THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DISTRICT

DOCKET NO. 07-S-1674

STATE OF NEW HAMPSHIRE

V.

GEORGE DAABOUL

ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS

LYNN, C.J.

The defendant, George Daaboul, is charged with one count of using a computer on-line service to solicit a person he believed to be a child under age 16 to engage in sexual activity, in violation of RSA 649-B:4 (2007). Presently before the court are the defendant's two motions to suppress. The court conducted a hearing on these motions on March 31 and April 8, 2008. The court concludes that the motions must be granted in part and denied in part.

I.

The court finds the pertinent facts to be as follows. Detective Michael Niven of the Hudson Police Department is a member of a local task force that investigates computer sex crimes. At various times between July 18, 2007 and July 20, 2007, Niven signed onto the computer instant messenger service Yahoo! with the online profile of a fourteen-year-old girl, "sarahnh14." On July 18, 2007, a person with the screen name "Bostonm4nicefemale" made on-line contact with "sarahnh14." "Bostonm4nicefemale" and "sarahnh14" conversed three times over a three day period. "[S]arahnh14" told

"Bostonm4nicefemale" that she was fourteen years old. During the course of the chats, "Bostonm4nicefemale," who told "sarahnh14" that his name was George and that he was "old," often directed the conversation to sexual topics and intimated that he desired to engage in sexual relations with "sarahnh14."

On July 20, 2007, "Bostonm4nicefemale" and "sarahnh14" agreed to meet that day between 10:30 and 10:45 a.m. at Merrill Park in Hudson, New Hampshire. "Bostonm4nicefemale" told "sarahnh14" that he would be driving a green Jeep Cherokee. Detective Niven testified that, at some point during the chats, "Bostonm4nicefemale" also indicated that he was from Massachusetts. As "sarahnh14," Niven provided "Bostonm4nicefemale" with an undercover cellular telephone number and asked "Bostonm4nicefemale" to telephone "sarahnh14" when he was approximately ten minutes away from the park. Later that morning, a person telephoned the number and spoke with Officer Rachelle MeGowan, who pretended to be "sarahnh14."

Detectives Niven and Jason Lucontoni and Officer MeGowan, all members of the Hudson Police Department, then went to Merrill Park in an unmarked Chevrolet Trailblazer. Niven and Lucontoni were dressed in plain clothes while MeGowan was in full police uniform; all of the officers were armed. They parked in the driveway of a home on Fulton Street, near the entrance to the park, where they could observe people entering and leaving the park. Niven testified that there was very little traffic in this area. At approximately 11:05 a.m.,[1] the officers observed a green Jeep Cherokee with

[1] The court notes that there was a minor inconsistency between Detective Niven's testimony and the arrest report as to the time Niven first encountered the defendant and then arrested him. However, the court is not persuaded that such a minor inconsistency affects Niven's credibility or the court's ultimate analysis in this case.

Massachusetts plates drive down Fulton Street to the entrance of the park and turn around.

The officers activated the emergency lights on the Trailblazer and initiated a motor vehicle stop. All three officers exited the Trailblazer. Niven approached the driver's side of the Cherokee while Lucontoni and MeGowan remained at the rear of the Cherokee. Niven asked the operator of the Cherokee for his license and registration. The operator complied. The license and registration identified the driver as George Daaboul, the defendant. Niven returned the defendant's license and registration to him and asked the defendant to exit the vehicle. The defendant did so.

