THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0147

State of New Hampshire

v.

Robert Leroux

Appeal Pursuant to Rule 7 from Judgment
of the Sixth Circuit Court – District Division – Franklin

BRIEF FOR THE DEFENDANT

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(10 minutes 3JX oral argument)

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QUESTIONS PRESENTED

1. Whether the court erred by denying the defense motion to dismiss the complaint.

Issue preserved by the request to dismiss the complaint, the hearings on the matter, the parties' memoranda of law, the defense motion to reconsider, and the court's orders. AD 32-36; A13-A26; H 52-57; T 19-23; S 2-12.*

2. Whether the court erred by admitting hearsay statements in the DMV records to prove the truth of the matters asserted.

Issue preserved by defense objection, the hearings on the matter, the parties' memoranda of law, the defense motion to reconsider, and the trial court's orders. AD 32-36; A13-A26; T 21-23; S 2-12.

* Citations to the record are as follows:
"AD" refers to the attached supplement containing the orders from which Leroux appeals;
"A" refers to the separate appendix to this brief;
"H" refers to the transcript of the proceedings held in the morning of November 23, 2020, when the same judge convened the bench trial on Leroux's other charges;
"T" refers to the transcript of the bench trial held on the afternoon of November 23, 2020;
"S" refers to the transcript of the sentencing hearing held on February 19, 2021.

STATEMENT OF THE CASE

The State filed complaints charging Robert Leroux with the class A misdemeanor of driving after suspension and with the class B misdemeanor of operating without a valid license, both alleging offenses committed on July 14, 2018. A3-A4. He stood trial before the court (Luneau, J.) on the afternoon of November 23, 2020. After taking the matter under advisement, the court in January convicted Leroux of the class A misdemeanor and dismissed the class B misdemeanor. AD 32-35. After a sentencing hearing on February 19, 2021, the court issued an order on March 19, 2021, sentencing Leroux to a term of thirty days in jail, all suspended except for seven days, and to other sanctions. AD 36. The court ordered the sentence to run concurrently with the same sentence pronounced in another case.[1] The court stayed the execution of the sentences pending appeal. Id.

[1] That case is under appeal in this Court in case 2021-0148.

STATEMENT OF THE FACTS

The only witness at trial was Tilton police officer Brian Kydd-Keeler. T 3-18. Kydd-Keeler testified that, on July 14, 2018, a little after 6:00 p.m., he saw a silver SUV driven by Leroux make a left turn without first signaling. T 5-6. Kydd-Keeler stopped the car. T 6. Leroux told Kydd-Keeler that he had a driver's license but did not have it with him and did not know where his wallet was. T 7. Moments later, a dispatcher told Kydd-Keeler that Leroux's driver's license was suspended in 2010 because of a driving-while-intoxicated (DWI) conviction. T 9.

Kydd-Keeler subsequently saw a copy of Leroux's driving record, as maintained by the Division of Motor Vehicles (DMV). T 9-10. The record contained a notice of the suspension of Leroux's driver's license, and a document indicating that notice of the suspension was sent to Leroux in May 2010. T 10. The State introduced the DMV record in evidence. T 10-12; A5-A12.

Upon learning during the stop of the status of Leroux's driver's license, Kydd-Keeler confronted Leroux with that information. T 12. Leroux replied that he had recently been stopped by the Belmont police department and "didn't understand" the problem, saying that those officers had checked his information and not arrested him. T 12, 17-18. Kydd-Keeler arrested him for driving on a suspended license.

T 12. During a subsequent search of the car, Kydd-Keeler found Leroux's wallet. T 13. The wallet did not contain Leroux's identification card. T 13.

The defense emphasized that Leroux did not flee when stopped by the officer. T 16. Moreover, he gave his true name and date of birth, when asked. T 16-17. When confronted, he acknowledged that he had been convicted of DWI eight years earlier, in 2010. T 17.

SUMMARY OF THE ARGUMENT

1. The complaint failed to charge a misdemeanor offense. The relevant misdemeanor version of operating after suspension or revocation requires the State to allege and prove that a court order, rather than a DMV order, initiated the current suspension of the defendant's driver's license. Here, the complaint alleged that Leroux's license was suspended by order of the DMV. The court therefore erred in failing to dismiss the misdemeanor complaint.

