THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

Docket Number: **2022-0253**

STATE OF NEW HAMPSHIRE V JULIE HELLINGER

APPELLANT'S BRIEF

On Appeal from the 10th Circuit Court-District Division-Salem

Julie Hellinger
By his counsel:

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(both on the brief and orally)

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TABLE OF AUTHORITIES

CASES

STATUTES

None.

OTHER AUTHORITIES

None.

QUESTIONS PRESENTED

1. Did the trial Court err and/or abuse its discretion in denying the Defendant's Motion to Suppress and finding that the arresting officer had a reasonable articulable suspicion that the Defendant had committed, was committing or was about to commit a crime and thus was justified in conducting an investigatory stop of the Defendant's vehicle? (Issue was preserved as reflected in the trial Transcript starting at page 3; see also appendix page 3, motion to suppress)

STATEMENT OF THE CASE

On July 15, 2020, Officer Jeffrey Czarnec (hereinafter "Czarnec") of the Salem Police Department noticed the Defendant's vehicle on the side of the road and the Defendant outside her car looking at her rear tire. Czarnec pulled in behind the Defendant believing she required assistance because the Defendant's vehicle was broken down. Immdeiately as Czarnec pulled in behind the Defendant she began to drive away. Czarnec then activated his emergency lights and conducted a motor vehicle stop of the Defendant. The Appellant maintains that Czarnec lacked authority to stop her vehicle and doing so violated her rights pursuant to Part I Article 15 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF FACTS

Czarnec works for the Salem Police Department as a law enforcement officer. (Trans, P.12, L.21). On July 15, 2020 at about 6:30pm Czarnec was traveling on South Police Street in Salem, NH headed towards North Policy Street. (Trans, P.29, L.23). The speed limit on South Policy Road is 30 miles an hour. (Trans, P.53, L.14).

While driving by, Czarnec noticed a car parked on Red Roof Lane and a woman walk from the driver area of the vehicle to the rear of the vehicle and look at the rear passenger side tire. (Trans, P.31, L.3-7). She was walking not running. (Trans P. 32, L. 20). He did not observe her to be unsteady on her feet or have any problems walking. (Trans, P.58, L.9). Czarnec drove past red roof lane. (Trans P.30, L.15). Czarnec then did a "U-turn" then drove onto Red Roof Lane. (Trans P.30,L8) Czarnec pulled in behind the Defendant but did not activate any cruiser lights or sires. (Trans, P.36, L.10). Czarnec described the road where the Defendant had pulled over to a "safe road to pull over". (Trans, P.62, L.6). Czarnec testified that he pulled in behind the vehicle to provide assistance for a potentially disabled vehicle. (Trans, P.38, L.1-15). By the time Czarnec pulls

behind the Defendant she is already back in her vehicle. (Trans, P.36, L.23: P.38, L.19).

Czarnec testified that his intention in pulling behind the vehicle was to render assistance if the motorist needed it. (Trans p.60, L.14). He further testified that at that point, he did not suspect any criminal activity. (Trans p.60, L. 18) He states that he pulled over, "initially, it was to provide assistance, I guess, to community care take in case she needed help with whatever she was checking out". (Trans P. 39, L.3) Yet, Czarnec admits that when the vehicle pulls away, he knew the vehicle was then operational. (Trans P.39, L.16; P.45, L.20)

As soon as Czarnec pulls in behind the Defendant, the vehicle begins driving. (Trans, P.38, L.23). Czarnec had not exited his cruiser when she pulled away. (Trans, P.62, L.13). The Defendant did not chirp her tires or speed in any way. (Trans, P.58, L.18-23). Czarnec admits that he had not indicated in any way to the Defendant that he was asking her not to pull away. (Trans, P.60, L.7). At this point Czarnec activates his blue lights and attempts to stop the vehicle. (Trans, P.40, L.20).