Niven then asked the defendant what he was doing in the area. He told the defendant that the police had received a call from a "frantic" mother who said that she caught her underage daughter online planning to meet someone at the park. He asked the defendant if he knew anything about the meeting. The defendant said no and denied that he was the person with whom the girl had planned to meet. Niven informed the defendant that the person had spoken with an undercover officer over a cell phone and explained that he could easily determine if the defendant was the person by looking at the defendant's cell phone to see if the undercover number was on the phone. Niven asked the defendant if he could look at his phone. The defendant agreed and handed Niven his cell phone. Niven scrolled through the telephone numbers until he identified the undercover number. Niven told the defendant that he had found the undercover number on the defendant's phone.[2] At the same time, MeGowan told Niven within the defendant's hearing that she recognized the defendant's voice as the voice of the person she spoke with on the phone. Niven then stated to the defendant words to the

[2] Niven testified that, at this point, he planned to arrest the defendant.

effect, “there is all this evidence.” The defendant responded by admitting that he had come to the park to meet a fourteen year old girl. At this point, Niven informed the defendant that he was under arrest.

Shortly thereafter, Officer James Stys of the Hudson Police Department arrived in a marked police cruiser. At approximately 11:15 a.m., Stys transported the defendant to the police department and began the booking process. Stys testified that he utilized a computer-based system known as IMC to book the defendant. He stated that IMC provides questions for him to ask a detainee and that he fills in the answers. He testified that a portion of the IMC indicates “phone used” to signify whether the detainee has used the phone. The IMC record for the defendant’s booking indicated that the defendant did not use the phone. Stys testified that he generally advises a detainee that, once he is done with the booking process, the detainee can use the phone as much as necessary to arrange for bail. Stys had no specific recollection of whether he followed this practice in booking the defendant, nor did he recall the defendant indicating that he desired to make a phone call.[3]

Meanwhile, Detective Niven conducted an inventory search of the defendant’s vehicle and arranged for the vehicle to be towed from the park. While conducting the inventory search, Niven found condoms in the vehicle. Niven secured the condoms as evidence. He filled out an inventory tow form but he did not list the condoms on the form. Niven testified that he generally lists anything that stays in the vehicle on the

[3] Section IIC of Hudson Police Department’s Detention Facility and Prison Processing guidelines incorporate the requirement of RSA 594:15 (2001) that a “prisoner’s parents or nearest relative, friend, or attorney with whom the prisoner may desire to consult be notified IMMEDIATELY, of the prisoner’s detention.” State’s Ex. 5 (emphasis in original). There is no evidence that Stys undertook any affirmative steps to ascertain whether there was anyone that the defendant desired be notified of his arrest.

inventory tow form and lists anything taken from the vehicle on the arrest report. The vehicle inventory form indicates that the vehicle was towed because the owner of the vehicle was arrested. See Def.'s Mot. to Suppress II, attach.

Niven then went to the police department and made contact with the defendant in the booking area. Niven and Lucontoni brought the defendant to an interview room. Niven explained to the defendant that everything was being recorded and the defendant indicated that he did not "mind." See State's Suppl. Submission to the Court, Tr. of Interview at p. 1 [hereinafter Tr.]. Niven advised the defendant of his Miranda rights, using the Hudson Police Department's Miranda rights form. See id. at pp. 1-2. After Niven read each right, the defendant indicated that he understood. See id. Niven next reviewed the waiver section of the rights form with the defendant. See id. at p. 2. He told the defendant that he was only going to ask him questions "about . . . what we talked about on the street." Id. at p. 3. The defendant said that was "fine." Id. Thereafter, at approximately 11:33 a.m., the defendant signed the Miranda waiver indicating that he understood his rights, that he was willing to answer questions without his lawyer present and that he understood and knew what he was doing. See State's Ex. 1.

Niven first obtained some basic background information from the defendant. He then questioned the defendant about the online chats. During the interview, the defendant made incriminating statements. Niven testified that the tone of the interview was calm and that at no time did he threaten the defendant. The interview lasted approximately twenty minutes.

II.

Motion to Suppress I

The defendant moves to suppress the statements he made at the park and at the Hudson Police Department, arguing that the statements were obtained in violation of his rights against self-incrimination under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. As the New Hampshire Constitution provides at least as much protection as the United States Constitution in these areas, the court will address the State constitutional issues, referring to federal law for guidance only. See State v. Turmel, 150 N.H. 377, 385 (2003) (custody); State v. Fleetwood, 149 N.H. 396, 402 (2003) (voluntariness of confession); see also State v. Ball, 124 N.H. 226, 231-32 (1983).