2. The court erred in admitting hearsay evidence for the purpose of proving that the Laconia District Court in 2010 ordered the current suspension of Leroux's license. The statement contained in DMV records about the validity and content of a court order constituted hearsay. No exception to the hearsay bar applied to permit the statement to be admitted substantively to prove the existence of the court order. The error prejudiced the defense.

I. THE COURT ERRED IN FAILING TO DISMISS THE MISDEMEANOR COMPLAINT AGAINST LEROUX.

In relevant part, the complaint alleged that Leroux committed the crime of driving after revocation or suspension, in violation of RSA 263:64, in that he did

> knowingly drive a certain motor vehicle … upon a certain way … after his operator's privilege had been suspended by the director of motor vehicles for DWI-second offense, on 05/17/2010.

A3. The legal issue raised in this appeal focuses on the allegation that his operator's privilege had been suspended *by the Director of Motor Vehicles*.

RSA 263:64 defines the offense of driving after suspension or revocation. See generally State v. Mercon, __ N.H. __ (May 21, 2021) (construing RSA 263:64). Paragraph I prohibits driving "while the person's license or privilege to drive is suspended or revoked by action of the director or the justice of any court in this state…." That paragraph confirms that a license can be revoked either by a court or by the Department of Safety, an entity that includes the Division of Motor Vehicles, which is headed by a "director." See RSA 259:19 (defining "department") & RSA 259:20 (defining "director").

Paragraphs II and III address the legal effect of circumstances that might theoretically fall outside paragraph

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

In paragraph IV, the statute begins to distinguish between criminal and violation variants of the prohibition, and as for the criminal variants, between misdemeanors and felonies, setting forth the elements of each variant. Accordingly, the paragraph opens by declaring the essential elements of one misdemeanor variant: "[a]ny person who violates this section by driving . . . during the period of suspension or revocation of his or her license [for reckless driving] shall be guilty of a misdemeanor."

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

> [a]ny person who violates this section by driving . . . during the period of suspension or revocation of his or her

> license [for a variety of offenses, including DWI] shall be guilty of a misdemeanor and shall be sentenced to imprisonment for a period not less than 7 consecutive 24-hour periods.…"

RSA 263:64, IV. The statute thus requires, as one element, proof that the person drove "during the period of suspension or revocation."

Paragraph V defines that element. It provides that:

> Notwithstanding the definition of "revocation" in RSA 259:90 and the definition of "suspension" in RSA 259:107, *the phrase "period of suspension or revocation" as used in paragraph IV and for purposes of paragraph IV only shall mean only suspension or revocation imposed by a court of competent jurisdiction*. "Period of suspension or revocation" shall include the period specifically designated and until restoration of the person's driver's license or privilege to drive.

RSA 263:64, V (emphasis added).

RSA 259:90 defines "revocation" and declares that a person's driver's license can be revoked either "by formal action of the department or of a court of competent jurisdiction …." RSA 259:107 defines "suspension" and similarly empowers both the department and courts to suspend a license. The above-italicized language in RSA 263:64, V, thus, permits criminal prosecution under

paragraph IV only when a court has suspended or revoked a person's license. Suspension or revocation by the department cannot support such a prosecution.

At the bench trial on November 23, counsel moved to dismiss the complaint, noting that it did not allege suspension of the license by a court, but rather suspension by the director. T 19. In so arguing, counsel referenced a discussion that took place earlier in the day, during Leroux's other trial, when counsel made a similar motion with respect to the similarly worded complaint filed in that case. H 52-53.

At that earlier hearing, the State objected, arguing that the complaint properly charged a crime. H 53-56. In part, the prosecutor referenced evidence indicating that a court had, in fact, suspended Leroux's license. H 54-55. In addition, the State contended that, even when a court takes the action, the department gives the person notice of the suspension or revocation. H 55. Moreover, when a person with a suspended or revoked license seeks restoration of the license, the person applies to the department, not to the court. H 55-56. Defense counsel noted that none of those responses changed the fundamental fact that the statute requires proof of a fact that the complaint did not allege – that the license was suspended by a court. H 56-57.

