

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2009-0554

The State Of New Hampshire

v.

John Guy

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STATE'S APPEAL PURSUANT TO RSA 606:10 FROM A JUDGMENT OF  
THE MERRIMACK COUNTY SUPERIOR COURT

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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**ISSUE PRESENTED**

Whether the trial court used an improper subjective test when it granted the defendant's motion to suppress and denied the State's motion for reconsideration, ruling that the defendant's arrest was unlawful even if the officer had probable cause to arrest him for speeding or reckless operation, because the court was "not convinced that that defendant would have been arrested [for] reckless operation or speeding even if he could have been."

Issue preserved at the suppression hearing, T 16, 96-97, and in the State's motion to reconsider, App. 5-8.<sup>1</sup>

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<sup>1</sup> References to the record are as follows: "NOA" is the notice of appeal; "App." is the appendix to this brief; "T" is the transcript of the suppression hearing on March 26, 2009.

**STATEMENT OF THE CASE AND FACTS**

On June 17, 2007, the defendant, John Guy, was stopped by State Police Trooper James Decker while driving northbound on Interstate Route 93 in Concord, after being clocked by radar at 92 miles per hour in a 55-mph zone. T 3-8. The defendant stipulated that the radar was correct and that he was legally stopped. T 7-8. Decker made observations that caused him to arrest the defendant for driving while intoxicated. T 9-10; *see* RSA 265-A:2 (Supp. 2009).

Because the defendant's car had to be towed pursuant to standard police practice, the police conducted an inventory search of the vehicle. T 11-13; *see* RSA 262:32 (Supp. 2007) (amended 2008). They found three "throwing knives" and what appeared to be two different controlled drugs. T 13-16. The defendant was subsequently charged with two counts of possession of illegal drugs, being a felon in possession of a deadly weapon, and aggravated driving while intoxicated. NOA 6; *see* RSA 318-B:2 (2004) (amended 2008); RSA 159:3 (2002); RSA 265-A:3, I(a) (Supp. 2009).

The defendant moved to suppress the weapons and drugs, arguing that his arrest was unlawful, and that the inventory search was the fruit of that arrest. T 95-96. The Merrimack County Superior Court (*Nicolosi, J.*) held a hearing at which Decker testified to the above facts, and further testified that, if he had not suspected the defendant of driving while intoxicated, he would nevertheless have

arrested him for reckless operation. T 16; *see* RSA 265:79 (Supp. 2009 ). The defendant testified that he had not been drinking, and introduced other witnesses who testified that he had stopped drinking years before. T 51; NOA 7-8. When asked by the court how the defendant responded to the State’s argument that he could have been arrested for reckless operation, defense counsel replied that “[p]erhaps he could have been arrested for reckless driving, but he wasn’t arrested for reckless driving.” T 96.

The court found the defense testimony credible, and granted the motion to suppress, ruling that the arrest was illegal because the trooper lacked probable cause to arrest the defendant for DWI. NOA 5-9. The State filed a motion to reconsider, citing Decker’s testimony that he would have arrested the defendant for reckless operation if DWI were not available, and arguing that the arrest was legal as long as the trooper had probable cause to arrest the defendant for speeding or reckless operation. App. 5-8. The defendant objected, arguing only that it would be an “unjustifiable burden” on the defense to allow the State to argue “alternative crimes and theories.” App. 9-10. The court denied the State’s motion; its order reads in full as follows:

State’s Motion to Reconsider—The Motion is DENIED. Although the State’s recitation is consistent with the officer’s testimony, the Court is not convinced that the defendant would have been arrested in [sic] reckless operation or speeding even if he could have been.

App. 11. The State then filed the instant appeal.

**SUMMARY OF THE ARGUMENT**

The trial court applied an improper subjective test when it ruled that the defendant's arrest could be lawful only if the officer *would* have arrested him for speeding or reckless operation in the absence of probable cause for DWI. As established by United States Supreme Court precedent, the test is an objective one. Because circumstances known to the officer established probable cause to arrest the defendant for speeding or reckless operation, the arrest and subsequent inventory search of the car were lawful, regardless of the officer's state of mind. The order suppressing the fruits of the search should therefore be vacated.