The defendant first argues that the court should suppress all statements that he made at the park prior to his arrest because he was subject to custodial interrogation without the benefit of Miranda warnings. The State objects, asserting that the officers merely conducted an investigatory stop of the defendant and, thus, Miranda warnings were not required.

"The police are obligated to issue Miranda warnings when conducting custodial interrogation." Turmel, 150 N.H. at 382 (citation omitted). Investigatory stops, however, do not constitute custody for the purposes of Miranda. Id. at 383. A police officer may undertake an investigatory stop if the "police officer [ ] [has] reasonable suspicion, based upon 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. Wiggin, 151 N.H. 305, 308 (2004) (citations

omitted). "During an investigatory stop, a reasonable person may not feel free to leave, because, in fact, he is not free to leave." Turmel, 150 N.H. at 383 (citation omitted). The police are permitted to "temporarily detain a suspect for investigatory purposes" and such detention "does not . . . constitute custody for Miranda purposes." Id. (citing Terry v. Ohio, 392 U.S. 1, 16 (1968)) (other citation omitted). Thus, Miranda warnings are not required during temporary detention. Id. (citations omitted). Nonetheless, the detention must be "within the scope of an investigatory stop." Id. (citation omitted).

The scope of a lawful investigatory stop "must be carefully tailored to its underlying justification [and] must be temporary and last no longer than is necessary to effectuate the purpose of the stop." State v. Hight, 146 N.H. 746, 748 (2001) (quoting State v. Wong, 138 N.H. 56, 63 (1993)). During an investigative stop, an "officer may ask 'a moderate number of questions to determine . . . identity and to try to obtain information confirming or dispelling the officer's suspicions." State v. Parker, 127 N.H. 525, 531 (1985) (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)). "The stop must last no longer than is necessary to effectuate its purpose." Turmel, 150 N.H. at 383 (citation omitted). "[U]nless the detainee's answers [to the questions posed] provide the officer with probable cause to arrest him, [the detainee] must then be released." Berkemer, 468 U.S. at 439-40.

In this case, there is no dispute that the police had reasonable suspicion to conduct an investigatory stop of the defendant's vehicle to determine whether the defendant was the person with whom Detective Niven had communicated online when posing as "sarahnh14." During the investigatory stop, Niven was permitted to lawfully detain the defendant for a limited period of time and to obtain information to confirm or

dispel his suspicion. Based on the totality of the circumstances, that court finds that the initial questioning conducted by Niven at the scene of the stop was brief and non-coercive and was designed to confirm or dispel Niven's suspicion that the defendant was the person with whom he had communicated online and who, therefore, had committed the violation of RSA 649-B:4. This questioning falls within the proper scope of an investigative detention and did not amount to custodial interrogation requiring the prior administration of Miranda warnings. See Turmel, 150 N.H. at 384-85; but see id. at 385-88 (Brock, C.J. and Nadeau, J., dissenting) (finding that the defendant was in custody from the inception of the motor vehicle stop).

The circumstances of the initial detention in this case were certainly no more coercive or prolonged than those present in Turmel. Id. at 379-80 (defendant stopped by four officers in four separate vehicles, separated from his passenger, and initially questioned and detained outside his vehicle for less than ten minutes). The defendant was approached by only one officer while the other two officers remained at the rear of his vehicle. Detectives Niven and Lucontoni were in plain clothes, and no weapons were brandished. Niven returned the defendant's license and registration to him after he inspected them. The record does not indicate whether the officers' police vehicle physically blocked the defendant's vehicle. Moreover, the initial inquiries were not confrontational, and even when Niven directed more pointed questions to the defendant about the computer crime, the total questions were few in number. There is no evidence that Niven used harsh or intimidating tones in speaking with the defendant. On the contrary, Niven simply explained to the defendant the purpose for the stop and that Niven could confirm or dispel his suspicion by checking the defendant's phone. He

then asked the defendant for his phone. The initial questioning took place in the middle of the day in a public place and was brief in nature, less than ten minutes. Similar to Turmel, Detective Niven was "diligent in addressing the purpose of the stop, asking only questions that were directly related to [his] suspicion." Id. at 384-85.