Czarnec states that the reason he pulled the vehicle over at that point was, "Because at that point, I knew it wasn't disabled, so it was stopped in the roadway, and due to her basic behavior, basically flight upon appearance". (Trans, P.44, L.20). Conversely, Czarnec testified that the Defendant was 100% free to pull away and that he hadn't indicated in any manner that he was asking her not to pull away. (Trans, P.60, L.4) Czarnec also testified that did not suspect any criminal activity when he activated his emergency lights. (Trans, P.106, L.22-25). Specifically, Czarnec was asked:

> Q: What crime did you believe the Defendant had committed, was committing, or was about to commit when you activated your blue lights?
> A: No crime. (Trans, P.106, L.22-25).

The Defendant was stopped on Red Roof Lane on which is also found the Red Roof Inn. (Trans P. 31, L. 3) Czarnec could not recall how far the Red Roof Inn was from the motor vehicle stop. (Trans. P.67, L.21) . Czarnec described the Red Roof Inn as "…a motel. It's a little seedy. We deal with a mix of people there. there is frequent crime that occurs." (Trans, P.19, L.9). Meanwhile, Czarnec testified that there are a number of other business on Red Roof Lane. (Trans, P.56, L.12). Czarnec also admitted that he had no idea where the Defendant was headed on Red Roof Lane (Trans, P.56, L.5) and that he had no information that the Defendant was ever at the Red Roof Inn. (Trans, P.56, L.6). After stopping her, Czarnec never even asked the Defendant if she came from or was going to, the Red Roof Inn. (Trans, P.59, L.9-18).

Czarnec approached the driver's window and requested her license and registration. (Trans, P.49, L.2). Czarnec then asks the Defendant to step out of the vehicle. (Trans, P.49, L.19). He did so because the Defendant had bloodshot eyes, "evasive behaviors when he went to pull her over", and "furtive" movements in the vehicle. (Trans, P.49, L.21). When asked to define "furtive", Czarnec defined it as meaning, "basically quick unnecessary movements". (Trans, P.63, L.21). When asked what the "evasive" behaviors were, he stated the fact that she pulled out when he pulled in behind her. (Trans, P.60, L.1). He determined this was "evasive even" though he acknowledged:

1. she was 100% free to pull away. (Trans, P.60, L.4).
2. He had not indicated in any manner that he didn't want her to pull away; (Trans, P.60, L.7).
3. He didn't suspect any criminal activity; (Trans, P.60, L.18).
4. He didn't have his emergency lights on. (Trans, P.38, L.19).

During the course of his investigation, Czarnec learned that the Defendant's license had been suspended and arrested her for driving with a suspended license. (Trans, P.94, L.23).

SUMMARY OF ARGUMENT

Law enforcement lacked a reasonable articulable suspicion that the Defendant had committed, was committing or was about to commit a crime to justify a motor vehicle investigatory stop.

ARGUMENT

1. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

The investigatory stop of the Defendant's vehicle violated her rights to be free from unreasonable search and seizure pursuant to Part I Article 19 of the New Hampshire Constitution and the Fourth Amendment to the United States Constitution applicable to the States via the Due Process Clause of the Fourteenth Amendment.

"A warrantless search is per se unreasonable and invalid unless it comes within one of a few recognized exceptions [to the warrant requirement]." *State v. Cora*, 170 N.H. 186, 190 (2017) (quotation omitted). "An investigatory stop based upon reasonable suspicion is such an exception." *State v. McInnis*, 169 N.H. 565, 569 (2017). "A traffic stop is a 'seizure' … even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Morrill*, 169 N.H. 709, 715 (2017) (quotation omitted). "For a police officer to undertake an investigatory stop, the officer must have reasonable suspicion, based upon 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. Joyce*, 159 N.H. 440, 446 (2009) (quoting *State v. De La Cruz*, 158 N.H. 564, 569 (2009).

