DID NOT COMPLETE ITS ANALYSIS OF THE DEFENDANT'S SPEEDY TRIAL RIGHTS IN DENYING THE STATE'S MOTION TO CONTINUE

12. In denying a continuance, the Court began an analysis of whether the Defendant's right to a speedy trial would be violated by continuing the trial to a later date when Trooper Muto is available.

13. The Court found that the continuance would result in a delay of eight months between the Defendant's appeal and the date of her trial, and ruled that this is a "presumptively prejudicial amount of time" for a delay of the trial. The Court explained its reasoning by stating that this is a trial on a misdemeanor charge and that the delay is attributable to the State, rather than the Defendant.

14. The State asserts, however, that the Court did not complete its analysis of the speedy trial issue at hand, and that if it had, it would or should have found in favor of the State.

15. "In determining whether a defendant's right to a speedy trial has been violated under the State Constitution, we apply the four-part test articulated in *Barker v. Wingo*... The test requires us to balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *State v. Brooks*, 162 N.H. 570, 581 (2011).

16. "The first factor, the length of the delay, is a triggering mechanism: we do not consider the remaining factors unless the delay is presumptively prejudicial." *Id.* "...[W]e held in *State v. Bain* that where a defendant charged with a misdemeanor is not in jail, we do not

consider a pretrial delay of fewer than six months to be presumptively prejudicial." *State v. Allen*, 150 N.H. 290, 294 (2003).

17. The Defendant appealed her District Court conviction in August of 2019. When the Court denied the State's oral request for a continuance on January 10, 2020, the appeal had been at the pretrial stage for approximately five months. Therefore, the State's request for a continuance should have been granted in the first place, since there was no presumptively prejudicial delay for the purposes of speedy trial and would not be for another month. The proper ruling would have been to grant the State a thirty-day continuance and then re-approach the speedy trial issue.

18. However, even if we assume, for the purposes of argument, that the Court should weigh future speedy trial issues in determining whether or not a present speedy trial issue exists, and that a presumptively prejudicial delay now exists, the Court is still required to complete the analysis that is triggered by the delay. "[T]he length of the delay is not necessarily the determinative factor in evaluating whether there has been a violation of the defendant's right to a speedy trial... In balancing delay against other factors, we are mindful that the right to a speedy trial is relative, and must be considered with regard to the practical administration of justice." *State v. Fellers*, 2015-0014, 2015 WL 11077952, at *1 (N.H. Sept. 18, 2015)

19. "The second factor requires that we assess why the trial was delayed, to which party the delay is attributable, and how much weight to give the delay." *Brooks*, 162 N.H. at 582.

20. While it is true that "trial delays arising from the failure of law enforcement personnel to appear in court accordingly are to be held against the State," this consideration is geared

more strongly towards "instances where no reasonable justification for the failure to appear is offered." *State v. Lagone*, 127 N.H. 49, 54 (1985).

21. Although the arresting officer is currently unavailable to testify, his non-appearance is due to the fact that he is in training to become a Massachusetts State Trooper and he is, quite literally, not permitted to leave the Recruit Training Academy during the week. "The day begins at 5:30 AM with physical training. The recruit then attends academic courses until 8:00 PM. The recruits then have study and personal time until lights out at 9:30 PM... On Friday evenings, recruits may go home and return Monday morning for training." *Recruit Training Academy*, Mass.gov, https://www.mass.gov/service-details/recruit-academy-training (last visited January 13, 2020). Being forced to leave the Academy for a day or more to testify in northern New Hampshire would be extremely disruptive to Trooper Muto's training, and although his non-appearance may technically be attributable to the State, Trooper Muto has a valid reason for non-attendance, and the State has made every reasonable attempt to obtain his attendance nonetheless.

22. "This court puts substantial emphasis on the latter two of the *Barker* factors." *Brooks*, 162 N.H. at 582 (quotations omitted).

23. The Court is correct that the Defendant has asserted her right to a speedy trial; however, that is not the end of the analysis. The Court must "consider the strength of a defendant's assertion of his right to a speedy trial." *Id.* A defendant's assertion of his right to speedy trial is stronger the earlier he asserts it. *State v. Lamarche*, 157 N.H. 337, 343 (2008). For example, where a defendant waited "approximately ten months from the date of his indictment to raise this claim... [t]he fact that the defendant waited so long to pursue his

right to a speedy trial means that although the factor weighs in his favor, it does not do so heavily." *Id.*

24. The State stresses that the Defendant was originally scheduled to select a jury to hear her appeal on October 7, 2019. Were the Defendant truly concerned with her right to a speedy trial, as she now asserts, she could have conducted and concluded her trial over three months ago. Instead, the Defendant waived her claim to a speedy trial by filing a Motion to Suppress, thus putting a substantive hearing on the docket and delaying her trial by over a month, to November 18.

25. Furthermore, the Defendant had not once asserted her right to a speedy trial until immediately after learning that the State's witness would be unavailable. She made this assertion orally, in an off-the-record in-chambers conference, in response to the State's request for continuance. The Defendant has never before explicitly stated or impliedly behaved as if she were concerned with her right to a speedy trial. It is concerning that the Defendant, who could have pursued and resolved this trial in early October, has instead waived speedy trial and delayed resolution with substantive motions and attempts to suppress evidence, and only now, immediately after learning of the State's witness unavailability and when the State requested its first continuance in good faith, demanded fulfillment of her right to a speedy trial. While this act may technically be an assertion of that right, it is weak and dissonant with her previous behavior, and should not weigh heavily in her favor.

