

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2009-0631

State of New Hampshire

v.

Serge E. Bayard

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

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)**

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QUESTION PRESENTED

Whether the trial court erred in denying Bayard's pre-trial motion to dismiss.

Issue preserved by Bayard's motion to dismiss, and supplemental pleadings filed April 30, May 15, June 8, June 14, and July 30, 2009, see App. 4, 8, 12, 15, and 20;* Bayard's August 3 oral argument, M 27-35; the State's May 11 and August 3 objections, see App. 22 and 27; and the Trial Court's May 19 (Conboy, J.), July 7 (Brown, J.), and August 4 (Fauver, J.) orders denying Bayard's pleadings, see App. 11, 12, and 20; and by the State's June 2 motion for joinder, see App. 32; Bayard's June 8 objection, App. 36; the Trial Court's July 7 order (Brown, J.) granting the State's motion, App. 32; Bayard's July 25 motion to reconsider, App. 38; and the Trial Court's August 3, 2009 denial of the motion to reconsider, App. 38.

*Citations to the record are as follows:

"M" refers to the transcript of the pre-trial motions hearing held August 3, 2009;

"T" refers to the transcript of the jury trial, held August 4-5, 2009;

"App." refers to the Appendix filed with this brief.

STATEMENT OF THE CASE

In January 2009, Serge Bayard was charged in the district court with one count of criminal trespass, a class A misdemeanor. App. 1. The complaint alleged that he entered the Shovan residence in defiance of a probate court writ of possession "evicting him" from the residence. Id. On April 14, 2009, pursuant to District Court Rule 2:14, Bayard appealed to the superior court for a trial de novo. App. 2.

On April 30, 2009, Bayard filed a motion to dismiss the complaint. App. 4. He filed supplemental pleadings on May 15, June 8, June 14, and July 30. App. 8, 12, 15, 20. He renewed his motion to dismiss at a pre-trial hearing. M 27-35. The Superior Court (Conboy, J., Brown, J., and Fauver, J.) denied the pleadings and argument, denying the final pleading on August 4. App. 11, 12, 20.

On June 2, the State brought a second misdemeanor criminal trespass charge, which alleged that Bayard entered and remained in the Shovan residence, an occupied structure, being neither licensed nor privileged to do so. App. 34. The State moved to join the two charges, which it characterized as alternate theories, for trial. App. 32. On July 7, over Bayard's objection and without a hearing, the Trial Court (Brown, J.) granted the State's request. App. 32, 36, 38.

Bayard's jury trial commenced on August 4, 2009 and concluded the following day. After the presentation of the State's case, the Trial Court (Fauver, J.) dismissed the original criminal trespass charge. T 214; App. 41. The court found that, as argued by Bayard before trial, the writ of possession could not be construed, as required by the criminal trespass statute, as a court order restraining Bayard from entering the residence. T 214.

The jury found Bayard guilty of the remaining charge. T 253-54. He was sentenced to 12 months stand committed with all but 208 days suspended, to which his pretrial confinement credit of 208 days was applied. App. 258.

STATEMENT OF FACTS

Dorothy Shovan ("Shovan") died in July, 2008. T 40. From about 1966 until that time, she had lived at 788 Little Sunapee Road in New London, New Hampshire. T 40-41. Her husband predeceased her, dying in 1992 or 1993. T 41. Shovan was survived by her son Mark Shovan ("Mark"), who was the executor of her estate and sole trustee of her trust. T 49.

Shovan met Bayard in about 1995. T 42. Mark described his mother's relationship with Bayard as "symbiotic." T 42. It was a friendship, not an employer/employee relationship. T 64. Bayard planted Shovan's gardens, played bridge with her, took her mushroom picking, and repaired her roof. T 42-43, 98. Both Shovan and Mark provided Bayard with spending money, and Shovan gave Bayard two gifts of \$10,000. T 63.

