State of New Hampshire
Supreme Court

NO. 2004-0197

2004 TERM

OCTOBER SESSION

STATE OF NEW HAMPSHIRE

v.

STEVE GUBITOSI

BRIEF OF STEVE GUBITOSI

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QUESTION PRESENTED

1. The Merrimack County Superior Court, where this case was pending, suppressed certain phone records on procedural grounds. The State then circumvented the court's ruling by obtaining a warrant for the same records in the Franklin District Court based on misleading statements. Did the Superior Court properly maintain suppression of the records upon its finding that the State's actions constituted prosecutorial misconduct?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Steve Gubitosi is charged with several misdemeanor counts of stalking and harassment. He filed a motion in the Merrimack County Superior Court, where the case was pending, requesting suppression of certain phone records. The motion was granted (*Edward J. Fitzgerald, III*, J.) with the indication that it was on procedural grounds because "no objection was filed." NOTICE OF DECISION (Oct. 31, 2003), *Appx. to State's Br.* at 12. After the State's motion to reconsider was denied, the State applied for a search warrant in the Franklin District Court (*David O. Huot*, J.), which did not mention the Superior Court had already suppressed the records, but which did include several misleading statements. The State surreptitiously circumvented the ruling of the Superior Court, committed judge-shopping, and subverted basic due process by not giving a party in a pending case notice or an opportunity to comment. The Superior Court found the conduct was prosecutorial misconduct, and maintained suppression of the records. The State appealed.

SUMMARY OF ARGUMENT

Mr. Gubitosi first notes that the Merrimack County Superior Court, where this case was pending, was the correct court from which the State should have requested a search warrant.

He then faults the State for instead going to the Franklin District Court for the warrant and for failing to disclose to the District Court that the Superior Court had already suppressed the records. He also faults the State for including in its warrant application misleading information regarding the reason for the warrant and its breadth.

Third, Mr. Gubitosi argues that the State's deception deprived him of both his search and seizure rights and his due process rights.

Fourth, Mr. Gubitosi questions why the State chose the Franklin District Court for its warrant application, and suggests that the choice was nefarious.

The defendant then defines prosecutorial misconduct. He argues that the Superior Court has authority – pursuant to its supervisory powers, contempt, and the exclusionary rule – to punish the State's conduct by suppression of evidence, that it was proper in doing so, and that suppression was the most rational and compelling remedy. He also notes that this Court gives broad discretion to trial courts' remedial actions involving their authority and dignity.

Mr. Gubitosi then addresses the State's claim that it caused no harm. He disputes that the warrant application showed probable cause, and notes that it was based on tainted evidence. He also argues that the State's excuse for its conduct is fabricated. Finally, Mr. Gubitosi points out that the State's argument concerning whether the evidence should have been suppressed based on prosecutorial misconduct was not preserved for appeal.

ARGUMENT

I. Merrimack County Superior Court Was the Proper Venue for Seeking a Search Warrant

The Superior Court was the proper venue for seeking a search warrant. Mr. Gubitosi's case was pending there, it had personal jurisdiction over the defendant, and it had recently made rulings concerning the very records the State went afield to obtain. It is self-evident that the State should have gone to the Merrimack County Superior Court, *State v. Delisle*, 137 N.H. 549, 552 (1993) ("[S]ince the defendant was already before the superior court, the preferred procedure for obtaining this evidence would have been by motion before the superior court."), rather than furtively finding a more friendly judge to make an "end run around the court's rulings." ORDER ON PENDING MOTIONS, *Appx. to NOA* at 8.