Nonetheless, while "the police may temporarily detain a suspect for investigatory purposes, . . . [a]n investigatory stop may metamorphose into an overly prolonged or intrusive detention (and thus, become unlawful)." Id. at 383 (quotation and citation omitted). If the detention exceeds the scope of the investigatory stop, "the defendant will . . . be deemed in custody for purposes of Miranda." Turmel, 150 N.H. at 383 (citation omitted); see also State v. Kaleohano, 56 P.3d 138, 145 (Haw. 2002) (recognizing that "questions posed by police officers during the course of a lawful temporary investigative detention may sometimes" require Miranda warnings, but if "probable cause to arrest [or] sustained and coercive interrogation [is] present," the police must give Miranda warnings). Likewise, abiding by the constitutional parameters outlined for interrogation during an investigative stop, once the police have confirmed or dispelled their suspicions as to the suspected criminal activity that led to the brief detention, the police must provide Miranda warnings or release the suspect from detention.

To determine whether the defendant was "in custody for purposes of Miranda," the court must examine all "the facts and circumstances of a particular case." Turmel, 150 N.H. at 383 (citation omitted). "The location of questioning is not, by itself, determinative: a defendant may be in custody in his own home but not in custody at a police station." State v. Johnson, 140 N.H. 573, 578 (1995) (internal quotations and

citations omitted). Factors the court will consider in making the custody determination include, among other things, "the suspect's familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview's duration and character." State v. Jennings, 155 N.H. 768, 772 (2007) (quotation and citation omitted). However, "[g]eneral 'on-the-scene questioning' as to facts and circumstances surrounding the crime or other general questioning of citizens in the fact-finding process do not trigger Miranda warnings." United States v. Teemer, 260 F.Supp.2d 187, 193 (D. Me. 2003) (citing Miranda v. Arizona, 384 U.S. 436, 477-78 (1966)).

In the instant case, the court finds that once Detective Niven informed the defendant that he had discovered the undercover number on the defendant's cell phone and Officer MeGowan indicated that she recognized the defendant's voice as the person she spoke with on the phone, the character of the encounter changed and the questioning of the defendant which occurred thereafter amounted to custodial interrogation. At this point not only did the officers unquestionably have probable cause to arrest the defendant, but the nature of Niven's questioning changed from general fact finding inquiries to an accusatory invitation to the defendant to respond to "all this evidence" that the police had amassed against him. Cf. Turmel 150 N.H. at 384 (finding it apparent "that the point at which the stop might have 'metamorphosed' into the functional equivalent of arrest for Miranda purposes occurred . . . after both the defendant's incriminating statement and his consent to search the car"); see also Teemer, 260 F.Supp.2d at 194 (finding that the defendant was not in custody during a motor vehicle stop where the objective circumstances of the stop did not change until

the officer learned that the defendant was a felon in possession of a firearm at which time all questioning of the defendant had ceased).

