

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2009-0060

The State Of New Hampshire

v.

Robert C. Hurlburt

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
STRAFFORD COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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3JX - (5 minutes)

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ISSUE PRESENTED

Whether any ambiguity was created by the use of words “commencing forthwith” in the trial court’s sentencing order in 03-S-625 where the order also clearly stated that the sentence in that case was to be consecutive to the sentence imposed in 03-S-624.

STATEMENT OF THE CASE AND FACTS

On February 9, 2005, the defendant appeared in the Strafford County Superior Court (Mohl, J.) for a jury trial on eight charges that were pending against him. TP 2.¹ The defendant was representing himself, but stand-by counsel had been appointed to assist him. Id. at 2, 5-6. A jury had been selected for the trial earlier that week; however, the defendant had refused to be transported to court that day. Id. at 2.

There were three felonies, four misdemeanors, and one violation offense pending against the defendant, as follows:

- 03-S-623 Possession of Hydrocodone, see RSA 318-B:2, I; 318-B:26, II(a) (2004)
- 03-S-624 Aggravated DWI, see RSA 265:82-a; 265:82-b, I(c) (2004)
- 03-S-625 Conduct After Accident, see RSA 264:25; 264:29 (2004)
- 03-S-748 Unauthorized Use of Motor Vehicle, see RSA 634:3 (2004)
- 03-S-749 Prohibited Sales of Alcohol, see RSA 179:5 (2002)
- 03-S-750 False Swearing, see RSA 641:2 (2007)
- 03-S-751 False Report to law Enforcement, see RSA 641:4 (2007)
- 03-S-752 Transporting Alcohol, see RSA 265:81, II (2004)

¹ References to the record are as follows:

TP refers to the transcript of the plea hearing on February 9, 2005;
TM refers to the transcript of the Motion to Withdraw Guilty Plea hearing on August 4, 2005;
TS refers to the transcript of the sentencing hearing on September 7, 2005;
NOA refers to the defendant's pro se Notice of Appeal and attachments;
DBr refers to the defendant's appellate brief; and
App. refers to the Appendix to the State's brief.

Id. at 13-14; App.1 - 8. The State had made a written plea offer to the defendant, which it reiterated on the record. Id. at 2-4.² The State had offered to enter nolle prosequis on one of the felony charges (03-S-623) and one of the misdemeanor charges (03-S-750), and recommend that the defendant be sentenced to 10-20 years in the New Hampshire State Prison on each of the remaining two felonies, to be served consecutively to each another, but concurrent to the sentence the defendant was currently serving. Id. at 3. The defendant was incarcerated in the New Hampshire State Prison on a parole violation, the sentence for which the State anticipated might be as long as 17 or 18 years. Id. On the misdemeanors, the State indicated that it would be recommending sentences of 2-5 years in the New Hampshire State Prison, concurrent with each other and concurrent with the felony sentences. Id. at 8. In each case, the State had filed a notice of intent to seek an extended term, based upon the defendant's previous convictions. Id. at 3, 25. See RSA 651:6, II(a) (Supp. 2003).

The court indicated that it would not be inclined to exceed the recommended sentences outlined by the State, and took a recess to allow the defendant and his stand-by counsel to consider the offer before the jury was brought in to start the trial. Id. at 5-6. After a short recess, the defendant advised

² The prosecutor indicated that he and the defendant had exchanged letters discussing a possible plea bargain. Id. at 2. In one of those letters, the defendant offered to plead guilty on terms that would have required him to do two years consecutive to his parole violation sentence, which "would be the same as a 20-year sentence concurrent." Id. at 4.

the court that he had decided to plead guilty and that he wanted stand-by counsel to represent him for the plea. The court agreed to this request. Id. at 7. The court then asked the prosecutor to re-state the sentencing recommendation he would be making, and explained to the defendant that he would be entering a so-called “naked” plea, meaning that he could argue for a lesser sentence than that recommended by the State. Id. at 8-10.³ The court also explained that, although it was not ordinarily bound by the recommendation of the State in a “naked” plea, in this instance, the court had agreed it would not impose a sentence in excess of that recommendation, and that, therefore, the defendant would have the opportunity to withdraw his guilty pleas if the court’s sentence did exceed the State’s recommendation. Id. 9-10; 16. After ascertaining that the defendant understood the terms of the plea and intended to plead guilty, the court took another recess to allow the defendant and his attorney to review the acknowledgment and waiver of rights form. Id. 10-11.