During 2002-2004, Shovan suffered a series of strokes, which left her somewhat disabled. T 45-46. Bayard moved into Shovan's home during this time, ultimately becoming her care giver. T 47, 106. Shovan's health continued to decline from 2006 to 2008. T 47-48. She suffered "many more" strokes; was in and out of the hospital; and lost the ability to speak. T 48-49. Bayard provided "significant care" to Shovan during her infirmity. T 64-65. Mark, who was himself very ill, was not able to visit his mother often. T 48. When Shovan died in 2008, it was Bayard who arranged her funeral. T 48.

After Shovan's death, Bayard continued to live in her house, which was owned by a trust created by her in 2002. T 52, 105. Mark planned to sell the house. T 52-53. He retained an attorney, Arthur Perkins, to represent his interests. T 52, 102. Perkins testified that none of the documents he reviewed during his involvement with the Shovan matters vested Bayard with any right to be at Shovan's residence. T 107.

Perkins had several conversations with Bayard about "[Shovan's] finances and ownership of property." T 106. Bayard appeared concerned that he "would be thrown out" of the house "overnight." T 109. Perkins told Bayard that he would have to leave, but solicited Bayard's input as to a reasonable time frame in which to do so. T 109. According to Perkins, Bayard indicated that he would not need more than two days to move. T 109. By letter dated August 26, 2008, Perkins advised Bayard that he would be expected to vacate the house by September 5. T 109.

In response, according to Perkins, Bayard filed claims against Shovan's trust and estate in the superior and probate courts. T 112. In the superior court, he sought an injunction against his removal from the house. Id. In the probate court, Bayard filed a claim against Shovan's estate, seeking compensation and an order allowing him to remain in the house until his suit was resolved. T 113. Perkins filed counter

claims and sought a writ of possession regarding the house. T 113. A hearing on the probate matters was scheduled for October 29, 2008, but Bayard did not appear. T 116-17. The probate court issued the writ of possession. T 117.

Perkins testified that he sent a copy of the writ of possession to Bayard. T 134. He also testified, however, that not only were orders of notice not prepared by the probate court for service on Bayard, but that he (Perkins) had never received a return of service on the writ and did not know whether the writ had ever been served on Bayard. T 134-135. Perkins testified that the writ permitted Bayard to remove personal belongings from the subject real property even after service of the writ. T 136.

At some point, Bayard left the house. T 53. On October 31, apparently after Bayard left, Mark had all of the locks on the Shovan house changed, save for that on the cellar door. T 54, 72-73, 138. In addition, the heat was turned down, and the water shut off. T 54-55.

Bayard stayed with a New London acquaintance, Sharon Case, for a short time. T 85. He then left for New Zealand for about two months, during which time he kept in contact with Case. T 84, 87-88. When Bayard returned to New London, he again briefly stayed with her. T 88-89. On January 6, 2009, Bayard moved his things out of Case's home. T 89, 176-77.

John Walford also lived in New London and had been an acquaintance of Shovan's. T 94. He had met Bayard through Shovan and considered him a family friend. T 95. When Bayard returned from a trip and needed a place to stay, Walford invited him to stay at his home for the "reasonable length of time" that it might take Bayard to find another place. T 95. Bayard did stay for one night in January, 2009, bringing with him a bed, a dresser, cooking utensils, gardening things, and clothes. T 95-96.

On January 6, 2009, Detective Chris Currier went to the Walford home to execute a search warrant there. T 142. Bayard was at the Walford residence; Currier later realized that Walford was there as well. T 142. Currier testified that he handed Bayard a copy of the warrant, telling him that it was "a search warrant for the premises." T 143-44. Attached to the "multi-page" warrant was a "package" of other documents, including some probate court orders and the writ of possession. T 143, 148. After searching the house, Currier returned to the living room, where Bayard was waiting. T 154. Currier noticed that the warrant packet was on a table in the living room, opened to the page following the writ of possession. T 154.

The next day, Bayard left Walford's home. T 97. He was distraught. T 100. He refused to return, despite the fact that

"it was a blizzard out," and Walford had invited him to come back. T 99-100.

