

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2009-0155

State of New Hampshire

v.

Roy McKinnon

**Appeal Pursuant to Rule 7 from Judgment
of the Coos County Superior Court**

BRIEF FOR THE DEFENDANT

**David M. Rothstein
Deputy Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
NH Bar No. 5991
(603) 228-9218**

(Oral Argument Waived)

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Question Presented.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Summary of Argument	7
Argument	
I. THE TRIAL COURT ERRED WHEN IT DENIED MCKINNON'S MOTION TO SUPPRESS HIS STATEMENT TO TROOPER CROSSLEY, BECAUSE THE STATEMENT WAS INVOLUNTARY.....	8
Conclusion.....	14

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<u>Commonwealth v. Morgan</u> , 416 Pa.Super. 145, 610 A.2d 1013 (1992).....	10
<u>State v. Beland</u> , 138 N.H. 735, 645 A.2d 79 (1994).....	11
<u>State v. Carroll</u> , 138 N.H. 687, 645 A.2d 82 (1994).....	9, 11
<u>State v. Dorval</u> , 144 N.H. 455, 743 A.2d 836 (1999).....	9
<u>State v. George</u> , 93 N.H. 408, 43 A.2d 256 (1945).....	10
<u>State v. Goupil</u> , 154 N.H. 208, 908 A.2d 1256 (2006).....	8
<u>State v. Middleton</u> , 220 W.Va. 89, 640 S.E.2d 152 (2006)....	9
<u>State v. Pehowic</u> , 147 N.H. 52, 780 A.2d 1289 (2001).....	9
<u>State v. Portigue</u> , 125 N.H. 352, 481 A.2d 534 (1984).....	8
<u>State v. Remick</u> , 149 N.H. 745, 829 A.2d 1079 (2003).....	11
<u>State v. Rezk</u> , 150 N.H. 483, 840 A.2d 758 (2004).....	12
<u>State v. Roache</u> , 148 N.H. 45, 803 A.2d 572 (2002).....	9
<u>State v. Slwooko</u> , 139 P.3d 593 (Alaska App. 2006).....	10
<u>State v. Spencer</u> , 149 N.H. 622, 826 A.2d 546 (2003).....	12
<u>State v. Stanley</u> , 167 Ariz. 519, 809 P.2d 944 (1991).....	10
<u>State v. Steimel</u> , 155 N.H. 141, 921 A.2d 378 (2007).....	8
<u>State v. Zwicker</u> , 151 N.H. 179, 855 A.2d 415 (2004).....	10
<u>United States v. Serlin</u> , 707 F.2d 953 (7th Cir. 1983).....	10

TABLE OF AUTHORITIES

	<u>Page</u>
CONSTITUTIONS:	
New Hampshire Constitution, Part 1, Article 15.....	8
United States Constitution, Fifth and Fourteenth Amendments.....	8

QUESTION PRESENTED

Whether the trial court erred when it denied McKinnon's motion to suppress his statement to Trooper Crossley, because the statement was involuntary.

Issue preserved by motion to suppress, App.* at A1-A5; objection, App. at A6-A10; transcript of hearing on motion, held on October 17, 2008; and court's order denying motion, App. at A11-A23.

*Citations to the record are as follows:
"NOA" designates the notice of appeal;
"App." designates the appendix to the brief;
"S" designates the transcript of the suppression hearing;
"T" designates the transcript of the trial.

STATEMENT OF THE CASE

A Coos County grand jury indicted Roy McKinnon with four counts of aggravated felonious sexual assault against C.W. One alleged that between June 1, 2004 and August 31, 2007, McKinnon engaged in a pattern of sexual assault. T 3. A second charge alleged he engaged in cunnilingus with her between June 1 and August 10 of 2007. T 4. The third indictment alleged an act of digital penetration in the same time frame. T 4. The final indictment alleged an act of fellatio during the same time frame. T 5.

At trial the State relied heavily on McKinnon's admissions during a May 15, 2008 interview with Trooper Jimmy Crossley, which McKinnon unsuccessfully attempted to suppress. App. at A1-23 (motions and order); App. 24-88 (Miranda form and transcript of statement); T 88-98 (Crossley's testimony). The jury convicted McKinnon of all charges. T 149. The court (Bornstein, J.) sentenced him to serve 25 years to life in prison. NOA 2.