**ARGUMENT**

**BECAUSE THE OFFICER HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR SPEEDING OR RECKLESS OPERATION, THE ARREST WAS VALID REGARDLESS OF THE OFFICER'S STATE OF MIND.**

“An arrest by a peace officer without a warrant on a charge of a misdemeanor or a violation is lawful whenever: (a) He has probable cause to believe that the person to be arrested has committed a misdemeanor or violation in his presence.” RSA 594:10, I(a) (Supp. 2009). The defendant in this case stipulated that he was speeding, and the trial court ruled, “The officer clearly had a basis to stop Mr. Guy’s vehicle due to his excessive speed.” NOA 8. The trial court denied the State’s motion to reconsider by applying a subjective test; when it ruled that it was irrelevant whether the defendant *could* have been arrested for speeding or reckless driving, it implicitly ruled that Decker’s arrest of the defendant could be lawful only if the court credited his testimony that he *would* have arrested him for reckless operation if DWI were not available. App. 11. In so ruling, the court erred.

As the Supreme Court of the United States has held, the correct test in such cases is an objective one:

Our cases make clear that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the

reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. The Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, whatever the subjective intent. Even handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.

*Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (citations, quotations, and brackets omitted). Thus, the standard governing probable cause for arrest is similar to the (objective) standard governing reasonable suspicion for an investigative stop. See *State v. McBreairty*, 142 N.H. 12, 15 (1997) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). The Court has also held that an arrest is constitutional even if made on the basis of a minor traffic violation. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001).

In *State v. Pierce*, 126 N.H. 84 (1985), this Court upheld the trial court's ruling that an officer who arrested the defendant for DWI had acted lawfully, whether or not he had probable cause to arrest for DWI, solely on the ground that he had probable cause to arrest the defendant for armed robbery. *Id.* at 86-87. Here, as in *Pierce*, because the circumstances known to Trooper Decker established probable cause to arrest the defendant for speeding or reckless operation, the arrest was lawful regardless of Decker's subjective state of mind. Because the arrest was lawful, the defendant's car was subject to removal by the police pursuant to standard police policy, T 11-12, and RSA 262:32 (Supp. 2007)

(amended 2008). This in turn justified the inventory search that uncovered the weapons and drugs at issue. *State v. Levesque*, 123 N.H. 52, 56-58 (1983). *Cf. Arkansas v. Sullivan*, 532 U.S. 769, 770-71 (2001) (holding that the Arkansas Supreme Court applied an improper subjective test when it suppressed the fruits of an inventory search following a legal arrest for speeding).

It follows that the trial court erred when it granted the defendant's motion to suppress. The trial court's order should be vacated and the case remanded for trial.

**CONCLUSION**

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

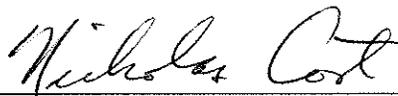
The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Michael A. Delaney  
Attorney General



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Nicholas Cort, NH Bar No. 236  
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January 4, 2010

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



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Nicholas Cort

**STATE'S APPENDIX**

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# The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

State of New Hampshire

v.

John Guy

NO. 07-S-1272-1275

## ORDER ON MOTION TO SUPPRESS

The defendant moves to suppress evidence seized by the police after his arrest for aggravated DWI on June 17, 2007. A hearing was held on March 26, 2009. The State presented the testimony of New Hampshire State Trooper James Christian Decker. The defendant testified and presented the testimony of four witnesses, three of whom were with him in the hours before his arrest and all four of whom were familiar with Mr. Guy's drinking habits. Considering the evidence and applicable law, the court GRANTS the motion to suppress.

The defendant is charged with two counts of possession of illegal drugs, being a felon in possession of a deadly weapon, and aggravated driving while intoxicated. On June 17, 2007, after midnight, he was pulled over by Trooper Decker while operating a motor vehicle on I-93 north in Concord. He was the sole occupant of the automobile.

