

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0197

State of New Hampshire

v.

Juan Alberto Monegro-Diaz

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
10TH CIRCUIT-DISTRICT DIVISION-SALEM

*******AMENDED*******
BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Ten-Minute Oral Argument Requested)

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ISSUES PRESENTED

Whether the trial court erred as a matter of law when it concluded that the officer lacked reasonable suspicion to stop the defendant's vehicle.

Issue preserved by the State's objection to the defendant's motion to suppress, the trial court's March 10, 2021 order on defendant's motion to suppress, the State's March 19, 2021 motion for reconsideration, and the trial court's denial of the motion to for reconsideration. SH¹ 56, SA 25-52.

¹ Citations to the record are as follows:

"SH__" refers to the transcript of the March 10, 2021 suppression hearing and page number.

"SA__" refers to the addendum to the State's brief and page number.

TEXT OF RELEVANT AUTHORITIES

U.S. CONST. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

N.H. Const. Pt. I, Art. 19

Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.

STATEMENT OF THE CASE AND THE FACTS

A. Procedural History.

The State has charged Juan Monegro-Diaz (“the defendant”) with one count of operating a vehicle after a revocation or suspension (RSA 263:64, VII), arising from an August 18, 2020 traffic stop. SH 3. On December 9, 2020, the defendant moved to suppress all evidence uncovered during that traffic stop. SA 25. The State objected. SA 41. The court (*Stephen, J.*) held an evidentiary hearing on the motion on March 10, 2021, during which it heard testimony from Salem Police Officer Michael Carpentier. Following the hearing, the court granted the defendant’s motion to suppress from the bench and later issued a written order. SA 44. The State filed a timely motion for reconsideration on March 19, 2021, which the court denied. SA 51.

This State’s appeal followed.

B. Facts of the Stop.

On August 18, 2020, Officer Michael Carpentier of the Salem Police Department testified that he was driving north on Kelley Road in Salem, New Hampshire. SH 5. Shortly before 5:00 p.m., a man driving a 2000 Honda turned onto the road in front of Officer Carpentier’s patrol car. SH 5. The vehicle caught Officer Carpentier’s attention because it has “natural voids and dead spaces commonly used for trafficking and concealing narcotics.” SH 27. Officer Carpentier used his cruiser’s Mobile Data Terminal (“MDT”) to run a check on the Honda’s license plate. SH 7. The

vehicle was registered to “a middle-aged female.”² SH 10.

While still driving behind the Honda, Officer Carpentier used the MDT to check the Salem Police Department’s records for prior contacts with the owner of the vehicle. SH 11. The MDT linked to a report from a 2019 incident in which the defendant had been arrested for DUI while driving a different vehicle registered to the same woman. SH 11. Through this prior incident, the police records had connected the Honda’s owner, and all vehicles registered to her, to the defendant. Officer Carpentier then used the MDT to check the defendant’s DUI arrest file. SH 12.

In addition to identifying the defendant as someone connected to the Honda’s registered owner, the arrest file contained booking photos and physical descriptors of the defendant. SH 12. Officer Carpentier also checked the defendant’s driving status through the MDT and found that his operating privileges were suspended due to the DUI. SH 15-16. As he continued to follow the defendant, Officer Carpentier observed the defendant’s face and profile in the rear-view mirror and in the driver’s window while the defendant was turning the Honda. SH 16. Comparing the booking photo to the man he saw driving the Honda ahead of him, Officer Carpentier determined that the person operating the vehicle in front of him was the defendant. SH 16-17.

At this point, strongly suspecting that the defendant was operating the Honda on a suspended license, Officer Carpentier stopped the car. SH 17. He confirmed the defendant’s identity with his New Hampshire driver’s

² Defense counsel later represented to the trial court that this woman was the defendant’s mother. SH 38.

license. SH 17. Officer Carpentier had not met the defendant before this incident. SH 18

On cross-examination, Officer Carpentier clarified that he initially believed the Honda he stopped was the same one the defendant had driven during the 2019 DUI incident, but that he was mistaken about this. The car from the 2019 incident was a different Honda registered to the same woman. SH 20-21. He reiterated, however, that the MDT had connected the registered owner of the two cars to the defendant through the 2019 DUI record. SH 20.

Defense counsel also questioned Officer Carpentier's ability to accurately compare physical descriptors such as height, weight, and eye color from the defendant's arrest record with the individual in the car while following in his cruiser. SH 29-30. Officer Carpentier testified that he could see the defendant's face and profile in the defendant's rear-view mirror and in profile through the driver-side window while the defendant was turning. SH 31. He testified that he primarily relied on the booking photo from the DUI arrest file to identify the defendant as the driver. SH 30-31.

C. The Parties' Arguments.

The defendant offered two arguments in support of his motion to suppress. First, he argued that Officer Carpentier violated the Fourth Amendment to the United States Constitution and Part I, Article 19 of the New Hampshire Constitution by conducting a stop without reasonable suspicion of criminal activity. SH 35. Second, the defendant contended that by running the Honda's license plate number through his MDT, Officer Carpentier violated RSA 236:130, I, II, which prohibits the State or its

political subdivisions from engaging in “surveillance on any public ways of the state or its political subdivisions.”³ SH 35.

Although he relied primarily on his RSA 236:130 argument, the defendant’s reasonable suspicion argument focused on Officer Carpentier’s identification of the defendant. SH 48. In defense counsel’s view, the officer could not have made a sufficient positive identification of the defendant. SH 48. He further argued that the defendant could have been wearing a mask, which could have complicated the officer’s ability to identify the defendant from a booking photo. SH 48.

The State countered that the officer did have reasonable suspicion for the stop. SH 44. It argued that the officer did not need a reason to run the license plate under *State v. Richter*, 145 N.H. 640 (2000). The information that the computer search had produced – the defendant’s identity and suspended license status – combined with the officer’s observations of the defendant’s face and profile, furnished reasonable suspicion for the stop. SH 44-46, 49-50.

D. The Trial Court’s Ruling.

Following these arguments, the trial court ruled from the bench. SH 56. The court first noted that “the officer did nothing improper” and “based the stop on what he discovered in his investigation.” SH 48-49. Despite this, the court then stated, “I still don’t like it.” SH 49. Specifically, the court did not like that the MDT had connected the defendant to the car he

³ The trial court did not base its ruling on RSA 236:130. However, *State v. Njogu*, 156 N.H. 551 (2007), is directly on point and specifically held that police patrol-car computers, like the MDT Officer Carpentier used in this case, are excluded from the scope of this law.

was driving. SH 49. The court felt that “the defendant shouldn’t have been tied to this car,” SH 49-50, but agreed that “the officer did nothing improper.” SH 52.

The court took judicial notice of the fact that it had “already convicted [the defendant] of aggravated DUI and DUI today.” SH 52. Then the court again noted that Officer Carpentier “did everything right according to his investigation tools.” SH 52. The court inquired as to whether it could place the case on file without a finding: “It’s almost like a nullification argument in jury court. It just seems like, in my discretion it might be appropriate to place it on file.” SH 52-53. However, the State argued, and the court agreed, that it could not do this, because the proceeding before it was a hearing on a motion to suppress, not a trial. SH 53, 56.

Once the court concluded that it could not place the case on file without a finding, it ruled that Officer Carpentier lacked reasonable suspicion to make the stop. SH 56. The court again reiterated that “Officer Carpentier was appropriate. He used an appropriate investigative tool.” SH 56. But, the court ultimately ruled that “I don’t find under the totality of the circumstances, even though he got it right, apparently, because he identified [the defendant], that when he made the stop, there was enough reasonable suspicion to stop the defendant.” SH 56.

The court based its argument on “some of the arguments [defense counsel] made [regarding] identification.” SH 56. Although Officer Carpentier testified that he could not remember if the defendant was wearing a mask due to the COVID-19 pandemic, the court hypothesized that the defendant could have been wearing a mask. SH 33. Moreover,

although the court found that Officer Carpentier correctly identified the defendant as the driver based on a booking photo, it concluded that he lacked reasonable suspicion because the defendant was in the car ahead of him. SH 56.

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law when it ruled that the officer lacked reasonable suspicion to make a stop. Based on proper investigative techniques, the officer determined that the driver of the vehicle was the defendant, and that the defendant had a suspended license. Under *State v. Richter*, 145 N.H. 640, 641-42 (2000), these two facts furnished reasonable suspicion for a stop and the court erred when it concluded, based on speculation that the defendant might have been wearing a face mask, that the officer's identification of the defendant was not certain enough to establish reasonable suspicion.