After the recess, the court again went over the terms of the State’s recommendation with the defendant, as well as the parameters of the “naked” pleas, and the defendant confirmed that he intended to go forward with guilty pleas on those terms. Id. 13-16. The State then made its offer of proof concerning the facts of the cases, which the defendant agreed were true. Id. at 16-21. The

³ The State indicated that it had a policy of not offering negotiated pleas after jury selection. The Court apparently adhered to the same policy; hence the defendant’s plea was termed a “naked” one, although it in effect was a “capped” plea. Id. at 2; 5.

Court reviewed the waiver of rights with the defendant, and again reviewed the terms of the State's recommended sentences with him. Id. at 21-25. Following a further colloquy concerning the defendant's understanding of the proceedings, the court accepted the defendant's guilty pleas. Id. at 26-28. Because the State had requested a pre-sentence investigation (PSI), and the defendant's attorney had requested time to prepare for the sentencing hearing, no sentence was imposed that day. Id. at 9; 28-29.

On the date that had been set for sentencing on the five charges the defendant pled guilty to, he informed the court that he wished to withdraw his pleas. Id. at 2. The court scheduled a hearing on the defendant's pro se motion to withdraw his guilty pleas for August 4, 2005. TM 2, 15. On July 29, 2005, the defendant wrote a letter to the court indicating that he would not be present at the August hearing, and, indeed, that he planned to refuse to be transported to any further hearings. Id. at 2-3. Following receipt of that letter, the court issued an order reminding the defendant that he had the burden of proof as to his motion to withdraw his guilty pleas, and that his refusal to be transported would be deemed a waiver of his right to be present. Id. at 3.

At the August 4 hearing, the court took testimony from a deputy sheriff concerning the defendant's refusal to be transported to court for the hearing. Id. at 10-15. The deputy testified that the defendant had given him a four-page motion to file with the court. This motion summarized the defendant's reasons for

moving to withdraw his guilty pleas. Id. 13-14.⁴ The court, after finding that the defendant had waived his right to be present, heard argument from the State on the motion to withdraw the guilty pleas, and took the motion under advisement. Id. at 20-22. The court later denied the defendant's motion to withdraw his pleas. TS 6.

September 7, 2005 was the new date set for the defendant's sentencing hearing. The defendant refused to be transported for the hearing. TS 3. The court again took testimony from a deputy sheriff concerning the circumstances surrounding the defendant's refusal to be transported. Id. at 4-6. Finding that the defendant had waived his right to be present, the court decided to go forward with the sentencing hearing. Id.

The State made its sentencing recommendation, which was consistent with what had been outlined during the plea hearing, except that, instead of entering nolle prosequis on one felony and one misdemeanor, the State elected also to enter a nolle prosequi on the violation-level offense, 03-S-752. Id. at 7-10. The State then made its sentencing argument, followed by a statement from one of the victims of the crimes. Id. at 11-13.

The court prefaced its imposition of the defendant's sentences by stating that, for at least a year, the defendant had "engaged in what can only be described as a game to see how much he could do to disrupt . . . the legal proceedings in this

⁴ The defendant was represented at the August hearing by a new attorney, for purposes of the motion to withdraw pleas. This attorney moved to withdraw, and the court granted the motion, but continued his appointment as stand-by counsel. Id. at 6-8; 19.

case, [and] evade prosecution through a series of measures . . . [including] a number of instances where he [had] refused to be transported to this court . . .” Id. at 15. The court also noted that, if it had not agreed to be bound by what was essentially a “capped” plea, it would have given the defendant a much longer sentence; but that the sentences it would impose would “mean that the defendant will be at the New Hampshire State Prison for at least the next 20 years.” Id. at 16. The court then imposed the sentences recommended by the State on the record, using the following language:

In 03-S-624, Robert Hurlburt is sentenced to the New Hampshire State Prison for not more than 20 years nor less than 10 years, to which is added to the minimum disciplinary period of 150 days for each year of the minimum term prorated for any portion of the year, stand committed, concurrent with the sentence presently being served at the State Prison with confinement credit of 843 days. In 03-S-625, the defendant is sentenced to the New Hampshire State Prison for not more than 20 years nor less than 10 years, again with a disciplinary period of 150 days for each year of the minimum term added to the sentence, stand committed, consecutive to 03-S-624, but also concurrent with the sentences presently being served at the New Hampshire State Prison. In this case, the defendant is ordered to pay restitution of \$3,752 plus the administrative fee of \$752 to Teresa Chick, \$3,000 to the Victim Compensation Fund. In 03-S-748 and 749 and 751, the defendant is sentenced to the New Hampshire State Prison for not more than 5 years nor less than 2 years. And these cases are stand committed, concurrent with 03-S-624 and 625 with 843 days pretrial credit. The sentences are also concurrent with each other.

Id. at 17-18. The court then went on to discuss the defendant's right to sentence review and directed that an application for same be sent to the defendant and to his stand-by counsel. Id. at 18. The sentencing orders themselves were also sent to the defendant and to his stand-by counsel. App. 1 - 8.

In October of 2008, the defendant filed a pro se "Motion to Clarify" his sentences, claiming that the use of the word "forthwith" in the mittimus issued in 03-S-625 made that sentence concurrent to the sentence imposed in 03-S-624. NOA 3. This motion was denied by the court (Brown, J.) on November 14, 2008. Id. at 8. The defendant then filed a motion for reconsideration, and another motion to withdraw his guilty plea, which were both denied on December 22, 2008. Id. at 4, 9. On or about January 16, 2009, the defendant filed his pro se notice of appeal.

SUMMARY OF THE ARGUMENT

There is no ambiguity in the sentencing orders issued by the superior court. The sentencing order in 03-S-625 clearly states that the sentence is to be served consecutively with that imposed in 03-S-624. The use of the word “forthwith” simply means that the sentence, other than the actual incarceration, was imposed on the date it was issued, instead of being suspended or deferred for future imposition.

Even if the use of the word “forthwith” in the mittimus created an apparent surface ambiguity, the defendant was never in any doubt as to the terms of the sentences. At the time of his guilty pleas, he was informed no fewer than five times that the State’s sentencing recommendation, which the trial court agreed not to exceed, would be for two 10-20 year consecutive sentences. Although the defendant elected not to be present when the actual sentencing hearing took place, the 10-20 year sentence in 03-S-625, as announced by the court on the record, was clearly made consecutive to the 10-20 year sentence imposed in 03-S-624. Moreover, the sentencing orders were sent to the defendant shortly after the sentencing hearing, yet the language of those orders was not challenged until more than three years later. The defendant should not be allowed to profit from his choice to waive his presence at the sentencing hearing by claiming, so long after the fact, that he did not understand the terms of the sentences imposed.

ARGUMENT

**THE SENTENCING ORDERS ISSUED IN THIS CASE ARE NOT
AMBIGUOUS AND CLEARLY IMPOSE CONSECUTIVE SENTENCES.**

**A. The Use Of The Words “Commencing Forthwith” Does Not
Cause Confusion Because The Sentencing Language Otherwise
Makes it Clear That The Sentences Were Consecutive.**

The defendant argues that the use of the words “commencing forthwith” in the sentencing order in 03-S-625, when coupled with the language “[t]he sentence is consecutive to 03-S-624” creates confusion as to whether the sentence was intended to be consecutive or concurrent, and thus violates due process. This argument must fail.

At the conclusion of the sentencing proceeding, a defendant and the society which brought him to court must know in plain and certain terms what punishment has been extracted by the court as well as the extent to which the court retained jurisdiction to impose punishment at a later date and under what conditions the sentence may be modified.

Stapleford v. Perrin, 122 N.H. 1083, 1087 (1982); see also State v. Burgess, 141 N.H. 51, 52 (1996) (“the sentencing order must clearly communicate to the defendant ‘the exact nature of [the] sentence.’”) (quoting State v. Ingerson, 130 N.H. 112, 116 (1987)).