In deciding whether the officer conducted a lawful investigatory stop, we conduct a two-step inquiry: first, we determine when the defendant was seized; second, we determine whether, at that time, the officer possessed a reasonable suspicion that the defendant was, had been or was about to be engaged in criminal activity. *State v. Beauchesne*, 151 N.H. 803, 809, 868 A.2d 972 (2005).

A reasonable suspicion must be more than a hunch. See *State v. Berrocales*, 141 N.H. 262, 265 (1996). The articulated facts "must lead somewhere specific, not just to a general sense that this is probably a bad person who may have committed some kind of crime." *State v. Vadnais*, 141 N.H. 68, 70 (1996). The officer's suspicion must have a particularized and objective basis in order to warrant that intrusion into protected privacy rights. *State v. Roach*, 141 N.H. 64, 66 (1996). "However, in analyzing facts that would support reasonable articulable suspicion, it is the particular and not the general that counts..." *State v. Pepin*, 920 A.2d 1209, 155 N.H. 364 (N.H. 2007)

Here, the officer first pulled behind the vehicle because he believed the driver may need assistance. (Trans. P. 60, L.14) Czarnec did not suspect any criminal activity when he pulled in behind her. (Trans. P. 60, L.14). Where the vehicle was pulled over was described as a “safe” place to pull over by Czarnec. (Trans, P. 47, L. 22 and P.62, L. 6). The only observation made by Czarnec that lead him to decide to pull the vehicle over was that it pulled out after he pulled in behind it, which he called, “flight upon appearance”. (Trans P. 44, L. 18).

The Defendant was perfectly within her rights to pull away. Her legal action of pulling out into the roadway and driving off cannot form the basis of the Officer’s reasonable articulable suspicion because it is not indicative of any criminal activity. It’s perfectly reasonable that the Defendant didn’t even see the officer pull in behind her. He did not have his lights or audible siren on. Furthermore, she clearly didn’t need any assistance so there was no reason for her to interact with law enforcement. The State basically forwards the theory that any

time law enforcement appears to want to communicate you, you must stop and talk to them or else you are fleeing and thus can be seized. That is not the law.

Czarnec did not know whether she saw him. (Trans P. 33, L. 23). The Defendant was already moving back towards her driver's seat before Czarnec even turns around onto to proceed onto Red Roof Lane. (Trans., P. 3, L. 5). Hence, she was planning on pulling out *before* the officer is even visible to her. This is not "flight" from law enforcement. The vehicle was running when he pulled in behind her. (Trans. P.40, L. 8). The Defendant pulls out at the same time as Czarnec pulls in. (Trans., P.38,L.23). So, it's not as if she has plenty of time to notice that he was pulled in behind her.

When pulling out the Defendant didn't speed off or chirp her tires. (Trans P. 58, L.13). Czaenec described her as being "evasive". (trans. P. 59, L. 24). However, the entirety of that conclusion was based solely on the fact that she pulled out as he pulled in. (Trans. P.60, L.1). There was no testimony of an unnatural acceleration. (Contrast with, *State v Oxley*, 127 NH 407(1985), where there was "unnatural acceleration"). In no way did Czarnec convey that he wanted her to not pull out. (Trans. P. 60, L.7) It wasn't as if Czarnec met eyes with the Defendant and saw her rush back to her car. Czarnec testified that he saw her look at her tire and head back to the driver's seat. Then the next time he sees the vehicle, the Defendant is already in the car behind the wheel. There is no evidence that she was rushing in any way due to his presence. The facts simply suggest that a motorist stopped to check if she had a flat tire, realized it was not flat, then began to drive off.

The trial Court found analogous the facts in *State v Oxley*, 127 NH 407(1985). In *Oxley*, at about 2:30 in the morning, the officer noticed a tan Saab traveling on Webster street with furniture in the back of the car "sticking out like it was going to fall out onto the road". *State v Oxley*, 127 NH 407(1985). The officer also testified that the, "area had been getting hit pretty heavily with burglaries in the weeks just before this incident". *Id*. The Saab turned onto a side road and

"unnaturally accelerated". *Id*. The *Oxley* Court ruled that the officer's concern that the furniture may fall into the roadway and endanger other drivers was sufficient alone to justify the stop. *Id*.