ARGUMENT

A. STANDARD OF REVIEW.

When reviewing a ruling on a motion to suppress, this Court accepts the trial court's factual findings unless they lack support in the record or are clearly erroneous and reviews legal conclusions *de novo*. *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014). A traffic stop constitutes a seizure, *State v. McKinnon-Andrews*, 151 N.H. 19, 22 (2004), and this Court reviews search and seizure cases under the New Hampshire Constitution first and relies upon federal constitutional law for guidance. *State v. Ball*, 124 N.H. 226, 231-33 (1983); *State v. Perez*, 173 N.H. 251, 256 (2020).

B. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT RULED THAT THE OFFICER LACKED REASONABLE SUSPICION FOR THE STOP.

“Warrantless seizures are *per se* unreasonable under Part I, Article 19 unless the State proves by preponderance of the evidence that the seizure falls within the narrow confines of judicially crafted exception.” *Perez*, 173 N.H. at 256. An investigatory stop of a vehicle can qualify as one such exception if the officer has “a reasonable suspicion-based on specific, articulable facts taken together with rational inferences from those facts—that the particular person stopped has been, is, or is about to be, engaged in criminal activity.” *State v. Roach*, 141 N.H. 64, 66 (1996). “Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from

information that is less reliable than that required to show probable cause.” *Alabama v. White*, 496 U.S. 325, 330 (1990).

In *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020), the United States Supreme Court recently discussed the suspicion required for an officer to initiate a traffic stop under the Fourth Amendment. The *Glover* Court noted that an officer can “initiate a brief investigative traffic stop when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Id.* at 1188. The Court further observed, “[a]lthough a mere ‘hunch’ does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.” *Id.*

“The reasonable suspicion inquiry falls considerably short of 51% accuracy, for . . . [t]o be reasonable is not to be perfect.” *Id.* (internal quotations and citations omitted). “[O]fficers, like jurors, may rely on probabilities in the reasonable suspicion context.” *Id.* at 1190. Ultimately, what constitutes reasonable suspicion “depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Prado Navarette v. California*, 572 U.S. 393, 402 (2014).

State v. Richter, 145 N.H. 640, 641-42 (2000), is also applicable and its reasoning is aligned with *Glover*. In *Richter*, a Salem police officer observed a vehicle while driving on Route 28 in Salem. The officer ran the license plate, and determined that the registered owner of the vehicle had a suspended license. *Id.* at 640. The officer did not observe any motor vehicle infractions. Based solely on the suspension information, the officer stopped

the driver. *Id.* The trial court dismissed the charges after determining the officer lacked reasonable suspicion for the stop and the State appealed. *Id.*

This Court reversed. *Id.* As a preliminary matter, the Court held that the police have the authority to run random computer checks on the license plates of passing vehicles, without suspicion of criminal conduct. *Id.* at 640-41. Such checks are not subject to protection under the Fourth Amendment or Part I, Article 19. *Id.* Then the Court turned to the issue at hand, “whether knowledge that the registered owner of a vehicle has a suspended driver's license provides the necessary reasonable suspicion for a police officer to initiate a traffic stop of that vehicle[.]” This Court concluded that such knowledge was sufficient. *Id.* at 641. The Court found that it was “reasonable for the officer to infer that the driver was the owner of the vehicle” and to stop the driver to “investigate whether the defendant was driving his vehicle in violation of the law.” *Id.* at 641-42.

Applying *Richter* and *Glover*, Officer Carpentier had reasonable suspicion to stop the defendant. The officer investigation used the MDT to link the defendant to the registrant of the vehicle, produced the defendant’s booking photo, and revealed that the defendant’s license was suspended. The officer viewed the defendant’s face and profile while following him and determined that he resembled the booking photo. At that point, the officer reasonably – and correctly – inferred that the person in the car ahead of him was likely the defendant and that defendant had a suspended license. Both *Glover* and *Richter* stand for the proposition that if an officer reasonably suspects that an individual is driving on a suspended license, the officer does not need to observe further driving infractions to justify a stop.

In order for the trial court to suppress evidence from this stop, it had to find that Officer Carpentier lacked reasonable suspicion to stop the defendant. SH 56. Based on *Richter*, if the officer determined that the driver had a suspended license, no further information was necessary before making the stop. The only consideration for the court, then, was whether Officer Carpentier had reasonable suspicion that the driver in front of him was the defendant. In other words, to suppress the stop, the court had to find that Officer Carpentier's identification of the defendant amounted to a mere hunch. The record does not support this conclusion.

Officer Carpentier testified to the investigative steps he took prior to stopping the defendant. As *Richter* informs, officers have the authority "to run random computer checks of passing vehicle licenses, without suspicion of criminal conduct." *Id.* at 640-41. Officer Carpentier did not need to suspect the driver of criminal activity to run the Honda's license plate. Having run the plate and found that the owner of the vehicle was a woman, Officer Carpentier reasonably concluded that the man driving the vehicle was not its registered owner. Unlike *Richter*, in which the defendant was the registered owner of the suspect vehicle, an additional investigative step was necessary to identify the driver. Officer Carpentier accomplished this identification through a valid investigation of Salem Police Department's records.

The trial court concluded that Officer Carpentier's identification of the defendant was not certain enough to justify a stop. SH 56. It based this on defense counsel's identification arguments and the court's own speculation that the defendant could have been wearing a mask due to the COVID-19 pandemic. SH 56. But as *Glover* and *Richter* instruct,

reasonable suspicion does not require absolute certainty or irrefutable proof. “Courts cannot reasonably demand scientific certainty . . . where none exists. Rather, they must permit officers to make commonsense judgments and inferences about human behavior.” *Glover*, 140 S. Ct. at 1188 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)) (internal quotations and citations omitted). Furthermore, under *Glover*, “combining database information and commonsense judgments. . . is fully consonant with. . . Fourth Amendment precedents.” *Id.* at 1190. The result is the same under *Richter*, 145 N.H. at 641-42.

Under this standard, the officer’s identification only needed to be reasonable, not certain. Based on his personal observations, the booking photo and descriptors, and a known association between the defendant and the owner of the Honda, Officer Carpentier’s identification was reasonable. In addition, the record contains no evidence that the defendant was wearing a mask, and the trial court’s speculation on this point is not a sufficient reason to suppress an otherwise valid, reasonable stop. At a bare minimum, the officer’s suspicions were sufficiently particularized to justify a brief and minimally invasive stop to confirm the defendant’s identity through his driver’s license.

In addition, the court’s own repeated statements that Officer Carpentier “did nothing improper” and “based the stop on what he discovered in his investigation” further undermine its decision to suppress the evidence. SH 48-49, 52, 56. This Court has observed that the “central aim of the exclusionary rule” is “deterrence of police misconduct.” *State v. Canelo*, 139 N.H. 376, 386-87 (1995). Going further, the United States Supreme Court has stated that “the *sole* purpose of the exclusionary rule is

to deter misconduct by law enforcement.” *Davis v. United States*, 564 U.S. 229, 246 (2011) (emphasis in original). This purpose is not served in this case where, as the trial court found, the officer conducted a proper investigation using the tools available to him and came to the correct conclusion regarding the identity and license status of the driver. The trial court even noted that the Officer Carpentier’s investigation showed “compliance with *Richter*.” SH 43. Given these facts, suppression was not an appropriate remedy.

Instead, the record seems to reflect that the trial court’s decision was motivated by its discomfort with the manner in which data is compiled and/or cross-referenced within Salem Police Department’s internal record system. The court’s statements that “[the defendant] wasn’t even in this vehicle on the prior occasion, but somehow in the Salem’s internal system, it connected [the defendant] to a vehicle for a prior incident when he wasn’t in that vehicle” (SH 47), “basically the [d]efendant shouldn’t have been tied to this car” (SH 49), and “I still don’t like it” (SH 49, 52), as well as the court’s attempt to invoke something akin to “a nullification argument in jury court,” (SH 52-53) support this reading.

But the trial court’s discomfort with a result produced by a valid investigatory tool does not provide grounds to suppress a legitimate stop. The defendant has not claimed, nor has this Court ever imputed, a privacy right onto police or motor vehicle records, particularly when “the state is the very body that issues, controls, and regulates such licenses and records.” *Richter*, 145 N.H. at 641 (quoting *State v. Bjerke*, 697 A.2d 1069, 1073 (R.I. 1997) (internal quotations omitted)).

