THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0674

State of New Hampshire

v.

Dennis Morse

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court/North

BRIEF FOR THE DEFENDANT

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(5 Minutes 3JX Panel Oral Argument)

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QUESTION PRESENTED

Whether the trial court erred in finding that Manchester Police officers possessed reasonable suspicion to conduct a motor vehicle stop of the defendant's car.

Issue preserved by defense motion to suppress, the State's objection, the pre-trial hearing on the matter and the trial court's ruling. A. 9-12, 13-21, 27-33; MH. 1-97.*

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* Citations to the record are as follows:
"MH." refers to the transcript of the motion hearing held on April 7, 2009;
"T." refers to the transcript of the trial proceedings, held on June 2, 2009;
"A." refers to the Appendix filed with this brief.

STATEMENT OF THE CASE

By indictment and information, the State charged Dennis Morse with one count of possession of a controlled drug (oxycodone), one count of falsifying physical evidence, one count of resisting arrest or detention and one count of driving while in possession of a controlled drug. T. 8-11; A. 1-3. All charges arose out of a motor vehicle stop which occurred on August 21, 2008. Id.

The Defendant's suppression motion was denied in a written order by the trial court (O'Neill, J.). A. 27-33. Mr. Morse thereafter stood trial in the Hillsborough County Superior Court - Northern District on June 2, 2009. The State withdrew the charge of driving while in possession of a controlled drug during trial, T. 131-32, and the defendant was convicted of the remaining three charges. T. 180-82.

The trial court sentenced Morse to 3 to 6 years at the New Hampshire State Prison for possession of a controlled drug, a consecutive term of 3 ½ to 7 years for falsifying physical evidence, suspended for three years, and to twelve months in the house of corrections, concurrent with the 3 to 6 year prison sentence, for resisting arrest or detention. A. 4-6.

STATEMENT OF THE FACTS

Officer Derek Sullivan was a member of the Manchester Police Department's "street crime unit." MH. 14. This unit worked in plainclothes and "target[ed] all crimes within the city." Id. On the evening of August 21, 2008, Sullivan was patrolling in an unmarked cruiser with two other officers, Thompson and Macken. MH. 19. Sullivan explained that the unit chose an unmarked car so that it would "blend in" and "not [be] as visible to people." MH. 16.

Sullivan and his partners were patrolling the west side of Manchester. MH. 72. As his car traveled south on Blucher Street, it approached the intersection of Conant Street. MH. 16. About five feet from that intersection, Sullivan noticed a car parked on the east side of the street. MH. 16. As he passed the parked car, his lights illuminated its interior. MH. 16. Sullivan noticed that there was a person, later identified as Morse, in the driver's seat of car who "lean[ed] back and crouch[ed] down" as the officers drove past. MH. 16. Although Sullivan testified that the type of vehicle he was driving was "known to everybody as being detective cars or unmarked police cars," MH. 33, it was not immediately apparent to him that Morse was aware that Sulllivan and his partners

were police officers. MH. 34. Nonetheless, his interpretation was that the driver of the car was attempting to "conceal himself from [them]." MH 34.

Sullivan described the area of Conant and Blucher Streets as a "high drug area" with a prevalence of home invasions and burglaries. MH. 15. In the week prior to August 21, 2008, however, Sullivan had no information about any specific criminal activity in the six-block area encompassing the Conant/Blucher intersection. MH. 46. Neither did he have any specific information about the address in front of which the car was parked. MH. 47-48.

After making his initial observation of Morse on Blucher Street, Sullivan continued to the intersection and made a left hand turn onto Conant Street. MH. 17. He drove a short distance to Quincy Street and let Macken out of the car. MH 38-39. Macken got out of the unmarked cruiser to further observe the parked car. MH. 17.

Sullivan then turned onto Quincy Street and turned his cruiser around. MH. 38. At the same time, he ran the license plate of the parked car and learned that it was registered to an address on the east side of Manchester. MH. 72. Sullivan conceded, however, that this fact did not assist him in determining whether a crime had occurred. MH. 73.

Shortly thereafter, Macken returned to the cruiser and told Sullivan that he saw someone come out of the house and run to the car they had been observing. MH. 17, 71. Once that person got into the car, it accelerated rapidly away from the parking spot. MH. 17.

Upon hearing this information, Sullivan began to follow Morse's car. MH. 17. He estimated its speed to be about forty miles per hour. MH. 18. The speed limit in that area was thirty miles per hour. MH 18. Sullivan followed Morse's car for short while, during which time it stopped for two stop signs, and made at least two turns, one of which was made without a signal. MH. 42-43. Sullivan activated his lights in the area of Dubuque and Wayne Streets and Morse immediately pulled over. MH. 18. Sullivan's objective in conducting the stop was not to investigate any of these motor vehicle infractions, but to try to determine whether there was possible drug activity or a burglary that had just taken place. MH. 55.