26. "The last factor requires us to determine whether and to what extent the defendant suffered prejudice." *Allen*, 150 N.H. at 294. The State notes that the Court did not

consider this factor in its January 2 Order, and respectfully requests that the Court give this factor appropriately strong attention in its reconsideration.

27. "Although we typically require a defendant to demonstrate actual prejudice from a delay to prevail on a speedy trial claim, when a defendant does not – or cannot – articulate the particular harm caused by delay, we inquire whether the length and reason for the delay weigh so heavily in the defendant's favor that prejudice need not be specifically demonstrated." *State v. Locke*, 149 N.H. 1, 8 (2002). Factors here can include "whether the delay resulted in an oppressive pretrial incarceration, anxiety, or an impaired defense." *Brooks*, 162 N.H. at 583.

28. "The passage of time, and the resulting impairment of memories, is insufficient to establish prejudice." *State v. Eaton*, 162 N.H. 190, 198 (2011).

29. "Analysis of the prejudice factor also requires a re-examination of the State's actions because if the State pursues a defendant with 'reasonable diligence,' then a speedy trial claim is likely to fail, regardless of the length of delay, as long as the defendant cannot show specific prejudice to his defense." *Locke*, 149 N.H. at 9 (quoting *Doggett v. U.S.*, 505 U.S. 647, 656 (1992)).

30. The State would first note that the Defendant has never specifically described or demonstrated an actual prejudice from the delay to her trial. She has simply broadly asserted her speedy trial rights and left it upon this Court to determine whether or not, and how, that right has been violated.

31. The Defendant is not incarcerated and has, at no point since filing her appeal, been incarcerated while awaiting this trial. Therefore, any delay to the trial does not cause or result in oppressive, or any, pretrial incarceration.

32. The Defendant suffers no impaired defense as a result of delay in the trial. There is no risk of witness unavailability, since the only person who could possibly testify in her defense is herself – she and the arresting officer were the only individuals on scene, and the only ones with personal, relevant knowledge of the incident. And if the Defendant plans to not present any testimony, she cannot claim that her defense would be impaired by delay.

33. Transcripts from the District Court trial show that the Defendant's strategy was to fully admit to the offense and request the Court's leniency. Should that be the Defendant's defense at her jury trial, she suffers no prejudice from a delay of several months.

34. Although the Defendant may claim anxiety from the pretrial period, that anxiety alone does not create prejudice leading to a violation of her speedy trial right. "Although the facts of... the anxiety presumed to attend criminal charges are not to be ignored, they do not reach a level of great importance over a span of ten months. What is important is the want of any indication of actual prejudice to the conduct of the defense. The defense lost no witnesses, and no memories appear to have faded during the time in question." *State v. Tucker*, 132 N.H. 31, 33 (1989).

35. Also consider: "Nor does the record disclose any significant prejudice to the defendant caused by the twelve-month wait. He was free on bail... and although he was surely anxious about the outcome of the pending proceedings, there is no indication that he suffered more than any defendant normally does... Hence, we conclude that there is no sufficient reason to find unreasonable delay in bringing the case to trial." *State v. Colbath*, 130 N.H. 316, 320 (1988).

36. The State would also propose that the anxiety "presumed to attend criminal charges" while awaiting disposition is lessened when the Defendant has already had a final disposition to her charges, and is now waiting for disposition of her appeal. The Defendant has already been convicted and sentenced, and thus knows the result of the charges against her. At this point, she is requesting continuation of the judicial process and, from her perspective, her circumstances can only improve – either her conviction is affirmed and she must carry out her sentence, or it is overturned and she is free to go. The situation is significantly different in terms of anxiety from a defendant who is facing new charges against him without final resolution.

37. Finally, during the five-month pendency of this appeal, the State has pursued the Defendant with "reasonable diligence." The State has made no delays in bringing the Defendant to trial until now; in fact, the Defendant has delayed her own trial more than the State has by filing substantive motions requesting suppression of various pieces of evidence and testimony. The State filed one Motion in Limine on October 16, but did so in an effort to reduce delay by determining the admissibility of evidence a month before the scheduled trial, rather than immediately before or during trial. The State has not, until January 10, requested a continuance, and the State only requested this continuance because it had no other options after making every reasonable effort to obtain the attendance of its only witness. The State has, in every sense of the phrase, pursued the Defendant with reasonable diligence in attempting to bring this matter to trial and conclusion. "Since the State prosecuted this case with reasonable diligence, and because the defendant has not demonstrated actual prejudice, his speedy trial claim must fail." *Locke*, 149 N.H. at 10.

THE DEFENDANT HAS CREATED SEVERAL DELAYS IN HER OWN CASE THAT CANNOT COUNT TOWARDS SPEEDY TRIAL ANALYSIS

38. As noted above, in this appeal, the Defendant has actually delayed her own trial more than the State has. This trial was originally scheduled for October, and then for November, and most recently for January; however, the Defendant has filed two motions/objections to suppress evidence and testimony, which have created substantial delays in bringing her appeal to a conclusion.

39. Returning to the second factor of the *Barker* test, the Court must "assess why the trial has been delayed, to which party the delay is attributable, and how much weight to give the delay." *Allen*, 150 N.H. at 294. "In considering the second factor, we initially discount any delays that were prompted by the defendant because he cannot take advantage of delay that he has occasioned." *Id.*

40. The Federal Speedy Trial Act states the following:

> **(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:**
>
> **(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –**
>
> **(A) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;**
>
> **...**
>
> **(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.**

18 U.S.C.A. § 3161 (2008)

41. The Defendant's request for appeal in this Court is dated August 15, 2019. The Court issued its order denying continuance on January 10, 2020. 4 months and 26 days have elapsed in that time.