In this case, the record reflects that the court, having found ample facts from which to conclude the officer had reasonable suspicion, did not correctly apply the appropriate legal standard. Instead, because of its discomfort with the data the MDT returned, the court substituted a higher standard than the law requires. The decisional law does not recognize this higher standard, under which an officer would be required to establish reasonable certainty for a stop, and would be precluded from making reasonable, commonsense inferences based on the specific, articulable facts available to him. In ruling otherwise, the trial court erred as a matter of law, and this Court must reverse

CONCLUSION

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

The State request a ten-minute 3JX argument.

The State certifies that the appealed decision is in writing and is appended to the State's brief.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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August 31, 2021

/s/Zachary L. Higham

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CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 3,422 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 31, 2021

/s/Zachary L. Higham
Zachary Higham

CERTIFICATE OF SERVICE

I, Zachary L. Higham, hereby certify that a copy of the amended State's brief shall be served on Simon Dixon, Esquire, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 31, 2021

/s/Zachary L. Higham
Zachary Higham

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STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

10TH CIRCUIT – DISTRICT DIVISION – SALEM
DOCKET#: 472-2020-CR-1612

STATE)
)
v.)
)
JUAN MONEGRO-DIAZ,)
DEFENDANT)

**DEFENDANT’S MOTION TO SUPPRESS INFORMATION OBTAINED DURING
SURVEILLANCE AND MOTOR VEHICLE STOP**

NOW comes the instant defendant, Juan Monegro Diaz, and respectfully requests that this Honorable Court suppress any and all information obtained during the traffic stop on August 18, 2020.

In support of this motion, defendant recites the following:

1. On August 18, 2020, Officer Michael Carpentier, Badge #180, stopped defendant’s vehicle. The vehicle was stopped based upon Officer Carpentier’s belief that the vehicle driven, a 2000 Honda, NH registration #4758335, was used for criminal activities, i.e., carrying narcotics, based upon his training and experience. He recites that such vehicles involving small sedans are used for concealment in trafficking of narcotics. The vehicle that the defendant was driving was an ordinary Honda Accord. The police officer saw no motor vehicle infractions. Thereafter, he conducted a registration check of the vehicle to determine who the owner was. The registered owner came back as a middle-aged female, unlike the youthful male driving the vehicle. He determined that the defendant had a case in 2019, arrested for DWI. In the 2019 case, defendant drove a different car, a 2007 white Honda CRV, registration 4662429 (NH), unlike the vehicle that was stopped on August 18, 2020, a 2000 Honda Accord, registration 4758335 (NH).

2. The stop was conducted without reasonable suspicion based upon specific, articulable facts taken together with rational inferences from those facts that the particular person stopped, the defendant has been, is or was about to engage in criminal activity. State v. Roach, 141 NH 64, 66 (1996).
3. Trooper Carpentier also violated RSA 236:130 (I) and (II).
4. Thus, Trooper Carpentier violated defendant's Fourth Amendment to the US Constitution and Part I, Article 19 of the New Hampshire Constitution.
5. Attorney Simon Dixon attaches an affidavit.

WHEREFORE, defendant respectfully moves that this Honorable Court suppress any and all information obtained from the illegal motor vehicle stop as Fruits of the Poisonous Tree Doctrine in violation of the Fourth Amendment to the US Constitution and Part I, Article 19 of the New Hampshire Constitution.

Respectfully submitted,
Defendant through counsel,



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RE-DO MOT TO SUPPRESS STOP 12-8-20

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

10TH CIRCUIT – DISTRICT DIVISION – SALEM
DOCKET#: 472-2020-CR-1612

STATE)
)
v.)
)
JUAN MONEGRO-DIAZ,)
DEFENDANT)

DEFENDANT'S MEMORANDUM OF LAW AND FACTS

NOW comes the instant defendant and hereby provides a Memorandum of Facts and Law in relation to the August 18, 2020 motor vehicle stop.

I. FACTS

On August 18, 2020 at approximately 16:46 hours, Officer Michael Carpentier, Badge #180, was traveling Northbound on Kelley Road, crossing the intersection with Cluff Crossing to South Policy. He observed a 2000 Honda, registration 4758335 (NH) in front of his patrol car. The vehicle caught the officer's attention based upon his "training and experience" in criminal narcotic interdiction, specifically, involving small sedans used for the concealment and trafficking of narcotics.

Officer Carpentier continues to recite that the Honda Accord has natural vehicle voids and dead spaces commonly used for the trafficking and concealment of narcotics. At such point in time, he conducted a registration check on the vehicle determining that the vehicle was registered to a middle-aged female, unlike the youthful male operator. He furthermore observed a male operator driving the vehicle. He proceeded to check the Salem Police Department in house records for contacts with the vehicle finding that in 2009, Juan Monegro Diaz was arrested for DWI. The officer fails to recite that in 2019, Juan Monegro Diaz drove a different vehicle with a different registration plate, i.e., a 2007 Honda CRV, registration number and state 4662429 (NH). Based upon this information, the officer ran a check to determine the identity of the driver, who was not the owner of the vehicle in question.

II. ISSUES

1. Whether Officer Carpentier conducted a surveillance and stop of the vehicle which defendant drove on August 18, 2020 without having reasonable suspicion based upon specific, articulable facts taken together with rational inferences from those facts that the defendant committed a crime, (State v. Roach, 141 NH 64, 66 (1996))?
2. Whether Officer Carpentier violated RSA 236:130 (I) and (II) in conducting a surveillance of the motor vehicle to determine the identity of the occupants on public ways?

III. ARGUMENTS

- (a) Officer Michael Carpentier violated RSA 236:130 (I) and (II) in conducting a surveillance on the ownership of the motor vehicle or the identity of the occupants within the vehicle on public ways.

RSA 236:130 (II) defines “surveillance”. Surveillance means the act of determining the ownership of a motor vehicle or the identity of a motor vehicle’s occupants on the public ways of the State or its political subdivisions through the use of a camera or other imaging device or any other device, including but not limited to, transponder, cellular telephone, global positioning satellite or radio frequency identification device that by itself or in conjunction with other devices or information can be used to determine the ownership of a motor vehicle or the identity of a motor vehicle’s occupants. RSA 236:130 (I).

It should be noted that RSA 236:130 (I) and (II) came into effect on April 5, 2006. (HR,G on HIB 1738-fn, April 5, 2006) (Exhibit A – RSA 236). See also State v. O’Neill, 2007 N.H.Super. LEXIS 2 (April 17, 2007, Justice Gina L. Nadeau). In State v. O’Neill, Supra, Justice Nadeau determined that the legislature provided an exhaustive definition of “surveillance” that is entirely clear. That definition, in essence, prohibits the

indiscriminate use of technology to ascertain the name of the owner or identity of the operator of the vehicle on a public way. “This court agrees with the ruling of the Nashua District Court submitted by defense that “the procedure used by the police of “running” random computer checks of license plate numbers of passing vehicles without suspicion of criminal conduct is using an “other device” to track drivers in a manner prohibited by RSA 236:130. (**Exhibit B**)

Since Officer Carpentier violated RSA 236:130, the court should apply the “Fruit of the Poisonous Tree Doctrine” to this case since the officer’s random check of the plate without seeing any evidence that the defendant committed a motor vehicle infraction, violates defendant’s Fourth Amendment to the US Constitution and Part I, Article 19 of the New Hampshire State Constitution. The officer’s tactics are in violation of RSA 236:130 and thus, all the evidence should be suppressed.

- (b) At the time that Officer Carpentier violated RSA 236:130, he did not have evidence that the registered owner of the vehicle, the 2000 Honda, registration 4758335 (NH), had a suspended license.

Unlike the defendant in State v. Richter, 145 NH 640 (2000) who was the registered owner of the vehicle which was stopped who had a suspended driver’s license, the instant defendant was driving a vehicle owned by a middle-aged female individual; thus, Officer Carpentier did not have a reasonable suspicion to believe that the owner of the vehicle stopped had a suspended driver’s license. In fact, the owner and driver were different sexes and fit into different age groups.