STATEMENT OF FACTS

C.W., who was born in February of 1995, lived primarily with her mother, Sandra Lee Day, in Stewartstown, but stayed with her father, Shawn Wallace, every other weekend in Columbia. T 32-33. C.W.'s grandmother, Virginia Wallace, dated Roy McKinnon, who lived in a trailer in Lancaster. T 32, 34, 35.

On weekends when she stayed with her father, C.W. tended to also see McKinnon, as well as her stepmother and her siblings. T 33. McKinnon and C.W. got along well. T 34. C.W. frequently spent time at McKinnon's trailer. T 35. She often helped him clean the trailer. T 35.

One time in 2004, while she was helping McKinnon clean his trailer, McKinnon asked C.W. to help him masturbate. T 37. McKinnon told her not to tell anyone, because he could go to jail. T 39. Thereafter, this conduct occurred repeatedly over the course of about a year. T 41-42.

Sometime during 2005, McKinnon began to digitally penetrate C.W.'s vagina. T 43-45. This occurred nearly every weekend C.W. stayed with her father. T 45. Over time, McKinnon also asked C.W. to put his penis in her mouth, and he licked her vagina. T 46-48. These acts also occurred several times. T 48.

C.W. testified that the sexual conduct occurred at her grandmother's home in Groveton, as well as her father's home in Columbia. She related stories of an incident of masturbation in

a tent in Columbia, while her siblings slept in the same tent with her and McKinnon, and an incident in her grandmother's kitchen in Groveton, during which McKinnon suggested they could have intercourse. T 49-50. C.W. told her father what had been happening, and subsequently, in August of 2007, she spoke to the police. T 16, 50, 88.

McKinnon's Statement and the Motion to Suppress

Trooper Jimmy Crossley interviewed McKinnon at the Colebrook Police Department on May 15, 2008. S 4, 9; T 91. The interview occurred in the Chief's office, which is very small, and the door to the office was closed. S 11, 13. McKinnon, who has an eighth grade education and was unfamiliar with these surroundings, S 21, 33, arrived with his daughter, Karla Verge, who was present for part of the interview. S 5; T 92. At the outset Crossley read McKinnon the Miranda rights, which McKinnon waived, and Crossley conducted an audiotaped interview. App. at A 24; S 6-7; T 92-93.

After getting some background information, Crossley asked McKinnon about C.W. App. at A26. When Crossley asked McKinnon, "what kind of things did happen between you and [C.W.]," McKinnon said, "No, if I answer this, this is going to be held against me." App. at A26. Crossley said he was "here to uh take [McKinnon's] side of the story, [C.W.] has told me her side of the story," and McKinnon said, "[w]e fondled." App. at A28.

A few moments later, in response to Crossley's request that he be more descriptive, McKinnon said, "I can't, I can't be more descriptive so they can do whatever they want." App. at A30. Crossley responded, "No, I'm not saying we're gonna throw the key away, um, but I will say this Roy, that. . . ." App. at A30. Crossley then asked whether there was penetration, and Karla interrupted. App. at A31. Subsequently, the following exchange occurred:

McKinnon: Fingers, yes, I'm not saying that

Crossley: So you put

McKinnon: I'm, I'm saying it to, to help you
and to try to help me

Crossley: and, and if Karla would have let me
finish, the only way I can help you
Roy, the only way I can help you is
to be one hundred percent truthful
to me and sitting here talking
about fondling and um, clothes on,
clothes off, those are, it's just,
it's all garbled, it's a, it's a
mess, we need to, we need to kinda
go one step at a time up

McKinnon: But I don't want to say anything
that's gonna hurt me without a
lawyer, I, I don't, I don't know
what to do.

Crossley: Well if you, I've told

McKinnon: I know

Crossley: and I've told you that
you can have a lawyer

McKinnon: I know

Crossley: We went over the Miranda
Rights, right.

McKinnon: Yes, yes

Crossley: and you under-, and you understood
them, you understood your Miranda
Rights

McKinnon: I just admitted to being wrong

Crossley: OK, but I, you understood
your Miranda Rights

McKinnon: Yes

Crossley: OK, and you understand
you are free to go

McKinnon: I know

Crossley: OK . . . But I told you and I told
Karla . . . that um, I needed to
get your side of the story to help
you and the only way I can go to
the County Attorney and say Roy
came to me, you need to help him
out um, Roy came to me, he was
truthful, he was a hundred per-, a
hundred percent honest to (sic) me

McKinnon: All kinds of things happened.