II. State Mislead Franklin District Court

A. Omission of Material Information Is Ethics Rules Violation

An application for a search warrant is an *ex parte* proceeding. *In re Bowman Search Warrants*, 146 N.H. 621, 626 (2001) ("In New Hampshire, as in other States, search warrants are issued *ex parte*."); *State ex rel Childs v. Hayward*, 109 N.H. 228, 230 (1968). The New Hampshire Rules of Professional Conduct provide:

> In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

N.H. R. PROF. COND. 3.3(d); *see Kalil's Case*, 146 N.H. 466, 467 (2001); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 112 ("[L]awyer applying for *ex parte* relief . . . must disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed

decision"); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, Standard 3-2.8(a) (1993) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court"); *Matter of Malmin*, 895 P.2d 1217 (Idaho 1995) (discipline of lawyer for failure to inform magistrate of settlement reached in related proceeding); *People v. Reichman*, 819 P.2d 1035 (Colo. 1991) (discipline of prosecutor for deception resulting in misleading court); *Com. on Pro. Ethics & Conduct v. Postma*, 430 N.W.2d 387, 391 (Iowa 1988) (discipline of lawyer for presenting *ex parte* application for order transferring funds without disclosing ongoing controversy over entitlement).[1]

A "material fact" requiring disclosure in an *ex parte* proceeding is one that might affect the outcome of the proceeding. *See e.g., N.E. Tel. & Tel. Co. v. City of Franklin*, 141 N.H. 449, 452 (1996) (material fact is one that can affect the outcome the proceeding). "Omissions, as well as positive misstatements, can be construed as misrepresentations" on a search warrant application. *State v. Wilkinson*, 136 N.H. 170, 174 (1992).

The State argues it committed no wrong because the fact that the evidence had already been suppressed is not necessary for a finding of probable cause. But had the Franklin District Court known of the order suppressing the records, out of comity alone – and because there was no pressing deadline or other emergency – it probably would have recommended the State return

[1]Although it was a member of the Belknap County Sheriff's Department who actually appeared at the Franklin District Court, the professional conduct rules apply because the warrant was sought at the direction of the County Attorney and possibly the Attorney General. ORDER ON PENDING MOTIONS, *Appx. to NOA* at 7 ("State directed one of its investigating officers . . ."); ORDER ON DEFENDANT'S MOTION TO SUPPRESS AND MOTION IN *LIMINE*, *Appx. to State's Br.* at 15 (lawyers involved in the matter); OBJECTION TO MOTION TO SUPPRESS II, *Appx. to State's Br.* at 30, 31 ("State directed the . . . Belknap County Sheriff's investigator to apply for a search warrant"); *see also* N.H. R. PROF. COND. 5.3(c) (lawyers responsible for action of non-lawyer subordinates).

to the Superior Court for the warrant. Moreover, the cases cited by the State for the proposition, *State's Br.* at 16, are not relevant here as they deal merely with whether exculpatory facts must be included in a warrant application rather than an existing order on the very same evidence.

Even setting aside guessing what the District Court might have done, without the information, the State prevented the District Court from "mak[ing] an informed decision." The State's lawyers thus appear to have violated the rules governing the ethical practice of law.

B. State Mislead District Court Saying Records Necessary for Corroboration

Beyond mere omissions, the State's warrant application is misleading because it contains positive falsities.

First, the warrant affidavit says that the evidence sought – phone records – will be "used to corroborate the information provided by the victim." SUPPORTING AFFIDAVIT FOR APPLICATION FOR SEARCH WARRANT, *Appx. to State's Br.* at 27, 28. The statement is simply not true. The State could not have used the phone records for that or any other purpose – they had already been ruled inadmissible. The Superior Court, of course, would have been aware of the evidentiary ruling and may have caught the falsity.

C. State Mislead District Court Regarding Dates of Records

Second, the warrant application sought "US Cellular telephone records from 04/12/02 up to 10/18/02," APPLICATION FOR SEARCH WARRANT, *Appx. to State's Br.* at 26, thus covering over six months during 2002. It is important to note, however, that the five charges against Mr. Gubitosi involving telephone communications cover a span of about two weeks. INFORMATIONS, *Appx. to State's Br.* at 1-5 (earliest date of alleged conduct is July 11, 2002; latest date is July 27).

It is axiomatic that a search by the State is an infringement on a person's privacy. *State v. Goss*, 150 N.H. 46 (2003). By requesting telephone records for a time more vast than the alleged conduct, the State infringed Mr. Gubitosi's privacy to a much greater extent than can be justified by the actual charges it brought against him. The Superior Court, familiar with the circumstances of Mr. Gubitosi's case, might have questioned the need for the overbroad warrant.

