THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

State of New Hampshire

v.

Carlos Perez

07-S-3385; 08-S-155

ORDER ON MOTION TO SUPPRESS

The defendant, Carlos Perez, is charged with one count of falsifying physical evidence, and one count of being a felon in possession of a deadly weapon. See RSA 641:6 (2007); RSA 159:3, I(a)(b)(3) (2002); RSA 625:11, V (2007). He moves to suppress the seizure of all evidence and property taken from him in a Wal-Mart restroom stall on September 10, 2007. The State objects. The court held a hearing on this matter on April 17, 2008. After considering the evidence and the applicable law, the defendant's motion is **DENIED** for the reasons stated in this order.

The court finds the following facts. On September 10, 2007, at approximately 2:15 a.m., Salem Police Officers James Fox and Kevin Fitzgerald separately received calls from dispatch that a group of individuals were stealing merchandise from the Salem Wal-Mart. Dispatch told the officers that one of the suspects used a knife to cut open packages, take items from the packages and place them into a bag. Dispatch further informed the officers that all but one of the individuals in the group had left, and the one suspect who remained in the store was in the restroom with the knife. The officers met each other when they arrived at Wal-Mart, and spoke to a female employee who confirmed that one of the suspects was in the restroom with a hunting style knife.

Officer Fitzgerald testified that the officers entered the restroom to investigate. They entered the restroom without drawing their weapons, and noticed that of all the restroom stalls, only one had a closed door. This stall, a handicapped stall, was the farthest from the restroom entrance. The handicapped stall door was approximately six feet tall and had approximately one foot to one and one-half feet of empty space between the door and the floor, as well as between the door and the ceiling. The officers attempted to view the occupant of the stall through the crack connecting the stall door to its frame, but only saw general movement inside. In addition, Officer Fitzgerald heard movement, possibly the sound of shuffling feet, coming from within the stall, but was unable to see the defendant's feet by looking underneath the stall. Neither of the officers observed anything to indicate that the defendant was using the restroom for its intended purposes.

Officer Fox knocked on the handicapped stall door and announced their presence as Salem Police. Within seconds of the knock and announce, Officer Fitzgerald entered the empty stall adjacent to the handicapped stall. Officer Fitzgerald then stepped onto the toilet in the empty stall and looked over the wall connecting the two stalls. Officer Fitzgerald saw the defendant seated on the toilet with a knife in his right hand, a spoon in his left hand and a syringe in front of his feet. Officer Fitzgerald thought he observed the defendant discard something between his legs into the toilet. Based on his training and experience, Officer Fitzgerald believed the defendant was destroying drugs. After making this observation, Officer Fitzgerald told the defendant to stop, and instructed Officer Fox to enter the stall.

After Officer Fox's unsuccessful attempt to kick in the door of the stall, Officer

Fitzgerald left the empty stall and kicked in the handicapped stall door. Both Officers entered the handicapped stall, at which point Officer Fox heard the defendant flush the toilet. The defendant stood facing the officers with his pants at his ankles. At the time, the defendant held the buck knife in his right hand. In response to the threat the defendant posed, the officers drew their weapons, ordered the defendant to drop the knife, and ordered him to the ground. The defendant complied and was taken into custody. After placing the defendant under arrest, the officers discovered a case of baking soda and store merchandise in the stall. They were unable to recover the spoon.

The defendant argues that the police seized evidence in violation of his rights under Part I, Article 15 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. As a result, the defendant asserts the evidence must be suppressed as "fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471 (1963); State v. Gravel, 135 N.H. 172, 180-81 (1991). Specifically, the defendant argues that: (1) because he had an expectation of privacy in the restroom stall, a search of the stall required a warrant; (2) because Officer Fitzgerald conducted a warrantless search when he looked into the stall, all evidence seized must be suppressed; and (3) because the officers lacked probable cause sufficient to support exigent circumstances, an exception to the warrant requirement did not exist.

The State objects, and argues that the defendant did not have a reasonable expectation of privacy in the restroom stall, Officer Fitzgerald had probable cause to conduct a warrantless search of the stall under the exigent circumstances exception to

the warrant requirement, and what Officer Fitzgerald observed when he conducted this search was in plain view.

The New Hampshire Constitution provides at least as much protection to defendants as its federal counterpart in this area of search and seizure jurisprudence. State v. Goss, 150 N.H. 46, 49 (2003). Accordingly, the defendants' motion is addressed under state law, using federal authority for guidance only. Id.; see State v. Ball, 124 N.H. 226, 231 (1983).