After the evidence was presented but before the court reached a verdict, the parties each submitted a memorandum

of law on the issue. A13-A24. In its memorandum, the State first cited Petition of the State (State v. Milner), 159 N.H. 456 (2009), in which this Court reviewed the history of RSA 263:64. From that history, the State drew the conclusion the complaint's sufficiency was established by the evidence introduced at trial. A14-A16. Essentially, the State contended that, in fact, Leroux's license was revoked by a court. When thereafter the court-ordered period of revocation elapsed, Leroux's license remained revoked by operation of law. In addition, the prosecutor contended that the prior conviction and judicial suspension would establish a sentencing enhancement rather than an element, and thus that the complaint need not allege the fact at all. A16-A17.[2]

In its Memorandum, the defense again argued that the plain language of the statute requires proof that a court, rather than the department, suspended the driver's license. A19-A20. Therefore, that circumstance constitutes an element that the State must allege in the charging document. Nothing in Milner or the history of the statute altered that fact.

Even if the evidence introduced at trial could cure a charging document's deficiencies, counsel argued that the State had not proven the element at trial. Moreover, to the

[2] In Mercon, this Court rejected the argument that the prior DWI conviction constitutes only a sentencing enhancement rather than an element. Mercon, __ N.H. at __ (slip op. at 3-6).

extent that the State relied on evidence introduced at Leroux's other trial to support the charging document in this trial, counsel objected. A21-A22. Finally, counsel argued that the fact constituted an element rather than a sentencing factor. A23.

In January 2021, by written order, the court denied Leroux's motion to dismiss the charging document. AD 32-35. After quoting the statute and summarizing the case's procedural history, the order began by stating its conclusion: "Based on the weight of credible evidence and the standards in the statutes and case law, the Court finds that the Misdemeanor A complaints in both cases are sufficient for convictions of Misdemeanor A RSA 263:64 IV." AD 34.

The court acknowledged that the complaint did "not include the exact wording in the statute" requiring revocation by a court. Id. Nevertheless, the court noted that the complaint alleged "the suspension was as a result of 'DWI second offense' and listed a specific date." Id. Citing a dictionary definition of "offense," the court reasoned that implicit in the allegation of "offense" was a conviction, and only a court can enter a conviction. AD 34-35. The court concluded that the complaint thus did sufficiently allege the element. Id. Finally, the court found that, at trial, the State had introduced credible evidence that Leroux's second DWI

conviction had been entered by the Laconia District Court. AD 35. In denying the motion, the court erred.

Part I, Article 15 of the New Hampshire Constitution provides in part that "[n]o subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him…." A charging document therefore must allege "all of the elements which constitute the offense charged." State v. Shannon, 125 N.H. 653, 664 (1984). "To meet this constitutional standard, a complaint must inform a defendant of the offense with which he is charged with sufficient specificity to enable him to prepare for trial and at the same time protect him from being put in jeopardy once again for the same offense." In re Alex C., 158 N.H. 525, 527 (2009). Complaints can be amended, even during the trial, under some circumstances. See, e.g., State v. Crockett, 116 N.H. 324 (1976) (affirming amendment of complaint). However, the State here never moved to amend the complaint, rendering that doctrine inapplicable.[3] The issue, thus, turns on whether the complaint as filed alleged all the elements of the crime.

[3] Moreover, the State chose to charge the violation variant of the offense, in which a person drives after suspension of a driver's license by the department. RSA 263:64, VII. See also State v. Erickson, 129 N.H. 515 (1987) (allegation in an indictment that specifies a statutorily defined variant of an element of an offense binds the State to prove that variant, thereby effectively circumscribing the scope of the charge).

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

As set forth above, the statute's plain language requires that a court, rather than the department, revoke the defendant's license. Nothing in Milner or the statute's history alters that fact. Milner raised a question about the interplay of the two sentences in RSA 263:64, V. The first sentence enacts the requirement of revocation or suspension by a court, as follows:

> Notwithstanding the definition of "revocation" in RSA 259:90 and the definition of "suspension" in RSA

> 259:107, the phrase "period of suspension or revocation" as used in paragraph IV and for purposes of paragraph IV only shall mean only suspension or revocation imposed by a court of competent jurisdiction.