D. State Mislead the District Court Because Telling the Truth Might Have Jeopardized the Warrant

The only rational explanation for omitting the fact of the Superior Court's suppression order, claiming the records would be used to corroborate the alleged victim's statement, and not apprising the court that the state was seeking information far broader than necessary, was that fully describing the situation might have caused the District Court to question the need for the search or its scope, and might have jeopardized its issuance of the warrant.

III. State Violated Defendant's Search and Seizure, and Due Process Rights

Had the State looked to the Superior Court for permission to search, one of two things may have happened.

The Superior Court, being armed with the knowledge that the phone records were not admissible, and being aware of the circumstances of the case such that the State's misleading statements may have been questioned, would have made a fully informed decision whether to issue the warrant on an *ex parte* basis.

Or, the Superior Court, already having personal jurisdiction over Mr. Gubitosi, would have summoned him, given him an opportunity to challenge the basis for the warrant, and would have made a fully informed decision whether to issue a warrant or some other command to search on a non-*ex parte* basis.

Search warrants are generally issued after an *ex parte* proceeding – of which the defendant has no notice, at which he is not present, and during which he has no opportunity to dispute the reason for or the scope of the search. These are the reasons among which search and seizure rights are enshrined in our constitutions. U.S. CONST., amd. 4; N.H. CONST., pt. I, art. 19.

But when the defendant has an opportunity to address the court regarding a search, due process rights substitute:

> The opportunity to quash a subpoena is particularly important because it permits the subpoenaed party (or other person whose interests would be invaded) to obtain a judicial examination of the basis for the seizure and reduces the chance of mistake. Thus, the opportunity to challenge arguably provides a person with greater protection than the warrant requirement and, consequently, justifies a less demanding standard than probable cause.

2 Wayne R. LaFave, SEARCH AND SEIZURE § 4.13(e) at 746 (3rd ed. 1996).

Here, the first time the State acquired the records, it was by subpoena, but without the benefit of Mr. Gubitosi having a chance to litigate the legality of acquisition or admissibility. The second time the State acquired the records, it was by an *ex parte* warrant proceeding, even though Mr. Gubitosi's case was already before a competent court.

The way it should have been done was either by a warrant before charges were entered as noted in Mr. Gubitosi's Motion to Suppress, *Appx. to State's Br.* at 14, or by a court order afterwards as preferred by *Delisle,* 137 N.H. at 552.

By deceiving the Franklin District Court into a warrant *after* charges were entered, the State deprived Mr. Gubitosi of both (1) his due process rights to notice and an opportunity to be heard in the Superior Court, and (2) his substituted rights against unreasonable searches and seizures in the District Court. The federal and state constitutions require that the defendant in this context enjoy the protections of either fourth or fifth amendment rights. U.S. CONST., amds. 4 & 5; N.H. CONST., pt. I, arts. 15 &19. Although the State may be free to chose,[2] it cannot deprive him of both. LaFave, SEARCH AND SEIZURE § 4.13(e).

[2]The State's choice may be constrained. *State v. Delisle*, 137 N.H. 549, 552 (1993) ("[S]ince the defendant was already before the superior court, the preferred procedure for obtaining this evidence would have been by motion before the superior court.").

IV. State Chose Franklin District Court for Nefarious Reasons

Of all the courts in New Hampshire, one must question why the State chose to make its warrant application in the Franklin District Court. The choice presents several issues.

First, as noted above, it would have been most logical and principled for the State to have gone to the Merrimack County Superior Court for its warrant.

Second, all crimes for which Mr. Gubitosi is being prosecuted are alleged to have occurred in Concord, Merrimack County. Thus, the State had first charged him in the Concord District Court. Early in the case, however, those charges had been withdrawn and the State re-filed in the Merrimack County Superior Court the misdemeanor informations Mr. Gubitosi is currently facing. Thus, the Concord District Court had some early involvement in Mr. Gubitosi's case, and when the State was shopping for a court in which to apply for its warrant, Concord District may have been reasonable.