42. However, on September 10, 2019, the Defendant filed a Motion to Suppress Statements with this Court. A hearing was held on that Motion on October 4, and the Court issued an order on November 5, 2019. 1 month and 25 days elapsed in that period, attributing 30 days to the period during which the Motion was under advisement. Therefore, the total, non-tolled time that has passed for the Defendant's speedy trial right is 3 months and 3 days. This matter could therefore be continued for almost three months before the Defendant would even have a presumptively prejudicial delay to trigger the speedy trial analysis in the first place.

43. On October 16, 2019, the State filed a Motion in Limine to Admit Case Summary as Dispositive Evidence. The State did not have to file this Motion, and merely did so to save time that would otherwise inevitably have been spent arguing the admissibility of the case summary during or immediately before the trial. However, the Defendant took this opportunity to file an Objection seeking to suppress the case summary and deny the State admission of it, for various reasons. The Defendant's Objection was filed on October 28, the Court held a hearing on November 6, and a final Order was issued January 2. Attributing 30 days to the period during which the Motion was under advisement, and subtracting the redundant days between October 28 and November 5, exactly 1 month elapsed during this period.

44. If the above time is also excluded from the Defendant's speedy trial calculation, the appeal has been pending for 2 months and 3 days.

45. Even if the Court were to count the period between October 28 and January 2 as attributable to the State, the Defendant's speedy trial objection is still three months short of being presumptively prejudicial to trigger the speedy trial analysis. The Defendant cannot object to, and this Court should not deny, a continuance on the basis of speedy trial when this matter is still several months short of being ripe to trigger the *Barker* analysis in the first place.

THE COURT HAS NOT YET RULED ON AN OUTSTANDING SUBSTANTIVE MOTION IN THIS MATTER

46. Following the Court's Order dated January 2, the State filed a Motion to Reconsider. That Motion is still outstanding, as the Court has not, as of this writing, ruled on it.

47. The result of the Court's Order dated January 10, which the State is herein requesting reconsideration on, is that the State cannot proceed with trial on this matter. The State currently has no witness to present, the reasons for which are described above. But even if the State did have Trooper Muto present, it still could not proceed with trial because of the outstanding Motion to Reconsider. If this matter were to have proceeded to jury selection on January 13, as it was originally scheduled to, the Court would have needed to either publish its Order on the outstanding Motion the Friday before, or on the morning of – or else, administratively continue the trial. And even if the Court had published the Order on one of those two days, the State then would have had to request a continuance anyway because the Court would have left the State fewer than 72 hours, weekend included, to review the Order and consider its trial strategy in light of the Order.

48. The accumulated result of the route this matter has taken is that the State is left in the untenable position of needing to request a continuance in every possible situation. And he Court's denial of the State's request requires the State to either plea down a charge for which the Defendant was convicted of, and has repeatedly admitted full guilt to, for reasons not related to the facts of the case or the Defendant's guilt or innocence, or to dismiss the charge altogether. And because the State cannot proceed further with the matter, the result of the Court's denial is that a substantive motion is left outstanding and without response.

CONCLUSION

49. The Court should reconsider its denial of the State's request to continue on the basis of a complete and fair analysis of the speedy trial issue. Even putting aside the Defendant's own delays of her trial, there simply is not a prejudicial effect on the Defendant by granting the State's request. If the trial were delayed until April, May, or even June at the absolute latest, this eight-to-ten month period between appeal and trial does not create a conceivable prejudice on the Defendant, and the Defendant cannot specifically demonstrate any prejudice to her. The State has made every reasonable effort to obtain the presence of its witness, and has in every sense of the phrase pursued its case with reasonable diligence. The Defendant suffers no impaired defense by the delay, faces no oppressive (or any) period of incarceration, does not lose any witness testimony, and suffers no more anxiety than any other defendant normally would.

50. The State's position is bolstered further when the Defendant's own delays are taken into account. At most, slightly over three months have accumulated towards a presumptively prejudicial delay; if both substantive motions are construed against the Defendant, about

five weeks have elapsed. The Court should not rule against the State on an assertion of speedy trial when this matter has already been delayed by the Defendant far more than it has by the State, and when the Defendant suffers absolutely no conceivable prejudice as a result of a further delay.

51. Lastly, even if the State had not moved to continue on the basis of Trooper Muto's absence, this trial could not have proceeded forward because the Court has not ruled on the State's outstanding Motion to Reconsider. If the Court did release a ruling before jury selection, it would have come on the absolute eve of – fewer than six business hours before. The State then inevitably would have had to request a continuance to review the Order and consider its trial strategy and options for appeal – including contacting the New Hampshire Attorney General's Office, if necessary. The State requested to continue the trial at the in-chambers conference not just because its witness was unavailable, but because it expected that the continuance would also allow the Court additional time to release an Order on the outstanding Motion. However, the Court denied the continuance, and in doing so forced the State into the untenable position of dismissing the case entirely while its Motion was still outstanding.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Reconsider its denial of the State's oral Motion to Continue jury selection; and

B. Release an order on the State's outstanding Motion to Reconsider; and

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

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its counsel,

January 15, 2020

Thomas D. Palermo, Esq.
NH Bar #271593
Assistant County Attorney
Carroll County Attorney's Office
PO Box 218
Ossipee, NH 03864
(603) 539-7769

CERTIFICATE OF SERVICE

I, Thomas Palermo, certify that a copy of this Motion was forwarded to Allison Schwartz, counsel for the Defendant in this matter, on January 15, 2020.

