

State of New Hampshire
Supreme Court

NO. 05-_____

STATE OF NEW HAMPSHIRE

v.

SETH O'DONNELL

NOTICE OF MANDATORY APPEAL OF DEFENDANT, SETH O'DONNELL
Pursuant to Supreme Court Rule 7(1)(A)

By: Joshua L. Gordon, Esq.
Law Office of Joshua Gordon
26 S. Main St., #175
Concord, N.H. 03301
(603) 226-4225
www.AppealsLawyer.net

State of New Hampshire Supreme Court

NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

State v. Seth O'Donnell
Concord District Court Nos. 2004-CR-5783, 5784

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Concord District Court
Brackett L. Scheffy, J (motions judge)
Michael F. Sullivan, J. (trial judge)

3A. NAME & ADDRESS OF APPEALING PARTY

Seth O'Donnell
61 Clough-Sanborn Rd.
Webster, NH 03303

3B. NAME, FIRM, ADDRESS & TELEPHONE
NUMBER OF APPELLANT'S COUNSEL

Joshua L. Gordon
Law Office of Joshua Gordon
26 S. Main St., #175
Concord, N.H. 03301
(603) 226-4225
www.AppealsLawyer.net

4A. NAME & ADDRESS OF OPPOSING PARTY

Steven Endres
Assistant Concord City Prosecutor
32 Clinton St.
Concord, NH 03301

4B. NAME, FIRM, ADDRESS, & TELEPHONE
NUMBER OF OPPOSING COUNSEL

Office of the Attorney General
33 Capitol St.
Concord, NH 03301
(603)271-3671

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Defendant was represented in the trial court by William L. Egge, Esq., Seufert Professional
Asso., 59 Central St., Franklin, NH 03235

6. DATE OF CLERK'S NOTICE OF DECISION
OR SENTENCING

Sentencing: December 16, 2004

DATE OF CLERK'S NOTICE OF DECISION
ON POST-TRIAL MOTION

No post-trial motions were filed that
would delay the appeals deadline.

7. CRIMINAL CASES*: DEFENDANT'S
SENTENCE AND BAIL STATUS

Sentences

Speeding. \$100 fine suspended for one year.
DWI 1st. Revocation of licence for nine
months, with possibility of return after 90
days if comply with conditions, and a fine of
\$350 plus penalty assessment.

Bail Status

Defendant has paid his fine. Pursuant to RSA
263:66, defendant has surrendered his licence,
although he has asked the District Court to
stay his license suspension during appeal; that
motion is pending.

*Both the charges here were violation-level
offenses, and thus technically not criminal.

8. APPELLATE DEFENDER REQUESTED?

No.

9. IS ANY PART OF CASE CONFIDENTIAL? IDENTIFY WHICH PART AND CITE AUTHORITY

There no known basis for confidentiality.

10. IF ANY PARTY IS A CORPORATION, NAMES OF PARENTS, SUBSIDIARIES & AFFILIATES.

No Party is a Corporation.

11. DO YOU KNOW ANY REASON WHY ONE OR MORE SUPREME COURT JUSTICE WOULD BE DISQUALIFIED FROM THIS CASE?

There is no known basis for recusal.

IF YES, FILE MOTION FOR RECUSAL, SUPREME COURT RULE 21A

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY?

Yes.

IF YES, COMPLETE TRANSCRIPT ORDER FORM

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH.

- I. After being stopped but before being arrested, the police did not inform Mr. O'Donnell that field sobriety tests (FST) are voluntary, and he was coerced into taking the FSTs. RSA 265:84 provides that consent to FSTs is implied "if arrested." Did the court err in not suppressing the FSTs in violation of Mr. O'Donnell's State and Federal constitutional rights against unreasonable searches?
- II. After being stopped for speeding and driving while intoxicated, the arresting officer learned that Mr. O'Donnell was on bail pending good behavior. According to settled law, known or knowable to the officer, neither speeding nor DWI-1st is a violation of "good behavior." Did the court err in not finding prosecutorial misconduct when the officer nonetheless arrested Mr. O'Donnell for breach of bail, resulting in immediate incarceration and his inability to obtain a timely and independent blood alcohol test that would have been exculpatory?
- III. After being stopped for speeding and driving while intoxicated, the arresting officer learned that Mr. O'Donnell was on bail pending good behavior. According to settled law, known or knowable to the officer, neither speeding nor DWI-1st is a violation of "good behavior." Did the court err in not dismissing the DWI when the officer nonetheless arrested Mr. O'Donnell for breach of bail, resulting in immediate incarceration and his inability to obtain a timely and independent blood alcohol test that would have been exculpatory?
- IV. Should the court have suppressed the results of a horizontal gaze nystagmus (HGN) test performed on Mr. O'Donnell when the officer failed to comply with State recommendations concerning its administration, when HGN is accepted only as evidence of probable cause and not of guilt, and when the test was relied upon by the court in determining that Mr. O'Donnell was impaired?
- V. Was the evidence insufficient to support a conviction for drunk driving when the court's finding was based merely on Mr. O'Donnell's failure of an HGN test, his admission to having a "couple of beers" one-and-a-half hours before, and an officer's observation of alleged excessive speed?
- VI. Was the evidence insufficient to support a violation for speeding when the court's finding was merely that "[d]efendant was observed . . . going at excessive speed [such that] two pedestrians in a crosswalk had to stop in their tracks to avoid contact with the vehicle," and the pedestrians were not in a crosswalk?

14. CERTIFICATIONS

I hereby certify that, upon information and belief, every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

Joshua L. Gordon, Esq.

I hereby certify that on or before the date below copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

January 18, 2005

Joshua L. Gordon, Esq.

ATTACHMENTS

(1) CLERK’S NOTICE OF DECISION (Oct. 14, 2004) 6

(2) ORDER ON DEFENDANT’S MOTIONS (Oct. 13, 2004) 7

(3) CLERK’S NOTICE OF DECISION (Dec. 16, 2004) 10

(4) ORDER (Dec. 16, 2004) 11

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED						
Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Steno/Recorded	Previously Prepared?*	Deposit
9/9/04	Motions	1 hr	B. Scheffy	Recorded	No	\$175
10/1/04	Motions	1 hr	B. Scheffy	Recorded	No	\$175
12/16/04	Trial/Sent.	½ day	M.Sullivan	Recorded	No	\$450
DO NOT SEND DEPOSIT AT THIS TIME						TOTAL DEPOSIT: \$800

SCHEDULE OF DEPOSITS

Length of Proceeding

Deposit Amount

Hearing or trial of one hour or less
 Hearing or trial up to ½ day
 Hearing or trial of more than ½ day
 Previously prepared portions

\$ 175
 \$ 450
 \$ 900/day
 Number of pages x \$.50 per page per copy if additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

* For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.