Third, and most important, however, it must be recalled that although the location of the crimes Mr. Gubitoisi is alleged to have committed was in Merrimack County, because he was a police officer for many years the State determined that he should be prosecuted by someone other than the Merrimack County Attorney. At about the same time as the events giving rise to this case occurred, Mr. Gubitosi was facing a charge of a crime similar in nature to those in this case. They occurred in Belknap County, and were prosecuted by the office of the Belknap County Attorney. Hence Wayne Coull, who normally practices in Laconia, Belknap County, was the prosecutor for the Merrimack County case.[3] Charges existing in two counties caused the Belknap

[3]Mr. Gubitosi cross-appealed the issue of whether the Belknap County Attorney has authority to prosecute in Merrimack County, but the cross-appeal was declined by this Court. ***State v. Steve Gubitosi***, COURT ORDER, N.H. Sup. Ct. No. 2004-0197 (June 1, 2004).

County Attorney some difficulties. *1/12/04 Trn.* at 14-15. Franklin, and its District Court, is in Merrimack County.

The State has alleged no emergency requiring swift action or a hurried warrant. The defendant had filed his motion to suppress in October 2003, three months before the January 2004 trial, and the various objections, reconsiderations, and hearings were done in the interim. The State waited until December 30, during the holidays, for its visit to Franklin.

District Court Judge David Huot normally sits in the Belknap County town of Laconia, *see* <http://www.courts.state.nh.us/courtlocations/belkdistdir.htm>, and is thus well-known to the Belknap County Attorney. Probably because of holiday scheduling, he was the presiding judge in Franklin on the day the Belknap County Attorney made its visit there. While only speculation, it does not appear coincidental that the Belknap County Attorney chose to apply for a warrant on the very day it could find a familiar judge sitting in Merrimack County.

The State having gone to the Franklin District Court – rather than Merrimack County Superior Court, or even the Concord District Court – creates the universally disapproved appearance of judge-shopping. *See, e.g., Lowell v. U.S. Savings Bank*, 132 N.H. 719, 723 (1990) (indicating pleading filed in improper attempt to shop for different judge).

V. Courts Have Authority to Punish Prosecutorial Misconduct

New Hampshire takes prosecutorial misconduct seriously. *State v. Dowdle*, 148 N.H. 345, 348 (2002) ("We have cautioned prosecutors, on more than one occasion, to avoid conduct that could potentially prejudice a criminal defendant and have made clear that we would take a firm stand when addressing the consequences of such tactics."). Too often, however, it escapes meaningful punishment. Bennett Gershman, PROSECUTORIAL MISCONDUCT § 14:1 (2002) (cited in *State v. Krueger*, 146 N.H. 541 (2001)).

Although the term prosecutorial misconduct may not be susceptible of a concise definition, the common theme in the reported cases appears to be a showing of bad faith. *See, e.g., State v. Bain*, 145 N.H. 367, 372 (2000) (prosecutor misleading court regarding trial scheduling; noting trial court made bad faith finding); *State v. Dayutis*, 127 N.H. 101, 103 (1985) (impermissible topics in opening statement); *but see Appeal of Morgan*, 144 N.H. 44, 55 (1999) (target of administrative proceeding disallowed from questioning witness; "When considering the propriety of an investigation or prosecution by a government official, only the official's conduct, not his motivation, is relevant."). "Misconduct" may refer "generally to improper conduct or wrong behavior," *Morgan*, 144 N.H. at 52, and bad faith generally "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will. It contains the element of intent to do wrong in some degree, actual or necessarily inferable." *Browning v. Fidelity Trust Co.*, 250 F. 321, 325 (3rd Cir. 1918) (contract dispute). Although conduct such as ordinary misjudgment, *In re Ash*, 113 N.H. 583, 586 (1973) (sheriff countermanding county attorney's order prohibiting gambling at county fair), or mere exaggeration, *In re Spookyworld, Inc.*, 346 F.3d 1 (1st Cir. 2003) (bankruptcy), do not constitute bad faith, it is "not limited to its

narrow sense of an intentional disregard of duty or an intent to injure." *Indian Head Bank v. Corey*, 129 N.H. 83, 87 (1986) (attorneys fees).