The defendant draws the wrong conclusion from this language. For example, the defendant quotes from United States v. Daugherty, 269 U.S. 360, 363 (1926), to the effect that a sentencing order “should reveal with fair certainty the

intent of the court.” DBr. at 7. Daugherty, however, is an example of a case where a hyper-technical reading of a trial court’s sentencing order, just as that advocated by the defendant in this case, was rejected by the United States Supreme Court.

In Daugherty, the defendant had been sentenced to five years for each of three counts charging him with selling drugs, by a sentencing order that read, “[s]aid term of imprisonment to run consecutively and not concurrently.” 269 U.S. at 361. On appeal to the United States Court of Appeals for the Eighth Circuit, the defendant argued that the three sales should be considered one continuous crime, and that he could not be sentenced to a total of fifteen years because the maximum sentence for a sale of drugs was ten years. Id. The court disagreed with this argument, but held that the sentencing order must be interpreted as imposing only one five-year term, because the order did not specify which term came first and which terms were to follow that consecutively. Id. at 362.

The government appealed, and the Supreme Court reversed the Court of Appeals, saying:

Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded.

Id. at 363 (emphasis added). The Court went on to find that “[t]he words ‘said term of imprisonment to run consecutively and not concurrently’ are not consistent with a 5-year sentence.” Id.

In this case, the words “[t]he sentence is consecutive to 03-S-624” are simply not consistent with a belief that the sentence in 03-S-625 was intended to run concurrently with that imposed in 03-S-624. The mere fact that the sentencing order in 03-S-625 also said “[c]ommencing forthwith” could not lead one to any “serious misapprehension[]” about the sentencing court’s intent. Indeed, the New Hampshire State Prison, “who must execute [the sentence],” Daugherty at 363, had no problem interpreting the sentences imposed in these cases, and calculated the defendant’s release date by running the sentence in 03-S-625 consecutive to that imposed in 03-S-624. NOA at 3.

State v. Almodovar, 158 N.H. 548 (2009), cited in the defendant’s brief at 7-8, is an example of this Court rejecting a hyper-technical reading of a sentencing order. The defendant had been sentenced to three 3 ½-7 year sentences on three felonious sexual assaults. Id. at 549. The first sentence was suspended for five years and the defendant was placed on five years probation. Id. The second two sentences were concurrent with each other, and deferred for five years. Id. In the second two sentences, the defendant was also placed on five years probation. Id. After two probation violations, the suspended 3½-7 year sentence was imposed. Id. The defendant was still serving that sentence when the deferral period on the

other two sentences expired. Id. When he failed to file the required motion to suspend those sentences, the court imposed them without a hearing. Id. at 549-550. On appeal, this Court held that, because the original sentencing orders were silent as to whether the deferred sentences were concurrent or consecutive with the suspended sentence, they were presumed to be concurrent. Id. at 551. This Court also found error in the trial court's imposition of the deferred sentences without a hearing. Id. at 551-553.

However, in response to the defendant's argument that it was error to impose the deferred sentences consecutively to the previously suspended sentence, this Court said: "[t]he effect of imposing the deferred sentences may result in the appearance of consecutive sentences; however, the plain language of the sentencing orders put the defendant on notice of this possibility." Id. at 551. In this case, just as in Almodovar, the plain language of the sentencing order in 03-S-625 put the defendant on notice that the sentence in that case was to be served consecutively with 03-S-624. App. 8.

The defendant's brief also erroneously relies on State v. Rau, 129 N.H. 126 (1987). DBr. at 7-9. In Rau, this Court held that, "when a sentencing order, encompassing multiple counts or multiple indictments, is silent as to whether the sentences imposed on each count or indictment are to run concurrently or consecutively, the presumption is that the sentences run concurrently. If, in its

discretion, a sentencing court intends to impose consecutive sentences, it must specifically state that intention in its order.” Rau, 129 N.H. at 130.

Here, the sentencing court did precisely what the Rau Court asked it to do – it specifically stated, in the sentencing order for 03-S-625, that the sentence imposed therein was to be consecutive to that imposed in 03-S-624. App. 7, 8. The defendant argues, however, that the additional words “commencing forthwith” created such ambiguity in the sentencing order that it “had the same effect as stating that the sentences were consecutive and concurrent in the same order.” DBr. at 9. This argument is untenable.