RSA 263:64, V. The second sentence governs the duration of a suspension or revocation, initially ordered by a court, as follows:

> "Period of suspension or revocation" shall include the period specifically designated and until restoration of the person's driver's license or privilege to drive.

Id.

In Milner, the trial court declined to find the element proven when the defendant drove after the end of the court-ordered period, but before the defendant had yet renewed his license. Milner, 159 N.H. at 456-57. The State appealed and this Court reversed.

The State acknowledged that the first sentence limited the criminal sanction to revocations initiated by a court order. It argued that the second sentence "explains that the 'period of suspension or revocation' imposed by *either* a court or the DMV continues until the offender's license is restored." Id. at 458 (emphasis in original). However, this does not mean that a person could commit the crime either by driving during the period of a court-ordered revocation, or by driving after the

expiration of either a court-ordered or department-ordered revocation if the person's license had not yet been restored. Rather, the second sentence simply means that the legal consequences, whatever they may be, that attach to a revocation or suspension, whether court- or department-ordered, continue after the designated period until the person's license is restored.

Thus, a person commits the crime defined in paragraph IV not only by driving during the period of a court-ordered suspension, but also by driving after the expiration of a court-ordered suspension period, until such time as the person's license is restored. The statute does not mean that a person commits the crime by driving during, or after the expiration of, a department-ordered period of suspension or revocation. This Court ultimately adopted that interpretation. Id. at 460.

In Leroux's case, the trial court's order raises a different question. Leroux does not argue that he could commit the crime only by driving during the initial three-year suspension period. He claims only that the complaint must allege that his license was suspended by a court, rather than by the director.

The court agreed that the State must plead and prove revocation or suspension by a court. AD 34-35. In denying the motion, the court instead reasoned that the other words of the complaint sufficiently charged that element. In so reasoning, the court erred.

First, it bears emphasis that the complaint here was not silent on the question of whether a court or the department suspended Leroux's license. On the contrary, it expressly alleged that his license was suspended by the director of the DMV. A3. It might be possible to maintain that a complaint otherwise silent on the point implicitly alleges that a court suspended Leroux's license. But when, as here, the complaint expressly asserts the opposite – suspension by the DMV – one cannot imply suspension by a court without contradicting the complaint's clear language. No authority of which counsel is aware permits a court to find implied in a complaint an allegation contradicted by the complaint's expressed terms.

Second, even if one ignores the point raised above, the court's reasoning still fails because the other terms in the complaint do not imply that a court suspended Leroux's license. The trial court relied on the presence of the word "offense" and cited a dictionary definition that equates "offense" with "a violation of the law; a crime, often a minor one." AD 34. As already quoted above, the complaint alleges that Leroux did

> knowingly drive a certain motor vehicle … upon a certain way … after his operator's privilege had been suspended by the director of motor vehicles for DWI-second offense, on 05/17/2010.

A3.

While the use of the word "offense" implies that Leroux previously committed a crime, nothing in the complaint says that he was convicted by a court for it. Still less does it allege that, as a result of such prior conviction, a court suspended his license. Rather, the complaint alleges that the director previously found Leroux to have committed two acts of DWI, and for that reason suspended his license. See RSA 263:56 (empowering director to suspend license for offenses); RSA 265-A:30 (empowering department to administratively suspend license following blood-alcohol-content test). The complaint neither alleges nor implies anything more.

Third, the complaint does not allege that the prior crimes of DWI, even if a court adjudicated them and pronounced a sentence that included license suspension, are the reason why Leroux's license was currently suspended when he drove in July 2018. RSA 263:64, IV, however, requires that the prior DWI be the reason for the defendant's license suspension at the time he drove.

Fourth, no principle of law allows a defective charging document to be cured by evidence introduced at trial. Under certain circumstances, as noted, the State can ask to amend a complaint, even during trial in response to evidence introduced, and the complaint's validity would be determined by its contents as amended. Here, though, as also noted, the State never asked to amend the complaint, and the court

entered no order amending it. In the absence of an amendment, the complaint must stand or fall on its stated terms.