App. at A31-A32. McKinnon made further admissions, and the trial
court denied his motion to suppress them. App. at A11-A23
(order). The State played an excerpt of the taped statement for
the jury. T 95; State's Suppression Exhibit 2.

SUMMARY OF THE ARGUMENT

The trial court erred when it ruled that McKinnon's statement was voluntary.

Two circumstances combined to render the statement involuntary. First, Trooper Crossley failed to honor McKinnon's efforts to invoke the Miranda rights he had received. While this fact is not dispositive in a non-custodial setting, Crossley's conduct conveyed the impression that McKinnon had no choice but to continue the interview. Second, in response to McKinnon's efforts to terminate the interview, Crossley implied that his only chance of receiving lenient treatment was to continue to speak. These factors combined to overbear McKinnon's will. The trial court thus erred in denying his motion to suppress.

I. THE TRIAL COURT ERRED WHEN IT DENIED MCKINNON'S MOTION TO SUPPRESS HIS STATEMENT TO TROOPER CROSSLEY, BECAUSE THE STATEMENT WAS INVOLUNTARY.

McKinnon made several efforts to invoke the Miranda rights Crossley had given him. In the face of those efforts Crossley persisted in his questioning. As a result, McKinnon's statements were involuntary under the Fifth and Fourteenth Amendments to the Federal Constitution, and part I, article 15 of the New Hampshire Constitution. Because the trial court erred in denying McKinnon's motion to suppress, this Court must reverse his convictions.

"Miranda warnings are required when a defendant undergoes custodial interrogation." State v. Steimel, 155 N.H. 141, 144 (2007). As a corollary, "[t]he police have no obligation to issue Miranda warnings when the person being interviewed is not subject to custodial interrogation." State v. Goupil, 154 N.H. 208, 226 (2006). Nonetheless, a defendant who was not in custody may still claim that his statements must be suppressed because they are involuntary. State v. Rodney Portigue, 125 N.H. 352, 362 (1984) ("Although the defendant was not in custody . . . to trigger the Miranda requirements, the standards of fundamental fairness under the due process clause of the United States Constitution do apply to noncustodial interrogations.").

McKinnon was not in custody. Thus, under normal circumstances, any effort on his part to invoke Miranda

protections would be inconsequential. Compare State v. Pehowic, 147 N.H. 52, 55 (2001) (because the defendant was not in custody, “[T]he fact that the defendant’s attorney indicated by letter that the defendant did not wish to speak with the police was irrelevant.”) with State v. Roache, 148 N.H. 45, 52 (2002) (“[W]hen an attorney calls or arrives at the police station and identifies himself or herself as counsel retained for the suspect to an agent of the State in a position of authority to contact the interrogating officers, the interrogating officers have a duty to stop questioning the suspect and inform the suspect that the attorney is attempting to contact him or her.”).

The unique feature of this case is that even though McKinnon was not in custody, Crossley secured a Miranda waiver before proceeding with the interview. While this is not unprecedented, see, e.g., State v. Dorval, 144 N.H. 455, 456 (1999); State v. Carroll, 138 N.H. 687, 689 (1994), the Court has not specifically examined the significance of the defendant’s invocation of Miranda after such warnings were, but did not have to be, given.

Other courts addressing the issue have held that a defendant who is not in custody, but is given his Miranda rights, cannot invoke them during interrogation in the classic sense, but his efforts to do so are nonetheless relevant in determining the voluntariness of his statements. See, e.g., State v. Middleton, 640 S.E.2d 152, 161-62 (W. Va. 2006) (collecting cases);

Commonwealth v. Morgan, 610 A.2d 1013, 1019 (Pa. Super. 1992) (considering fact that defendant was given Miranda rights in determining whether statement was product of actual coercion); State v. Stanley, 809 P.2d 944, 949-50 (Ariz. 1991) ("Because no such warnings were required, and because we agree that Stanley was not in custody, the pertinent inquiry is whether his statements were voluntarily made."). "Although the "scrupulously honor" test is not our guide in cases of non-custodial questioning, we will nevertheless consider the officers' persistence in questioning the defendant in the face of his stated desire not to cooperate. This is, however, but one factor in determining the voluntariness of the defendant's statements.'" State v. Slwooko, 139 P.3d 593, 603 (Alaska App. 2006) (quoting United States v. Serlin, 707 F.2d 953, 958 (7th Cir. 1983)) (internal brackets omitted).

