

**THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT**

ROCKINGHAM, SS.

No. 06-S-3456, -57

State of New Hampshire

v.

Patrick O'Neill

**ORDER ON MOTION TO SUPPRESS**

The defendant, Patrick O'Neill, stands charged with two counts of possession of cocaine. See RSA 318-B:2; RSA 318-B:26(l)(c)(1). He moves the court to suppress evidence the police obtained during a search of his vehicle on August 19, 2006, arguing that the traffic stop leading to the search was illegal from the outset. In addition, the defendant argues that even assuming the legality of the initial traffic stop, the police improperly expanded the investigative scope of that stop, thereby tainting his subsequent consent to a search. The court held a hearing on this matter on April 2, 2007. After considering the evidence, arguments of counsel, and the applicable law, the defendant's motion is **GRANTED** for reasons stated in this order.

The court finds the following facts. At approximately 11:00 p.m. on August 19, 2006, New Hampshire State Trooper Gary Ingham was on routine patrol on A Street at Hampton Beach when he observed a white SUV traveling directly in front of him. The trooper observed no erratic or illegal operation, but ran a random check on the SUV's license plates to ensure its compliance with the rules and regulations of the Division of Motor Vehicles. This check revealed that the

vehicle was registered with the DMV as being red, rather than white, in color. The trooper stopped the SUV to inquire about this discrepancy.

When Trooper Ingham stopped the car, he noticed that the driver, later identified as the defendant, appeared to be nervous and sweating. The trooper asked the defendant why his car was registered as a red SUV. In response, the defendant explained that he just recently painted the vehicle white because his employer, Comcast, required the change.<sup>1</sup> Upon request, the defendant produced a valid New Hampshire driver's license, but was unable to produce a registration. The trooper observed that the defendant's hand was shaking when he handed over his license.

During the course of this encounter, the trooper also noticed that the inspection sticker on the defendant's vehicle was worn and peeling. The defendant explained that upon purchasing the car, he did not have the car re-inspected, as he believed the previous inspection was valid. At this time, the trooper observed a "solid bead of sweat" on the defendant's brow and noticed that the defendant would not make eye contact.<sup>2</sup>

As a result of the defendant's apparent nervousness, the trooper asked him to step out of the car. Once the defendant was out of the vehicle, Trooper Ingham explained the summons being issued for the inspection violation. The trooper then handed the defendant his license, and told the defendant he was "all

---

<sup>1</sup> At the hearing, the defendant produced a copy of his registration dated July 24, 2006, which indicated that the car was indeed registered with the DMV as being white.

<sup>2</sup> In its objection to the defendant's motion to suppress, the State alleges that "the defendant was sweating despite the weather that evening being cold[.]" State's Obj. at ¶ 12. The court, however, takes judicial notice of the fact that National Weather Service records indicate the temperature at 11 p.m. on August 19, 2006, in Portsmouth (the weather station closest to Hampton Beach) was 73 degrees.

set” to go. The trooper testified that during this exchange, the defendant appeared nervous and continued to glance back at his vehicle. As a result, before the defendant had gotten back into the SUV, the trooper asked whether there were any guns or drugs in the car. Although the defendant answered this question in the negative, the trooper then asked whether the defendant would consent to a search of the vehicle.<sup>3</sup> Trooper Ingham told the defendant he could decline the request. Nevertheless, the defendant agreed to the search, which revealed the cocaine that underlies the defendant’s criminal charges.

The defendant now advances three theories as to why the fruits of the trooper’s search must be suppressed. Initially, he claims that Trooper Ingham’s random license plate surveillance was prohibited by the July 1, 2006, enactment of RSA 236:130 (Supp. 2006), rendering the motor vehicle stop on A Street illegal *ab initio*. Next, the defendant argues that the trooper’s desire to inquire about the color of his vehicle did not justify an investigative Terry stop. See Terry v. Ohio, 392 U.S. 1 (1968); State v. McKinnon-Andrews, 151 N.H. 19, 23 (2004). Finally, the defendant argues that even if the trooper’s stop was permitted, the expansion of the scope of the traffic stop to include a search for drugs and weapons occurred in contravention of his rights under Part I, Article 19 of the New Hampshire Constitution, as well as the 4<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution. With respect to the defendant’s constitutional claims, the New Hampshire Constitution has been found to provide at least as much protection as its federal counterpart in the areas of search and seizure jurisprudence that

---

<sup>3</sup> The trooper did not provide the defendant with a written consent form. The trooper testified that while he usually has such forms in his cruiser, he could not recall why one was not used in this case.

control the outcome of this motion. McKinnon-Andrews, 151 N.H. at 27; State v. Hight, 146 N.H. 746, 748 (2001). Accordingly, this matter is addressed under state law, using federal authority for guidance only. Id.; see State v. Ball, 124 N.H. 226, 231 (1983).

