

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **State v. Kevin A Whitney**
Case Number: **218-2017-CR-01679**

Enclosed please find a copy of the court's order of June 29, 2018 relative to:

Order on Defendant's Motion to Suppress.

July 03, 2018

Maureen F. O'Neil
Clerk of Court

(695)

C: Jennifer M. Haggar, ESQ; Kevin P. O'Keefe, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

KEVIN WHITNEY

Docket No. 218-2017-CR-01679

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Defendant Kevin Whitney stands charged with one count of possession of the controlled drug fentanyl. He moves to suppress all evidence obtained during a September 6, 2017 encounter with police, arguing that the evidence was obtained in violation of the State and Federal Constitutions. The State objects. On June 8, 2018, the Court held an evidentiary hearing on Defendant's motion. For the reasons that follow, Defendant's motion to suppress is **GRANTED**.

Facts

On September 6, 2017, at around 3:50 p.m., New Hampshire State Trooper John DeJesus was patrolling a portion of Route 93 North in Windham, New Hampshire. Trooper DeJesus, who was travelling north in his fully marked police cruiser, observed a vehicle also traveling north that did not appear to have an inspection sticker on the top center of the windshield. Specifically, Trooper DeJesus made this observation while he was driving past the left side of the vehicle. The vehicle then moved to the "far right lane," which was an exit only lane for the northbound exit 3 off-ramp. Trooper DeJesus slowed down, positioned his cruiser directly behind the vehicle, and activated his emergency lights.

After activating his emergency lights, Trooper DeJesus observed the driver and the front passenger, later identified as Defendant, turn toward each other "as if to communicate something." The vehicle did not reduce its rate of speed and continued toward the exit ramp. He also observed Defendant's entire body "shuffling" back and forth in the seat. In an attempt to obtain the driver's attention, Trooper DeJesus activated his "wig-wag" lights,¹ siren, and two white lights on the cruiser's light bar, but the vehicle continued toward the exit and did not show signs of slowing down. The vehicle eventually pulled over after continuing "down almost to the bottom of the" off-ramp. Trooper DeJesus explained that the vehicle traveled roughly one-half mile from the time he first initiated the traffic stop to when the vehicle actually stopped, and that there were multiple areas in which the vehicle could have pulled over on this stretch. He also explained that, while there was no other vehicles to his left or right during this time, there were vehicles in front of his cruiser and the suspect vehicle.

Once the vehicle came to a stop, Trooper DeJesus exited his cruiser, approached the driver's side of the vehicle, and made contact with the driver. The driver was unable to provide his license or the vehicle's registration, but provided his name and date of birth to Trooper DeJesus. During this period, Defendant, was "riffing" through the glove compartment looking for the registration. The driver explained that he did not initially pull over because he was unsure whether Trooper DeJesus was actually pulling his vehicle over. Trooper DeJesus noticed that Defendant's hands were shaking, he was sweating, and he would not look at the trooper. While the driver explained that the vehicle was registered in his name, he could not produce a registration.

¹ Trooper DeJesus explained that "wig-wag" lights are the two headlights on the cruiser.

Trooper DeJesus then asked where the pair was coming from and where they were going. The driver explained that they were coming from Lawrence, Massachusetts and headed toward Raymond, New Hampshire. Trooper DeJesus explained that, based on his training and experience, Lawrence was significant because it is a known area for purchasing drugs. The driver explained that he had picked up Defendant from work. Defendant further noted that he had been working all day at his landscaping job. Trooper DeJesus found this explanation odd because Defendant did not look "dirty," which the trooper associated with landscaping work. After speaking with the occupants, Trooper DeJesus returned to his cruiser and ran the driver's name and date of birth to confirm his identity. During this inquiry, Trooper DeJesus was provided with the height and weight associated with the name provided. Because it is not uncommon for persons to provide false names, Trooper DeJesus returned to the vehicle and asked the driver to exit the vehicle to confirm his height and weight. When Trooper DeJesus asked the driver where his license was, he replied that it was in another wallet. Trooper DeJesus was also able to confirm, during this conversation, that the vehicle had a "rejected" inspection sticker from May. Trooper DeJesus explained, however, that he ultimately determined that there was no issue with either the vehicle's registration or the driver's license.

While speaking with Trooper DeJesus outside of the vehicle, the driver explained that Defendant was his cousin. Although the driver could not provide the specific address from which he picked Defendant up, he explained that he picked him up from a house. After this discussion, Trooper DeJesus then approached Defendant, who was still seated in the front passenger seat. According to Trooper DeJesus, Defendant was

extremely nervous, and the trooper observed that Defendant's whole body was shaking. In an effort to determine whether the shaking was a medical issue, Trooper DeJesus asked if Defendant was taking any medications. Defendant confirmed that he was not. Trooper DeJesus then asked Defendant where the driver had picked him up in Lawrence. Defendant explained that the driver had picked him up from a gas station. In light of the inconsistency on their meeting in Lawrence, as well as with the other observations made, Trooper DeJesus asked Defendant to step out of the vehicle. Specifically, Trooper DeJesus explained that he requested Defendant to exit the vehicle because: (1) the pair was coming from Lawrence; (2) the vehicle did not immediately stop when he first initiated his lights; (3) Defendant made furtive movements; and (4) the lack of a cohesive story concerning where Defendant was picked up. According to Trooper DeJesus, there was roughly 7 to 8 minutes between the time the vehicle initially stopped to the moment he asked Defendant to exit the vehicle.