On January 10, 2009, suspecting that Bayard was at the Shovan house, Officers Andersen and David White went there. T 179-80, 197-98. It was cold that day, and there was snow on the ground. T 161. At the Shovan home, the officers noticed smoke coming out of the chimney and a set of footprints in the snow leading to a small cellar door. T 161, 180. Anderson and White, by now assisted by additional officers, forced the cellar door open. T 162-63, 165-66. The door, against which a metal bar had been placed, led to a basement with low ceilings, which forced the officers to hunch over as they walked. T 167. In the basement was a set of stairs that led up to a hatch door. Id. The hatch did not open easily when pushed; looking through a window into the house, Andersen concluded that a seemingly out-of-place rug and chair had been positioned on top of it. T 167, 182.

Once inside, the officers encountered Bayard, who they ordered to the ground and arrested. T 183. Bayard yelled, "I knew you would do this. This is exactly what I wanted." Id. He also told the officers that he had not been served with any paperwork prohibiting him from being present. T 183. He was wearing a long-sleeved shirt and either shorts or underwear. T 184. White noticed that some of Bayard's personal property was

in the home, including his immigration papers, passport, and toiletries. T 147. According to Mark, who also went to the Shovan house that day, the heat and water had been turned back on; the house was a mess; and the blinds had all been drawn.

T 55.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Bayard's pre-trial motion to dismiss the original criminal trespass complaint filed in his case. The validity of the charge turned on whether the writ of possession referenced in it was a "court order restraining [Bayard] from entering" the premises at issue, pursuant to RSA 635:2, III(b)(3). As the trial court determined after the presentation of the State's case, it was not. Because the court's determination was a decision of law based upon a mixed question of law and fact, dismissal prior to trial was appropriate. The failure to dismiss the charge prior to trial prejudiced Bayard's ability to prepare to meet the charges against him; prejudiced the jury's ability to deal with the charges intelligently and dispassionately; and permitted the State to introduce at trial unfairly prejudicial evidence, thereby casting Bayard in a negative light. This was a violation of Bayard's right to due process under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. His trial was fundamentally unfair.

I. THE TRIAL COURT ERRED IN DENYING BAYARD'S PRE-TRIAL MOTION TO DISMISS.

In five pleadings filed between April 30 and July 30, 2009 Bayard advanced several arguments in support of his motion to dismiss the original criminal trespass complaint filed in his case. This charge (hereinafter, the "court order" charge) alleged that he entered the Shovan residence in defiance of a court order. A Merrimack County Probate Court writ of possession was identified on the complaint as the court order. App. 1.

Bayard's primary contentions were first, that the basis for the charge - the writ of possession - was not, as a matter of law, a "court order restraining him from entering" the Shovan home, per RSA 635:2, III(b)(3); and second, that the State could not prove that he had "been properly notified of such," per RSA 635:2, III(b)(3), because, in fact, he had never been served. See generally App. 4, 8, 12, 15, 20. The State objected, characterizing the writ as a "probate court[] eviction order." App. 23. The Trial Court (Conboy, J.) denied Bayard's motion to dismiss, finding that "based on the allegations of the complaint, the defendant is not entitled to dismissal as a matter of law." App. 11. His motion to reconsider was denied by the court (Brown, J.). App. 12.

On June 2, 2009, during the course of the litigation over the motion to dismiss the court order charge, the State filed an information charging him under an alternate section of the

criminal trespass statute. App. 34. The information alleged that Bayard knowingly entered and remained in the Shovan residence, an occupied structure, being neither licensed nor privileged to do so. App. 34; see RSA 625:2, III(a). The State sought to join the "court order" complaint with the new criminal trespass information for trial. App. 32. Bayard objected, citing State v. Allison, 126 N.H. 111, 113 (1985) for the proposition that the State may not proceed to trial on alternate theories "when trial upon multiple counts . . . would prejudice either the defendant's ability to prepare to meet the charges or the jury's ability to deal with them intelligently or dispassionately." App. 40. The Trial Court (Brown, J.) issued an order stating only that the State's request was granted. App. 35.