It appears that the trial Court likened Czarnec's concern that the defendant's vehicle may be disabled to the offer's concern for motorists in *Oxley*. The difference however, is that when the Defendant pulls out, this concern is dispelled while the furniture concern in *Oxley* is ever present. (Trans. P.45, L.5) The concern that the Defendant's vehicle may be disabled was dispelled ***before*** Czarnec initiates his investigatory stop. Furthermore, unlike in *Oxley*, where the Defendant's manner of driving away from the officer was "unnatural", the Defendant here did nothing unnatural in the manner in which she pulled away.

The trial Judge's decision was based on the premise that pulling out after a police officer pulls in creates reasonable suspicion that the person is committing a crime. This goes too far. The officer, prosecutor and judge all conceded that the Defendant was in fact free to leave when she did:

Officer Czarnec:

Q: You acknowledge do you not, that she was 100 percent free to pull away?

A: Yes (Trans P. 60, L.4)

Prosecutor, Jason Grosky:

> "I agree with some of what Attorney Sakellarios said. She had an absolute right to pull away. That was her Constitutional right. No argument from the State about that. She was free to leave. She was free to pull away." (Trans. P.77,L.21)

Judge Lown:

"And the Defense is quite correct that the Defendant had the right to do that. The Defendant had the right to pull out. There was no reason why she had to [stay] there. (Trans.P.81,L.22)

Furthermore, the trial Court's recitation of the legal standard at play was unclear and appeared to change during the hearing suggesting that reasonable suspicion of a crime was not even needed. At one point undersigned and the Court engaged in the following discussion:

THE COURT: Well, I don't think the witness has to identify a criminal activity. The fact that she pulled away -- and I guess the question is was it reasonable for this police officer to assume that the Defendant had seem him and pulled away, okay?

MR. SAKELLARIOS: You're changing the standard. You're changing the standard. Of course it's reasonable. But that's not what the standard is to stop someone and violate their rights to be free unreasonable search and seizure. He has to have a reasonable suspicion that a crime is being committed, not just anything. What is she doing, wire transfer fraud? I mean, it has to be some specific evidence that there's a crime being committed. There's none. You can't just say it was reasonable. That's not the inquiry at all. Reasonable suspicion from specific, articulable facts that a crime was being committed.

What facts? Just that she pulled out. That's it. You even said I'm not even getting to the high crime area, just that she pulled out.

THE COURT: Right. And the suspicion was that she was being evasive. Now, I understand that you have an argument against that which is that she didn't see him, okay? But is it reasonable for the police officer to believe that she was being evasive? Not is it -- not was she being evasive or not whether she had committed a crime,

but was is reasonable for this officer under these circumstances to believe that she might be evasive.

MR. SAKELLARIOS: You're comingling all standards, Judge, respectfully. If she's being evasive, that doesn't give him the right to pull her over. That does not give him the right to pull her over. It has to be that he reasonable suspected from articulable facts that she was committing a crime.

THE COURT: All right.

MR. SAKELLARIOS: So in *Pepin*, which I gave you, they say, the fact that you're in a high-crime area alone is enough. So the fact that she's being evasive perhaps, if you find that to be evasive, which I disagree with. If that's true, that's not enough. Just this alone is evasive?

THE COURT: I'm not finding that it was evasive. I'm finding that it was reasonable for Ofc. Czarnec to think that it was evasive. And it's a low bar on a motion to suppress and on a stop or a seizure. The question is was it reasonable, that's all. Was it reasonable. I do note your objection.