Trooper DeJesus explained that he asked Defendant to exit the vehicle because he wanted to "put the story together." Once Defendant exited the vehicle, Trooper DeJesus performed a pat-frisk for weapons at the front of the vehicle. Trooper DeJesus explained that, given the totality of the circumstances, he believed that it was "possible" that Defendant had items on his person that were dangerous. Specifically, Trooper DeJesus was concerned that, when the Defendant was moving about the vehicle prior to the stop, he was attempting to secret an item that could potentially harm the trooper. When Trooper DeJesus advised Defendant that he would perform the pat-down, Defendant immediately informed the trooper that he had a needle in his pocket. Defendant explained that the needle was uncapped and that he believed that the sharp

end was "sticking upward." In light of this information, Trooper DeJesus handcuffed Defendant, grabbed "special gloves" from his cruiser to protect his hands, and then removed the syringe. Trooper DeJesus observed that the syringe contained a liquid believed to be a narcotic drug. Defendant explained that he was a drug user and typically purchased a "gram" every morning. Trooper DeJesus placed Defendant inside of his cruiser and then asked the driver for consent to search the vehicle. A search uncovered no other drugs or drug paraphernalia. Defendant was then placed under arrest.

Analysis

Defendant argues that all of the evidence obtained during the September 6th traffic stop should be suppressed because it was obtained in violation of Part 1, Article 19 of the New Hampshire Constitution and the Fourth Amendment and Fourteenth Amendments of the United States Constitution. Specifically, Defendant asserts that Trooper DeJesus: (1) unlawfully expanded the scope of the stop by requiring Defendant and the driver to exit the vehicle; and (2) conducted an illegal pat-frisk of Defendant's person. Because Defendant invokes the protections of both the State and Federal Constitutions, the Court addresses his claims under the State Constitution first, and relies on federal precedent merely for guidance. See State v. Ball, 124 N.H. 226, 231-32 (1983).

Part 1, Article 19 ensures that all persons are protected from unreasonable searches and seizures by the government. State v. Craveiro, 155 N.H. 423, 426 (2007). Pursuant to its terms, "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions."

N.H. CONST. pt. I, art. 19. As such, in the absence of a warrant, all searches and seizures are per se unreasonable “unless they fall within the narrow confines of a judicially crafted exception.” Craveiro, 155 N.H. at 426. A traffic stop, often referred to as a Terry stop, is one such exception to the warrant requirement. State v. McKinnon-Andrews, 151 N.H. 19, 22–23 (2004); see State v. Robbins, 170 N.H. 292, 296 (2017) (“During a traffic stop, both the driver and passengers in the vehicle are seized for constitutional purposes”). To pass constitutional muster, the “scope of such an investigative stop must be carefully tailored to its underlying justification [,] must be temporary[,] and last no longer than is necessary to effectuate the purpose of the stop.” State v. Blesdell-Moore, 166 N.H. 183, 187 (2014) (quotation omitted) (bracketing in original).

There is no dispute that Trooper DeJesus expanded the scope of the initial stop. Thus, the question is whether the expansion was constitutionally permissible. An investigatory stop, while initially constitutionally permissible, may “metamorphose into an overly prolonged or intrusive detention (and, thus, become unlawful).” State v. Turmel, 150 N.H. 377, 383 (2003) (quotation omitted). “Whether the detention is a lawful investigatory stop or goes beyond the limits of such a stop depends upon the facts and circumstances of the particular case.” State v. Michelson, 160 N.H. 270, 274 (2010). While an officer “may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions,” State v. Szczerbiak, 148 N.H. 352, 355 (2002) (quotation omitted), “[t]he scope of the stop must be carefully tailored to its underlying justification—to confirm or dispel the officer’s particular suspicion—and must be temporary and last no

longer than is necessary to effectuate the purpose of the stop.” State v. Roach, 141 N.H. 64, 68 (1996) (quotation omitted).

New Hampshire has adopted a three-part test to determine whether the scope of an otherwise constitutional stop has been impermissibly expanded. See McKinnon-Andrews, 151 N.H. at 25. During its inquiry, the Court must “examine whether: (1) the question 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.” Michelson, 160 N.H. at 274. No constitutional violation occurs if the question is related to the initial purpose of the stop. Robbins, 170 N.H. at 297. Likewise, no violation occurs when “the law enforcement officer had a reasonable, articulable suspicion that would justify the question.” Id. (quotation omitted). “In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion,” the Court “must consider whether in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop.” Id. (quotation omitted).