"When we speak of a voluntary confession, all we mean is that it is trustworthy because it was not induced by threat, promise, fear, or hope." State v. George, 93 N.H. 408, 417 (1945). "To be considered voluntary, a confession must be the product of an essentially free and unconstrained choice and not extracted by threats, violence, direct or implied promises of any sort, or by exertion of any improper influence." State v. Zwicker, 151 N.H. 179, 186 (2004). "[W]e look at whether the actions of an individual are the product of an essentially free

and unconstrained choice or are the product of a will overborne by police tactics." State v. Rezk, 150 N.H. 483, 487 (2004) (quotation omitted). The State must prove voluntariness beyond a reasonable doubt. Carroll, 138 N.H. at 691.

Here, the combination of two "police tactics" overbore McKinnon's will and rendered his statements involuntary. First, at the start of the interview with Crossley, McKinnon made two efforts to terminate it. App. at A28 (when asked to explain what happened, McKinnon says, "No, if I answer this, this is going to be held against me."); App. at A31 (McKinnon said he did not want to speak without a lawyer); see State v. Remick, 149 N.H. 745, 746-47 (2003) (holding that invocation of the right against self-incrimination is construed liberally and does not require any "magic words"). Each time, Crossley persuaded McKinnon to continue speaking to him. Crossley's persistence in the face of McKinnon's efforts to invoke the rights he had been read conveyed the message that McKinnon had no choice but to answer Crossley's questions.

Second, whenever McKinnon tried to invoke his rights, or otherwise hesitated in describing his conduct with C.W., Crossley implied that McKinnon could only secure lenient treatment if he continued to talk. While a promise of leniency in conjunction with a confession is not dispositive on the issue of voluntariness, see State v. Beland, 138 N.H. 735, 738 (1994),

"all the facts must be examined and their nuances assessed to determine whether, in making the promise, the police exerted such an influence on the defendant that [his] will was overborne." State v. Spencer, 149 N.H. 622, 627 (2003) (quotation omitted) (brackets added).

In this case, the timing of the promises, especially the one in response to McKinnon's desire to have a lawyer, is key. When McKinnon said he did not want to proceed without counsel, Crossley said that he would not be able to try to secure more lenient treatment for him unless he was "truthful," which meant describing "fondling" and "clothes on [or] clothes off." App. at A31-A32. Though "promises to recommend leniency are [generally] not sufficiently compelling to overbear a defendant's will," Rezk, 150 N.H. at 489 (quotation omitted), the timing of this promise in particular caused McKinnon to continue to submit to Crossley's interrogation.

The Court's charge is to consider the totality of the circumstances in determining the voluntariness of a suspect's statements to the police. In this case, a defendant with an eighth grade education, in the unfamiliar surroundings of the Colebrook Police Chief's office, repeatedly tried to tell a state trooper that he wanted to exercise his rights to silence and counsel. The fact that Crossley read but did not honor the rights conveyed that McKinnon had no choice, and no right, to

decline Crossley's requests to speak. This is especially so because those requests were interspersed with suggestions that detailed disclosures will merit lenient treatment. Crossley's persistence in the face of McKinnon's attempted invocations, joined with the promise that Crossley would help McKinnon if McKinnon was "a hundred percent honest," overbore McKinnon's will and rendered his statements involuntary. This Court must reverse.

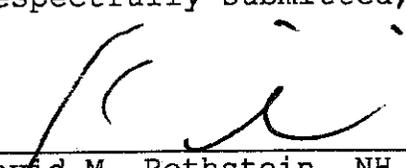
CONCLUSION

WHEREFORE, Mr. McKinnon respectfully requests that this Honorable Court reverse the trial court's ruling on his motion to suppress and remand his case for a new trial.

Oral argument is waived.

Respectfully submitted,

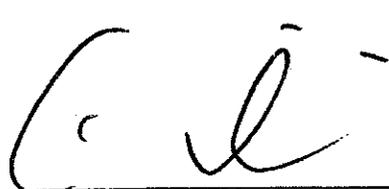
By


David M. Rothstein, NH Bar #5991
Deputy Chief Appellate Defender
NH Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, this 28TH day of September, 2009, to:

Criminal Bureau
Attorney General's Office
33 Capitol Street
Concord, NH 03301


David M. Rothstein

DATED: September 28, 2009