The fact that Czarnec reasonably believed that the Defendant was being "evasive" does not give him justification to stop her vehicle. "Evasiveness" is not a crime in New Hampshire. The Court believed that the Officer doesn't have to "identify a criminal activity" and suggests that evasiveness by its nature, is sufficient to create a reasonable belief of criminal activity.

Thus, the Court articulates that the Defendant's action in pulling out constituted "flight" from law enforcement, and that, standing alone, flight is *per se* tantamount to reasonable suspicion. See *Florida* v. *Royer*, 460 U.S. 491 (1983), (…when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business

and any "refusal to cooperate", without more, does not furnish the minimal level of objective justification needed for a detention or seizure.)

Most courts that have considered the issue, have determined that flight alone does not constitute reasonable suspicion, *Commonwealth v Perry*, 62 Mass.App.Ct. 500 (2004)("flight alone does not create reasonable suspicion"); *State* v. *Hicks*, 241 Neb. 357, 488 N. W. 2d 359 (1992) (flight is not enough); *State* v. *Tucker*, 136 N. J. 158, 642 A. 2d 401 (1994) (same); *People* v. *Shabaz*, 424 Mich. 42, 378 N. W. 2d 451 (1985) (same); *People* v. *Wilson*, 784 P.2d 325 (Colo. 1989) (same); *People v. Walker*, 149 A.D.3d 1537, 52 N.Y.S.3d 782 (N.Y. App. Div. 2017)("flight alone is insufficient to justify pursuit...); *U.S. v Bonner*, 363 F.3rd213(2004)(Flight alone is not enough to justify a police stop);

First of all, the Defendant's action in pulling out shouldn't be considered flight. There was nothing about her actions in pulling out that suggests she was trying to flee. She was already in the process of returning to her driver's seat in order to pull out before Czarnec even turned onto Red Roof Lane. Her actions were consistent with simply pulling back into traffic after confirming she did not have a flat tire which is what every single motorist would do. If indeed her act of pulling away constitutes flight, it should not have amounted to reasonable suspicion for Czarnec to initiate an investigatory stop. This is because the mere act of fleeing, or some other furtive gesture, is an ambiguous act. *Miller v. United States*, 357 U.S. 301, 311, 78 S.Ct. 1190 1196, 2 L.Ed.2d 1332 (1958); *Alberty v. United States*, 162 U.S. 499,511, 16 S.Ct. 864, 868, 40 L.Ed. 1051 (1896); *People v. Superior Court*, 3 Cal.3d 807, 817-18, 478 P.2d 449, 455, 91 Cal.Rptr. 729, 734-35 (1970).

The Court acknowledges that it did not even reach the issue of whether or not the area was a high crime area or not. (Trans P. 83. L. 16). Rightfully, the high crime area argument should not have factored into the Court's analysis. Czarnec could not even state how far away the Defendant's stopped vehicle was from the

Red Roof Inn. (Trans. P.8, L.21). The neither the road, Red Roof Lane, nor the area around the hotel, were described as high Crime areas, only the hotel itself. The officer had no indication that the Defendant was going to or had been to the Red Roof Inn. (Trans., P.56, L.3). It's not as if the Defendant was actually at the Red Roof Inn when Czarnec pulled in behind her. She's only on the same road as the hotel. Where the Defendant pulled over to check her tire was simply a "safe place" to pull over. There are a number of other businesses on Red Roof Lane. (Trans., P.56, L.9). It's error to extrapolate that all business on Red Roof Lane are considered a high crime area and that driving on the road itself places one in a high crime area. Czarnec never even asks the Defendant if she was going to the Red Roof Inn or had come from the Inn at any point in his investigation. (Trans., P.59, L.9; P.59, L.19).