In State v. Richter, Supra, the court held that “the officer observed nothing that would indicate that the driver was not the owner, in light of the fact that a male operator was driving a vehicle whose owner had a suspended driver’s license.” The owner of the vehicle in question did not have a suspended driver’s license and is of a different sex than the driver. In Richter, the court found that it was reasonable for the officer to infer that the driver was the owner of the vehicle. Citing Village of Lake in the Hills v. Lloyd, 227

Ill.App. 3d. (351) (Ill.App.Crt.) ...such an inference gave rise to a reasonable suspicion that the driver was committing a violation of RSA 263:64. We therefore conclude that the officer properly initiated a traffic stop to investigate whether the defendant was driving his vehicle in violation of the law. Compare to State v. Pike, 551 N.W. 2d. 919, 922 (Minn. 1996) (recognizing that where officer had reason to believe owner is not driving, rule does not apply).

In light of the instant facts, the officer violated RSA 236:130 (I) and (II) by conducting surveillance on the vehicle to determine the owner and/or occupants. It should be highly stressed that the statute, RSA 236:130, was implemented in 2006, after the opinion of State v. Richter, 145 NH 640 (2000). Thus, the Supreme Court in State v. Richter did not have RSA 236:130 for guidance to follow which the legislature provided.

IV. CONCLUSION

Where Officer Carpentier violated RSA 236:130 and Defendant's Fourth Amendment Right to the US Constitution and Part I, Article 19 of the New Hampshire Constitution, defendant's Motion to Suppress any and all information obtained should be allowed and the case be dismissed.

Respectfully submitted,
Defendant through counsel,



Simon Dixon, Esq., NH ID# 7882
DIXON & ASSOCIATES
439 South Union Street, Suite 202
Lawrence, MA 01843
(978) 794-1623
simondixonlaw@gmail.com

Date:

12/9/2020

RE-DO MEMO OF FACT LAW 12-8-20

EXHIBIT A

Lexis®

Document: RSA 236:130

RSA 236:130**Copy Citation**

Statutes current through the 2020 Regular Session (Act Chapter 39).

LEXIS™ New Hampshire Revised Statutes Annotated Title XX Transportation (Chs. 228 — 242) Chapter 236 Highway Regulation, Protection and Control Regulations (§§ 236:1 — 236:134) Highway Video Surveillance (§§ 236:130 — 236:131)

236:130. Highway Surveillance Prohibited.

I. In this subdivision, "surveillance" means the act of determining the ownership of a motor vehicle or the identity of a motor vehicle's occupants on the public ways of the state or its political subdivisions through the use of a camera or other imaging device or any other device, including but not limited to a transponder, cellular telephone, global positioning satellite, or radio frequency identification device, that by itself or in conjunction with other devices or information can be used to determine the ownership of a motor vehicle or the identity of a motor vehicle's occupants.

II. Neither the state of New Hampshire nor its political subdivisions shall engage in surveillance on any public ways of the state or its political subdivisions.

III. The prohibition set forth in paragraph II shall not apply where surveillance:

- (a) Is specifically authorized by statute;
- (b) Is undertaken on a case-by-case basis in the investigation of a particular violation, misdemeanor, or felony;
- (c) Is undertaken to produce images or data that:
 - (1) Are viewed only at the transportation management center of the department of transportation in connection with a particular incident occurring on a public way; and
 - (2) Are not recorded;
- (d) Is incidental to the monitoring of a building or other structure under the control of the state or a political subdivision of the state;
- (e) Is undertaken for purposes of operation of the toll collection system; or
- (f) Is undertaken for the security of the following bridges and approach structures: I-95 Piscataqua River

Bridge, Sarah Mildred Long Bridge, and the Memorial Bridge, all in Portsmouth.

(g) Is undertaken for security and to facilitate law enforcement in the investigation of criminal activity at the state-owned park and ride facilities that provide regularly scheduled public transit service listed below. A video recording may only be retrieved from the department of transportation's transportation management center, subject to its availability. The storage of any video recording shall be limited by the storage capacity of the individual server at each facility. No video recording shall be stored longer than 24 days. Any video recordings requested and retrieved prior to expiration may only be used by the requesting party for a lawful purpose, including as evidence in a judicial or administrative proceeding, and shall be copied and retained by the department of transportation's transportation management center for no longer than 18 months from the date of the recording. The state-owned park and ride facilities which conduct video surveillance shall display signage indicating the presence of 24 hour video cameras.

(1) I-93 Exit 2 in Salem.

(2) I-93 Exit 4 in Londonderry.

(3) I-93 Exit 5 in Londonderry.

(4) I-93 Exit 14 in Concord.

(5) I-95 Exit 3 in Portsmouth.

(6) Spaulding Turnpike Exit 9 in Dover.

(7) Everett Turnpike Exit 8 in Nashua.

(8) I-89 Exit 12 in New London.

(9) NH Route 101 Exit 7 in Epping.

(10) Any future state-owned park and ride facilities that provide regularly scheduled public transit service.

IV. Nothing in this section shall prevent the creation, transmission, or recording of any images or data which cannot, by enhancement, manipulation, or otherwise, be used for surveillance.

V. Any person violating the provisions of this section shall be guilty of a violation if a natural person, or guilty of a misdemeanor if any other person.

History

2006, 107:1, eff. July 1, 2006; 2007, 335:2, eff. July 16, 2007; 2013, 186:10, eff. August 31, 2013; 2014, 272:1, effective September 26, 2014.

EXHIBIT B

Document: State v. O'Neill, 2007 N.H. Super. LEXIS 2

State v. O'Neill, 2007 N.H. Super. LEXIS 2

Copy Citation

Superior Court of New Hampshire, Rockingham County

April 17, 2007, Decided

No. 06-S-3456, -57

Reporter

2007 N.H. Super. LEXIS 2 *

State of New Hampshire v. Patrick O'Neill

Notice: THE ORDERS ON THIS SITE ARE TRIAL COURT ORDERS THAT ARE NOT BINDING ON OTHER TRIAL COURT JUSTICES OR MASTERS AND ARE SUBJECT TO APPELLATE REVIEW BY THE NEW HAMPSHIRE SUPREME COURT.

Core Terms

traffic stop, questioning, detention, license, surveillance, consent to search, color, articulable suspicion, suppress, driver, random, plate

Judges: [*1] TINA L. NADEAU ▼, Presiding Justice.

Opinion by: TINA L. NADEAU ▼

Opinion

ORDER ON MOTION TO SUPPRESS

The defendant, Patrick O'Neill, is charged with two counts of possession of cocaine. See RSA 318-B:2; RSA 318-B:26(I)(c)(1). He moves the court to suppress evidence the police obtained during a search of his vehicle on August 19, 2006, arguing that the traffic stop leading to the search was illegal from the outset. In addition, the defendant argues that even assuming the legality of the initial traffic stop, the police improperly expanded the investigative scope of that stop, thereby tainting his subsequent consent to a search. The court held a hearing on this matter on April 2, 2007. After considering the evidence, arguments of counsel, and the applicable law, the defendant's motion is **GRANTED** for reasons stated in this order.

The court finds the following facts. At approximately 11:00 p.m. on August 19, 2006, New Hampshire State Trooper Gary Ingham was on routine patrol on A Street at Hampton Beach when he observed a white SUV traveling directly in front of him. The trooper observed no erratic or illegal operation, but ran a random check on the SUV's license plates to ensure its compliance with the rules [*2] and regulations of the Division of Motor Vehicles. This check revealed that the vehicle was registered with the DMV as being red, rather than white, in color. The trooper stopped the SUV to inquire about this discrepancy.

When Trooper Ingham stopped the car, he noticed that the driver, later identified as the defendant, appeared to be nervous and sweating. The trooper asked the defendant why his car was registered as a red SUV. In response, the defendant explained that he just recently painted the vehicle white because his employer, Comcast, required the change. [1] Upon request, the defendant produced a valid New Hampshire driver's license, but was unable to produce a registration. The trooper observed that the defendant's hand was shaking when he handed over his license.

During the course of this encounter, the trooper also noticed that the inspection sticker on the defendant's vehicle was worn and peeling. The defendant explained that upon purchasing the car, he did not have the car re-inspected, as he believed the previous [*3] inspection was valid. At this time, the trooper observed a "solid bead of sweat" on the defendant's brow and noticed that the defendant would not make eye contact. [2]

As a result of the defendant's apparent nervousness, the trooper asked him to step out of the car. Once the defendant was out of the vehicle, Trooper Ingham explained the summons being issued for the inspection violation. The trooper then handed the defendant his license, and told the defendant he was "all set" to go. The trooper testified that during this exchange, the defendant appeared nervous and continued to glance back at his vehicle. As a result, before the defendant had gotten back into the SUV, the trooper asked whether there were any guns or drugs in the car. Although the defendant answered this question in the negative, [*4] the trooper then asked whether the defendant would consent to a search of the vehicle. [3] Trooper Ingham told the defendant he could decline the request. Nevertheless, the defendant agreed to the search, which revealed the cocaine that underlies the defendant's criminal charges.