Trooper Decker stopped the defendant after the defendant passed him traveling 92 MPH in a 55 MPH zone, measured by radar. The officer had been positioned in the grassy portion of the road side near the 393/I-93 interchange, because dispatch had received information from a caller who saw a silver Chrysler 300, with a Mass plate: 23JW90, miss the entrance onto Route 393 West from Route 106 and almost strike a motorcycle. After the defendant pulled over, the officer confirmed that his vehicle fit the description and license plate given by dispatch; however, the officer testified he would have stopped the defendant regardless of the dispatch information as a result of the

excessive speed. The trooper admitted that he never observed any erratic operation, and the defendant had no trouble pulling over to the road side and pulled over immediately after the officer's blue lights were activated.

After the trooper identified himself, Mr. Guy produced his license and registration without any difficulty. Trooper Decker testified that he smelled an odor of an alcoholic beverage coming from the vehicle, and he was confident it was emanating from the defendant's person. He also testified that the defendant's eyes were bloodshot and glassy, the defendant's movements were slow and deliberate when he was obtaining his license, and the defendant's description that he was heading from Laconia to Massachusetts after Motorcycle Weekend on I-93 North did not make sense. Trooper Decker testified that the defendant admitted that he had a few beers.

Trooper Decker testified that, although the defendant cooperated with his request to step out of the vehicle and perform field sobriety tests, during the instructions, the defendant indicated that his lawyer told him not to do field sobriety tests. This was corroborated by Mr. Guy's lawyer's business card on the back of which was this advice typed in bold red letters. He ultimately refused to complete the tests. The trooper admitted the defendant's speech was not slurred, and he had no difficulty getting out the car or walking. After the defendant declined to perform the tests, he was arrested for aggravated DWI. He was handcuffed, searched and placed in the cruiser.

A lawful inventory search of the defendant's vehicle was conducted after his arrest, resulting in the discovery of the incriminating evidence that led to three possession related charges. Before the car search, when asked if there was anything of exceptional value in the vehicle, the defendant indicated that all he needed was his medication. The trooper testified that, regardless of the arrest for aggravated DWI, the defendant would not have been free to leave, because he would have been arrested for reckless conduct.

Mr. Guy denied he consumed any alcohol on June 17, 2007. Approximately seven years ago Mr. Guy was involved in a serious motorcycle accident. The accident left him permanently disabled and with a problem walking. He testified that he wears leg braces, which were in the car when he was arrested. The braces were not listed as one of the items seized during the inventory search. He contended that he has not consumed

alcohol since his accident. A family member corroborated that he has not seen Mr. Guy drink alcohol at family events since the accident. Three other witnesses confirmed that Mr. Guy did not consume any alcohol on June 17, 2007 during the motorcycle weekend activities and that Mr. Guy did not drink generally. Mr. Guy explained that when the trooper stopped him, he was on his way to Saco, Maine to attend his daughter's basketball game and that he was disoriented because he was unfamiliar with the route from Laconia to Saco. He explained that after numerous cell phone conversations with his wife, during which she unsuccessfully attempted to guide him, he decided to head to I-93 to eventually travel to Route 101 to go via the Seacoast, a route which was longer, but which he knew.

The defendant bases his argument on the Fourth Amendment to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution. Because the New Hampshire Constitution provides at least as much protection in this area as the United States Constitution, the Court addresses the defendant's claims under the New Hampshire Constitution, referring to federal authority only to assist in its analysis. See State v. Ball, 124 N.H. 226, 232 (1983); see also State v. Kennison, 134 N.H. 243, 246 (1991).

Part I, Article 19 of the New Hampshire State Constitution provides that every citizen has "a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." "A warrantless search is per se unreasonable and invalid unless it comes within one of the recognized exceptions to the warrant requirement." Livingston, 153 N.H. 399, 402 (2006). A lawful inventory search conducted after an arrest is an exception.

The only viable issue presented is whether the State had probable cause to arrest Mr. Guy for aggravated DWI. The officer clearly had a basis to stop Mr. Guy's vehicle due to his excessive speed. Once he stopped the vehicle and confirmed it was consistent with the vehicle reported for erratic driving, he was entitled to confirm or dispel his suspicion that the defendant was an impaired driver.