Also, Judge Lown confused when the seizure occurred. The seizure occurs when the officer puts on his emergency take down lights. Yet, Judge Lown borrowed facts that occur after the lights are ignited to justify the seizure. He states:

> "But the question is really whether Ofc. Czarnec had a reasonable suspicion that something was going on in that she was pulling out after he was behind her. Was it reasonable to suspect something? I find that it was. And then she didn't stop unknown period of time. He put his blue lights on, and she didn't stop for what Ofc. Czarnec calls an unusual period of time. That further gives Ofc. Czarnec a reasonable suspicion. All it has to be is reasonable. It's a very low bar. He's thinking to himself probably, well, she must have seen me, she's pulling out. Now, I've got my blue lights on, she's not pulling over right away." (Trans.P.82, L.1)

The Trial Court erred in including post seizure facts of the Defendant continuing to drive after the emergency lights are ignited, in its

analysis of reasonable suspicion. The Defendant was seized when the officer initiated his take down lights. *State v. Francisco Perez*, 173 N.H. 251 (2020).(A traffic stop is a seizure.); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)("An interaction between a police officer and a citizen becomes a seizure, however, when a reasonable person believes he or she is not free to leave) See also, *State v. Riley*, 126 N.H. 257 (1985) (adopting the Mendenhall definition of seizure).

The fact that the Defendant allegedly continued to drive for a short time without pulling over should not have factored into the analysis of when reasonable suspicion was formulated. *State v. Beauchesne*, 151 N.H. 803, 868 A.2d 972 (N.H. 2004)("Under Part I, Article 19 of the State Constitution, a police officer must possess reasonable suspicion before taking an action that would communicate to a reasonable person that he or she is not free to leave.") .

The Court's reliance on *State v Brunelle* in denying the Defendant's motion to suppress was misplaced. *State v. Brunelle*, 145 N.H. 656 (N.H. 2000). In *Brunelle*, the Defendant's vehicle was disabled and being pushed off the highway when the officer arrived to render assistance. *Id*. First of all, the *Brunelle* Court states that it was, "doubtful that a seizure occurred here". *Id.* Then without deciding whether seizure occurred, the Court found the "seizure" was reasonable as part of law enforcement's community care taking function. *Id*. The *Brunelle* Court found that the Trooper was "not conducting a criminal investigation". *Id*.

Here, Czarnec was not community caretaking as he knew the vehicle was not disabled at the point he activated his take down lights. (Trans P.45, L20) He specifically testified that he initiated the stop because of "flight upon appearance", not to somehow force community care taking on a vehicle that didn't need it. (Trans, P.44, L.20). When the original reason for a community care-taking investigation is dispelled, so is the exception to the warrant requirement. See

generally, *State v Szczerbiak*, 148 NH 352(2002)(once the purpose of the stop is fulfilled, law enforcement needs additional reasons for the stop).

The Court said at the hearing, "There is no suspicion of a crime in *State v. Brunelle*. *Brunelle* was a disabled vehicle, and the police officer asked for identification. And that's basically what happened here. So, I'm going to deny the motion to suppress". (Trans. P83, L.12)

The problem with the Court's analysis is that this case is readily distinguishable from *Brunelle* because this is not a community caretaking case. Czarnec initiated the stop as part of a criminal investigation due to "flight upon appearance". The Court erred in concluding that reasonable suspicion of a crime was unnecessary here and that this circumstance was analogous to *Brunelle*.

CONCLUSION

The Appellant is entitled to have the trial Court **REVERSED** based upon the above enumerated errors of law and remanded for further hearings consistent with its orders, if necessary.

Respectfully submitted,
Julie Hellinger
By and through her attorneys

Date September 18, 2022

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REQUEST FOR ORAL ARGUMENT

Ms. Hellinger respectfully requests oral argument. The estimated time is fifteen (15) minutes. Olivier Sakellarios appears for Ms. Hellinger for the oral argument.

CERTIFICATION OF WORD LIMIT

I hereby certify that this brief is under the Court's word limit of 9,500.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served on all parties via the Court's efile system.

Dated: September 18, 2022

/s/Olivier Sakellarios
Olivier Sakellarios