The defendant now advances three theories as to why the fruits of the trooper's search must be suppressed. Initially, he claims that Trooper Ingham's random license plate surveillance was prohibited by the July 1, 2006, enactment of RSA 236:130 (Supp. 2006), rendering the motor vehicle stop on A Street illegal *ab initio*. Next, the defendant argues that the trooper's desire to inquire about the color of his vehicle did not justify an investigative *Terry* stop. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. McKinnon-Andrews*, 151 N.H. 19, 23, 846 A.2d 1198 (2004). Finally, the defendant argues that even if the trooper's stop was permitted, the expansion of the scope of the traffic stop to include a search for drugs and weapons occurred [*5] in contravention of his rights under Part I, Article 19 of the New Hampshire Constitution, as well as the 4th and 14th Amendments to the U.S. Constitution. With respect to the defendant's constitutional claims, the New Hampshire Constitution has been found to provide at least as much protection as its federal counterpart in the areas of search and seizure jurisprudence that control the outcome of this motion. *McKinnon-Andrews*, 151 N.H. at 27; *State v. Hight*, 145 N.H. 746, 748, 781 A.2d 11 (2001). Accordingly, this matter is addressed under state law, using federal authority for guidance only. *Id.*; see *State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347 (1983).

I. Legality of the Traffic Stop

The State does not dispute that Trooper Ingham's decision to stop the defendant was based on a random license plate check. The trooper observed no other behavior that would give rise to a reasonable, articulable suspicion that the defendant had committed or was about to commit a crime. *Cf. McKinnon-Andrews*, 151 N.H. at 22-23. The trooper's action does not offend our state constitution. *State v. Richter*, 145 N.H. 640, 640-41, 765 A.2d 687 (2000). However, the defendant argues that RSA 236:130, entitled "Highway Surveillance Prohibited," amounts [*6] to a legislative ban on Trooper Ingham's election to randomly check license plates for violations. That statute states that "[n]either the

state of New Hampshire nor its political subdivisions shall engage in surveillance on any public way of the state or its political subdivisions." RSA 236:130(II). "Surveillance" is statutorily defined as follows:

37 of
236:130(I)(II)

'[S]urveillance' means the act of determining the ownership of a motor vehicle or the identity of a motor vehicle's occupants on the public ways of the state or its political subdivisions through the use of a camera or other imaging device or any other device, including but not limited to a transponder, cellular telephone, global positioning satellite, or radio frequency identification device, that by itself or in conjunction with other devices or information can be used to determine the ownership of a motor vehicle or the identity of a motor vehicle's occupants.

RSA 236:130(I) (emphasis added).

The State has presented the court with the legislative history behind the enactment of RSA 236:130, arguing that it shows the Legislature did not seek to ban the type of surveillance at issue in this case. See Tr. of N.H. Senate Comm. on Transp. and [*7] Interstate Coop., Hgt on HB 1738-FN, Apr. 5, 2006. The court, however, will not look to legislative history unless the text of a statute in question is unclear or ambiguous. *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 38, 871 A.2d 18 (2005). Here, the Legislature has provided an exhaustive definition of "surveillance" that is entirely clear. That definition, in essence, prohibits the indiscriminate use of technology to ascertain the name of the owner or identity of the operator of a vehicle on a public way. This court agrees with the ruling of the Nashua District Court submitted by defense counsel that "the procedure used by the police of 'running' random computer checks of the license plate numbers of passing vehicles without suspicion of criminal conduct is using an 'other device'" to track drivers in a manner prohibited by RSA 236:130. *State v. Njogu, et al.*, No. 06-CR-11900 (Feb. 28, 2007) (Order, Ryan v., J.); cf. RSA 236:130(III)(b) (permitting surveillance where "undertaken on a case-by-case basis in the investigation of a particular violation, misdemeanor, or felony"). Accordingly, the court finds that Trooper Ingham's stop of the defendant was indeed illegal from the outset.

Furthermore, [*8] even if RSA 236:130 did not prohibit a random check of the defendant's registration, Trooper Ingham lacked a reasonable, articulable suspicion that the defendant was involved in any sort of criminal activity that would have justified a temporary investigative detention. See *McKinnon-Andrews*, 151 N.H. at 22. The court is unable to find, and the State has failed to present, any statute or administrative regulation from the Department of Safety requiring a vehicle owner to notify the DMV of a change in vehicle color before the annual expiration date of a valid registration. This means that Trooper Ingham could not possibly have suspected the defendant of any criminal wrongdoing warranting the August 19 traffic stop challenged here. [4] Suppression of the evidence obtained as the "fruit" of the trooper's stop is therefore mandated. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *State v. Gravel*, 135 N.H. 172, 180-81, 601 A.2d 678 (1991). This court will not sanction traffic stops for those citizens who simply decide to paint their cars without some particularized suspicion of criminal wrongdoing such as, for example, the theft and subsequent repainting of a vehicle.

II. Expansion of the Scope of the Traffic Stop

Even if the court were to assume, *arguendo*, that Trooper Ingham's traffic stop was initially valid, it further finds that he unlawfully expanded the scope of that stop when asking the defendant for consent to search the SUV for drugs and guns. This unlawful expansion, coupled with the circumstances of the traffic stop in question, rendered the defendant's subsequent consent to a search incurably "tainted" as a matter of law. See *Hight*, 146 N.H. at 750.

When a driver is pulled over by the police for a traffic violation, a "seizure" occurs under our constitution "even though the purpose of the stop is limited and the resulting detention quite brief." *McKinnon-Andrews*, 151 N.H. at 22. Accordingly, our state supreme court has consistently applied the principles governing investigative detentions articulated in *Terry v. Ohio, supra*, when analyzing traffic stops. See *id.* "To be constitutional, the scope of a *Terry* stop must be carefully tailored to its underlying justification, and the stop must be temporary and last no [*10] longer than is necessary to effectuate its purpose." *Id.* at 23 (internal quotations and citations omitted). [5]

To determine whether the scope requirement of *Terry* has been exceeded by off-topic police questioning during a traffic stop, New Hampshire courts employ a three-part test asking whether: (1) the questioning is reasonably related to the initial justification for the stop; (2) the law enforcement officer had a reasonable articulable suspicion that would justify the question; and (3) in light of all the circumstances, the question impermissibly prolonged the detention or changed its fundamental nature. *Id.* at 25 (the "*McKinnon-Andrews* inquiry"). These three prongs [*11] are to be addressed sequentially: a

Here, Trooper Ingham's questions as to whether the defendant had any drugs or weapons in his vehicle were clearly unrelated to his concerns about the color of the defendant's vehicle, which formed the basis for his stop of the defendant. As a result, the trooper is required to have had a reasonable, articulable suspicion that the defendant was in possession of such illegal items to justify his questions.

The evidence presented by the State, however, does not support such a finding. The trooper's suspicions were essentially aroused by the defendant's nervousness and sweatiness during the course of their interaction; the trooper made no specific observations of intoxication, drug use, or furtive gestures which might indicate the defendant had hidden contraband. Regardless, "[n]ervousness is a common and entirely natural reaction to police presence[.]" *U.S. v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005). The court finds the trooper's observations insufficient justification for a request to search the interior of the defendant's vehicle. The facts articulated [*12] by Trooper Ingham fail to "lead somewhere specific, [beyond] a general sense that [the defendant was] probably a bad person who may have committed some sort of crime." *McKinnon-Andrews*, 151 N.H. at 26. His questioning consequently fails the second prong of the *McKinnon-Andrews* inquiry.

The court also finds that Trooper Ingham's questions changed the fundamental nature of the traffic stop in question, and would therefore also fail the third prong of the *McKinnon-Andrews* inquiry. The questions were not facially innocuous inquiries about the defendant's itinerary; rather, the Defendant almost instantaneously went from answering questions about his inspection sticker and paint color to being questioned about contraband. See *id.* at 28 (Broderick ▼, J., concurring). In sum, the trooper's line of questioning amounted to an unlawful detention outside the scope of the underlying stop.