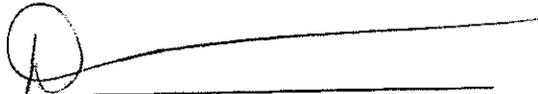
The Court finds, however, that the State has not met its burden to demonstrate sufficient facts to support a finding of probable cause for the defendant's arrest. Absent a valid arrest, an inventory search was improper.

State v. John Guy, 07-S-1272-1275

The Court was convinced by the witnesses who corroborated Mr. Guy's testimony that he did not drink alcohol after his accident and had not consumed any alcohol on June 17, 2007. The Court also was not confident that Mr. Guy actually admitted that he consumed two beers before driving. His one incident of erratic driving and his speeding logically could be explained by the defendant being lost and impatient to reach his destination while conversing with his wife, as it could be by being impaired by alcohol. Although the defense through its presentation of evidence suggests that the DWI arrest was manufactured after the police learned Mr. Guy was a felon and member of the Hell's Angels, the Court need not address the allegation. Given the explanations provided by Mr. Guy for his driving infractions and the alternative reasons for having bloodshot and glassy eyes at such a late hour, considered together with the evidence that favored a conclusion that the defendant was not impaired, the Court simply finds that the trooper had not sufficiently confirmed or dispelled his suspicions that Mr. Guy was engaged in illegal activity before he effected the arrest.

SO ORDERED.

6/18/09  
DATE

  
\_\_\_\_\_  
Diane M. Nicolosi  
Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

JUNE 2009 TERM

DOCKET NOS.  
07-S-1272 through -1274 and 07-S-1277

THE STATE OF NEW HAMPSHIRE  
v.  
JOHN GUY

MOTION TO RECONSIDER

NOW COMES The State of New Hampshire, by and through the Merrimack County Attorney, and requests reconsideration of the Court's decision issued June 8, 2009 (date of clerk's notice) (Nicolosi, J.) suppressing the evidence obtained during a post-arrest vehicle inventory search, and for reasons says that:

1. It is within the trial court's sound discretion to reconsider its rulings in the interests of justice, at any time prior to final judgment. State v. Poirier, 136 N.H. 477, 479-80 (1992).
2. In its order, the Court states that "[t]he only viable issue is whether the State had probable cause to arrest Mr. Guy for DWI." Order at 3.
3. The State respectfully submits that the Court has overlooked or misapprehended certain evidence and argument, submitted at the hearing, which establishes that defendant's arrest was lawful regardless of the Court's determination of the DWI issue, because the officer unquestionably had probable cause to arrest the defendant for reckless operation or simply for speeding.

4. The Court expressly found that the initial stop for speeding was lawful. "The officer clearly had a basis to stop Mr. Guy's vehicle for excessive speed." Order at 3. In fact, the uncontroverted evidence established that the officer had clocked the defendant's vehicle at 92 mph in a 55 mph zone on I-93 North after midnight, after receiving reports from dispatch that the same vehicle minutes earlier had missed the entrance onto Route 393 and almost struck a motorcycle. Order at 1.

5. The officer testified at the hearing that, even if the defendant had not been intoxicated, he would have arrested him for reckless operation --driving more than 35 mph over the speed limit after midnight.

6. Defendant did not challenge the State's evidence of speed.

7. After the presentation of evidence, the State, in addition to arguing that the officer had probable cause to believe the defendant was intoxicated, argued that, in light of the uncontroverted testimony, the officer had an alternate basis for arresting the officer, based on the excessive speed.

8. An officer may arrest a subject without a warrant on a charge of a misdemeanor or a violation when he has probable cause to believe that the person to be arrested has committed a misdemeanor or violation in his presence. RSA 594:10, I(a) (Supp. 2008); compare Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (Fourth Amendment does not prohibit

MOTION TO RECONSIDER  
PAGE 3

arrest for even a very minor criminal offense such as a seatbelt violation punishable only by a fine).

9. The officer here had probable cause to believe the defendant had committed the offenses of reckless operation and speeding in his presence and therefore was authorized to arrest him. The subsequent inventory search was therefore proper and the evidence found during that search should not be suppressed.