January 15, 2020

Thomas Palermo

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

The State of New Hampshire

v.

Teresa Mercon

212-2019-CR-181

Clerk's Notice of Decision
Document Sent to Parties
on 02/24/2020

MOTION TO SCHEDULE CASE FOR JURY SELECTION

NOW COMES the defendant, Teresa Mercon, by and through her counsel, Allison H. Schwartz, Esq., Public Defender, and respectfully requests that this Honorable Court schedule this matter for jury selection in February 2020.

In support of this Motion, the following is stated:

1. Ms. Mercon is charged with one count of Driving After Revocation or Suspension pursuant to N.H. RSA 263:64, IV.
2. Jury Selection in this matter was scheduled on January 13, 2020. However, that date was cancelled after the State's Emergency Motion to Stay Proceedings to Allow State's Appeal of Trial Court Ruling was granted by the New Hampshire Supreme Court on January 10, 2020.
3. Prior to filing the Emergency Motion, the State requested to continue this matter because their law enforcement witness was not complying with a subpoena and would not be "available" for the next 20 weeks. The Court denied the State's request for a continuance.
4. On February 4, 2020, the New Hampshire Supreme Court issued an Order in which it vacated the State's emergency motion to stay trial court proceedings and

The court will schedule a hearing on the status of this case and pending motions as soon as the docket permits.

Amy L. Ignatius

Honorable Amy L. Ignatius
February 20, 2020

remanded this matter to the trial court. Ms. Mercon was ready to proceed to trial on the January 13, 2020 date and there should be no further delays in scheduling her case.

5. Based upon the above, Ms. Mercon requests that this Court schedule this matter for jury selection in February 2020.

WHEREFORE, for the above-stated reasons, Ms. Mercon respectfully requests that this Honorable Court schedule this matter for jury selection in February 2020.

Respectfully submitted,

/s/ Allison Schwartz
Allison H. Schwartz, Esq.
Bar ID # 20132
N.H. Public Defender
408 Union Avenue
Laconia, NH 03246
(603) 524-1831

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was forwarded on this 6th day of February 2020 to Thomas Palermo, Esq., Assistant Carroll County Attorney.

/s/ Allison Schwartz
Allison H. Schwartz, Esq.

CERTIFIED COPY

THE STATE OF NEW HAMPSHIRE

3RD CIRCUIT COURT - DISTRICT DIVISION - CONWAY

* * * * * * * * *

STATE OF NEW HAMPSHIRE

v. 430-2019-CR-76

TERESA MERCON

* * * * * * * * *

EXCERPT FROM BENCH TRIAL, TESTIMONY OF TERESA MERCON held before the Hon. Janet Subers, Justice, Circuit Court, District Division, at Conway, New Hampshire, on Tuesday, August 13, 2019.

APPEARANCES:

For the State:
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For the Defendant:
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Electronically Recorded

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Teresa Mercon	4	9	--	--

E X H I B I T S

	FOR ID	IN EVIDENCE
STATE'S:		
DEFENDANT'S:		

P R O C E E D I N G S

(The following is an excerpt from the Bench Trial held on August 13, 2019.)

IN OPEN COURT

MS. SCHWARTZ: So at this point we would call -- I would call Teresa Mercon to the stand.

THE COURT: Thank you. Please step forward.

MS. SCHWARTZ: When you get up there please just raise your right hand.

THE COURT: And do you swear that any testimony you provide today will be the truth and the whole truth subject to the pains and penalties of perjury?

THE WITNESS: I do, and I promise.

THE COURT: Thank you. You may be seated, and then just state your name, and spell your last name for the record.

THE WITNESS: Teresa Mercon. M-e-r-c-o-n.

THE COURT: Thank you. You may inquire.

MS. SCHWARTZ: All right.

TESTIMONY OF TERESA MERCON,

who was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SCHWARTZ:

Q. So I'm just gonna take you through some background information. So just to explain to the Court, how old are you?

A. Fifty-five.

Q. And where do you currently live?

A. Chatham, New Hampshire.

Q. And how long have you lived there?

A. Oh, I'm guessing close to almost 20 years.

Q. Okay. Are you currently employed?

A. Yes.

Q. What do you do?

A. I'm a housekeeper at Scenic Inn.

Q. And where is that located?

A. Right on Wilder Street by the Conway Library.

Q. Okay. And how -- um -- frequently do you work?

A. Um -- I'm seasonal, and -- um -- it's -- it depends on what -- what people come so it varies. But usually it's -- you know, I start in May or -- May or June, and then we go right up from June till like November.

Q. Okay. And how -- how far is work from

home?

A. Close to 20 miles.

Q. How do you get to and from work?

A. My -- my boss comes gets me or his wife.

Q. And he's present here in court today?

A. Yes, he is. Right there.

Q. Okay. So let's go back to what we're talking about. So do you have a DWI conviction on your record?

A. Yes.

Q. When was that? Do you remember?

A. I believe it was in '97.

Q. Okay. And in 1997 what was your situation --

A. Back then --

Q. -- in terms of your home life and things like that?

A. Well, my daughter was home, and I was with my other half working so we didn't have much money, so I pretty much stayed home, and I was scared to leave her. And I just stayed home. I was home, and I was -- and I -- I -- I guess I was uncomfortable or didn't have the money to go basically.

