

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

Docket Number: 2022-0253

STATE OF NEW HAMPSHIRE V JULIE HELLINGER

APPELLANT'S BRIEF ON INTERLOCUTORY APPEAL

On Appeal from the Rockingham County Superior Court

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CASES

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2. *State v McGurk*, 157 NH 765(2008)..... 4,8,9,10
3. *State v Hight*, 146 NH 746(2001)..... 9, 10
4. *People v Doke*, 171 P.3d 237 (Colo. 2007)..... 8, 9
5. *State v Gubitosi*, 152 N.H. 673(2005)..... 7

STATUTES

None.

OTHER AUTHORITIES

None.

QUESTIONS PRESENTED

1. For the “new crime” exception to the exclusionary rule, as articulated in *State v Panarello*, 157 NH 204 (2008) and *State v McGurk*, 157 NH 765(2008) to apply, must the new crime be “distinct and separate” from the illegal search/seizure and/or purged of the primary taint of the illegal seizure?

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. Immediately 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. Upon questioning, the Defendant is alleged to have given the officer a false name. She was accordingly charged with disobeying a police officer. 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. The Defendant believes that the exclusionary rule applies to her statements made to the arresting officer.

Citing *State v Panarello* and *State v McGurk*, the Rockingham County Superior Court (Ruoff, J.) ruled that, “the defendant’s alleged lie to the police about her identity came after the ‘stop’ and is, thus, not subject to exclusion”. Appendix p10. The Defendant moved to reconsider arguing that the act of lying about one’s identity after

being stopped is not “separate and distinct” from the illegal seizure and is not a crime committed against law enforcement and thus, not subject to the “new crime exception”. Appendix p. 11 The Court denied the motion to reconsider stating “...that this case is controlled by McGurk...”. Appendix p. 11

STATEMENT OF FACTS

The underlying facts surrounding the motor vehicle stop are laid out in the Appellant’s brief filed in her appeal from the 10th Circuit-District Division-Salem Court. That appeal has been consolidated with this appeal. Those facts were not recited in this brief as there was no evidentiary hearing and the trial Court “assumed without deciding” that the stop was illegal. However, the facts as laid out in the Appellant’s motion to suppress were as follows:

1. Officer Czarnec was driving on South Policy Street in the direction of North Policy Street on July 15, 2020 at 6:25pm. While driving he passed Red Roof Inn Lane on his left.
2. Officer Czarnec observed a 2006 Toyota Camry stopped on the right side of the Red Roof Lane. He watched a blond female walk from the driver’s side door to the rear passenger tire. He observed her to “quickly” check her tire and get back into the driver’s seat.
3. Officer Czarnec estimates that she was at the rear tire “under two minutes”. Transcript page 35.
4. Czarnec turns around and pulls into Red Roof Lane behind the defendant’s vehicle and does not turn on any of his lights or sirens to alert the motorist to his presence. Transcript page 36.

5. When he pulls behind the Defendant she was already in her driver's seat.
Transcript 36.
6. Czarneck states that "as soon as I pull in behind her, the vehicle stopped begins to drive forward". Transcript p 38.
7. Czarneck states that he pulled behind the vehicle, "... to render assistance, I guess, to community care take in case she needed help with whatever she was checking out". Transcript p 39.
8. Immediately as the car drives away Czarneck activates his emergency blue lights and stops the vehicle.
9. Czarneck testified that where the Defendant stopped to check her tire was, "...reasonably safe to pull over." Transcript p 47.
10. The Defendant was not cited for any traffic violations due to her being pulled over to the side of the road. Transcript page 58, 59.
11. Czarneck initiated the motor vehicle stop despite acknowledging that the Defendant was, "100 percent free to pull away". Transcript p 60.
12. Czarneck acknowledged that at the time he pulled behind the Defendant he, "didn't suspect any criminal activity". Transcript p 60.
13. Czarneck never exited his cruiser and testified that as soon as the vehicle pulled back into the roadway, he activated his emergency take down lights.
14. Czarneck testified as followed regarding his belief that a crime had been committed when he activated his lights:

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.

[Transcript p. 106]

15. During the motor vehicle stop, Ms. Hellinger made several incriminating statements and Czarneck gathered evidence that resulted in the charge of disobeying a police officer.

SUMMARY OF ARGUMENT

The trial Court erred in concluding that the exclusionary rule did not apply simply because the alleged crime was committed after the allegedly illegal stop. This court's prior decisions indicate that there must be a finding that the new crime is sufficiently separate and distinct so as to purge the taint of illegality and that the new crime must be a crime that is committed against law enforcement.

ARGUMENT

1. **THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN CONCLUDING THAT THE NEW CRIME EXCEPTION, ADOPTED BY THIS COURT, EXCEPTS FROM THE EXCLUSIONARY RULES APPLICATION, ALL CRIMES COMMITTED AFTER AN ILLEGAL SEIZURE SIMPLY BY VIRTUE OF CHRONOLOGY.**

This Court's review of this matter, is *de novo* except as to any controlling facts determined by the trial Court, of which there were none. State v Gubitosi, 152 N.H. 673(2005). The trial Court assumed without deciding that the motor vehicle stop in this case was illegal. The Court then concluded that simply because the Defendant's alleged lie to law enforcement came "after the stop", that it was not subject to the exclusionary rule. The Defendant argued that for the new crime exception to apply, there must be a finding that the criminal act must be sufficiently separate and distinct from the illegal seizure so as to purge the taint. The Defendant also argued that the new crime exception only applied to crimes against law enforcement.