Finally, even if the evidence could rescue an unamended, defective complaint, the State introduced no admissible evidence to prove that Leroux's current license suspension was ordered initially by a court. The State introduced a DMV record that references a 2010 conviction in Laconia District Court for DWI-second, and that summarizes sanctions, including a statement that the revocation was for a period of three years. A8. But, as counsel argued, T 23; A22, A26, the DMV record is inadmissible hearsay if offered to prove the truth of its assertions about the outcome of court proceedings.[4]

For all of these reasons, this Court must conclude that the complaint was defective in failing to allege the necessary element that a court, rather than the DMV, initially ordered Leroux's license suspension. The trial court therefore erred in denying the motion to dismiss the complaint.

[4] This brief's second claim pursues this argument.

II. THE COURT ERRED IN ADMITTING, FOR ITS TRUTH, EVIDENCE CONTAINED IN A DMV RECORD ABOUT COURT PROCEEDINGS.

At trial, the State introduced hearsay purporting to describe Leroux's criminal conviction and to identify it as the source of his current license suspension. First, the State elicited testimony from Kydd-Keeler about a representation made to him by dispatch about Leroux's conviction and driver's license statute. T 9, 17. Second, the State introduced Kydd-Keeler's testimony about a DMV document describing Leroux's driving record. T 9-12. Finally, the State introduced the DMV document itself. T 12; A8-A12. That document asserted that Leroux had been convicted of DWI-second in Laconia District Court in 2010. A8.

When in argument the prosecutor claimed that the State had introduced the prior conviction, the defense objected. T 21. The prosecutor said that he would "walk back" that argument, and the court sustained the objection. Id. The prosecutor then suggested that the State could prove the prior conviction at sentencing, id., before moving on to other arguments. Defense counsel argued that the State had not introduced "any records from any court … that Mr. Leroux's license was suspended by court order." T 23. The court took the issue under advisement. T 24.

Subsequently, the State filed a memorandum of law. A13-A18. In that memorandum, while acknowledging that it

had not introduced a certified copy of any court record, the State asserted that it had introduced evidence admissible substantively to prove Leroux's prior conviction. A15-A16. The State urged the court to rely on notes in the DMV record to prove that Leroux's license was suspended by a court. A15-A17.

The defense then filed a memorandum of law. A19-A24. In that memorandum, the defense contended that the DMV records constitute "second-hand, unclear, and unreliable proof of the underlying fact of a valid criminal conviction and sentence." A22. Counsel further asserted that "it would be inadmissible hearsay for the State to use DMV records to prove the underlying fact of a criminal conviction." A22. Counsel argued that the business-record exception would permit only the admission, for their truth, of notations in the DMV records about DMV actions. It would not extend to cover DMV record notations about court actions.

In a written order issued in January 2021, the court implicitly overruled the hearsay objection, by announcing a guilty verdict while citing the introduction of evidence proving that Leroux's suspension was court-ordered. AD 34-35. The court did not, however, expressly address the hearsay objection.

The defense filed a motion to reconsider, renewing the hearsay objection. A25-A26. The motion further argued that,

if the hearsay statements in the DMV records about court orders were admitted only for a proper limited purpose, the State introduced insufficient evidence to support a conviction. A25. The State did not file a response, saying that its position was stated in its previously filed memorandum. S 3.

At the sentencing hearing on February 19, 2021, the parties briefly discussed the motion to reconsider. S 3, 11-12. At that hearing, the State introduced a certified copy of the Laconia District Court record of Leroux's 2010 conviction. S 6. The defense objected to the admission of the court record, insofar as it was offered to rectify any evidentiary deficiency at trial. S 7-8.

In a written order dated March 19, 2021, the court denied the motion to reconsider. AD 36. The court ruled first that the State introduced sufficient evidence to find that a court had suspended Leroux's license. Without mentioning the hearsay objection, the court stated that it

> considered the testimony of the witnesses and the exhibits, including Exhibit 2, the Defendant's certified DMV record, which includes a listing of the 2010 conviction, with details, and is a certified public record.

AD 36. In so ruling, the court erred.