After Morse pulled his car over, Sullivan asked him to get out and walk to the rear of the car. T. 26. Morse complied. Once at the rear of the car, Sullivan noticed that Morse put his hand to his mouth and began to chew something. T. 26. Sullivan instructed Morse to spit out what he was chewing, but Morse did not comply. T. 28. A

struggle ensued, during which Morse eventually spit out a cellophane wrapper containing two pills of oxycodone. T. 30-31.

SUMMARY OF THE ARGUMENT

In order to conduct a motor vehicle stop, the police must have reasonable suspicion, based on specific, articulable facts, that the person stopped has been, is, or is about to be, engaged in criminal activity. The State argued for reasonable suspicion based on two factors, the character of the neighborhood in which the stop took place, and the conduct of the defendant and his passenger.

The evidence in support of the bad character of the neighborhood was sparse, conclusory and stale. The record is devoid of any recent criminal activity in the area. Furthermore, the arresting officer had no information about any drug activity at the particular address where the defendant was located. With respect to the conduct of the defendant and his passenger, those actions are not probative because there is no evidence that Morse and his passenger knew that police officers were watching.

Finally, the potential alternative bases for the motor vehicle stop, the failure to use a directional and the speed, should not be relied on by this Court because Sullivan testified that the defendant was not stopped for any motor vehicle infractions and no such basis was relied upon by the trial court.

THE TRIAL COURT ERRED WHEN IT RULED THAT THE MANCHESTER POLICE POSSESSED REASONABLE SUSPICION TO CONDUCT A MOTOR VEHICLE STOP OF THE DEFENDANT'S CAR.

The trial court erred because Officer Sullivan did not articulate sufficient facts to justify the stop of Morse's car. On appeal, this Court must uphold the trial court's findings with respect to pure questions of fact unless they are unsupported by the record or clearly erroneous. State v. Roach, 141 N.H. 64, 65 (1996) (citing State v. Santana, 133 N.H. 798, 809 (1991)). The application of the appropriate legal standard to those facts, however, is a question of law which this Court will review *de novo*. Id. 141 N.H. at 66 (citation omitted).

In order to conduct an investigatory stop of a citizen, a police officer "must have a reasonable suspicion, based on specific, articulable facts taken together with rational inferences from those facts, that the particular person stopped has been, is, or is about to be, engaged in criminal activity." State v. Turmel, 150 N.H. 381 (2003) (citing State v. Hight, 146 N.H. 746, 748 (2001)). This same standard is applied whether the person is in a motor vehicle or is a pedestrian. Hight, 146 N.H. at 748. It is not enough that the officer believes that the suspect is "probably a bad person who may have committed some kind of a crime." State v. Vadnais, 141

N.H. 68, 70 (1996). Rather, the suspect's conduct and other specific facts must create a "significant possibility of criminality." Id. (citing 4 LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(b), at 149 (3d ed. 1996)). The Manchester Police did not meet this standard with respect to the motor vehicle stop in this case.

While the character of a neighborhood is an important factor in the reasonable suspicion inquiry, it can not alone sustain a seizure. In this case it was the first factor mentioned by the trial court in its analysis. A. 32. The trial court observed that "the hour and character of the area may cast an individual's own conduct in a more suspicious light." Vadnais, 141 N.H. at 70-71 (1996). The setting in this case, however, differs substantially from that of Vadnais. In Vadnais, the defendant walked out of a building where drug sales had occurred at all hours of the night and where each of the two arresting officers had made a number of drug arrests. Id. at 69. In fact, the building was so notorious that the two officers were suspicious of anyone leaving that particular address in the early morning hours. Id.

By contrast, the evidence in support of the bad character of the west side of Manchester where Morse was

arrested was sparse, conclusory and stale. Officer Sullivan described the area of Conant and Blucher Streets as a high drug area with a prevalence of home invasions and burglaries. MH. 15. However, the record is devoid of any specific criminal activity in the area. Moreover, Sullivan admitted that he had no evidence of recent activity of any nature in the vicinity. MH. 46. He was similarly unaware of any criminal activity, drug or otherwise, at the particular address where Morse was parked. MH. 47-48. Thus, the criminal nature of the neighborhood in this case was decidedly more benign and less current than that of Vadnais or other cases reviewed by this Court. See, e.g., State v. Roach, 141 N.H. 64, 66 (1996) (furtive behavior in the "combat zone" of Manchester); State v. Wallace, 146 N.H. 146, 149 (2001) (defendant coming from the direction of a house from which $500 had been stolen two days before); State v. Wiggin, 151 N.H. 305, 308 (2004) (officer encounters defendant at the scene of an ongoing investigation of a potential burglary).