10. That the State did not advance this alternative argument in its written Objection to Motion to Suppress does not preclude it from presenting it at the hearing. Prior to the hearing, the State did not know that the defendant's primary factual basis for suppression would be testimony that the defendant had had nothing to drink that day or at any other time in the past several years. The State did advance the argument during the hearing.

WHEREFORE The State of New Hampshire requests that this honorable Court:

- A. Reconsider the suppression ruling and deny the defendant's Motion to Suppress; and
- B. Grant such other and further relief as the Court deems just.

MOTION TO RECONSIDER  
PAGE 4

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

DATED: June 5, 2009

---

George A. Stewart  
Assistant Merrimack County Attorney  
Susan M. Venus  
Assistant Merrimack County Attorney  
4 Court Street  
Concord, NH 03301  
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CERTIFICATION

I hereby certify that a copy of the foregoing Motion to Reconsider was this day forwarded to defense counsel, P. Scott Bratton, Esq., 9 Middlesex St., Lowell, MA 01852.

DATED: June 5, 2009

---

George A. Stewart

## STATE OF NEWHAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

JUNE 2009 TERM

DOCKET NOS.

07-S-1272 THROUGH 1274 AND 07-S-1277

THE STATE OF NEW HAMPSHIRE

v.

JOHN GUY

DEFENDANT'S OPPOSITION TO  
MOTION TO RECONSIDER

NOW COMES the defendant, John Guy, by and through counsel, P. Scott Bratton, and requests that this Honorable Court deny the State's Motion to Reconsider and affirm the Court's Order dated June 08, 2009, Nicolosi, J.

As grounds for the defendant's request, the defendant states as follows:

1. The Order by this Court suppressing the evidence obtained during a post-arrest inventory search was within the Court's discretion.
2. The defendant was indicted and charged with two counts of possession of illegal drugs, being a felon in possession of a deadly weapon and aggravated driving while intoxicated.
3. The Court has properly considered the evidence and charges the State brought against the defendant.
4. The State now raises the issue that although the Court has ruled that the trooper did not have probable cause to arrest the defendant for the underlying charge of driving under the influence of intoxicating liquor (DWI) that the trooper did have probable cause to arrest for reckless operation or speeding which the defendant is not charged.
5. Although the Court found that the initial stop for speeding was lawful, the issue was whether the State had probable cause to arrest the defendant for the criminal charge of DWI and not alternative crimes that the defendant could have been arrested for which the State now raises within its motion for reconsideration.
6. To permit the State to raise alternative crimes and theories that the defendant may have been charged with to justify probable cause would put an unjustifiable burden on the

defendant to defend against all alternative crimes and theories of probable cause which the defendant is not charged.

- 7. The Court properly decided the sole issue before the Court, "whether the State had probable cause to arrest Mr. Guy for aggravated DWI." Order at 2.

WHEREFORE, the defendant respectfully requests that this Honorable Court Affirm the decision of the Court dated June 05, 2009.

Dated: 6-24-09

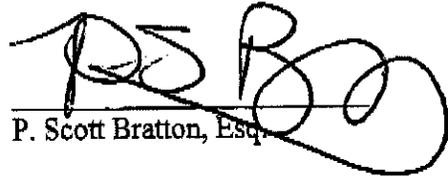
Respectfully submitted;



P. Scott Bratton, Esq.  
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Certification

I, P. Scott Bratton, hereby certify that a copy of the foregoing was mailed to Assistant County Attorney, George A. Stewart, this day of June 24, 2009.

  
P. Scott Bratton, Esq.

**THE STATE OF NEW HAMPSHIRE  
Merrimack County Superior Court**

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State v. John Guy

07-S-1272; 1273; 1274; 1275

State's Motion to Reconsider - The Motion is DENIED. Although the State's recitation is consistent with the officer's testimony, the Court is not convinced that the defendant would have been arrested in reckless operation or speeding even if he could have been.

Diane M. Nicolosi, P.J.  
6/26/09

7/08/2009  
Date

/s/ William McGraw  
Clerk of Court

cc: John Guy  
P. Scott Bratton, Esq.  
Ann M. Guy