It is crucial to the court's finding of custody not only that probable cause existed but that Detective Niven verbalized to the defendant that he had located the undercover number on the defendant's phone, that Officer MeGowan told Niven in the defendant's presence that she recognized the defendant's voice as the person she spoke with on the phone, and that Niven then stated to the defendant that "there is all this evidence." The combination of these circumstances changed the objective nature of the stop from that of a limited seizure to the functional equivalent of arrest for Miranda purposes. See Berkemer, 468 U.S. at 442 (noting that "[a] policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in custody' at a particular time") (emphasis added); see also Teemer, 260 F.Supp.2d at 194 ("Regardless of any suspicions that an officer might hold or be developing in his head, if he does not convey them to the defendant, then they do not affect the objective circumstances of an interrogation or interview, and they cannot affect the custody inquiry."). Because the officers here did convey to the defendant the sum and substance of the evidence they had against him, from that point on "it would be naïve of the [c]ourt to suggest that a reasonable person in the position of the defendant would have believed that . . . he would be allowed to . . . leave." Jennings, 155 N.H. at 775; see also United States v. Acosta-Colon, 157 F.3d 9, 14 (1st Cir. 1998) ("It is often said that an investigatory stop constitutes a de facto arrest when a reasonable person in the suspect's position would have understood his situation, in the circumstances then obtaining, to be tantamount to being under arrest."). Accordingly, because Miranda warnings were not given,

suppression is required for all statements made by the defendant at the park after Detective Niven informed the defendant that he had located the undercover number on the defendant's cell phone.

The defendant next asks the court to suppress the statements he made during the recorded interview at the police station after he was advised of his Miranda rights. The defendant argues that these statements were involuntary because the taint of the Miranda violation at the park had not yet dissipated. The State maintains that the defendant's statements were voluntary and properly purged of any taint.

Under Part I, Article 15 of the New Hampshire Constitution, the State must prove beyond a reasonable doubt that the defendant voluntarily confessed. See State v. Aubuchont, 141 N.H. 206, 209 (1996) (citation omitted). "To be considered voluntary, a confession must be the product of an essentially free and unconstrained choice and not be extracted by threats, violence, direct or implied promises of any sort, or by the exertion of any improper influence or coercion." Fleetwood, 149 N.H. at 402-03 (citation omitted). When a defendant makes incriminating statements prior to Miranda warnings, the court must analyze the totality of the circumstances to determine whether the subsequent incriminating statements, given after the original, illegal statements and after the belated Miranda warnings, are admissible. See id. at 405 (citing Aubuchont I, 141 N.H. at 209).

> [W]hen determining whether the lesser taint of a Miranda violation is dissipated, a broader inquiry is required. This inquiry into the facts and circumstances surrounding the second confession necessarily encompasses an evaluation of several factors: the time lapse between the initial confession and the subsequent statements; [the defendant]'s contacts, if any, with friends or family members during that period of time; the degree of police influence exerted over [the defendant]; whether [the defendant] was advised that [his] prior admission could not be used

> against [him]; or whether . . . [the defendant] was told that [his] previous statement could be used against [him]. No one factor in isolation will be determinative.

Id. at 405-06 (quotation and citation omitted) (brackets included).

In this case, the evidence demonstrates beyond a reasonable doubt that the defendant's post-Miranda confession at the police station was voluntary. In making this determination, the court finds Fleetwood instructive. In Fleetwood, the defendant was suspected of murdering her infant son. Id. at 397-98. During the investigation, the defendant voluntarily went to the police station where she was interviewed by two detectives for approximately two and a half hours. Id. at 398-99. The defendant was not advised of her Miranda rights. "When the defendant failed to tell the detectives whether she knew how the baby died," one of the detectives confronted her with a notebook, found in her home, which contained writings that said "Kill the Boy" and "the dog told me to kill." Id. at 398-99. After the defendant explained each of the writings except "Kill the Boy," one of the detectives drew her attention to the phrase. Id. at 399. The defendant explained that in the past she had thoughts of killing the baby but that she had not acted on those thoughts. Id.

One of the detectives then asked the defendant about the night of the infant's death, telling the defendant that, based on the time of death, what the defendant had already told them did not make sense. Id. "He pleaded with her to be honest with him." Id. He continued to ask her questions about possible ways she could have "perhaps" killed the infant. Id. at 399-400. The defendant then made incriminating statements. Id. at 400. Subsequently, the detectives took a brief break and then advised the defendant

of her Miranda rights. Id. Thereafter, the defendant made further admissions. Id. at 400-01.

