

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0314

The State Of New Hampshire

v.

Stephen Aguiar

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
NEW LONDON DISTRICT COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(5 minutes)

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ISSUE PRESENTED

Whether the trial court correctly denied the defendant's motion to suppress his driver's license, which the police retrieved from the floor of his car after his arrest for speeding, where the license would have been discovered inevitably in the course of a later inventory search.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

At 1:21 a.m. on Saturday, October 11, 2008, Trooper Vincent Grieco of the New Hampshire State Police was traveling north on Interstate Route 89 in New London, operating a “moving radar” device. T 9.¹ He observed a car traveling south at high speed, and his radar recorded a speed of 92 miles per hour. T 9-10. Grieco used a paved crossover to reverse direction and gave pursuit, but did not turn his emergency lights on. T 10-11. When the car, a black 2007 Pontiac, increased its speed to 118 miles per hour while weaving through traffic, Grieco turned his lights on and pulled the car over. *Id.*

When he approached the driver, Grieco saw that the driver’s door was open and the driver was bending down inside the car. T 16, 19. He told the driver to get out of the car, and they went to the rear of the Pontiac, where Grieco placed him under arrest for speeding and put him into Grieco’s cruiser. T 14, 20. Grieco asked for his identification, and the driver told him that his license was on the floor of the car. T 15, 21. Grieco then went back to the car and retrieved a Massachusetts driver’s license, which identified the driver as the defendant, Stephen Aguiar. T 11, 21. Later, Grieco’s supervisor conducted an inventory search of the vehicle preparatory to towing it away. T 15.

¹ References to the record are as follows: “NOA” is the notice of appeal; “DB” is the defendant’s brief with attachments; “T” is the transcript of the bench trial on January 7, 2009.

The defendant was charged with reckless driving. T4. *See* RSA 265:79 (Supp. 2008). At a bench trial in New London District Court (*McSwiney, J.*), Grieco and the defendant testified as outlined above. The defendant moved to suppress the evidence of his identification through the driver's license, arguing that Grieco's retrieval of the license from the floor of the car was an illegal search, and citing part I, article 19 of the state constitution. T 22. The State responded that the search was legal either as a search incident to arrest, or because the car would be automatically subject to an inventory search: "An inventory search is done on every single vehicle that we tow or remove from the scene." T 22-23. The defendant's only response to the latter argument was that Grieco had not done an inventory search. T 23. The court then denied the motion to suppress and found the defendant guilty. T 23, 27.

At trial, the court ruled that the State had identified the defendant independently of the driver's license. T 27. The defendant moved for reconsideration based on the trial transcript, arguing that the license had been the only evidence admitted that proved his identity as the driver. DB B1-B2. The court denied the motion, and ruled that the identification by means of the driver's license was proper. DB A5. The court sentenced the defendant to a fine of one thousand dollars plus sixty days' suspension of his right to operate a motor vehicle in New Hampshire. T 27-28. This appeal followed.

SUMMARY OF THE ARGUMENT

The driver's license was properly admitted under the doctrine of inevitable discovery. Even if Grieco's search of the car exceeded the scope of a proper search incident to arrest (and the State concedes that it did), the defendant did not dispute the State's assertion that every car towed by the State Police, as this one was, was automatically subject to an inventory search. He also does not dispute that this Court has held such searches to be constitutional. Because the license would inevitably have been found during such a search, the fact that Grieco himself was not conducting an inventory search is not dispositive. The license was admissible.

ARGUMENT

THE LICENSE WAS PROPERLY ADMITTED UNDER THE DOCTRINE OF INEVITABLE DISCOVERY.

The defendant argues that the trial court erred in denying his motion to suppress, because the license was not seized legally. DB 6-8. This court's "review of the trial court's ruling on a motion to suppress is *de novo*, except as to any controlling facts found by the trial court in the first instance." *In re Juvenile 2006-0406*, 156 N.H. 233, 235 (2007). Here, the license was properly admitted. Because the defendant cited the state constitution in his motion, T 22, this Court will analyze the question under part I, article 19 of the state constitution, which is more protective than the federal constitution regarding searches or seizures of a motor vehicle. *State v. Finn*, 146 N.H. 59, 61 (2001).

As a threshold matter, the license could not have been retrieved through a search incident to arrest. *See State v. Sterndale*, 139 N.H. 445, 447-48 (1995) ("Since the search was made only after the defendant was securely in custody and unable to gain access to the vehicle, it was not justifiable as a search incident to arrest."). *See also Arizona v. Gant*, 129 S. Ct. 1710 (2009) (adopting the same rule under the Fourth Amendment).

The defendant, however, did not contest the State's assertion at trial that "[a]n inventory search is done on every single vehicle" that the State Police tow or remove from the scene of an arrest or accident. T 22-23. He also did not contest

Grieco's testimony that his supervisor actually conducted such a search of the Pontiac before it was towed from the scene on Interstate 89. T 15. On appeal, he does not dispute that the police may constitutionally establish a procedure of conducting inventory searches of an arrestee's property. *See State v. Levesque*, 123 N.H. 52, 56-58 (1983) (upholding inventory search of briefcase carried by defendant when running from police). The defendant only argued that Grieco's search was not an inventory search. T 23. This is not dispositive.

Because standard State Police procedures required an inventory search of the vehicle, the license on the floor would inevitably have been discovered during that search. The license was therefore admissible because "[u]nlawfully obtained evidence may be admitted ... if the police would have inevitably discovered the evidence." *State v. Hill*, 146 N.H. 568, 573 (2001). This doctrine was applied by the Arizona Court of Appeals, after the ruling by that State's Supreme Court in the *Gant* case which was subsequently upheld by the United States Supreme Court. *State v. Rojers*, 169 P.3d 651 (Ariz. Ct. App. 2007).

The *Rojers* court held that, because the defendant had been arrested and handcuffed before his car was searched, the search was not a valid search incident to arrest under *Gant*. *Id.* at 653-54 (citing *State v. Gant*, 162 P.3d 640 (Ariz. 2007)). The drugs at issue in that case were admissible, however; they would have been inevitably discovered, because the police would have performed an inventory search before towing the vehicle. *Rojers*, 169 P.3d at 655-58. *See State v.*

Camacho, 75 P.3d 370, 374-76 (Nev. 2003) (although search of car exceeded scope of permissible search incident to arrest under state constitution, evidence was admissible because car would have been impounded and subject to inventory search); *see also State v. Tassin*, 758 So. 2d 351, 354 (La. Ct. App. 2000) (although search of defendant's purse found in car went beyond scope of proper search incident to arrest, purse would inevitably have been searched after she was taken to central lockup, so contents were admissible).

When courts have rejected an inevitable discovery argument based on impoundment of a motor vehicle accompanied by an inventory search, it has been because the State failed to prove that standard procedures would have called for impoundment. *See, e.g., State v. Vandeveld*, 138 P.3d 771, 783-84 (Kan. Ct. App. 2006) (“there were never reasonable grounds for impoundment”); *State v. Bauder*, 924 A.2d 38, 51 (Vt. 2007) (“there was no legal basis to impound the vehicle”). Here, as the State argued at trial and the defendant does not dispute, the car was towed and an inventory search was conducted according to standard police procedure. T 15, 22-23. Because the license was on the floor near the driver's seat, T 18-19, it would have been found immediately. It was accordingly properly admitted under the doctrine of inevitable discovery.

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.

Respectfully submitted,

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November 9, 2009

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



Nicholas Cort