Q. When you say to go, to go to what?

A. Go to the -- the school, the -- I guess that drunk school, whatever, what it was back then, you know what I mean.

Q. Okay.

A. So -- and I just -- it didn't happen, and I apologize for that, but I just -- it didn't happen.

Q. Okay. Um -- just to be clear, so you're saying it didn't happen because?

A. I didn't have the money to do it.

Q. Okay.

A. I just did not.

Q. Okay. And --

A. I mean, I did $7 an hour if you were working, and if you didn't have any work -- it was pretty cheap back then. You know, 20 some odd years ago you didn't make much money.

Q. Okay. So at that point in time did you have any reason to have your license or drive?

A. No. Back then, no. I mean, because once my daughter got in -- got into preschool, day care, and started kindergarten -- um -- I got a job at Ames Department Store, and -- um -- a lady that lived on the same road as I did picked me up and brought me home.

Q. Okay.

A. So I didn't have -- so I didn't need -- I didn't drive.

Q. Okay.

A. So I was very comfortable with that, and then it just seemed to go on.

Q. When you say it seemed to go on, how -- how else did you get around for the years following?

A. Um -- my other half. Um -- my dad took me a lot, and then I had friends.

Q. Okay.

A. And it -- and it just seemed to be -- sadly to say, it just snowballed, and -- and then it just -- I -- I don't know -- maybe forgot about it or something. It just didn't -- I was busy raising my kids and going on and doing what I was doing, and it just snowballed.

Q. So let's talk about December 24th of 2018. Do you remember that day?

A. Oh, definitely. The night before Christmas.

Q. And what were you doing?

A. Well, at that point I was coming from my son's -- coming from my son's house, and -- um --

as the officer said, which was -- which he was very good about.

Um -- he pulled me over, and -- um -- but I didn't know -- I didn't know what I got pulled over for until he pulled me over of course, and he -- you know, the information was all correct. He was right.

And he was kind enough to help me get the -- um -- gifts out of the car, and he was very -- he was very kind. He was good to me, and I apologized. I apologized for not having the -- my license, and I -- I just felt bad. You know, I felt bad.

Q. Why did you drive that night?

A. Well, that -- for that particular time my dad couldn't drive because he couldn't drive at night.

Q. Okay.

A. So I -- so I wanted to make a run as quick as I could and get the gifts where I had to go, and that was that.

Q. Were you under the influence of alcohol that night?

A. No, I don't drink no more. After -- after what happened many years ago, I don't drink

anymore.

Q. Were you under the influence of any drugs?

A. No. Only -- the only drug that I actually take is Tylenol.

Q. Okay.

A. Or my medicine for breathing.

Q. Okay.

MS. SCHWARTZ: I don't have anything further.

THE COURT: Thank you. Cross-examination?

MS. TESSARI: Briefly, Your Honor.

CROSS-EXAMINATION

BY MS. TESSARI:

Q. You own a 1995 Honda Civic?

A. My dad does.

Q. Okay. Black in color?

A. Yes, it is.

Q. And are you familiar with the area of north South Road in Conway?

A. Yes. Yes. I wasn't for a while until I got -- because it's pretty complicated. It's new -- new style stuff, but yeah, I am.

Q. Okay. And you recall operating the black Honda Civic on 2008 on the north South Road --

A. Yes, ma'am, I was.

Q. -- in December?
A. Yes.
Q. And you recall being stopped by the trooper?
A. Yes.
Q. You recall telling him you didn't have a license?
A. He was good to me. You know, he was a good -- he was good to me. You know, I may have been in the wrong, but he was good to me.
Q. That's good. Um -- you recall telling him that -- eventually that you were suspended for DWI?
A. Yes, I believe I did. Yes.
Q. Okay. Do you recall telling him that you didn't take the alcohol class?
A. I -- I believe I did. I believe I did. I'm not -- I'm not positive. I'm not sure of that. Honest to God, I'm not sure of that --
Q. Okay.
A. -- but I might have. I don't know. I mean, it was -- it's been -- it's been a few months. I can't recall everything I said.
Q. Sure.
A. I apologize for that.
Q. No, that's okay. Do you recall getting

the DWI back in 1997?

A. Yes.

Q. Okay. And you knew there was a requirement to go to the class?

A. Yes, I think -- yes.

Q. Okay.

A. But I think I forgot about it, to be honest with you.

Q. And counsel talked with you a little bit about -- direct about how you got places. You said your dad had given you rides, and --

A. Yes, after -- of course after my mom passed away, and which is really sad. Today -- I hate to say this, but today is when my mom passed away, today on the 13th.

Q. I'm sorry.

A. Yeah.

Q. Um -- and you also drove places on occasion?

A. Not if I didn't have to.

MS. SCHWARTZ: Objection.

THE WITNESS: No, I did not. Nope. I mean no, I did not. My family members would help me.

MS. SCHWARTZ: Objection.

THE COURT: Hang on a sec. There was -- there was an objection. So I think we just need to stick to the 24th of December.

MS. TESSARI: Okay.

BY MS. TESSARI:

Q. But you don't deny driving on that date.

A. That day, no. No. No. I was delivering presents. That's what I was doing that night. That's exactly what I was doing.

Q. You weren't going to the hospital. There was no emergency that precipitated your driving on that day.

A. No. No. No, it was not.

MS. TESSARI: I have nothing further for this witness, Your Honor.

THE COURT: Okay. Thank you. Do you have any redirect based on that cross-examination?

MS. SCHWARTZ: No, Your Honor.

THE COURT: Okay. Thank you. You may step down, ma'am. Thank you.

THE WITNESS: Thank you.