Bayard renewed his motion to dismiss at a pre-trial motions hearing on August 3. T 27 et seq. The court (Fauver, J.) denied the motion on August 4. App. 20.

The trial court erred in denying Bayard's pre-trial motion to dismiss. This decision allowed the State to introduce unfairly prejudicial evidence at trial in support of the baseless court order complaint that was dismissed after the close of the State's case. But for the State's ability to prosecute the court order charge at trial, the evidence at issue would otherwise have been marginally probative, if probative at all.

The admission of the unfairly prejudicial evidence denied Bayard due process of law. The resulting trial was a fundamentally unfair one. "A fundamentally unfair adjudicatory procedure is one, for example, that gives a party a significant advantage or places a party in a position of prejudice or allows a party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading disadvantage." State v. Dupont, 149 N.H. 70, 75 (2003) (citing State v. Winslow, 140 N.H. 319, 321 (1995)). This Court must reverse.

Whether the writ of possession was a "court order restraining [Bayard] from entering such place," see RSA 635:2, III(b)(3), was a mixed question of law and fact. There was no factual dispute regarding the contents of the writ referenced in the complaint; the only issue for the trial court was whether, as a matter of law, the writ was a restraining order pursuant to the criminal trespass statute. Cf. In re Estate of Hollett, 150 N.H. 39, 42 (2003) ("Although whether duress exists in a particular case is normally a question of fact, it becomes a question of law when only one valid inference can be drawn from the undisputed facts."); Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 282 (1992) (mixed questions of law and fact concern the application of a rule of law to the facts and the consequent determination of whether the rule is satisfied). But see, e.g., Motion Motors v. Berwick, 150 N.H. 771, 775 (2004) ("The proper

interpretation of a . . . deed[] is a question of law for this court.").

Because the determination at issue here was based on a mixed question of law and fact, it was an appropriate determination for the trial court to decide prior to trial. Cf. United States v. Barletta, 644 F.2d 50, 59 (1981) (finding, in context of Federal Rule of Criminal Procedure 12(b), that the evidentiary question at issue was "'capable of determination without the trial of the general issue' despite the fact that evidence relevant to it arguably overlaps at least in part with some of the proof to be introduced at trial"; issue should have been determined prior to trial). This court reviews mixed issues of law and fact de novo. See State v. Jennings, 155 N.H. 768, 772 (2007) (where ultimate determination involves a mixed question of law and fact, review is de novo); State v. Knickerbocker, 152 N.H. 467, 471 (2005) (same); see also State v. Simone, 151 N.H. 328, 330 (2004) (standard of review is de novo where appeal presents both a question of law and a mixed question of law and fact).

RSA 635:2, III(b)(3) makes criminal trespass a misdemeanor if the person "knowingly enters or remains [i]n any place in defiance of any court order restraining him from entering such place so long as he has been properly notified of such order." A writ of possession is "[a] writ issued to recover the possession of land." Black's Law Dictionary 1605 (7th ed. 1999). The writ

does not restrain a person from entering a place. Cf. Johnston v. Flatley Realty, 125 N.H. 133, 136 (1984) ("An eviction order is merely 'a summary proceeding to recover possession of real estate ... and not a permanent injunction barring visitation."). The writ in this case did not restrain Bayard from entering the Shovan residence. Nor was it even directed to Bayard; rather, it was directed to "any sheriff of Merrimack County and/or police officer of the town of New London." App. 3; see RSA 540:14 ("A writ of possession shall authorize the sheriff to remove the defendant from the premises.").