Thus, prosecutorial misconduct generally "connotes an intentional flouting of known rules or laws." *See, Ex parte Peterson*, 117 S.W.3d 804, 816 (Tex. Crim. App. 2003) (prosecutor not comply with *Brady* discovery requirements); *Commonwealth v. DeCicco*, 744 N.E.2d 95 (Mass.App.Ct. 2001) (prosecutorial misconduct difficult to define, but "even a dog knows the difference between being stumbled over and being kicked.") (*Brown, J.*, dissenting, quotation omitted).

Unless the defendant requests dismissal of criminal charges, however, there is no need for a showing of prejudice. *See State v. Chace*, __ N.H. __ (decided Aug. 26, 2004) (letter to defendant recommending guilty plea insufficient prejudice to justify dismissal); *State v. Bain*, 145 N.H. 367, 373 (2000) ("court was required to find prejudice before dismissing the charges as a sanction for prosecutorial misconduct"); *State v. Dayutis*, 127 N.H. 101, 103 (1985) ("The standard for reversible error . . . is that the prosecutor must be shown to have acted in bad faith . . . and the defendant must be prejudiced thereby.").

Thus, it is prosecutorial misconduct when the State makes a material misstatement of fact. *See e.g., United States v. Udechukwu*, 11 F.3d 1101, 1105-06 (1st Cir. 1993) (prosecutor's insinuation the defendant fabricated story about drug source improper when prosecutor knew drug source existed).

And it is prosecutorial misconduct when the State uses a deceptive method to influence a court against a defendant. *People v. Strickland*, 523 P.2d 672 (Cal. 1974) ("Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either

the court or the jury. The ultimate question to be decided is, had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred."); *State v. Bain*, 145 N.H. at 372 (prosecutor misleading court regarding trial scheduling).

Prosecutorial misconduct can be a grounds for contempt. *United States v. Williams*, 504 U.S. 50, 46-47 (1992) ("[T]he court's supervisory power . . . may be used as a means of establishing standards of prosecutorial conduct before the courts themselves."); *State v. Boetti*, 142 N.H. 255, 260 (1997) ("unusually brazen misconduct may suitably be punished through the trial court's contempt powers"); *State v. Killam*, 133 N.H. 458, 464 (1990); *Barber v. Jones Shoe Co.*, 80 N.H. 507, 512 (1923) ("Any attempted fraud upon a court is a contempt, and may be punished as such."). Courts' contempt power is necessary to preserve respect for the judicial system and its orders. *Rogowicz v. O'Connell*, 147 N.H. 270, 273 (2001); *Nottingham v. Cedar Waters, Inc.*, 118 N.H. 282 (1978). Thus all courts have the power to punish for contempt to prevent conduct that obstructs or interferes with the ordinary administration of justice. *Kersevich v. Jaffrey Dist. Ct.*, 114 N.H. 790 (1974). Thus, however else prosecutorial misconduct might be addressed by a court, it is also punishable by contempt.

VI. Suppression is Proper Remedy for State's Misconduct

Most reported prosecutorial misconduct cases involve the government's trial conduct such as improper witness examination or argument, and the resulting defendant's request for mistrial or dismissal which requires a showing of prejudice.

There is prejudice here. Mr. Gubitosi lost his privacy, his due process rights, and his search and seizure rights. Moreover the State sought its warrant, and the defendant and the Merrimack County Superior Court learned of it, on the very eve of trial. The hearings on this matter took place after the jury had already been selected. *1/13/04 Trn.* The defendant was ready for trial, his witnesses were subpoenaed, and he had already asserted his speedy trial rights. *Id.* at 3. The State's action, and then this appeal attempting to undo the Belknap County Attorney's misconduct, has resulted in a long delay. Given the prejudice, dismissal is a reasonable remedy.