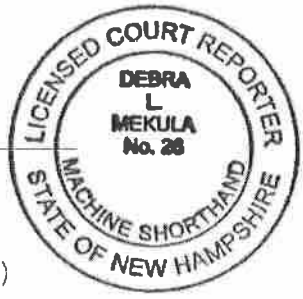
(This concludes the requested excerpt.)

C E R T I F I C A T E

I, Debra L. Mekula, a Licensed Court Reporter and Justice of the Peace in and for the State of New Hampshire, do hereby certify that the foregoing, to the best of my knowledge, skill and ability, is a true and accurate transcript from the electronic sound recording of the excerpt of the proceedings in the above-entitled matter.

Debra L. Mekula

Debra L. Mekula, LCR, RMR
Licensed Court Reporter
Registered Merit Reporter
N.H. LCR No. 26 (RSA 310-A)



THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2020 TERM
JANUARY SESSION

No. 2020-____

State of New Hampshire

v.

Theresa Mercon

STATE'S EMERGENCY MOTION TO STAY PROCEEDINGS TO ALLOW STATE'S APPEAL OF TRIAL COURT RULING

NOW COMES the State of New Hampshire, by and through its attorneys, the office of the Attorney General, and respectfully requests that this Honorable Court order a stay in trial proceedings currently underway in Carroll County Superior Court, so that the State may pursue its appeal, and in support thereof asserts the following:

1. The defendant, Theresa Mercon, is scheduled for trial in the superior court on one count of operation after suspension. RSA 263:64, IV. Jury selection is scheduled for January 13, 2020. The trial will start shortly thereafter. The charge alleges that she was driving with a suspended license after a conviction for driving while intoxicated.

2. On October 16, 2019, the State filed a motion in limine, alerting the court that it intended to prove the defendant 1997 conviction for driving while intoxicated by offering into evidence a certified copy of the 1997 court case summary. The State's motion explained that the district court had destroyed its records, pursuant to its policy, in 2007.

3. On January 2, 2020, the trial court (*Ignatius*, J.) denied the State's motion in

limine. The court wrote that the case summary was not proof that the defendant had "made a knowing, intelligent waiver of her rights, particularly as to the collateral consequences of her decision."

4. On January 3, 2020, the State filed a motion to reconsider and, on January 10, 2020, the trial court held a hearing on the motion to reconsider, but did not rule on it. The State has also filed a motion to continue the trial, but the State expects the motion to reconsider and the motion to continue may be denied.

5. Thus, the State requests that this Court issue an immediate stay of the trial proceedings so that it may pursue its legitimate right to appeal the trial court's pretrial orders, in the event that the trial court denies both motions. *See State v. Hayes*, 138 N.H. 410, 411 (1994) (recognizing that the "State appeals statute [is] liberally construed to insure State's ability to prosecute with all evidence to which it is legally entitled;" and finding trial court erred in refusing to allow the State a continuance in order to appeal).

WHEREFORE the State requests that this Honorable Court:

A. Issue an emergency order immediately staying the proceedings in *State v. Teresa Mercon*, Docket No. 212-2019-cr-00181, in the Carroll County Superior Court; and

B. Continue the stay until the Court has reviewed the State's Notice of Appeal and decided whether to accept the case for review; and

C. Grant such other and further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys

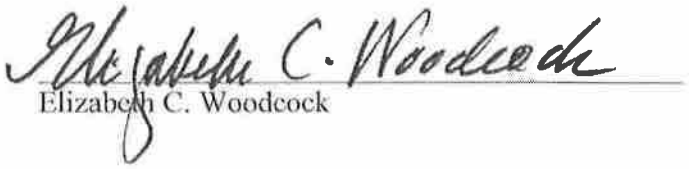
Gordon J. MacDonald
Attorney General

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

January 10, 2020

Certificate of Service

I certify that a copy of the foregoing was sent this day, first class postage prepaid, to Allison Schwartz, defense counsel of record in the trial court, to the Appellate Defender's Office, and to the Clerk of the Carroll County Superior Court.



Elizabeth C. Woodcock

January 10, 2020

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2020-0020

PETITION OF STATE OF NEW HAMPSHIRE

MOTION FOR RECONSIDERATION ON STATE'S EMERGENCY MOTION TO STAY PROCEEDINGS TO ALLOW STATE'S APPEAL OF TRIAL COURT RULING

NOW COMES the defendant, Teresa Mercon, by and through her counsel, Allison H. Schwartz, Esq., Public Defender, and hereby requests that this Court reconsider its ruling on the State's Emergency Motion to Stay Proceedings to Allow State's Appeal of Trial Court Ruling that was granted by this Court on January 10, 2020.

In support of this Motion, the following is stated:

1. Ms. Mercon presently faces one count of Driving After Revocation or Suspension pursuant to N.H. RSA 263:64, IV for an incident that is alleged to have occurred on December 24, 2018.
2. The Parties were scheduled for a Final Pretrial Hearing on January 2, 2020 and Jury Selection on January 13, 2020 in the Carroll Superior Court.
3. The State filed a Motion In Limine to admit an "Odyssey case summary" as dispositive evidence of Ms. Mercon's 1997 Driving While Intoxicated conviction and sentencing at her upcoming jury trial. In its motion, the State indicated that the underlying documents had been destroyed pursuant to the court's retention policy in 2007, over ten years ago.