Despite this, "[a] conclusion that the detention of the defendant became unlawful once the officer asked about the car's contents does not lead inexorably to the conclusion that the defendant's consent to search the car was invalid." *Id.* (Broderick ▼, J., concurring); see *Hight*, 146 N.H. at 749-51; compare *State v. Carty*, 170 N.J. 632, 790 A.2d 903, 912 (N.J. 2002) [*13] (establishing bright-line rule that officer must have reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search vehicle in light of compulsion invariably experienced by detained drivers). While an unlawfully prolonged detention may render a defendant's consent to a search "tainted," the Supreme Court's decision in *Hight* next requires consideration of whether the taint of the unlawfully prolonged detention was purged. 146 N.H. at 750-51. In making this determination, the following factors are evaluated: (1) the temporal proximity between the police illegality and the consent to search; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Id.* at 750.

Here, there was absolute temporal proximity between the unlawful detention and the defendant's consent, since the defendant gave consent *while* he was unlawfully detained. *Id.* Next, the court finds that Trooper Ingham's decisions to hand the defendant his license and explain that the defendant could decline to consent did create intervening circumstances tending to support a conclusion that the defendant's consent was an "act of free will." See *id.* [*14] Nevertheless, it is equally plausible that the "seamless transition" in this case from an *invalid* traffic stop to the unlawful detention and subsequent consent mitigated the effect of the trooper's acts. There remained a real and "serious risk" that the defendant felt compelled to consent "because he believed he was still under the lawful authority of the officer." *Id.* at 750-51; see also *Carty*, 790 A.2d at 910-11 ("where the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent").

Even if the court were to consider factor two a "draw," the court still finds the "purpose and flagrancy" of Trooper Ingham's actions troubling. A traffic stop based on an innocuous fact like the color of a vehicle seems pretextual; the court is mindful that the defendant's vehicle was an older model (circa 1991), and that the stop in question occurred on a Saturday evening at Hampton Beach, a relatively high-crime area. These facts, coupled with the complete absence of any reasonable basis to suspect the defendant of criminal activity, give rise to the [*15] appearance, even if not the reality, that the officer's purpose was simply "to engage in a fishing expedition for incriminating evidence[.]" *Id.* at 751 (internal quotations omitted). The court therefore concludes that the State has failed to purge the taint of the defendant's unlawful detention. Accordingly, the defendant's motion to suppress is **GRANTED**.

So **ORDERED**.

Footnotes

[*18]

At the hearing, the defendant produced a copy of his registration dated July 24, 2006, which indicated that the car was indeed registered with the DMV as being white.

2 ¶ In its objection to the defendant's motion to suppress, the State alleges that "the defendant was sweating despite the weather that evening being cold[.]" State's Obj. at P 12. The court, however, takes judicial notice of the fact that National Weather Service records indicate the temperature at 11 p.m. on August 19, 2006, in Portsmouth (the weather station closest to Hampton Beach) was 73 degrees.

3 ¶ The trooper did not provide the defendant with a written consent form. The trooper testified that while he usually has such forms in his cruiser, he could not recall why one was not used in this case.

4 ¶ This is true regardless of the **[*9]** fact that the defendant's paper registration on file with the DMV actually listed his vehicle color as white. See Def.'s Ex. A.

5 ¶ Despite this scope requirement, when executing a *Terry* stop an officer may, as a matter of course, order a driver to exit his vehicle in the interest of officer safety. *Pennsylvania v. Mimms*, 434 U.S. 106, 109-10, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977). Such an order has been held to constitute a *de minimus* intrusion on constitutional rights, and reduces the possibility that a driver can make unobserved movements. *Id.* at 110-11. This rule, however, does not authorize an officer to convert a traffic stop into a general inquisition through questioning.

Content Type: Cases

Terms: richter

Narrow By: Court: State Courts>New Hampshire

Date and Time: Dec 07, 2020 07:16:07 p.m. EST

CERTIFICATE OF SERVICE

I, Simon Dixon, Esq., as attorney for the instant defendant, do hereby say and depose that I emailed a copy of the following:

1. **Notice of Appearance;**
2. **Defendant's Motion to Suppress Stop and Items Seized;**
3. **Affidavit of Attorney Simon Dixon;**
4. **Defendant's Memorandum of Law and Facts;**

To counsel of record, to wit:

Jason Grosky, Esq.
Salem Police Department
9 Veterans Memorial Parkway
Salem, NH 03079-3388
jgrosky@salempd.com

**SIGNED UNDER PAINS AND PENALTIES OF PERJURY
THIS 19 DAY OF DECEMBER 2020**



Simon Dixon, Esq.



ROCKINGHAM, ss

SALEM DISTRICT COURT

STATE OF NEW HAMPSHIRE

V.

JUAN MONEGRO DIAZ

2020-CR-1612

OBJECTION TO MOTION TO SUPPRESS

Now comes the State, by and through the Prosecution Division of the Salem Police Department, which states as follows in support of its objection:

1. While at liberty on orders and conditions of bail for a DUI offense before this Honorable Court, the defendant was charged with committing the violation-level offense of Driving After Suspension (OAS) per RSA 263:64 on 8/18/2020 in the Town of Salem. The offense accuses him of driving a vehicle while his license remained revoked under the related administrative license suspension entered by the DMV.
2. A report authored by Salem Police Officer Michael Carpentier notes he saw a 2000 Honda driving on Kelly Road and ran a registration check on the vehicle. The vehicle came back registered to a woman. He then checked in-house Salem Police records for prior contacts with the vehicle and found a 2019 contact involving that vehicle and a Juan Monegro Diaz, DOB 06/07/91, the defendant in this matter. He checked the defendant's booking photos and physical descriptors of the defendant and, based upon that information and what he could see, he believed the defendant was driving the vehicle.
3. Officer Carpentier checked the defendant's driving status and found his license or operating privileges were under suspension by the DMV for the administrative per se offense. While the officer was conducting these checks, he saw the vehicle travel through Salem and turn right onto Stiles Road, where Officer Carpentier stopped the vehicle in the parking lot at 23 Stiles Road. The defendant was identified as the driver, and he was subsequently charged with OAS.
4. The defendant has maintained a not-guilty plea in this matter and about 12/10/2020, the State received and appearance to represent the defendant from Simon Dixon, Esq. along with a motion to suppress. The State objects.
5. The defendant's motion cites the on-point case that controls in this matter – State v. Richter, 145 N.H. 640 (2000), while placing significant emphasis on a separate superior court case that provides no precedential value. And the defendant's recitation of what happened fails to provide the Court with enough facts to show how this stop is supported by the holding of Richter.

6. The defendant's motion focuses on the fact the registered owner here was a woman. But it ignores the reasoned steps Officer Carpentier took to identify the driver of the vehicle, and assess that the defendant was the driver, prior to stopping the car.
7. Whatever initially caught the defendant's attention to this vehicle is irrelevant. As Richter notes, Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment to the U.S. Constitution are not implicated by checking the registration of any passing vehicle where there is no suspicion of criminal conduct. The visual observation of a license plate mounted in public view on a vehicle is not an act of "prying into hidden places for that which is concealed. See Richter at 641, quoting State v. Bjerke, 697 A.2d 1069, 1073 (R.I. 1997).
8. Richter focuses on whether knowledge that the owner has a suspended license provides reasonable suspicion to stop the vehicle. As Richter notes, to make an investigatory stop, an officer must have reasonable suspicion based on specific articulable facts taken together with rational inferences from those facts that the particular person stopped has been, is, or is about to be, engaged in criminal activity.
9. The case here goes a step further. This is not just a stop of a vehicle because the registered owner has a suspended license. In fact, Officer Carpentier runs the plate and identifies the registered owner is a woman. The driver is a male. Officer Carpentier checks further. He checks the vehicle status with Salem Police records and discovers a 2019 matter involving the defendant and this same vehicle. That connects the defendant to this vehicle. Officer Carpentier runs descriptor information on the defendant and, with his observations, he believes the defendant is the driver of the vehicle. He checks the defendant's license status and finds he's under suspension.
10. As such, Officer Carpentier developed reasonable suspicion based upon specific articulable facts, taken together with rational inferences from those facts, that the defendant was the driver of the vehicle, that he's driving under suspension and engaged in criminal activity. The stop was proper.
11. The defendant's cites to RSA 236:130 is a misnomer. Our Supreme Court has not taken the position argued by the defendant. His motion places significant focus on State v. O'Neill, 2007 N.H. Super. LEXIS 2 (April 2007), while failing to note that O'Neill is a superior court case. O'Neill is in no way binding or controlling on the matter and issue here. Our Supreme Court has not taken the position argued by the defendant, who relies upon one prior opinion of a superior court judge.
12. Officer Carpentier took steps that go beyond the scenario set forth in Richter. This was not just a traffic stop of a vehicle because the registered owner had a suspended license. This stop came after Officer Carpentier determined the defendant was in fact the driver, and that his license was suspended. This was a stop made with reasonable suspicion and, as such, the defendant's motion must fail.