A. Suppression is Appropriate Remedy for Prosecutorial Misconduct

The Superior Court nonetheless imposed a less drastic sanction, and suppressed the evidence the State gained by its misconduct. Suppression is an appropriate remedy for unsavory prosecutorial acts, especially when there has been a violation of ethical rules or constitutional rights. "A pre-trial judicial order excluding tainted evidence can be an efficient and appropriate sanction against investigative misconduct." Gershman at §1:47 (suggesting evidentiary consequences are particularly compelling for prosecutors).

In *State v. Miller*, 600 N.W.2d 457 (Minn. 1999), for example, the prosecutor took statements from a person who was represented by an attorney, in violation of ethical rules. The Minnesota Supreme Court wrote that its job is "encouraging compliance with the rules and assuring that a party violating the rules does not profit from the misconduct." It thus reversed the

lower court order which had held that suppression was too great a remedy, and barred the State from using the statements at trial. *See also United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988); *Brewer v. Williams*, 430 U.S. 387 (1977) (suppressing evidence acquired through illegal interrogation consisting of "Christian burial speech"); *Rochin v. California*, 342 U.S. 165 (1952) (suppressing evidence acquired through illegal search consisting of induced vomiting).

B. Suppression is Appropriate Remedy for Contempt

Maintaining the suppression of the phone records also fulfills the court's exercise of its contempt power. For contempt, "court[s] has broad discretion to fashion a remedy based on the nature of the harm and the probable effect of alternative sanctions." *Connolly v. J.T. Ventures*, 851 F.2d 930 (7th Cir. 1988), *see United States v. Mine Workers*, 330 U.S. 258, 304 (1947); *Bonser v. Courtney*, 124 N.H. 796 (1984). This Court has held that suppression of testimony is a valid punishment for contempt. *Robinson v. Owen*, 46 N.H. 38 (1865).

Suppression of the phone records is an appropriate sanction, which will preserve respect for the judicial system and its orders.

C. Suppression Fulfills Purposes of the Exclusionary Rule

Suppression also fulfills all four stated purposes of the exclusionary rule: 1) deterring police misconduct, 2) redressing the privacy of the search victim, 3) restoring the parties to their position had no constitutional violation occurred, and 4) "preserv[ing] the integrity of the judiciary and the warrant issuing process." *State* v. *Canelo*, 139 N.H. 376, 387 (1995); *see also State v. Martin*, 145 N.H. 362 (2000).

1. Deterring Police Misconduct

The State circumvented the Merrimack County Superior Court, and then mislead the

Franklin District Court. If there are no consequences, it "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution." *Weeks v. United States*, 232 U.S. 383, 394 (1914). "[F]ourth amendment guarantees would be meaningless unless courts prohibited the government from using unlawfully seized evidence." *Canelo*, 139 N.H. at 383-84. Thus, "deterrence of police misconduct is a central aim of the exclusionary rule." *Id.*

Maintaining suppression of the phone records here will surely deter police from again attempting to circumvent an inconvenient court order.

2. Redressing Mr. Gubitosi's Privacy

Mr. Gubitosi's privacy can never be fully redressed – the police acquired a half-year of his phone records first by subpeona and then by warrant. And given the nature of the crimes Mr. Gubitosi he is alleged to have committed – stalking and harassing his former girlfriend by telephone – his privacy might seem trifling. Nonetheless, the public disclosure of who Mr. Gubitosi called would reveal too much about his life that is nobody's business. During that six months he may have made calls to doctors, bankers, romantic interests, or other persons his contact with whom he'd rather keep private.

3. Restoring Parties to Their Position Before Constitutional Violation

By barring the use of the evidence at trial, the State will be in the same position it was before it went to the Franklin District Court. It will have in its possession months of Mr. Gubitosi's phone records, but it will not be able to make direct evidentiary use of them. Similarly, Mr. Gubitosi will have given up his privacy to the police and members of the Belknap County Attorney's office, but not to the public. Allowing the use of the evidence, on the other

hand, will give the State the benefit of its conduct, and will further open up Mr. Gubtosi's private life. Maintaining suppression will thus restore both parties to their position before the State's prosecutorial misconduct.