4. The Court ultimately denied the State's Motion in Limine and provided the Parties with a written order on the date of the Final Pretrial Hearing.
5. On January 3, 2020, the State filed a Motion for Reconsideration regarding the admissibility of the court summary documents at trial.
6. Based upon the upcoming Jury Selection date, the Court held a chambers conference with counsel in order to discuss the State's Motion for Reconsideration on Friday, January 10, 2020. During that conference, the Court heard from both parties, but did not issue a ruling.
7. During that chamber's conference the State explained that they would also be seeking a continuance. The expressed basis for this continuance was not an appeal of the denial of the State's Motion in Limine, but because Trooper Samuel Muto, the State's only witness, was not going to make himself available for trial.
8. Specifically, the State explained that Trooper Muto is presently in training to become a Massachusetts State Trooper. The State subpoenaed Trooper Muto for Ms. Mercon's trial but according to the State, the Trooper was not going to comply with the subpoena and would not appear for trial. Trooper Muto is expected to be in training for the next 20 weeks. The defense objected to the State's request for a continuance.
9. The Court issued a written ruling on the State's Motion to Continue trial on that same date. In the Order, the Court conducted a speedy trial analysis and concluded that it was not in the interests of justice to continue Ms. Mercon's case for the reasons given by the State. Nothing in that Order discusses the idea of a State's appeal on the issue regarding the prior conviction.

10. On that same date, the Clerk of the Carroll Superior Court contacted the Parties to ascertain whether jury selection would be needed in light of the Court's denial of the State's motion to continue based upon Trooper's Muto's absence. In response, the State emailed that "based upon the court's ruling, they would not be able to proceed to jury selection as scheduled."
11. The State, through the Attorney General's Office, then filed the Motion to Stay Proceedings to Allow State's Appeal of Trial Court Ruling, which was granted by this Court. Based upon that ruling, Jury Selection in Ms. Mercon's case was cancelled and nothing in her case is presently scheduled.
12. The State did not outline a sufficient basis for a stay of proceedings in Ms. Mercon's case. Additionally, in rendering its Order, this Court overlooked certain facts and Ms. Mercon requests that this Court reconsider its Order pursuant to Rule 22 of the Rules of the Supreme Court.
13. The State's Motion to Continue Trial was denied because the State's witness is not making himself available for trial. The Court's ruling on the Motion for Reconsideration and any potential appeal is immaterial because the State was not able to proceed. The State's inability to proceed had nothing to do with the rulings regarding the admissibility of the prior conviction; it was because their law enforcement witness was non-compliant with a subpoena and will continue to be "unavailable" for the next 20 weeks.
14. In its motion, the State cites to State v. Hayes, 138 N.H. 410, 411 (1994) as a basis for the requested relief. In Hayes, the State sought to appeal the trial court's order on a motion to suppress and specifically asked to continue the case

to pursue an appeal. The Court in Hayes found that the trial court erred in refusing to allow the State a continuance in order to appeal. The denial of the State's request in the instant case had nothing to do with an appeal, but rather was based upon their inability to proceed to trial as scheduled because of Trooper Muto.

15. The Defense presents this information so that this Court will have a full and accurate understanding of the posture of the proceedings in the trial court. The State was clear with the Court and the Defense that they had no witness available to proceed to trial. The Court denied the request for a continuance and the ruling on the motion in limine was moot and immaterial at that time.
16. As cited above, the State sought a continuance because they didn't have a witness necessary for trial. To allow the State to stay the proceedings by this potential appeal of a ruling circumvents the trial Judge's ruling and gives the State the continuance that it had unsuccessfully sought to deal with a separate problem, a decision that is within the trial court's discretion.
17. To grant the State a stay of proceedings based upon the facts and circumstances in Ms. Mercon's case would be in violation of Part I, Articles 14 and 15 of the New Hampshire Constitution and the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

WHEREFORE, for the above-stated reasons, Teresa Mercon requests that this Court reconsider its Order granting the State's Emergency Motion to Stay Proceedings to Allow State's Appeal of Trial Court Ruling.

Respectfully submitted,

/s/ Allison Schwartz
Allison H. Schwartz, Esq.
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N.H. Public Defender
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(603) 524-1831

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was forwarded on this 17th day of January 2020 to Elizabeth Woodcock, Esq., Assistant Attorney General, and Thomas Palermo, Esq., Assistant Carroll County Attorney.

/s/ Allison Schwartz
Allison H. Schwartz, Esq.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0020

Petition of the State of New Hampshire

(State of New Hampshire v. Theresa Mercon)

STATE'S RESPONSE TO
THE RESPONDENT'S MOTION TO RECONSIDER

By motion dated January 17, 2020, the respondent, Teresa Mercon, asks this Court to reconsider the stay issued by this Court on January 10, 2020.

The petitioner asks this Court to continue the stay and to order the trial court to rule on the State's pending motion to reconsider.

1. The stay was issued on January 10, 2020, so that the State could consider whether to appeal the court's ruling that the certified copy of the case summary was inadequate proof of a conviction, the court's shifting of the burden to the prosecution to prove, as well, that the plea was knowing, voluntary and intelligent, and the expected denial of the State's motion to continue. *Ex Parte Motion*, ¶¶ 3-5. In its motion for a stay, the State explained that the Carroll County Attorney had filed a motion in limine in October 2019 to admit the case summary as evidence of a prior conviction as the sole remaining record of that conviction, but the trial court did not rule on that motion until January 2, 2020, which was eleven days before jury selection. The county attorney filed a motion to reconsider the following day. The court has since declined to rule on that motion,

citing the stay issued by this Court.[1] A copy of the trial court's ruling, which was written on the final page of the county attorney's motion, is attached to this pleading. *See State's Motion to Reconsider* at 16 (attached).