This Court adopted the new crime exception in State of New Hampshire v Joseph Panarello, 157 NH 204 (2008). There, the Defendant responded to a police officer's unlawful entry into his home by pointing a gun at her. *Id.* In adopting the New crime exception, this Court was persuaded with the reasoning in People v Doke, namely, "the deterrent purpose of the exclusionary rule would not be served by applying it 'in cases where the accused has committed a crime against police officers in response to police misconduct'". *Id.* Quoting People v Doke, 171 P.3d 237 (Colo. 2007). The Court found this policy rational, "a persuasive reason for adopting the [new crime] exception to the exclusionary rule". *Id.*

Here, there was no crime committed against law enforcement. The Defendant is alleged to have simply given a false name when questioned by law enforcement. As such, the rationale forwarded in Panarello would not apply and as this offense was not a crime committed against law enforcement, it is not sufficiently separate and distinct from the

police misconduct so as to be purged of the primary taint. *Wong Sun v United States*, 371 US 471, 83 S.Ct. 407(1963).

Five months after *Panarello* was decided, this Court revisited the new crime exception and when the, “taint of a Part I Article 19 violation has been purged” in *State v McGurk*, 157 NH 765(2008). There, a Defendant destroyed suspected contraband (marijuana). *Id.* This Court pointed out that the illegal conduct was not committed during an active, illegal police search for evidence and was not committed while evidence was still in her possession. *Id.* Rather, this Court pointed out the destruction of evidence occurred after it had been reduced to the sole custody of law enforcement. *Id.*

The *McGurk* Court cites *Panarello* in its decision. Notwithstanding, its acceptance of the *Panarello* holding, the Court still goes through a process of analysis to determine whether the taint of a Part I Article 19 violation has been purged. *State v McGurk*, 157 NH 765(2008). The three factor test the McGurk Court lays out is 1)the temporal proximity between the police illegality and the [acquisition of evidence sought to be suppressed], 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct.” *Id.* quoting *State v Hight*, 146 NH 746(2001).

In adopting this “new crime” exception, the *Panarello* Court found the reasoning of the Colorado Supreme Court persuasive in *People v Doke*, 171 P.3d 237(Colo.2007). In *Doke*, the Defendant responded to an illegal entry into his home by law enforcement, by “menacing” them with a shotgun. *Doke*, at 238. The Colorado Supreme Court found that the exclusionary rule did not apply to that new crime because, “when Doke allegedly menaced the deputies with a shotgun, his independent and intervening criminal action dissipated the taint of the prior illegality. *Doke*, at 240. The Court further held that, “a

holding contrary to the one we reach today would effectively give the victim of police misconduct carte blanche to respond with any means, however violent.” *Id.*, at 241.

So the *Doke* Court’s holding is limited to new crimes *against* law enforcement. The *Panarello* holding similarly involved the pointing of a gun at law enforcement and so was a crime *against* law enforcement. Lastly, the *McGurk* holding involved a Defendant taking property from an officer that was in police custody. No where in any of these decisions does the holding state that any crime committed after an illegal search or seizure is immune from the exclusionary rule. In all three of these decisions, the Courts engaged in an analysis to determine whether the taint of the police misconduct had been purged. The holding of the Rockingham Superior Court interprets this Court’s decisions in *Panarello* and *McGurk*, to require simply that the new crime be committed after the illegal search or seizure to be excepted from exclusion. It summarized this Court’s holding in *Panarello* as “holding that a new crime committed in police presence purges the taint of any antecedent illegality”. Appendix p. 10. Thus the trial Court’s criteria for purging of antecedent illegality is not guided by the three part test articulated in *State v Hight*, rather only that the crime be “new” and “committed in police presence”.

The “new crime” doctrine and its application as an exception to the exclusionary rule, is not resolved simply by finding that the new crime occurred after the illegal seizure. The trial Court here erred in determining that incriminating evidence suggesting the Defendant disobeyed a police officer, was *per se* excepted from the exclusionary rule simply because of timing. It appears that this Court’s “new crime exception” only applies either to crimes committed *against* law enforcement or that are sufficiently separate and distinct so as to purge the taint of the illegal seizure. If the new crime was not committed

against law enforcement, then the Court must still conduct an analysis to determine whether the criminal act was sufficiently separate and distinct so as to purge the taint as laid out in *State v Hight*, 146 NH 746(2001).

CONCLUSION

The Appellant is entitled to have the trial Court's decision on the motion to suppress **REVERSED** and **REMANDED** for an evidentiary hearing to determine whether the evidence to be admitted at trial is sufficiently separate and distinct from the illegal seizure so as to be excepted from exclusion as a violation of the Defendant's rights under Part I Article 19 of the New Hampshire State Constitution.

Respectfully submitted,
Julie Hellinger
By and through her attorneys

Date December 5, 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.

CERTIFICATION OF DECISION BEING FILED

The written decisions in this matter are being filed in the appendix pursuant to Rule 16(i).

CERTIFICATE OF SERVICE

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

Dated: December 5, 2022

/s/Olivier Sakellarios
Olivier Sakellarios