If the trial court correctly interprets the rules of evidence, its application of those rules is reviewed for an unsustainable exercise of discretion. State v. Munroe, 173

N.H. 469, 472 (2020). Under that standard, this Court assesses whether the ruling is clearly untenable or unreasonable to the prejudice of the appellant's case. Id. This Court does not, though, defer to the trial court's interpretation of the rules of evidence. Id. ("we review the trial court's interpretation of court rules *de novo*"); see also State v. Saucier, 926 A.2d 633, 641 (Conn. 2007) ("To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary"); Koon v. United States, 518 U.S. 81, 100 (1996) (abuse-of-discretion "label" "does not mean a mistake of law is beyond appellate correction," because "[a] district court by definition abuses its discretion when it makes an error of law").

As relevant here, Evidence Rule 801 defines hearsay as an out-of-court statement that a party offers to prove the truth of the matters asserted in the statement. N.H. R. Evid. 801(c). Evidence Rule 802 states the general rule that hearsay is not admissible. Rule 805 governs the double-hearsay circumstance, in which proffered testimony contains an out-of-court statement that itself relates an out-of-court statement.

Rule 801(d), in defining certain kinds of statements as not hearsay, and Rules 803 and 804, in establishing various exceptions, can defeat the general rule of inadmissibility in

the specified circumstances. None of those exceptions applies here. Indeed, neither the prosecutor nor the trial court ever identified any applicable hearsay exception.

The DMV records make a variety of assertions about the status of Leroux's driver's license. For example, the record gives a date of issuance of his non-driver's identification as January 9, 2017, with an expiration date of December 17, 2022. A8. That assertion, referring to an action performed by the DMV itself – issuance of a non-driver's identification – involves only one layer of hearsay, and it could be admitted in evidence for its truth on the authority of the public records exception. See N.H. R. Evid. 803(8)(A)(i) (defining public-records exception as covering a record or statement of a public office that sets out the office's activities).

More relevant here, the DMV record also asserts that Leroux was convicted in the Laconia District Court in May 2010 of DWI-second, and that as a result of that conviction his driver's license was suspended. A8. Because the Laconia District Court is an entity separate from the DMV, the activities of the former are not the activities of the latter. The entry in the DMV record therefore reflects the occurrence of some prior communication between the Laconia District Court and the DMV, in which the court notified the DMV of Leroux's conviction and sentence. No exception to the hearsay rule applies to make admissible that communication. Had the

State introduced the Laconia District Court's own records of the conviction, those records would have fallen within the definition of the public records exception. However, the State did not do so.

The court's error in admitting, for their truth, the DMV record's assertions about Leroux's conviction prejudiced the defense. The State offered no non-hearsay evidence to prove the essential element that a court ordered the currently operative suspension of Leroux's driver's license. Without substantive evidence of that element, the State could not win a conviction. This Court must therefore reverse Leroux's conviction.

CONCLUSION

WHEREFORE, Mr. Leroux respectfully requests that this Court reverse his conviction.

Undersigned counsel requests ten minutes of oral argument before a 3JX panel.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 4883 words.

Respectfully submitted,

By /s/ Christopher M. Johnson
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CERTIFICATE OF SERVICE

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

/s/ Christopher M. Johnson
Christopher M. Johnson

DATED: October 5, 2021

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

Merrimack County **6th Circuit - District Division - Franklin**

State v. Robert Leroux

437-2018-CR-874 and 1213

ORDERS

The Court held a hearing on November 23, 2020. Counsel for the State appeared (Attorney Renauld-Smith), and the Defendant, Mr. Leroux appeared with counsel (Attorney Ackerman.)

The Court heard testimony from Officer Richard Ort and Sergeant Bryan Kydd-Keeler from the Tilton police.

The Court held the record open for counsel to file memoranda on the legal issue of whether the complaints are legally sufficient in this case.

The issue is whether the language in the complaints for misdemeanor A RSA 263:64 is sufficient.

Pursuant to RSA 263:64 Driving After Revocation or Suspension:

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.

II. A person who drives a motor vehicle in this state while such person's license or driving privilege is suspended or revoked shall be guilty of violating this section regardless of whether such person has a license on the effective date of such suspension or revocation. Evidence that the notice of suspension or revocation was sent to the person's last known address as shown on the records of the division shall be prima facie evidence that the person was notified of the suspension or revocation.