2. It is true, as the respondent states and as the State acknowledged in the motion to stay in this Court, that the county attorney also filed a motion to continue the trial because the sole witness was not available. Although the court did not rule on the motion to reconsider its ruling on the case summary, it did deny the motion to continue. The county attorney has filed a motion for reconsideration of the court's denial of the motion to continue in the same pleading as the motion to reconsider the ruling on the case summary. *See Motion to Reconsider* (attached).

3. At the moment, therefore, the lower court refuses to rule on the State's motion for reconsideration of the denial of the motion in limine, and, presumably, will take the same position with respect to the motion to continue. While those motions are pending, the State cannot appeal the court's orders; indeed, the State does not yet know whether an appeal is necessary, as the outcome of the motions for reconsideration may change the landscape.

4. The petitioner seems to suggest that the State sought the stay in this Court because the witness was not available. This is not the case. The State sought the stay so that it may decide if it wishes to challenge a ruling by the trial court with respect to proving a conviction that it feels is

[1] As undersigned counsel was awaiting this Court's ruling on the stay, she received information that the trial court had denied the motion to reconsider. She relayed this to

of dubious legal merit. The State may also challenge the denial of the motion to continue because it relied on speedy trial considerations and characterized certain facts in a way in which the State thinks may also be error. But the primary purpose of the stay was to allow the State adequate time to determine whether to appeal the trial court's disposition of the motion in limine.

3. The charges in this case arise out of the State's allegations that the defendant pleaded guilty to DUI, failed to complete her sentence as a result of which her license remains suspended, and drove for the following 22 years before being stopped and the situation discovered. But the legal issue regarding the court's refusal to admit the case summary and shifting of the burden to the State to prove that the conviction was knowing and voluntary, is of greater significance than this particular case. Certified copies of court records are routinely offered and admitted into evidence to establish that a particular legal event took place. For example, proving that a person is a convicted felon, therefore prohibiting his or her possession of a firearm, is routinely accomplished by offering a certified copy of the conviction. *See* RSA 159:3. The court does not inquire, under those circumstances, as to the constitutionality of the guilty plea or the fairness of the trial. If a defendant wishes to challenge either of those, he or she must bring a collateral attack on the proceeding. This was not done in this case.

4. Indeed, proof of conviction is all this Court has ever required. *See State v. Young*, 159 N.H. 332, 340 (2009) ("The State submitted evidence of his criminal history that identified the felony convictions.");

the Clerk of Court. This information, provided by the Carroll County Superior Court

State v. Ward, 118 N.H. 874 (1978) (certified copies of conviction are admissible). And it is clearly not the State's burden to prove that the prior conviction was constitutionally sound. *See State v. Ward*, 118 N.H. 874 (1978) ("When the defendant challenges the validity rather than the existence of a prior conviction, *he, and not the state*, must, 'go forward with evidence which would have put in issue the question of whether he had previously been represented by counsel.'") (citation omitted) (emphasis added).

5. The problem may be compounded if the trial court requires the prosecution to prove the validity of out-of state convictions. While it might be, as in this case, difficult to obtain a transcript of the plea colloquy in New Hampshire because of the trial court's retention policies, it might very well be impossible to obtain transcripts of colloquies from other states.

6. The same is true in using prior convictions to impeach witnesses. *See N.H. R. Ev.* 609(a) governing impeachment of a witness by evidence of a conviction); *see also State v. McGill*, 153 N.H. 613 (2006) (reversing a conviction where the trial court prevented the defense from confronting a witness with his criminal conviction).

7. The problem presented here was compounded by the trial court's delay in ruling on the October 2019 motion in limine. By delaying its ruling, the trial court virtually foreclosed the State's ability to appeal, absent a stay from this Court. If the trial court had issued a ruling earlier, the State could have taken an appeal without asking this Court to intercede. As it is, the trial court has yet to rule on either motion to reconsider.

Clerk of Court, was not accurate, however.

8. The State cannot proceed in this Court, however, as long as the trial court declines to address the motions to reconsider. The request for the stay has not deprived the trial court on ruling on the county attorney's motion to reconsider. *See Rautenberg v. Munnis,* 107 N.H. 446, 447 (1966) ("Perfection of an appeal vests exclusive jurisdiction in this court over those matters arising out of and directly related to the issues presented in the appeal."). There is no appeal at this point; the purpose of the stay was to allow time to consider the wisdom of an appeal. Therefore, the State asks this Court to direct the trial court to rule on the motions to reconsider its rulings on the case summary and the continuance. Once those rulings issue, the State will be in a position to decide if an appeal is warranted.

WHEREFORE, the petitioner respectfully asks this Court:

A. To leave the stay in place;

B. To order the trial court to rule on the Carroll County Attorney's motions to reconsider; and

C. To grant such other relief as may be warranted.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys

Gordon J. MacDonald
Attorney General

January 24, 2020

/s/Elizabeth C. Woodcock
Elizabeth C. Woodcock
N.H. Bar No. 18837
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CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the foregoing shall be served on Allison Schwartz, Esquire Counsel of record in the trial court, and to the Appellate Defender's Office, through the New Hampshire Supreme Court's electronic filing system.

I, Elizabeth C. Woodcock, hereby certify that a copy of the foregoing shall be served on Clerk of the Carroll County Superior Court by Thomas Palermo, Esquire, prosecutor of record in the trial court, through the superior court electronic filing system.

January 24, 2020

/s/Elizabeth C. Woodcock
Elizabeth C. Woodcock