***I. Legality of the Traffic Stop***

The State does not dispute that Trooper Ingham’s decision to stop the defendant was based on a random license plate check. The trooper observed no other behavior that would give rise to a reasonable, articulable suspicion that the defendant had committed or was about to commit a crime. Cf. McKinnon-Andrews, 151 N.H. at 22-23. The trooper’s action does not offend our state constitution. State v. Richter, 145 N.H. 640, 640-41 (2000). However, the defendant argues that RSA 236:130, entitled “Highway Surveillance Prohibited,” amounts to a legislative ban on Trooper Ingham’s election to randomly check license plates for violations. That statute states that “[n]either the state of New Hampshire nor its political subdivisions shall engage in surveillance on any public ways of the state or its political subdivisions.” RSA 236:130(II). “Surveillance” is statutorily defined as follows:

‘[S]urveillance’ means the act of determining the ownership of a motor vehicle or the identity of a motor vehicle’s occupants on the public ways of the state or its political subdivisions through the use of a camera or other imaging device *or any other device*, including but not limited to a transponder, cellular telephone, global positioning satellite, or radio frequency identification device, that by itself or in conjunction with other devices or information can be used to determine the ownership of a motor vehicle or the identity of a motor vehicle’s occupants.

RSA 236:130(I) (emphasis added).

The State has presented the court with the legislative history behind the enactment of RSA 236:130, arguing that it shows the Legislature did not seek to ban the type of surveillance at issue in this case. See Tr. of N.H. Senate Comm. on Transp. and Interstate Coop., Hr'g on HB 1738-FN, Apr. 5, 2006. The court, however, will not look to legislative history unless the text of a statute in question is unclear or ambiguous. Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 38 (2005). Here, the Legislature has provided an exhaustive definition of "surveillance" that is entirely clear. That definition, in essence, prohibits the indiscriminate use of technology to ascertain the name of the owner or identity of the operator of a vehicle on a public way. This court agrees with the ruling of the Nashua District Court submitted by defense counsel that "the procedure used by the police of 'running' random computer checks of the license plate numbers of passing vehicles without suspicion of criminal conduct is using an 'other device'" to track drivers in a manner prohibited by RSA 236:130. State v. Njogu, et al., No. 06-CR-11900 (Feb. 28, 2007) (Order, Ryan, J.); cf. RSA 236:130(III)(b) (permitting surveillance where "undertaken on a case-by-case basis in the investigation of a particular violation, misdemeanor, or felony"). Accordingly, the court finds that Trooper Ingham's stop of the defendant was indeed illegal from the outset.

Furthermore, even if RSA 236:130 did not prohibit a random check of the defendant's registration, Trooper Ingham lacked a reasonable, articulable suspicion that the defendant was involved in any sort of criminal activity that would have justified a temporary investigative detention. See McKinnon-

Andrews, 151 N.H. at 22. The court is unable to find, and the State has failed to present, any statute or administrative regulation from the Department of Safety requiring a vehicle owner to notify the DMV of a change in vehicle color before the annual expiration date of a valid registration. This means that Trooper Ingham could not possibly have suspected the defendant of any criminal wrongdoing warranting the August 19 traffic stop challenged here.<sup>4</sup> Suppression of the evidence obtained as the “fruit” of the trooper’s stop is therefore mandated. See Wong Sun v. United States, 371 U.S. 471 (1963); State v. Gravel, 135 N.H. 172, 180-81 (1991). This court will not sanction traffic stops for those citizens who simply decide to paint their cars without some particularized suspicion of criminal wrongdoing such as, for example, the theft and subsequent repainting of a vehicle.

## ***II. Expansion of the Scope of the Traffic Stop***

Even if the court were to assume, *arguendo*, that Trooper Ingham’s traffic stop was initially valid, it further finds that he unlawfully expanded the scope of that stop when asking the defendant for consent to search the SUV for drugs and guns. This unlawful expansion, coupled with the circumstances of the traffic stop in question, rendered the defendant’s subsequent consent to a search incurably “tainted” as a matter of law. See Hight, 146 N.H. at 750.

When a driver is pulled over by the police for a traffic violation, a “seizure” occurs under our constitution “even though the purpose of the stop is limited and the resulting detention quite brief.” McKinnon-Andrews, 151 N.H. at 22.

---

<sup>4</sup> This is true regardless of the fact that the defendant’s paper registration on file with the DMV actually listed his vehicle color as white. See Def.’s Ex. A.

Accordingly, our state supreme court has consistently applied the principles governing investigative detentions articulated in Terry v. Ohio, *supra*, when analyzing traffic stops. See id. “To be constitutional, the scope of a Terry stop must be carefully tailored to its underlying justification, and the stop must be temporary and last no longer than is necessary to effectuate its purpose.” Id. at 23 (internal quotations and citations omitted).<sup>5</sup>

To determine whether the scope requirement of Terry has been exceeded by off-topic police questioning during a traffic stop, New Hampshire courts employ a three-part test asking whether: (1) the questioning is reasonably related to the initial justification for the stop; (2) the law enforcement officer had a reasonable articulable suspicion that would justify the question; and (3) in light of all the circumstances, the question impermissibly prolonged the detention or changed its fundamental nature. Id. at 25 (the “McKinnon-Andrews inquiry”). These three prongs are to be addressed sequentially; a constitutional violation occurs if the disputed questioning fails either of the latter two prongs. Id.