First, it should be pointed out that the sentencing judge, in pronouncing the defendant’s sentences on the record, made it abundantly clear that the sentences imposed in 03-S-624 and 03-S-625 were to be served consecutively, and did not himself ever use the words “commencing forthwith.” TS at 17. The “commencing forthwith” language appears to be part of the standard mittimus issued by the clerk’s office. App. 1-8. Although the defendant argues that ‘the sentencing terms were not made clear to [him] *at the time of sentencing*, . . . as he was not present[,]” DBr. at 9 (emphasis in original); the defendant cannot be allowed to profit from his voluntary decision not to attend his sentencing hearing. See State v. Davis, 139 N.H. 185, 189-192 (1994) (trial court did not err in holding proceedings in defendant’s absence where he had voluntarily refused to attend court; court also did not err in granting defendant’s motion to proceed pro se

without conducting personal colloquy as “these unusual circumstances were brought about by the defendant himself.”); see also State v. Goodale, 144 N.H. 224, 227 (1999) (“Under the invited error doctrine, a party may not avail himself of error to which he has led the trial court, intentionally or unintentionally.”) (quotations omitted).

Second, the use of the words “commencing forthwith” in the mittimus did not in fact create any ambiguity. This Court has frequently recognized the wide variety of sentencing options available to trial judges, as well as the fact that many sentences are not fully executed on the day they are pronounced. Deferred sentences are often scheduled to commence sometime in the future, while, with regard to both deferred and suspended sentences, the court often retains jurisdiction to decide whether they will be imposed at some future time. See Stapleford, 122 N.H. at 1081, (“[A sentencing] court may . . . suspend the imposition or execution of sentence or any part thereof, or place a defendant on probation . . . [which] may be provided when the commencement or execution of a sentence is deferred . . .”); Ingerson, 130 N.H. at 114-115 (“[With] a sentence marked suspended . . . the court determines the sentence but postpones its execution.”).

Thus, the words “commencing forthwith” in the 03-S-625 mittimus are fairly understood to mean that the sentence has been imposed - that is, the court has not retained jurisdiction to impose or determine the sentence at a future time -

but that the actual serving of the sentence will not begin until the defendant has served the first sentence, imposed in 03-S-624. This interpretation of the word “forthwith” is consistent with its legal definition, and with cases from this Court that have discussed its meaning. According to Black’s Law Dictionary (Rev. 4th Ed. 1968), “forthwith” means: “[i]mmediately; without delay, directly, hence within a reasonable time under the circumstances of the case.” In Hinse v. Burns, 108 N.H. 58 (1967), this Court found that a delay of over six months in conducting a review of a committed patient’s mental condition, under a statute that required the review to be conducted “forthwith” did not violate that statute, because “[t]here is no precise definition, so far as time is concerned, of the word ‘forthwith,’ and its meaning depends on the circumstances of the case and the act to be performed.” Id. at 59-60. Similarly, in Hatch v. Hayes, 101 N.H. 214 (1958), this Court found that a 14 day delay between service of process on the motor vehicle commissioner and the mailing of notice of the lawsuit to the out-of-State defendants was sufficient to satisfy the statutory requirement that such notice be given “forthwith.” Id. at 217-218.

Finally, the defendant’s brief argues that the so-called “rule of lenity” should be applied to this Court’s interpretation of the sentencing orders in this case, and, therefore, that any ambiguity caused by the use of words “commencing forthwith” should be resolved in his favor. DBr. at 10-12. This argument too is unavailing.

The “rule of lenity” derives from federal double jeopardy law. See State v. Bailey, 127 N.H. 811, 814 (1986) (“[T]he touchstone of whether the double jeopardy clause is violated in this context [of determining the proper unit of prosecution] is the legislature’s articulated intent . . . and the so-called rule of lenity, which forbids interpretation of a federal criminal statute so as to increase the statutory penalty where Congress’ intent is unclear . . .”); see also State v. MacLeod, 141 N.H. 427, 434 (1996) (“The defendant . . . argues that principles of federal law, including the rule of lenity, prohibit his dual convictions.”). Thus, it is questionable whether the rule is valid as a matter of New Hampshire law, where the common law rule that criminal statutes are to be strictly construed in favor of the accused has been abrogated by statute. See RSA 625:3 (2007) (“All provisions of this [criminal] code shall be construed according to the fair import of their terms and to promote justice.”); Derosia v. Warden, 149 N.H. 579, 580 (2003) (New Hampshire does not follow the common law rule that criminal statutes are to be strictly construed); State v. Harper, 126 N.H. 815, 818 (1985) (same); see also Comments to the 1969 Report of the Commission to Recommend Codification of Criminal Laws (rejecting the holding of State v. Morey, 103 N.H. 529 (1961) which had seemingly adopted the common law rule of strict construction of criminal statutes in favor of the accused); but see State v. Dansereau, 157 N.H. 596, 602 (2008) (relying in part on Morey, *supra*; describing the rule of lenity as a