As the trial court found after the close of the State's case, no "logical reading" of the writ of possession would lead to the conclusion that it was a court order restraining Bayard from entering the home. T 214. See also T 207-211 (during consideration of Bayard's motion to dismiss at the close of the State's evidence, court questions prosecutor about legal nature and effect of writ; directs prosecutor to "look at the face of this writ of possession."); T 216. The court ruled, therefore, that the writ "does not meet the statutory requirements." T 214. This was a conclusion of law, which should have been reached upon Bayard's motion prior to trial.**

** The record suggests that the court could have also decided the pre-trial motion in Bayard's favor on the basis that Bayard was not "properly notified" of the writ, as required by RSA 635:2, III(b)(3). See also RSA 514:14 ("The court shall order notice to be given, in such manner as due process of law requires, of any petition, (footnote continued on page 16)

This Court has concluded that the general rule in New Hampshire is "that the State may proceed to trial on more than one charge, when it seeks only one conviction based on a single act or transaction." State v. Currier, 148 N.H. 203, 207 (2002) (citing State v. Allison, 126 N.H. 111, 114 (1985)). "The general rule is subject to exception, however, when trial upon multiple counts . . . would prejudice either the defendant's ability to prepare to meet the charges or the jury's ability to deal with them intelligently and dispassionately." Currier, 148 N.H. at 207-208.

Here, as in Currier, the "decision to defer granting the motion to dismiss until the close of evidence impermissibly cast the defendant in a negative light, increasing the likelihood of jury prejudice." Currier, 148 N.H. at 208. The prejudicial evidence concerning the writ would have indeed hampered the jury's ability to deal dispassionately with the remaining charge. Moreover, the testimony concerning the legal effect of, procedural foundation for, and notice (or lack thereof) of the writ was confusing and, particularly with regard to Perkins' testimony, tantamount to a trial within a trial. See State v.

(footnote continued from page 15)
complaint, libel, application, or motion in writing filed therein, and no judgment, decree, or ruling shall be rendered thereon absent compliance with such order."). The State presented no evidence of proper service, and in fact presented testimony affirmatively suggesting that proper service was never made. See, e.g., T 134-35 (Perkins' testimony).

Hopkins, 136 N.H. 272 (1992) (noting that an objective at trial is to avoid a trial within a trial, that is, to avoid the litigation of issues that are collateral to the case at hand). The jury would have been confused by the evidence presented; its ability to deal intelligently with the remaining charge would have been compromised.

In addition, as in Currier, the trial court's rulings here prejudiced Bayard's ability to prepare to meet the charges. Currier, 148 N.H. at 207-208. On the one hand, Bayard was forced at his trial to litigate the issues concerning service and the legal effect of the writ. On the other, the pre-trial rulings precluded him from moving to exclude prejudicial evidence concerning the writ and its service, and from litigating the relevance of the writ-related evidence to the charge alleging lack of license and privilege to enter.

By presenting this charge for the jury's consideration, the State was permitted to present evidence nominally relevant to that charge but unfairly prejudicial in several regards to the alternative theory. First, to establish the basis for the writ, the State put on prejudicial and confusing testimony from Perkins about both the nature and creation of wills and inter vivos trusts, and about the civil litigation between Mark Shovan and Bayard leading up to and including the issuance of the writ. Of the sixteen full pages of Perkins' direct testimony, roughly four

pages are devoted to an explanation of trusts and estates law, see T 102-105, and roughly six to an explanation of the claims and counterclaims that ultimately resulted in the writ being issued. See T 112-118.

In addition, during this testimony, Perkins explained that Bayard had filed suit against Shovan's estate seeking "compensation," and that Bayard failed to appear at a scheduled court hearing, thereby triggering the issuance of the writ. T 113; T 116-17; see RSA 540:14, I ("If the defendant makes default ... judgment shall be rendered that the plaintiff recover possession of the demanded premises and costs, and a writ of possession shall issue."). The prosecutor's questions about the litigation led Perkins to explain that he had initially requested the writ on an ex parte basis, and, at the prosecutor's insistence, to explain further that pleadings filed ex parte are filed in that manner out a concern that "damage would be done to the property," or that "certain items may disappear." T 113-14.

In turn, the defense focused much of its cross-examination on the lack of proof of service of the writ. This included questioning and testimony about the distinctions between wills and trusts, T 122-124, and probate and superior court jurisdiction over these matters. T 124-25, T 133-34.