The parties do not dispute that the expansion was not reasonably related to the initial justification of the stop. Rather, the issue before the Court is whether Trooper DeJesus had reasonable and articulable suspicion to justify the request. The Court finds that he did not. “Reasonable articulable suspicion refers to 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.” McKinnon-Andrews, 151 N.H. at 25–26. “To determine the sufficiency of an

officer's suspicion, [the Court] consider[s] 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." Id. at 26. However, "[a] reasonable suspicion must be more than a hunch," id., but instead "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).

To start, it was certainly reasonable for Trooper DeJesus to ask the driver out of the vehicle so that he could confirm his identity. See Szczerbiak, 148 N.H. at 355. At this point in the encounter, the driver failed to produce his driver's license. He did, however, provide Trooper DeJesus with his name and date of birth. When Trooper DeJesus ran this information through his computer, he was provided with this person's height and weight. However, given that the driver was seated in the vehicle, Trooper DeJesus could not confirm either of these metrics. Indeed, Trooper DeJesus testified that he needed to determine the driver's height and weight in order to confirm that the name provided matched the driver's description. According to Trooper DeJesus, it is not uncommon for persons that fail to produce a license to provide false names to an officer in an attempt to avoid detection. Thus, it was necessary for Trooper DeJesus to remove the driver in order to confirm the driver's identity. This was reasonable under the circumstances. Cf. State v. Dalton, 165 N.H. 263, 265 (2013) ("States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing,

registration, and vehicle inspection requirements are being observed.” (quotation omitted)).

The more difficult question before the Court is whether Trooper DeJesus was justified in ordering Defendant to exit the vehicle and then further requesting permission to conduct a pat-frisk for weapons. For the purposes of this order, the Court will assume without deciding that the removal of Defendant from the vehicle was constitutionally sound. Cf. United States v. Pulliam, 265 F.3d 736, 740 (8th Cir. 2001) (“Contradictory statements establish the reasonable suspicion necessary to detain a motorist further and to interview passengers.”). Indeed, even if the removal of Defendant was based upon reasonable articulable suspicion, the request to search for weapons was not. State v. Broadus, 167 N.H. 307, 310–12 (2015).

Here, Trooper DeJesus articulated the following facts underlying the basis for his request: (1) Defendant was coming from Lawrence; (2) the vehicle did not immediately stop when he first initiated his lights; (3) Defendant made furtive movements; and (4) the lack of a cohesive story concerning where Defendant was picked up. These facts, when taken in their totality, fall short of the constitutional requirement. To start, “neither the defendant nor the driver was suspected of having committed, or being about to commit, a violent offense.” Id. at 311. The only fact that could weigh in favor of the request is Defendant’s furtive movements prior to Trooper DeJesus making contact with the occupants. Id. However, Trooper DeJesus explained that when he approached the vehicle, he observed Defendant feverishly searching for the car’s registration. Moreover, the fact that Trooper DeJesus believed that Defendant and the driver were being untruthful about their movements bears little weight. See id. 312–13. Equally

insufficient is the fact that Defendant appeared nervous and was visibly shaking. State v. Joyce, 159 N.H. 440, 447 (2009). Indeed, “[m]ost people, when confronted by a police officer, are likely to act nervous[] [and] avoid eye contact, . . . such behaviors [are] of very little import to a reasonable suspicion determination that the defendant was armed and presently dangerous. Broadus, 167 N.H. at 313 (quotation omitted) (alteration in original). Rather, the constitution requires an officer conducting a protective frisk to reasonably believe that the “individual is armed and presently dangerous.” Michelson, 160 N.H. at 272 (quotation omitted). “[T]he purpose of a protective frisk is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence.” Id. (quotation omitted) (bracketing in original). The frisk, therefore, “must be strictly confined to what is minimally necessary to discover the presence of a weapon.” Id. (quotation omitted). The frisk, in this instance, was not.

Simply put, “these facts do not create particularized reasonable suspicion that the defendant was armed and presently dangerous.” Broadus, 167 N.H. at 313 (emphasis in original). While the Court “appreciate[s] that officer safety is of paramount concern, the goal of ensuring officer safety does not vitiate the requirement that an officer have an objective basis to believe that a subject is armed and presently dangerous before initiating a frisk.” Id. (emphasis in original). In sum, the Court finds that, in viewing the totality of the circumstances, Trooper DeJesus was not constitutionally justified in conducting a pat-frisk of Defendant. Because the evidence, here the needle, was only obtained through the unlawful request, it must be suppressed in this instance. Blesdell-Moore, 166 N.H. at 191 (“If the evidence in question has been

obtained only through the exploitation of an antecedent illegality, it must be suppressed.”)

Conclusion

In light of the foregoing, Defendant's motion to suppress is **GRANTED**.

So Ordered.

Date

6/29/18


Marguerite L. Wageling
Presiding Justice