III. A person who obtains or possesses an out-of-state license after such person's New Hampshire license or driving privilege has been revoked does not revive his or her driving privilege by having such out-of-state license, and such person shall be guilty of violating this section if he or she drives in the state while his or her New Hampshire license or driving privilege is suspended or revoked.

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.

V. Notwithstanding the definition of "revocation" in RSA 259:90 and the definition of "suspension" in RSA 259:107, the phrase "period of suspension or revocation" as used in paragraph IV and for purposes of paragraph IV only shall mean only suspension or revocation imposed by a court of competent jurisdiction. "Period of suspension or revocation" shall include the period specifically designated and until the restoration of the person's driver's license or privilege to drive.

V-a. (a) Except as provided in subparagraph (b), any person who drives a motor vehicle in this state during the period of suspension or revocation of his or her license or driving privilege and is involved in a collision resulting in death or serious bodily injury, as defined in RSA 625:11, VI, to any person, shall be guilty of a class B felony, where such person's unlawful operation of the motor vehicle caused or materially contributed to the collision. Evidence that the driver violated any of the rules of the road shall be prima facie evidence that the driver caused or materially contributed to the collision.
(b) A person violating this section whose license or driving privilege has been suspended pursuant to the provisions of RSA 263:14 only shall be guilty of a misdemeanor.

VI. Any person who violates the provisions of this section shall be guilty of a misdemeanor upon conviction based upon a complaint which alleged that the person has had one or more prior convictions for driving after revocation or suspension in this state within the 7 years preceding the date of the second or subsequent offense.

VII. Except as provided in paragraphs IV, V-a, and VI, any person who violates the provisions of this section shall be guilty of a violation, and shall be fined a minimum of $250 for a first offense and $500 for a second or subsequent offense.

Pursuant to RSA 263:64 sections IV and V, for a Misdemeanor A conviction, the license suspension must be from a court of competent jurisdiction, as opposed to a DMV license suspension without a conviction. Under section VI, if the Defendant has a prior conviction for driving after revocation and suspension within 7 years of the date of the offense, it is a Misdemeanor B. Otherwise, it is a Violation.

In case #437-2018-CR-874, the Defendant, Mr. Leroux was arrested for driving without a valid license and registration in Tilton on 7/14/2018, which lead to the charges in #437-2018-CR-0874. A Class A Misdemeanor complaint was filed in that case for committing the offense of driving after revocation or suspension, contrary to RSA 263:64, and that the Defendant did "*knowingly drive a certain motor vehicle, to wit, a silver 2002 Isuzu Trooper bearing New Hampshire registration*

4188950 upon a certain way, to wit Laconia Rd, Tilton, New Hampshire after his operator's privilege had been suspended by the director of motor vehicles for DWI second offense, on 5/17/2010."

The Defendant was also arrested on the same date and time for a Class B Misdemeanor of Operating Without a Valid License, contrary to RSA 263:1, with the charging language that the Defendant "*knowingly drive a certain motor vehicle, to wit, a silver 2002 Isuzu Trooper bearing New Hampshire registration 4188950, upon a certain way, to wit, Laconia Rd., Tilton, New Hampshire without a valid driver's license and who has never obtained a valid driver's license.*

At the time, the Defendant had a suspended license as a result of a DWI second conviction from the Laconia District Court in 2010. He had received a suspension notice from the DMV dated 5/25/10 for a three year suspension, which cites the Laconia District Court conviction.

The Defendant was also driving with an expired registration.

On 10/5/2018, the Defendant was arrested again for the same offense, which lead to case #437-2018-CR-1213. A Misdemeanor A complaint for RSA 263:64 was brought, with the charging language that the Defendant did "*knowingly drive a certain motor vehicle, to wit, a 2002 silver Isuzu Trooper, bearing NH temporary registration 290650, upon a certain way, to wit, Laconia Rd in Tilton, NH after his operator's privilege had been suspended by the director of motor vehicles for driving while intoxicated (second offense) on 5/17/2010.*"