I. Privacy Interest in a Restroom Stall

Part I, Article 19 of the New Hampshire Constitution "protects all people, their papers, their possessions and their homes from unreasonable searches and seizures." Goss, 150 N.H. at 48. Our State Supreme Court has adopted a two-part test to determine whether a defendant has a reasonable expectation of privacy in a particular place. Id. at 48-49. First, a person must have "exhibited an actual (subjective) expectation of privacy and, second, . . . the expectation [must] be one that society is prepared to recognize as reasonable." Id. at 49 (quotation omitted). Although the New Hampshire Supreme Court has established this broad two-part test, it has not squarely addressed whether a person has a reasonable expectation of privacy in a closed toilet stall in a public restroom. For this reason, both parties rely on federal law to support their respective positions.

The State asserts that an individual does not have a reasonable expectation of privacy against observation in a stall within a public restroom. The State further argues that the defendant did not have an expectation of privacy in his use of the stall because: (1) the design of the handicapped stall in Wal-Mart was not such that an occupant would

reasonably expect such a privacy interest; and (2) he was not using the stall for its intended purpose.

In support of its position that the defendant does not have an expectation of privacy in a public restroom stall, the State relies on State v. Jupiter, 501 So.2d 248 (La. Ct. App. 4th Cir. 1986). The defendant in Jupiter was in a closed stall in a public restroom with one-inch spaces in between the stall door and its frame. Id. at 249. A police officer entered the restroom to search for drug use, and upon looking through the one-inch spaces, observed the defendant standing for a long period of time, after which he observed the defendant with his hands above his waist. Id. According to the officer, these actions led him to believe the defendant was using drugs. Id. After the officer became suspicious of the defendant's drug use, the officer stood on the vanity next to the stall and looked over the stall wall to better view the defendant. Id. The Court held:

> one in a toilet stall with one-inch spaces between its door and walls and completely open at its top, with a vanity next to it upon which anyone could stand, that is part of a larger, open, public . . . restroom, cannot have an expectation of privacy that society is prepared to honor as reasonable, against observation through those one-inch spaces by others lawfully in the restroom or against observation over the top of the stall by anyone whose observation through the spaces prompts him for whatever reason to mount the vanity to see more clearly.

Id. at 250 (emphases added). Jupiter does not hold, as the State suggests, that all persons do not have an expectation of privacy in a public restroom stall. On the contrary, Jupiter stands for the proposition that individuals do not have a reasonable expectation of privacy against "an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." Id. (quotation omitted). Furthermore, Jupiter implies that an officer who does not observe suspicious activity from a position where others lawfully in the restroom could be will violate a defendant's right to privacy if

he then attempts to view the defendant in the stall from a position where others in the restroom would not likely be. Id.

In this instance, the officers looked through a one-inch space, similar to that in Jupiter, to search for the defendant. Upon looking through that space, however, the officers were only able to make out general movement, and one of the officers heard shuffling feet. As opposed to the officer in Jupiter, who saw what appeared to be drug use from his view through the one-inch space, Officers Fox and Fitzgerald did not hear or see any type of criminal activity through the space, nor were they able to discern if the defendant was, in fact, in the stall. Moreover, Officer Fitzgerald climbed up on the toilet in the adjacent stall mere seconds after Officer Fox's knock and announce, which indicates that the defendant's momentary silence did not arouse such suspicion of criminal activity to justify Officer Fitzgerald's actions. Because the officers were not able to identify the defendant or the suspicious nature of any activities through the one-inch spaces in the restroom stall, Officer Fitzgerald was not properly prompted to climb onto the toilet seat in the adjacent stall and view the defendant. The defendant, therefore, had a reasonable expectation of privacy in the stall according to the holding in Jupiter.

The State further relies on United States v. Billings, 858 F.2d 617 (10th Cir. 1988) and State v. Cooper, 23 P.3d 163, 166 (Kan. Ct. App. 2001) to support its position that the design of the stall determines whether or not the occupant has a reasonable expectation of privacy. Cooper involved a defendant who failed to prove an expectation of privacy in an adult entertainment video booth, where the door was closed but not locked, and the door was at least fifteen inches from the ground and not more than six feet from the floor. 23 P.3d at 164. The Court distinguished the adult entertainment video booth, where

individuals are not allowed to lock the booth doors and the business is subject to inspection at any time, from the vast majority of restroom stalls which have locks and serve "intimate and personal activities and private functions." Id. at 166. Furthermore, the Court noted that restroom stalls have "consistently been granted constitutional rights to privacy[,]" and although stalls do not provide complete privacy, "'an occupant of the stall would reasonably expect to enjoy such privacy as the design of the stall afford[s].'" Id. (quoting People v. Kalchik, 407 N.W.2d 627 (Mich. Ct. App. 1987)). Although the State relies on the latter quote to indicate that the design of the stall was one in which privacy was not reasonable to expect, the remainder of the statement from Kalchik proves this reliance to be misplaced. Kalchik provides:

> to the extent that [the] defendant's activities were performed beneath a partition and could be viewed by one using the common area of the restroom, the defendant had no subjective expectation of privacy . . . . On the other hand, [the] defendant did have an actual, subjective [and reasonable] expectation that he would not be viewed overhead.