Perkins' testimony about civil probate and trust litigation would have been confusing to the jury. Moreover, it cast Bayard

in an unfavorable light as a litigious, untrustworthy, and possibly criminal person. As such, the evidence was unfairly prejudicial.

Second, given that the State apparently had no evidence that Bayard had properly been served the writ, the prosecutor sought at trial to establish that he had at least seen it. See, e.g., T 134-35 (Perkins testifies that orders of notice were not prepared by the probate court for service on Bayard, and that he (Perkins) had never received a return of service on the writ). To that end, the State called Officer Currier to testify that he executed "a search warrant for the premises" in which Bayard was present. T 144. The search took Currier "from room to room" at the Walford house. T 154. Currier testified that he handed Bayard the warrant, which was accompanied by a packet of documents that included the writ of possession concerning the Shovan residence. T 143, 148. After searching the Walford home, Currier returned to the room in which Bayard was waiting, and noticed that the warrant packet was on a table in the living room, opened to the page following the writ of possession. T 154.

This testimony was also unfairly prejudicial. The testimony strongly suggested, if not established, that Bayard was suspected of removing Shovan's property from her home and concealing it at the Walford home. This, and the fact that the recovery of the

unnamed property necessitated court intervention and police supervision, cast suspicion on Bayard as a likely thief.

Third, the writ of possession, which was entered into evidence at trial, was itself prejudicial. See App. 3. It ordered a sheriff or police officer to remove Bayard "using such efforts and methods as you deem best, including such force as may be necessary to remove the Defendant from the premises." Id. Moreover, it directed that Bayard not be permitted to remove "tangible personal property" from the residence, and identified him by two aliases. Id. In sum, the contents of the writ suggested that Bayard was at the best a person of dubious character, and at the worst, a criminal.

Contrary to the trial court's determination of relevance to the remaining charge, see T 214, the evidence concerning the writ was only marginally probative of Bayard's knowledge of lack of license and privilege to enter the Shovan residence. First, as discussed, the writ did not order Bayard off the property and did not categorically prevent him from returning. Second, the State had no direct evidence that Bayard had ever seen the writ. Indeed, Perkins testified that orders of notice were not prepared by the probate court for service on Bayard, and that he (Perkins) had never received a return of service on the writ. T 134-135. At best, the evidence permitted the inference that Bayard might have received a copy of the writ sent to him by Perkins, and

might have seen the writ during the time Officer Carrier executed a search warrant at the Walford home; under the circumstances, it would have been just as reasonable, however, to conclude that Bayard had simply not seen it. If it was probative at all, therefore, evidence of the writ was only nominally so. It should not have been presented to the jury. See N.H. R. Ev. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

A ruling dismissing the court order charge would not have compromised the State's ability to prosecute Bayard. Here, recognizing its problems with proof of the court order complaint, the State could have elected to file the alternative charge and then entered a nolle prosequi with regard to the original charge. In a case directly on point, this Court has found that it is a proper exercise of prosecutorial discretion to do precisely that. State v. Anderson, 142 N.H. 918, 923 (1998) (holding no double jeopardy implications in superior court trial de novo context, where State brings new attempted criminal trespass charge, then dismisses criminal trespass charge on which defendant was convicted in district court).

That, however, did not occur in Bayard's case. Instead, the trial court permitted the State to proceed to trial on both charges. This resulted in the introduction of unfairly prejudicial evidence, which placed Bayard in an "unmerited and misleading disadvantage," and in turn gave the State "a significant advantage" at trial. See Dupont, 149 N.H. at 75. Because Bayard's trial was fundamentally unfair, in contravention of his guarantees of due process under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, this Court must reverse.

CONCLUSION

WHEREFORE, Mr. Bayard respectfully requests that this Honorable Court reverse.

Undersigned counsel requests 15 minutes oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Wolford, hereby attest that two copies of the foregoing brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 16th day of February, 2010.

Lisa L. Wolford

Dated: February 16, 2010