Here, Trooper Ingham’s questions as to whether the defendant had any drugs or weapons in his vehicle were clearly unrelated to his concerns about the color of the defendant’s vehicle, which formed the basis for his stop of the defendant. As a result, the trooper is required to have had a reasonable, articulable suspicion that the defendant was in possession of such illegal items to

---

<sup>5</sup> Despite this scope requirement, when executing a Terry stop an officer may, as a matter of course, order a driver to exit his vehicle in the interest of officer safety. Pennsylvania v. Mimms, 434 U.S. 107, 109-10 (1977). Such an order has been held to constitute a *de minimus* intrusion on constitutional rights, and reduces the possibility that a driver can make unobserved movements. Id. at 110-11. This rule, however, does not authorize an officer to convert a traffic stop into a general inquisition through questioning.

justify his questions.

The evidence presented by the State, however, does not support such a finding. The trooper's suspicions were essentially aroused by the defendant's nervousness and sweatiness during the course of their interaction; the trooper made no specific observations of intoxication, drug use, or furtive gestures which might indicate the defendant had hidden contraband. Regardless, "[n]ervousness is a common and entirely natural reaction to police presence[.]" U.S. v. McKoy, 428 F.3d 38, 40 (1st Cir. 2005). The court finds the trooper's observations insufficient justification for a request to search the interior of the defendant's vehicle. The facts articulated by Trooper Ingham fail to "lead somewhere specific, [beyond] a general sense that [the defendant was] probably a bad person who may have committed some sort of crime." McKinnon-Andrews, 151 N.H. at 26. His questioning consequently fails the second prong of the McKinnon-Andrews inquiry.

The court also finds that Trooper Ingham's questions changed the fundamental nature of the traffic stop in question, and would therefore also fail the third prong of the McKinnon-Andrews inquiry. The questions were not facially innocuous inquiries about the defendant's itinerary; rather, the Defendant almost instantaneously went from answering questions about his inspection sticker and paint color to being questioned about contraband. See id. at 28 (Broderick, J., concurring). In sum, the trooper's line of questioning amounted to an unlawful detention outside the scope of the underlying stop.

Despite this, "[a] conclusion that the detention of the defendant became



unlawful once the officer asked about the car's contents does not lead inexorably to the conclusion that the defendant's consent to search the car was invalid." Id. (Broderick, J., concurring); see Hight, 146 N.H. at 749-551; compare State v. Carty, 790 A.2d 903, 912 (N.J. 2002) (establishing bright-line rule that officer must have reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search vehicle in light of compulsion invariably experienced by detained drivers). While an unlawfully prolonged detention may render a defendant's consent to a search "tainted," the Supreme Court's decision in Hight next requires consideration of whether the taint of the unlawfully prolonged detention was purged. 146 N.H. at 750-51. In making this determination, the following factors are evaluated: (1) the temporal proximity between the police illegality and the consent to search; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Id. at 750.

Here, there was absolute temporal proximity between the unlawful detention and the defendant's consent, since the defendant gave consent *while* he was unlawfully detained. Id. Next, the court finds that Trooper Ingham's decisions to hand the defendant his license and explain that the defendant could decline to consent did create intervening circumstances tending to support a conclusion that the defendant's consent was an "act of free will." See id. Nevertheless, it is equally plausible that the "seamless transition" in this case from an *invalid* traffic stop to the unlawful detention and subsequent consent mitigated the effect of the trooper's acts. There remained a real and "serious

risk” that the defendant felt compelled to consent “because he believed he was still under the lawful authority of the officer.” Id. at 750-51; see also Carty, 790 A.2d at 910-11 (“where the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent”).

Even if the court were to consider factor two a “draw,” the court still finds the “purpose and flagrancy” of Trooper Ingham’s actions troubling. A traffic stop based on an innocuous fact like the color of a vehicle seems pretextual; the court is mindful that the defendant’s vehicle was an older model (circa 1991), and that the stop in question occurred on a Saturday evening at Hampton Beach, a relatively high-crime area. These facts, coupled with the complete absence of any reasonable basis to suspect the defendant of criminal activity, give rise to the appearance, even if not the reality, that the officer’s purpose was simply “to engage in a fishing expedition for incriminating evidence[.]” Id. at 751 (internal quotations omitted). The court therefore concludes that the State has failed to purge the taint of the defendant’s unlawful detention. Accordingly, the defendant’s motion to suppress is **GRANTED**.

So **ORDERED**.

April 17, 2007  
DATE

\_\_\_\_\_  
TINA L. NADEAU  
Presiding Justice