A suspect's actions can also inform the reasonable suspicion inquiry. Indeed, this Court places considerable weight in its reasonable suspicion analysis on evasive action and flight when a suspect is unexpectedly confronted by a police officer. See Wallace, 146 N.H. at 148 (2001)

(defendant made a 360 degree turn after noticing police officer); Vadnais, 141 N.H. at 69 (1996) (defendant reversed direction upon noticing cruiser); Roach, 141 N.H. at 65 (1996) (defendant quickly reverses direction after police car drives towards him).

In this regard, the State pointed to two actions to bolster its case for reasonable suspicion. First, the State elicited evidence that the defendant "lean[ed] back and crouched down" when Sullivan, wearing plainclothes, drove past in his unmarked cruiser. MH. 16. Second, Macken observed an individual run to the car, which then rapidly pulled away from the house. MH. 17. These two observations, however, are only significantly probative if the individuals know that they are being observed by police officers. Here, there is no evidence in the record that the individual who ran to the car knew that police officers were watching. Indeed, Sullivan admitted that that he did not know if Morse recognized him as a police officer, and that it was only his "interpretation" that Morse was trying to conceal himself. MH. 34. Consequently, these two observations are of limited probative value with respect to reasonable suspicion. Indeed, even if Morse and his passenger did realize they were being observed by police, that would not be sufficient to establish reasonable

suspicion. See State v. Dodier, 135 N.H. 134, 139 (1991)(finding no reasonable suspicion where police officer observed two men in a truck, they appeared nervous when he approached and the driver made a furtive gesture).

The State may argue on appeal that due to Morse's speed and his failure to use a directional on one of his turns, there was an independent basis to stop Morse's car. The Court should reject this argument for two reasons. First, the evidence with respect to speed was not well developed. Sullivan testified that Morse was driving "around 40 [mph], I guess" and that Morse was driving in excess of the speed limit. MH. 18. There was no testimony regarding whether or for how long Sullivan tracked Morse's car, or that the speed was verified by radar.

Secondly, Sullivan candidly admitted that Morse was not stopped for any traffic infraction, but to determine whether he was involved in drug activity or a burglary. MH. 55. The prosecution did observe below, pursuant to State v. McBreairty, 142 N.H. 12, 15 (1997) that "an officer's motivations are immaterial so long as there exists a valid justification for an investigatory stop." (citing Whren v. United States, 116 S.Ct 1769, 1774 (1996)). A. 18. However, the trial court did not rely on the alleged speed of the car or on the failure to use a

directional as separate and independent bases to conduct the motor vehicle stop. Rather, it simply mentioned the speed of the defendant's car in its recitation of the facts, and made no made of the alleged turn signal violation. Accordingly, this Court should not consider this basis for the stop on appeal.

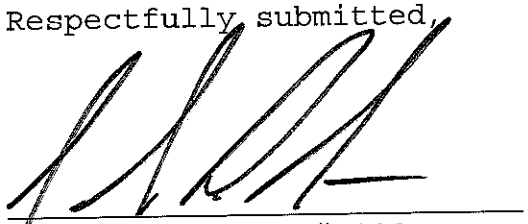
To develop its case for reasonable suspicion, the State relied solely on the reputation of the neighborhood and the actions of the defendant and his passenger. These two factors do not establish reasonable suspicion. The evidence developed by the State with respect to the neighborhood was thin. Furthermore, the evidence of evasive actions and flight was ambiguous because it was not made in reaction to a police presence. The police in this case did that which they are expressly forbidden to do: they conducted a motor vehicle stop in order to see what evidence could be developed. Roach, 141 N.H. at 67 (1996) (citing State v. Palamia, 124 N.H. 333, 338 (1983)).

CONCLUSION

WHEREFORE, Mr. Morse respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Undersigned counsel requests five minutes of oral argument before a 3JX Panel of this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, this 8th day of March, 2010, to:

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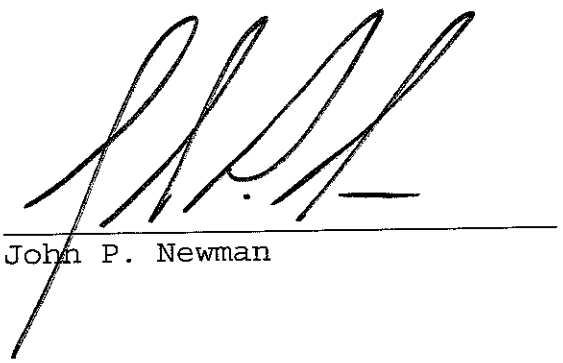

John P. Newman

DATED: March 8, 2010