4. Preserving Integrity of the Judiciary and the Warrant Process.

If this Court allows the State to use the improperly acquired records, it will be making clear to prosecutors everywhere that its "firm stand" *Dowdle*, 148 N.H. at 348, against misconduct is merely hortatory. If the State here is allowed the benefit of its spoils, the Court will have undermined the authority of the Superior Court, and the integrity of the District Court.

VII. Supreme Court Gives Broad Discretion to Trial Court for Suppression Rulings

No matter under what authority the Superior Court suppressed the records – prosecutorial misconduct, contempt, exclusionary rule, evidentiary rulings – this Court gives trial courts broad discretion to make such decisions. *State v. Gamester,* 149 N.H. 475, 478 (2003) (review of trial court's evidentiary decisions is for unsustainable exercise of discretion); *State v. Bain*, 145 N.H. at 372 (review of trial court's determination of prosecutorial misconduct and its sanctions is for unsustainable exercise of discretion); *State v. Lieber*, 146 N.H. 105, 106-07 (2001) (review of orders of contempt is for unsustainable exercise of discretion); *State v. Wallace*, 146 N.H. 146, 148 (2001) (review of suppression order pursuant to exclusionary rule is *de novo*; review of facts behind suppression order is for unsustainable exercise of discretion).

The suppression order here was squarely within the Superior Court's authority. If not, then it would appear that courts have no remedy for even the most blatant prosecutorial flouting of their orders.

VIII. Warrant Application Did Not Show Probable Cause and was Based on Tainted Evidence

The State argues that regardless of its conduct, it should suffer no sanctions because the District Court found probable cause to issue the search warrant.

The phone records were sought for the purpose of showing that Mr. Gubitosi is the source of a number of hang-up calls. The State's warrant affidavit recites that the alleged victim and others received hang-up calls. There is no basis in the affidavit, however, to judge whether Mr. Gubitosi was the source of the calls. *1/12/04 Trn.* at 6. Thus, despite the State's argument, there was no probable cause for issuing the warrant and the court could have suppressed the records on that basis.

Moreover, information in the warrant application is tainted by the State's prior acquisition of the records by subpoena. The application reveals Mr. Gubitosi's account number with US Cellular. APPLICATION FOR SEARCH WARRANT, *Appx. to State's Br.* at 26. Because there is no way for the State to have known that number other than by the subpoena, *1/12/04 Trn.* at 6-7, the application is tainted and the court could have suppressed the records on that basis.

IX. State's Claimed Motivation Lacks Credibility and was not Preserved

The State argues that by obtaining the records via a warrant, it was merely doing what the defendant suggested.

First, Mr. Gubitosi's suppression motion, which attacked the subpoena, said what the State *should have* done. MOTION TO SUPPRESS, *Appx. to State's Br.* at 14. It did not contain a recommendations for how the State should repair its error. The State acknowledges this. OBJECTION TO MOTION TO SUPPRESS II, *Appx. to State's Br.* at 30. Thus the argument lacks credibility.

Second, the State claims that because it did not know why Mr. Gubitosi's motion to suppress had been granted, it honestly believed that getting a warrant from a second court would make the evidence admissible. There was no doubt, however, that the Superior Court granted the suppression because "no objection was filed."[4] NOTICE OF DECISION (Oct. 31, 2003), *Appx. to State's Br.* at 12. The Court's order is only a few words long. There can be no mistaking that the court indicated it was granted on procedural and not constitutional grounds. The State acknowledges this. *State's Br.* at 11; *1/12/04 Trn.* at 3; MOTION TO RECONSIDER ORDER REGARDING SUPPRESSION, *Appx. to State's Br.* at 35 & 38 ("The essence of the issue centers on the procedural granting of a motion and the denial of the State's efforts to correct a purely technical procedural error.") ("It is critical to note that the suppression was not related to the merits of the legality of the records obtained, but was based on a procedural technicality."). But getting a warrant from the Franklin District Court can in no way be construed as a solution to

[4]Superior Court Rules "permit[] the court to act upon a motion without a hearing if the party opposing the motion fails to request a hearing and to object to the motion." *State v. Watson*, 120 N.H. 950, 952 (1980).

having not filed an objection. Thus the State's claim – that it somehow misunderstood the basis for the order and "[t]he prosecutor's intention in seeking the warrant was to comply with the court's implied conclusion of law, *State's Br.* at 10 – also lacks credibility.