The defendant moved to suppress all of her statements, arguing that none of them were voluntary, including her post-Miranda statements. Id. at 401. The trial court found that the defendant was in custody when the detectives first confronted her and therefore was entitled to Miranda warnings, but that the defendant's post-Miranda statements were voluntary. Id. at 401-02. The New Hampshire Supreme Court upheld the trial court's voluntariness finding. Id. at 402-08.

Here, similar to Fleetwood, the court finds beyond a reasonable doubt that all of the statements made by the defendant at the park (including those that must be suppressed because of the Miranda violation) were entirely voluntary and uncoerced. Furthermore, the tone of the interview at the police station was cordial. See id. at 406. There is no evidence of threats, violence or coercion of any kind. See id. Nor is there any evidence of promises or undue influence. See id. Indeed, the record suggests that the defendant willingly cooperated with the police. While Detective Niven did not advise the defendant that his prior statements could not be used against him, "this alone does not give rise to the conclusion that the second confession was involuntary." Aubuchont, 141 N.H. at 209. "[I]t is impractical to require the police to determine the admissibility of an unwarned confession. This would require them to make legal determinations regarding whether there had been interrogation and custody." Fleetwood, 149 N.H. at 406 (citation omitted).[4] Further, the defendant was advised of his Miranda rights

[4] It is important to note here that, although the court has found the questioning of the defendant at the park intensified to the level of custodial interrogation requiring Miranda warnings after the point at which the officers recited to the defendant the evidence they had against him, this determination is not so obvious as to warrant a conclusion that the officers must have realized they were violating the

approximately 18 minutes after he left the park and was transported to the police station for booking. See id. at 407 (defendant provided with a 17 minute break between first confession and Miranda). During this 18 minute interval the defendant was separated from the investigating police officers and was in the custody of Officer Stys, who did not attempt to interrogate him.

The defendant maintains that the fact that RSA 594:15 was not followed in this instance is critical to a finding that his post-Miranda statements were involuntary. The court disagrees.

RSA 594:15 states, in pertinent part:

> The officer in charge of a police station to which an arrested person is brought shall immediately secure from the prisoner, if possible, the name of the parent, nearest relative, friend or attorney with whom the prisoner may desire to consult, and shall immediately notify such relative, friend or attorney of the detention of the prisoner, when possible.

There is no dispute that neither Officer Stys nor Detective Niven notified anyone of the defendant's arrest. Indeed, Stys acknowledged that the there is no evidence the statute was followed in this instance. However, the defendant's contact with friends or family members is but one factor to consider. See Fleetwood 149 N.H. at 406-07; accord. State v. Farrell, 145 N.H. 733, 738 (2001) (holding that, even in the case of a juvenile, failure to follow the requirements of RSA 594:15 does not render a waiver of Miranda rights invalid as a matter of law). Furthermore, while the police did not comply with the affirmative duties which this statute appears to place on them to provide notice of the defendant's arrest to a friend or relative, or to his attorney, it also must be

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defendant's Miranda rights. In short, the court makes no determination in this case that the officers deliberately withheld Miranda warnings at the park for the purpose of "exploiting the inherent pressures of custodial interrogation." Fleetwood, 149 N.H. at 407. At most, it appears the officers simply made an error of judgment as to the point at which their questioning had become custodial interrogation.

emphasized that there is no evidence to suggest the defendant was denied contact with friends, family or an attorney. The record shows that the defendant never made a request to contact anyone. Under all the circumstances, the court is not persuaded that the failure of the police to comply with RSA 594:15 outweighs the other factors discussed previously and is sufficient to render involuntary the statement given by the defendant at the police station.

Based on the foregoing, the court finds and rules that the defendant's post-Miranda statements were not tainted by the prior Miranda violation at the park. Accordingly, the defendant's post-Miranda statements made at the police station are not subject to suppression.