The Defendant was also arrested for Misdemeanor B of Suspended Registration, contrary to RSA 261:178, with the charging language "*drive a motor vehicle, to wit, a 2002 silver Isuzu Trooper, bearing New Hampshire temporary registration 290650, upon a certain way, to wit, Laconia Road in Tilton, New Hampshire, after his registration privileges had been suspended by the director of motor vehicles for driving while intoxicated (second offense) on 6/24/2010.*"

The Defendant was also arrested for Violation of Unregistered Vehicle, contrary to RSA 261:40, and that he did "*knowingly drive a certain motor vehicle, to wit, a 2002 silver Isuzu Trooper bearing NH temporary registration 290650, upon a certain way, to wit, Laconia Rd., Tilton NH, while the said vehicle was not registered in accordance with New Hampshire state law.*"

Based on the weight of credible evidence and the standards in the statutes and case, law, the Court finds that the Misdemeanor A complaints in both cases are sufficient for convictions of Misdemeanor A RSA 263:64 IV.

Although the two Misdemeanor A complaints do not include the exact wording in the statute that that the Defendant's license suspension was as a result of "a conviction by a court of competent jurisdiction" or list the court in which the convictions took place, the complaints did allege the suspension was as a result of "DWI second offense" and listed a specific date.

A "second offense" is defined by Black's Law Dictionary as "an offense committed after conviction of a first offense." See Black's Law Dictionary, 11th Ed., 2019. An "offense" is defined by Black's Law Dictionary as "a violation of the law; a crime, often a minor one." Id.

To give the last sentence in these two Misdemeanor A complaints logical meaning, a reading of the term "offense" in the body of these complaints is to define an offense as a conviction. Only a Court, not the DMV, can convict a person of a crime.

This reading of an "offense" meaning a conviction is also consistent with the wording of the statute in section IV, and VII, above, which refers to the fines for the violation level for a "first offense" and "second or subsequent offense."

Thus, the term "DWI second offense" as used in these complaints is interchangeable with "DWI second conviction", and is enough to put the Defendant (and the reader) on notice that the Defendant had two prior convictions for DWI, the second one in 2010, when he was arrested. At trial, based on credible evidence, the detail about the second DWI conviction from the Laconia District Court, which is a court of competent jurisdiction, was put into evidence.

A finding of guilty is made on both Misdemeanor A complaints.

With regard to the Misdemeanor B complaint in #1213, based on the weight of credible evidence, the state met its burden on this charge. A finding of guilty is made.

The Misdemeanor B charge in #874 is dismissed.

The Violation charge #1213 is dismissed.

The case shall be scheduled for a sentencing hearing.

So Ordered.

January 22, 2021
Date

Signature of Judge

Henrietta W. Luneau
Printed Name of Judge

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

Merrimack County **6th Circuit - District Division - Franklin**

State v. Robert Leroux

437-2018-CR-874 and 1213

ORDERS

1. The Motion for Reconsideration is respectfully denied.

There was sufficient evidence for the Court to find that the state met its burden beyond a reasonable doubt that the Defendant's license was suspended from a DWI second offense conviction out of the Laconia District Court. The Court considered the testimony of the witnesses and the exhibits, including Exhibit 2, the Defendant's certified DMV record, which includes a listing of the 2010 conviction, with details, and is a certified public record.

2. With regard to sentencing, see accompanying sentencing orders. The Court considered both the mitigating and aggravating factors in this case.

The sentence for charge id #1554725C Misdemeanor B Suspended Registration in #437-2018-CR-1213 sentence is a fine of $250, plus PA.

The sentences for charge id #1554724C in #437-2018-CR-1213 and charge id #1522881 C in #437-2018-CR-874, both Misdemeanor A Driving After Revocation or Suspension complaints shall be concurrent sentences: 30 days in HOC, all suspended but 7 24 hour periods, for one year good behavior, one year license loss, and 12 months of interlock after license is restored. Self-report to Belknap County House of Corrections. These sentences are all concurrent.

The Court notes the Defendant's intent to appeal was expressed on record. The sentences are stayed for any appeal period.

The Clerk's office shall schedule a Case Status Hearing to address the self-report date and the status of any appeal.

So Ordered.

March 19. 2021
Date

Signature of Judge

Henrietta W. Luneau
Printed Name of Judge