Third, the claim is not preserved. The State claims that "the prosecutor's actions were motivated by a desire to comply with what he believed was the court's conclusion behind the suppression order." *State's Br.* at 19. This supposed "desire" is nowhere supported in the record. Attorney Coull never attested to such a fact, nor established it by testimony. SUPER. CT. R. 57 ("The Court will not hear any motion grounds upon facts, unless they are verified by affidavit."); *see Ossipee Auto Parts, Inc. v. Ossipee Planning Bd.*, 134 N.H. 401, 404 (1991). Rather, it appears as a late-offered suggestion created by the Attorney General for the purposes of appeal.

Accordingly, the State's argument should be rejected.

X. State's Argument that Suppression is not a Remedy was not Preserved

The State argues on appeal that suppression is not a remedy for prosecutorial misconduct. The question posed by the State's notice of appeal did not preserve the argument, and it should thus be ignored.

The question in the State's notice of appeal is:

> Whether the State's act of obtaining a search warrant for cellular telephone records that had been seized earlier without a warrant, and suppressed by the trial court, constituted prosecutorial misconduct or bad faith, where the court had initially suppressed the records without a hearing or discussion of the grounds for the suppression, where there was no legal bar to seeking a search warrant, and where the court's earlier ruling had no legal bearing on whether there was probable cause to seized the challenged records from U.S. Cellular.

Notice of Appeal at 3. The wording of the question in the State's brief is substantially identical. *State's Br.* at 1.

Based on this statement of the State's question, the defendant was under the impression that for institutional or other reasons the State was bothered by the finding of prosecutorial misconduct, and that it sought to undo that finding. Based on the statement of the State's question, the defendant had been prepared to file a brief on the limited issue of whether the State's actions constituted prosecutorial misconduct.

The argument in the State's brief, however, goes beyond the question it twice posed.

In its brief, the State repeatedly takes issue with the ***suppression based on*** prosecutorial misconduct in addition to the misconduct itself. *State's Br.* at 9, 12, 21. It becomes apparent upon reading the brief that the State's interest on appeal is not the determination of misconduct itself, but the suppression of evidence based on the misconduct. Its brief makes the State's appeal an evidentiary issue rather than a misconduct issue.

The State's shift has required a more extensive response from the defendant. He not only had to brief prosecutorial misconduct, but also had to argue the evidence question not raised in the notice of appeal. The new issues are a burden to the defendant as they have required a greater expenditure of resources.

The Supreme Court rules provide that "[t]he statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." SUP. CT. R. 16(3)(b).

The evidentiary issue argued in the State's brief is not comprised within the misconduct question it posed. This is best seen by examining the matter in the opposite direction. The question asks whether there was prosecutorial misconduct. The brief argues that because there was no prosecutorial misconduct, the evidence should not have been suppressed. The question *is* comprised within the argument, but the argument goes beyond the question.

This Court has routinely held that arguments going beyond the question in a party's notice of appeal are deemed waived. *See, e.g., MacDonald v. Bishop*, 145 N.H. 442, 444 (2000). The issue of whether the State's actions constitute prosecutorial misconduct is properly before this Court. Implications of that misconduct, whether suppression or some other, are not.

CONCLUSION

Based on the foregoing, Mr. Gubitosi requests that the order of the trial court be left intact.

Respectfully submitted,

Steve Gubitosi,
By his Attorney,

Law Office of Joshua L. Gordon

Dated: October 26, 2004

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Steve Gubitosi requests that his counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on October 26, 2004 copies of the foregoing will be forwarded to Stephen D. Fuller, Senior Assistant Attorney General.

Dated: October 26, 2004

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