“well established tool of statutory construction,” and applying it to an analysis of RSA 651:6 (Supp. 2008)).

In any event, the “rule of lenity” is a rule of *statutory* construction, and should therefore not be applicable to the interpretation of a sentencing order. But see State v. Parker, 157 N.H. 89, 92 (2007) (apparently applying the rule of lenity to the interpretation of a sentencing order in order to “err on the side of protecting a defendant’s constitutional right to counsel” for a hearing on whether a deferred sentence should be imposed). In Burgess, this Court stated that, if a sentencing order is found to contain any ambiguity, “we will not speculate about what sentence the court might have intended; rather, we will construe the sentencing order so as to enforce the terms that are clear but not to augment the sentence beyond such terms.” Burgess, 141 N.H. at 53.

In this case, the sentencing court’s intention to impose the second 10-20 year sentence consecutively to the first is very clear on the face of the order itself. App. 8. Even if the ‘rule of lenity’ is found to be relevant to this Court’s consideration of the sentencing order, it is applicable only where there is an obvious ambiguity. “[The rule of lenity] is applicable only where statutory ambiguity has been found. . . . Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one.” Bailey, 122 N.H. at 814 (internal quotations omitted). Therefore, because there is no ambiguity here, the sentences should be affirmed.

B. Even If Some Ambiguity Was Created By The Use Of The Words “Commencing Forthwith” In The Mittimus, The Defendant Was On Notice That The Sentences In The Two Felonies Were Consecutive.

The fundamental inquiry raised by the defendant’s due process claim is whether he was on notice of the nature of the sentences imposed upon him by the trial court. “[This Court has] previously stated that our constitution requires that a defendant be informed at the time of sentencing in plain and certain terms what punishment has been exacted by the court” State v. Huot, 136 N.H. 96, 98 (1992) (internal quotations omitted); see also Almodovar, 158 N.H. at 551 (although the defendant’s suspended and deferred sentences were concurrent with each other, “the plain language of the sentencing orders put[] the defendant on notice” that after the five year period of probation on the suspended sentence had expired, the deferred sentences might still be imposed). Thus, even if some other person might read the sentencing order in 03-S-625 and find the use of the words “commencing forthwith” and “consecutive to 03-S-624” confusing, this defendant was under no misapprehension about its meaning.

The defendant was representing himself in the time period leading up to jury selection and trial and was apparently actively negotiating with the State for possible guilty pleas. TP 2-3. At the plea hearing, the State indicated that its written plea offer had stated that it would enter a nolle prosequi on one felony, and recommend that the defendant be sentenced to 10-20 year terms consecutive to

each other, on the other two. Id. The State explained that its rationale for this offer was to insure that the defendant would serve “a little more time” on top of the 17 or 18 years it anticipated he would serve on his parole violation. Id. at 3-4. The State also informed the court (and the defendant did not dispute this), that the defendant had offered to plead guilty if the State would recommend a two-year sentence consecutive to his parole violation sentence, which “would be the same as a 20-year sentence concurrent.” Id. at 4. Thus, the defendant himself had offered to serve a 20-year sentence on his parole violation and new offenses combined.

Moreover, even though the defendant planned to argue for less than the 20 year minimum sentence on the new charges that would be recommended by the State, he was informed, no fewer than five times during his plea hearing, that the State would recommend a 20 year minimum and that the Court could impose, but could not exceed, this minimum. Id. at 4, 8, 10, 14-15, 16. After the plea hearing, even though he was told that the court would consider his refusal to be transported as a waiver of his right to be present and would conduct proceedings in the case without him, the defendant voluntarily refused to attend his sentencing hearing, thereby insuring that no argument for a lesser sentence than that recommended by the State would be made on his behalf.