III.

Motion to Suppress II

The defendant moves to suppress any and all evidence found as a result of Detective Niven's search of his cell phone and of his vehicle, arguing that these searches were conducted in violation of Part, I Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments of the United States Constitution. Specifically, he maintains that he did not give Niven consent to search the numbers in his phone. The defendant further argues that the officers conducted an illegal, warrantless search of his vehicle.

The State objects, asserting that the defendant validly consented to the "search" of the numbers in his cell phone when he handed the phone to Niven in response to the officer's request. The State further contends that the officers properly searched the

defendant's vehicle pursuant to the Hudson Police Department's inventory search policy.

As the New Hampshire Constitution provides at least as much protection as the United States Constitution in these areas, the court will address the State constitutional issues, referring to federal cases for guidance only. See State v. Szczerbiak, 148 N.H. 352, 354 (2002) (consent); State v. Finn, 146 N.H. 59, 61 (2001) (inventory search); State v. Sterndale, 139 N.H. 445, 449 (1995) (emphasizing that the New Hampshire Constitution provides "significantly greater protection than the fourth amendment [of the Federal Constitution] against intrusion by the State" relative to the search and seizure of a motor vehicle).

Consent

The court first addresses whether the defendant gave Detective Niven valid consent to look at the numbers on his cell phone. "Under the New Hampshire Constitution, all warrantless searches are per se unreasonable, unless they conform to the narrow confines of a judicially recognized exception." Szczerbiak, 148 N.H. at 354 (quotation and citation omitted). "One such exception exists where the defendant has consented to the search." Id. (citation omitted). Here, the defendant concedes that he consented to Niven's request to see his phone. However, he maintains that Niven exceeded the scope of his consent when he scrolled through the call list on the defendant's phone.

"To determine the scope of consent, [the court] employ[s] an objective test." Szczerbiak, 148 N.H. at 358 (citation omitted). The court "ask[s] whether under the circumstances surrounding the search, it was objectively reasonable for the officers

conducting the search to believe that the defendant had consented to it." Id. (quotation and citation omitted).

Here, it was objectively reasonable for Niven to believe that the defendant had consented to a search of the numbers on the defendant's phone. Prior to asking the defendant for his phone, Niven informed the defendant that the person the officers were looking for had spoken with an undercover officer over a cell phone. Niven explained that he could easily determine if the defendant was the person by looking at the defendant's cell phone to see if the undercover number was on the phone. He asked the defendant if he could look at his cell phone. The defendant agreed and handed Niven his phone. When Niven began to scroll the numbers, the defendant did not protest. Under these circumstances, it was reasonable for Niven to believe that the defendant, by providing the officer with his phone, had consented to Niven's search of the numbers the phone contained. The fruits of this search therefore need not be suppressed.

Inventory Search

The defendant next argues that the condoms recovered from his vehicle should be suppressed because they were seized in an illegal, warrantless search. Further, the defendant maintains that, if the search was conducted pursuant to the Hudson Police Department's Vehicle Inventory Search Policy, the search violated the policy. Specifically, he asserts that the policy only allows for an inventory search when the police tow a vehicle, and, under RSA 262:32, VI (Supp. 2007), the police may tow a vehicle when the owner is under arrest and "the vehicle will be a menace to traffic if permitted to remain." The defendant contends that because there is no evidence that

his vehicle was "a menace to traffic," the officers violated the policy by conducting an inventory search and towing the defendant's vehicle. The defendant also claims that the officers failed to comply with the policy by neither recording the evidentiary items found in his vehicle on the inventory tow form nor having him sign a receipt upon the return of his vehicle.

As noted above, under the New Hampshire Constitution a warrantless search is per se unreasonable unless it comes within one the recognized exceptions to the warrant requirement. State v. Denoncourt, 149 N.H. 308, 310 (2003) (citation omitted). The State must "prov[e] by a preponderance of the evidence that a seizure or search falls within one of these exceptions." State v. D'Amour, 150 N.H. 122, 125 (2003) (citations omitted).