WHEREFORE, the State moves this Honorable Court to:

1. Deny the motion to suppress; and
2. Grant any other relief that is just.

RESPECTFULLY SUBMITTED

By the State,

/s/ Jason B. Grosky
Prosecuting Attorney
Salem Police Department
9 Veterans Memorial Parkway
Salem, NH 03079
893-1911

AFFIDAVIT

I hereby assert the information contained above is truthful and accurate based upon my review of Officer Carpentier's police report and the applicable case law and statutes.

/s/ Jason B. Grosky

CERTIFICATE OF SERVICE

A copy of this pleading was forwarded by email to Attorney Dixon.

/s/ Jason B. Grosky

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

10th Circuit - District Division - Salem
35 Geremonty Dr.
Salem NH 03079

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

NOTICE OF DECISION

**SALEM POLICE DEPARTMENT
9 VETERAN'S MEMORIAL PARKWAY
SALEM NH 03079**

Case Name: **State v. JUAN ALBERTO MONEGRO-DIAZ**
Case Number: **473-2020-CR-01612**

Enclosed please find a copy of the Court's Order dated March 10, 2021 relative to:
Order

March 10, 2021

Kathleen E. Tripp
Clerk of Court

(473641)
C: Simon Dixon, ESQ

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: 10th Circuit - District Division - Salem

Case Name: State v. Juan Monsegro-Diaz

Case Number: 473-2020-CP-1162
(if known)

ORDER

In the matter of

For the reasons presented at the Court on
the record on March 10, 2021, the Defendant's motion
to suppress is GRANTED. SO ORDERED.

Recommended:

Date

Signature of Marital Master

Printed Name of Marital Master

So Ordered:

I hereby certify that I have read the recommendation(s) and agree that, to the extent the marital master/judicial referee/hearing officer has made factual findings, she/he has applied the correct legal standard to the facts determined by the marital master/judicial referee/hearing officer.

Date 3/10/21

Signature of Judge

Printed Name of Judge R. STEPHEN

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SALEM DISTRICT COURT
2020-CR-1612

STATE OF NEW HAMPSHIRE

v.

JUAN ALBERTO MONEGRO-DIAZ

STATE'S MOTION TO RECONSIDER

NOW COMES the State of New Hampshire, by and through the Prosecution Division of the Salem Police Department, which states as follows in support of its Motion to Reconsider:

1. Following a hearing conducted March 10, 2021, the Honorable Court (Stephen, J.) granted a defendant's motion to suppress the traffic stop in this matter. The State brings this motion to reconsider, positioning that the Court misapprehended the facts and/or law and requesting that the Court reverse its decision.
2. Salem Police Officer Michael Carpentier was the lone witness to testify in the suppression hearing. The matter concerned his stop of the defendant's vehicle in Salem on August 18, 2020. The question for the Court concerned whether Officer Carpentier had reasonable suspicion the defendant was committing an offense to justify stopping his vehicle.
3. On a Motion for Reconsideration the moving party shall state, with particularity, points of law or fact that the court may have overlooked or misapprehended. N.H. Rules of Criminal Procedure, Rule 43(a). The State asserts the Court overlooked or misapprehended facts or law leading to its granting the motion to reconsider.

RELEVANT FACTS

4. Officer Carpentier testified as to the following sequence preceding his stop of the defendant:
 - a) Using the mobile data terminal (MDT) in his cruiser, he ran the license plate number of a Toyota in traffic;
 - b) The check showed the vehicle was registered to a middle-age woman. The driver was a male;
 - c) Officer Carpentier ran the female registered owner's name through the Salem Police records database. There, he learned that a vehicle registered to her was driven by the defendant a year earlier in a DUI offense;¹

¹ The State acknowledges it erred in its "Objection to Motion to Suppress" when it noted the defendant was driving the same vehicle a year earlier when he was arrested for DUI. This was a misstatement by the State. When he

- d) He then looked up that male's name in the Salem Police database. He reviewed a booking photo of the defendant from his 2019 DUI arrest in Salem;
- e) He ran a motor vehicle record search on the defendant and received a response instructing that the defendant's New Hampshire license/driving privilege was under suspension;
- f) That Officer Carpentier continued to observe the male driver as they continued in traffic, seeing his appearance in mirrors, and seeing a side profile during turns. He compared his observations of the driver and the 2019 DUI booking photo and determined the male driver was in fact the defendant. Given the defendant's booking photo he reviewed, and his visual observations made of the driver, Officer Carpentier indicated he did not rely upon physical descriptors of the defendant prior to making the stop; and
- g) He stopped the vehicle and identified the driver as the defendant.

AUTHORITY & ARGUMENT

5. The real question here is when, in the Constitutional sense, was there police action that impacted the defendant's rights.
6. The first issue the Court took up was Officer Carpentier running the license plate of the vehicle driven by the defendant. The Court found that was proper, and is authorized under State v. Richter, 145 N.H. 640 (2000)².
7. Next concerns the investigation performed by Officer Carpentier, and whether the information he culled, coupled with his training and experience, provided him with reasonable suspicion to justify stopping the vehicle driven by the defendant.
8. In order for a police officer to undertake an investigatory stop, an officer must have a reasonable suspicion based on specific articulable facts taken together with rational inferences from those facts that a particular person stopped has been, is, or is about to be engaged in illegal activity. State v. Hight, 146 N.H. 746 (2001); State v. Vadnais, 141 N.H. 68, 70 (1996); *see also* Terry v. Ohio, 392 U.S. 1, 20-21 (1968). We have applied the Terry standard to motor vehicle stops. Hight, at 748; *see* State v. Pellicci, 133 N.H. 523, 528-29 (1990). A traffic stop is lawfully initiated when it is based on an officer's reasonable suspicion of a traffic violation under the New Hampshire motor vehicle code. State v. McBreairty, 142 N.H. 12, 15 (1997).

testified as to this stop, Officer Carpentier corrected his answers and explained he did not know whether the defendant in this stop was driving the same vehicle he drove in the DUI arrest. Rather, that in this investigation, Officer Carpentier ran the registration for the suspect vehicle, identified the female owner, ran her name in Salem Police records and learned a vehicle registered to her was driven by the defendant when he was arrested for DUI in 2019. Officer Carpentier was not involved in the 2019 DUI arrest.

² Where the Court found the officer needed no reason to search the registration of any vehicle, the State will not provide greater focus on it here. However, it incorporates by reference the arguments and reasoning of its underlying Objection.