At the sentencing hearing, the court made the sentences that were being imposed abundantly clear. As previously noted, the sentencing judge did not use

the language “commencing forthwith” when announcing the sentence in 03-S-625 on the record. Thereafter, the clerk’s office mailed the defendant a notice of his right to seek sentence review and a copy of the sentencing orders. Yet the defendant never challenged his sentences until more than three years after they were imposed. Based upon this record, there can be no finding that the defendant was not fully aware that he had been sentenced to consecutive terms of imprisonment on the two felonies to which he pled guilty. Thus, there was no due process violation, and the sentences imposed on the defendant must be upheld.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute oral argument before a 3JX Panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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September 23, 2009

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Eric R. Wilson, Esq., counsel of record.


Janice K. Rundles

STATE'S APPENDIX

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The State of New Hampshire

Strafford County

Superior Court

No. 03-S-748

RETURN FROM SUPERIOR COURT

Name: Robert Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 5/18/52

Indictment Waiver Information Complaint

Offense: Unauthorized Use Of Propelled Vehicle RSA: 634:3

Date: 5/4/03

Disposition: Guilty By Plea Jury Court

T/N: n/a

Conviction: Felony Misdemeanor (Extended Term)

Sentence: A finding of GUILTY is entered. The defendant is sentenced to the New Hampshire State Prison for not more than 5 year(s), nor less than 2 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year. This sentence is to be served as follows: Stand commencing forthwith. The sentence is concurrent with 03-S-624-625. Pretrial confinement credit: 843 days. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

09/07/05

Date

Hon. Bruce E. Mohl

Presiding Justice

Julie W. Howard

Clerk

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **NH State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

9/8/05

Date

Attest:

Julie W. Howard
Clerk

SHERIFF'S RETURN

I delivered the defendant to the **NH State Prison** and gave a copy of this order to the **Warden**.

Date

Sheriff

cc: State Police
 Defendant
 SRB

DMV
 Pros. Attorney
 Patrick Fleming, Esq.

Dept. of Corr.
 Office of Cost Cont.

The State of New Hampshire

Strafford County

Superior Court

No. 03-S-749

RETURN FROM SUPERIOR COURT

Name: Robert Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 5/18/52

Indictment Waiver Information Complaint

Offense: Prohibited Sales RSA: 179:5

Date: 5/4/03

Disposition: Guilty By Plea Jury Court

T/N: n/a

Conviction: Felony Misdemeanor (Extended Term)

Sentence: A finding of GUILTY is entered. The defendant is sentenced to the New Hampshire State Prison for not more than 5 year(s), nor less than 2 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year. This sentence is to be served as follows: Stand committed. Commencing forthwith. The sentence is concurrent with 03-S-624-625/748. Pretrial confinement credit: 843 days. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

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Presiding Justice

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Date

Sheriff

- cc: State Police
- Pros. Attorney
- Patrick Fleming, Esq.

- Dept. of Corr.
- Office of Cost Cont.

- Defendant
- SRB

The State of New Hampshire

Strafford County

Superior Court

No. 03-S-750

RETURN FROM SUPERIOR COURT

Name: Robert Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 5/18/52

Indictment Waiver Information Complaint

Offense: False Swearing RSA: 641:2

Date: 5/4/03

Disposition: Not Guilty Nol Pros Remand
 Annulled Quashed/Dismissed

Date: 09/07/05

T/N: n/a

By: Judge Jury Prosecutor Defendant

Nolle pros.

Name of Prosecutor : Brian T. Lee, Assistant County Attorney

cc: State Police
 Pros. Attorney

Dept. of Corr.
 Office of Cost Cont.

Defendant
 Patrick Fleming, Esq.