New Hampshire recognizes an inventory exception to the warrant requirement "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." Denoncourt, 149 N.H. at 311 (citations omitted). "In order to be valid as an inventory search, the search must be conducted pursuant to a neutral police policy." Id. (citations omitted). A neutral police policy prevents police officers from turning inventory searches into "a ruse for a general rummaging in order to discover incriminating evidence." Florida v. Wells, 495 U.S. 1, 4 (1990).

Preliminarily, the court notes that while the defendant has provided the court with what appears to be a portion of the Hudson Police Department Manual that covers "Searches Without Warrants," see Def.'s Mot. to Suppress II, attach., neither party has provided the court with a copy of the policy that specifically applies to inventory

searches. Given that the court must review that particular policy to determine whether the search of the defendant's vehicle was properly conducted, the court now takes judicial notice of the Hudson Police Department Vehicle Inventory Search policy as previously submitted to the court and referred to in this court's order on the defendant's Motion to Suppress in State v. Arnold, Hills. Cty. Super. Ct., No. 07-S-1877 (Apr. 10, 2008) (Order on Mot. to Suppress) (Groff, J.). See N.H. R. EVID. 201 (outlining when a court may take judicial notice of a fact).

The policy states, "It is the policy of the [Hudson Police Department] that every vehicle which is taken into custody or towed under orders of a member of this department shall have the contents of the vehicle inventoried . . . ." Arnold, Hrg. on Mot. to Suppress, Def.'s Ex. D, § IIA. The policy lists four specific situations in which Hudson Police Department officers "shall" conduct an inventory search. See id. at § IIC(1)-(4). The provision most applicable in this instance requires Hudson Police Department officers to search a vehicle when "[t]he vehicle is towed . . . because [its] [ ] driver is under arrest and the owner . . . is not present or is unable to drive because s/he . . . is under arrest, . . . and the vehicle will be a hazard to traffic if allowed to remain." See id. at § IIC(3). This language comports with RSA 262:32, VI, which provides that "[a]n authorized official may cause the removal and storage of a vehicle if he has reasonable grounds to believe that . . . [t]he owner or custodian of the vehicle is under arrest or otherwise incapacitated, and the vehicle will be a menace to traffic if permitted to remain."

Here, Detective Niven arrested the defendant and Officer Stys transported him to the Hudson Police Department. There is no dispute that the defendant owned the Jeep

Cherokee. However, the State has presented no evidence that the Cherokee, which was parked on the street near the park, was a traffic hazard. Indeed, Niven testified that there was very little traffic in the area in which the vehicle was stopped. Moreover, the policy states that "[v]ehicles … that are legally parked shall not be inventoried." Arnold, Hrg. on Mot. to Suppress, Def.'s Ex. D, § IIC(5). The State has presented no evidence that the defendant's vehicle was illegally parked. Thus, from all that appears of record, Niven was not authorized to remove the vehicle under either the policy or RSA 262:32, VI. Consequently, his search of the defendant's vehicle did not comport with the policy and cannot be justified under the inventory search exception to the warrant requirement. The condoms seized as a result of the search therefore must be suppressed.[5]

IV.

To summarize, the defendant's Motion to Suppress I is GRANTED as to any statements made by the defendant at the park after Detective Niven informed the defendant that he had located the undercover number on the defendant's cell phone, but is otherwise DENIED. With respect to the defendant's Motion to Suppress II, the motion is DENIED as to the evidence obtained from the search of his cell phone and GRANTED as to the evidence seized during the search of his vehicle.

So ordered.

May 8, 2008

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ROBERT J. LYNN
Chief Justice

[5] Having found that the inventory search was improper on the above grounds, the court finds it unnecessary to address the defendant's additional arguments challenging the search of his vehicle.