9. A police officer may make an investigative stop when he has reasonable suspicion that the person had committed, was committing, or was about to commit a crime. State v. Pellicci, at 528-529. The police officer must “be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” State v. Brodeur, 126 N.H. 411, 415 (1985).
 10. To determine the sufficiency of an officer’s suspicion, the Court “can consider the articulable facts in light of all surrounding circumstances, keeping in mind that a trained officer may make inferences and draw conclusions from conduct that may seem unremarkable to an untrained observer.” State v. Joyce, 159 N.H. 440, 446 (2009). State v. McKinnon-Andrews, 151 N.H. 19, 26 (2004); *see also* State v. Turmel, 150 N.H. 377, 381 (2003) (“That observed activity could be consistent with both guilty and innocent behavior, however, does not mean that an officer must rule out innocent explanations before proceeding.”). “The facts which are a sufficient basis to support an investigatory stop need not necessarily reach the level of those needed to support an arrest,” State v. Oxley, 127 N.H. 407, 411 (1985), or a finding of probable cause. *See* State v. Kennison, 134 N.H. 242, 247 (1991); *see also* State v. Jaroma, 137 N.H. 562, 567 (1993) (“When determining whether the police had probable cause to arrest, the court should review ‘reasonable probabilities and not the amount of evidence required to sustain a conviction or to make out a ‘prima facie’ case.’ ” (quoting State v. Birmingham, 122 N.H. 1169, 1172 (1982)) (emphasis added).
 11. Part I, Article 19 of the New Hampshire Constitution protects the defendant against unreasonable seizures. N.H. Const. Pt. 1, Art. 19; State v. Morrill, 169 N.H. 709, 715 (2017). “A traffic stop is a ‘seizure’ even though the purpose of the stop is limited and the resulting detention quite brief. Id. at 715.
- A. Officer Carpentier’s observations that the defendant was violating RSA 263:64 was sufficient reasonable articulable suspicion to conduct a motor vehicle stop.**
12. Officer Carpentier made multiple, investigative steps prior to stopping the defendant’s vehicle. First is that he observed a moving vehicle on the roadways of Salem. He observed a male driver. He ran the plate number and found the vehicle was registered to a middle-aged woman. From his cruiser computer, he checked the woman’s name in a Salem Police in-house database and found a vehicle registered to her was used a year earlier by a Juan Monegro-Diaz (the defendant), who was arrested for DUI. Using the database, he viewed the Monegro-Diaz booking photo from the 2019 DUI arrest. He observed the male driver, watching the vehicle’s mirrors and watching him as his vehicle made turns. He determined the driver was in fact Monegro-Diaz, the defendant. He ran the defendant’s motor vehicle record and found his New Hampshire license/driving privilege remained suspended from a 2019 administrative per se suspension. Officer Carpentier testified that he was “confident” the defendant was the driver. He stopped the vehicle for a violation of RSA 263:64 (Driving After Revocation or Suspension) and identified the defendant as the driver.
 13. The question is whether Officer Carpentier acted with reason to suspect the driver was committing an offense. Did all of the information culled by Officer Carpentier add up to reasonable suspicion justifying the stop of the vehicle driven by the defendant?

14. The State asserts that yes, Officer Carpentier acted with reason to suspect the driver was operating under suspension. He saw the defendant driving. He undertook investigative steps to identify him, including viewing a mugshot of the defendant taken a year earlier and comparing that to the driver he had eyes on. He ran the defendant's motor vehicle record and learned he was under suspension. Prior to making the stop, he identified the driver and confirmed he was under suspension. When the blue lights turned on and the defendant was pulled over, that was a State action seizing the defendant and implicating Part I, Article 19 of our state constitution. That's the point requiring that Officer Carpentier had a reasonable suspicion the defendant was committing an offense justifying the stop of his vehicle.
15. As the Court (Stephen, J.) reasoned through its analysis in this matter, it repeatedly credited Officer Carpentier and his testimony. Yet the Court, more than once, expressed that "I still don't like" how Officer Carpentier's looking up the registered owner provided him with the name of the defendant, where in this case, the vehicle in question was not the same vehicle belonging to the registered owner and used by the defendant a year earlier in his DUI arrest. "Salem Police Department connected him to a vehicle for a prior incident when he wasn't in that motor vehicle. There was a disconnect in the system, but it connected it anyway. Is that search appropriate?" the Court reasoned aloud.
16. The State argued these were all appropriate, investigative steps. The Court acknowledged the same, noting "the officer did nothing improper" and "I don't think the officer did anything wrong." The Court expressed its difficulty was that the defendant was somehow tied to this car. "Something jumps out at me as wrong", the Court stated. The State went back over Officer Carpentier's testimony, that his search of this registered female owner showed the defendant was previously driving a vehicle belonging to her in a 2019 DUI arrest. That's what caused him to look into and ultimately identify the defendant as the driver.
17. After hearing the suppression hearing testimony, the Court inquired whether it could place this matter on file (POF) without a finding. It also asked whether it could take judicial notice that it had just, earlier on the same day, convicted the defendant of the underlying Aggravated DUI offense. The State asserted its objection to a POF, and asked the Court to decide the suppression issue.
18. In granting the suppression motion, the Court stated that Officer Carpentier used appropriate investigative tools to identify the defendant as the driver, yet he acted with enough reasonable suspicion to stop the vehicle. The Court cited arguments about identification, the defendant being seated in a vehicle and the officer not knowing whether he was wearing a mask. The question of whether the defendant wore a mask was not referenced in the police report, and where this stop was one based on identity, its reasonable to conclude the officer never mentioned a mask because the defendant was not wearing one. In any event, Officer Carpentier observed activity which could be consistent with both guilty and innocent behavior. The case law does not require him to rule out all innocent explanations before making the stop. At the point the stop is made, the matter is going one of two ways – either the driver is the defendant, or he's not, and if he's not the defendant and he's a lawful driver, he's soon on his way.

19. The State asserts there was ample suspicion, and suspicion that was reasonable, for Officer Carpentier to stop the vehicle. He was not required to act with probable cause to effectuate a traffic stop, or to prove beyond reasonable doubt that the defendant was the driver. Was his act of stopping the vehicle based on suspicion that was reasonable, sensible, logical? Yes. He properly identified the defendant as being the driver and that he was under suspicion. He identified that the defendant was driving a vehicle belonging to this same registered owner the year before when he was arrested for DUI. This occurred before he activated his blue lights.
20. The State asserts this would have been a proper stop under Part I, Article 19 even if Officer Carpentier did not identify the defendant prior to the stop. If he viewed no booking photo but knew the male defendant was stopped driving a different vehicle owned by the woman a year earlier, and that he was presently under suspension - - that would be a proper basis to stop the vehicle and inquire as to the identify of the male driver.
21. As such, the State moves the Court to reconsider its decision in this matter and reverse its granting of the motion to suppress.

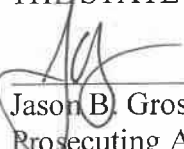
WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Reconsider its order and instead deny the motion to suppress; and
- B. Grant such other and further relief as justice may require.

Respectfully submitted,

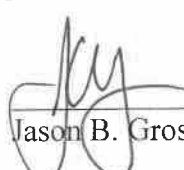
THE STATE OF NEW HAMPSHIRE

Dated: 19th March 2021


 Jason B. Grosky
 Prosecuting Attorney, #19451
 Salem Police Department
 9 Veterans Memorial Parkway
 Salem, NH 03079
 (603) 893-1911

AFFIDAVIT / CERTIFICATE OF SERVICE

I, Jason B. Grosky, attest that the information and statements listed above are based upon its review of a recording of the suppression hearing and the applicable rules and law. Further, a copy of this pleading was forwarded to Simon Dixon, Esq.


 Jason B. Grosky

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

10th Circuit - District Division - Salem
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NOTICE OF DECISION

**SALEM POLICE DEPARTMENT
9 VETERAN'S MEMORIAL PARKWAY
SALEM NH 03079**

Case Name: **State v. JUAN ALBERTO MONEGRO-DIAZ**
Case Number: **473-2020-CR-01612**

Enclosed please find a copy of the Court's Order dated April 07, 2021 relative to:
Order on Motion for Reconsideration

Hearing notice to follow

April 08, 2021

Kathleen E. Tripp
Clerk of Court

(473641)

C: Simon Dixon, ESQ

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

ROCKINGHAM COUNTY

10TH CIRCUIT – DISTRICT DIVISION – SALEM

**State, Plaintiff v. Juan Monegro-Diaz, Defendant
Docket No. 473-2020-CR-01612**

ORDER ON MOTION FOR RECONSIDERATION

On March 10, 2021, the Court granted a Motion to Suppress on the bench setting forth its reasons in a colloquy with the parties. The State has filed a Motion to Reconsider. In the Defendant's Objection to the State's Motion to Reconsider, the Defense submits that the Court found the Defendant not guilty of the charge of Operating after Revocation. This is not accurate as the Court merely granted the Motion to Suppress.

On the Motion to Reconsider, the State quotes the Court in expressing its concerns of the facts involving the matter at hand. In Paragraph 18, the State indicates that the Court stated there was enough Reasonable Suspicion for the stop. This may or may not be a typo on the part of the State. Notwithstanding, the Court specifically recalls indicating in Court that there was not an articulable suspicion for the stop in granting the Motion to Suppress.

To make a clear record, the Court sets forth the ultimate basis of the decision that it attempted to make clear in court during the colloquy with the parties:

The Court does not find under the totality of the circumstances (the car that was pulled over was not unregistered or under suspension, there was no observations of motor vehicle violations, there was not enough evidence presented to establish an identity of the Defendant behind the wheel) that the stop rose to the level of an articulable suspicion to make the stop consistent with Part 1, Article 19 of the State Constitution and the Fourth Amendment of the United States' Constitution.

For those reasons, the Motion to Reconsider is respectfully denied.

So Ordered.

April 7, 2021

Date



Judge Robert S. Stephen