The State of New Hampshire

Strafford County

Superior Court

No. 03-S-751

RETURN FROM SUPERIOR COURT

Name: Robert Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 5/18/52

Indictment Waiver Information Complaint

Offense: False Reports to Law Enforcement RSA: 641:4

Date: 5/4/03

Disposition: GUILTY By Plea Jury Court

T/N: n/a

Conviction: Felony Misdemeanor

Sentence: A finding of GUILTY is entered. The defendant is sentenced to the New Hampshire State Prison for not more than 5 year(s), nor less than 2 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year. This sentence is to be served as follows: Stand commencing forthwith. The sentence is concurrent with 03-S-624-625/748-749. Pretrial confinement credit: 843 days. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

09/07/05

Date

Hon. Bruce E. Mohl

Presiding Justice

Julie W. Howard

Clerk

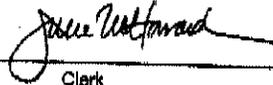
MITTIMUS

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9/8/05

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Clerk

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Date

Sheriff

- cc: State Police
- Defendant
- SRB

- DMV
- Pros. Attorney
- Patrick Fleming, Esq.

- Dept. of Corr.
- Office of Cost Cont.

The State of New Hampshire

Strafford County

Superior Court

No. 03-S-752

RETURN FROM SUPERIOR COURT

Name: Robert Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 5/18/52

Indictment Waiver Information Complaint

Offense: Transporting Alcoholic Beverages RSA: 265:81,II

Date: 5/4/03

Disposition: Not Guilty Nol Pros Remand
 Annulled Quashed/Dismissed

Date: 09/07/05

T/N: n/a

By: Judge Jury Prosecutor Defendant

Nolle pros.

Name of Prosecutor : Brian T. Lee, Assistant County Attorney

cc: State Police
 Pros. Attorney

Dept. of Corr.
 Office of Cost Cont.

Defendant
 Patrick Fleming, Esq.

The State of New Hampshire

Strafford County

Superior Court

No. 03-S-623

RETURN FROM SUPERIOR COURT

Name: Robert C. Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 05/18/52

Indictment Waiver Information Complaint

Offense: Possession of a Controlled Drug RSA: 318:B-26,II(a)

Date: 5/4/03

Disposition: Not Guilty Nol Pros Remand
 Annulled Quashed/Dismissed

Date: 09/07/05

T/N: n/a

By: Judge Jury Prosecutor Defendant

Nolle pros.

Name of Prosecutor : Brian T. Lee, Assistant County Attorney

cc: State Police
 Pros. Attorney

Dept. of Corr.
 Office of Cost Cont.

Defendant
 Patrick Fleming, Esq.

The State of New Hampshire

Strafford County

Superior Court

No. 03-S-624

RETURN FROM SUPERIOR COURT

Name: Robert C. Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 5/18/52

Indictment Waiver Information Complaint

Offense: Aggravated Driving While Intoxicated RSA: 265:82-a

Date: 5/4/03

Disposition: Guilty By Plea Jury Court

T/N: n/a

Conviction: Felony Misdemeanor

Sentence: A finding of GUILTY is entered. The defendant is sentenced to the New Hampshire State Prison for not more than 20 year(s), nor less than 10 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year. This sentence is to be served as follows: Stand committed. Commencing forthwith. The sentence is concurrent with sentences presently being served at NHSP. Pretrial confinement credit: 843 days. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

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9/8/05
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Attest

Julie W. Howard
Clerk

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Date

Sheriff

cc: State Police
 Defendant
 SRB

DMV
 Pros. Attorney
 Patrick Fleming, Esq.

Dept. of Corr.
 Office of Cost Cont.

The State of New Hampshire

Strafford County

Superior Court

No. 03-S-625

RETURN FROM SUPERIOR COURT

Name: Robert C. Hurlburt, c/o NH State Prison, Berlin, NH

DOB: 5/18/52

Indictment Waiver Information Complaint

Offense: Conduct After An Accident RSA: 264:25;29

Date: 5/4/03

Disposition: Guilty By Plea Jury Court

T/N: n/a

Conviction: Felony Misdemeanor

Sentence: A finding of GUILTY is entered. The defendant is sentenced to the New Hampshire State Prison for not more than 20 year(s), nor less than 10 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year. This sentence is to be served as follows: Stand committed. Commencing forthwith. The sentence is consecutive to 03-S-624. The sentence is concurrent with sentences presently being served at NHSP. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is ordered to make restitution of \$3752.00 plus statutory 17% administrative fee through the Department of Corrections on the following terms: \$752 to Theresa Chick, \$3000 to Victims Compensation Fund. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

09/07/05

Date

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