407 N.W.2d at 631.

The Tenth Circuit came to a similar conclusion in Billings, where a police officer followed a man he suspected of carrying drugs into an airport restroom. 858 F.2d at 617. Once inside the restroom, the officer stood a few feet away from the stall where any member of the public would normally stand. Id. From this vantage point, the officer noticed the defendant's distinctive pant legs in the one-foot opening between the floor of the restroom and the bottom of the stall door. Id. The officer then saw the defendant pull up the pant of his left leg, where a clear bag with a white substance was openly displayed and taped to the inside of his left ankle. Id. at 617-18. The Court distinguished the cases supporting a reasonable expectation of privacy on the basis that those cases "involved an

officer using extraordinary methods to peer over a partition or down into a bathroom stall in order to see what no ordinary observer could otherwise see." Id. at 618. The Court held that the defendant did not have a reasonably objective expectation of privacy under these circumstances, but declined to "address the issue of a person's reasonable expectations within the enclosed portion of the stall which would not be observable by the ordinary patron of the restroom . . . [and limited its] holding to what can be observed by any ordinary patron of a public restroom." Id.; see also United States v. White, 890 F.2d 1012, 1015 (8th Cir. 1989) (officer did not violate defendant's reasonable expectation of privacy in restroom stall when "the design of the stall allowed the officer to make her observations without placing herself in any position that would be unexpected by an occupant of the stall").

Unlike Cooper, the defendant in this instance exhibited an actual subjective expectation of privacy by locking the stall door in the enclosed stall, which is an inherently intimate and private place. See Cooper, 23 P.3d at 166. Furthermore, Officers Fox and Fitzgerald did not notice any criminal or suspicious actions from the space below the stall door or between the stall door and its frame, which would be from the vantage point of an ordinary patron of the restroom. Rather, one officer stood on an adjacent toilet seat, without being prompted to do so by any of the defendant's actions within the stall. According to the cases cited, the Officers' actions, which would be unexpected by an occupant within the stall, violate the defendant's reasonable expectation of privacy. See White, 890 F.2d at 1015; Billings, 858 F.2d at 618; Kalchik, 407 N.W.2d at 631.

Finally, the State asserts that an individual does not have an expectation of privacy in a restroom stall where there is an outward indication that the stall is not being used for

its intended purpose. The cases the State relies on, however, specifically hold that when two or more people use a bathroom stall, its intended use is not fulfilled, as a restroom stall is designed for use by one person. See In re C.P., 555 S.E.2d 426, 427 (Ga. 2001) (two people engaged in sexual intercourse in a restroom stall); State v. Mudloff, 36 P.3d 326, 327-28 (Kan. Ct. App. 2001) (two people enter a restroom stall and have a conversation indicating their involvement in criminal activity which is audible to others in the restroom); State v. Tanner, 537 N.E.2d 702, 705 (Ohio Ct. App. 10th Dist. 1988) (officer observed two pairs of legs from the area beneath the stall door, and heard sniffing sounds from within the stall, which justified his looking over the partition into the defendant's stall); State v. Orta, 663 N.W.2d 358, 360 (Wis. Ct. App. 2003) (officer observed the heads and feet of two people in a public restroom stall, both of whom failed to latch or lock the stall door or assure that the door was fully closed).

The State concedes that some courts have found an expectation of privacy in a closed toilet stall in a public restroom, but asserts that these cases hold an officer's probable cause to believe that the stall is being used for an unlawful purpose defeats this expectation of privacy. See Ward v. State, 636 So.2d 68, 72 (Fla. Dist. Ct. App. 5th Dist. 1994) (observations in violation of a defendant's right to privacy should be suppressed unless the police had probable cause or suspicion that the defendant was using the facility for an unlawful purpose); State v. Biggar, 716 P.2d 493, 495 (Haw. 1986) (an area where a defendant has a reasonable expectation of privacy may not be searched without a warrant, or where probable cause and an exception to the warrant requirement exist); Brown v. State, 238 A.2d 147, 149-50 (Md. Ct. Spec. App. 1968) (defendant was unlawfully arrested because the officer's physical intrusion into the defendant's protected

privacy interest was not justified by probable cause); Cook v. State, 762 S.W.2d 714, 715-16 (Tex. App. 1st Dist. 1988) (evidence admitted although defendant's reasonable expectation of privacy was violated, because the officer had probable cause to conduct the warrantless search and exigent circumstances existed). Even if the cited courts do hold that a defendant's use of the bathroom for an unlawful purpose defeats the defendant's reasonable expectation of privacy, this court need not address this issue here. Under New Hampshire law, once the court recognizes a protected privacy interest in a particular place, it next analyzes whether an exception to the warrant requirement exists. These requirements and their applicability are, accordingly, addressed below.

This court, therefore, finds that the defendant exhibited an expectation of privacy which society is prepared to recognize as reasonable when he entered the restroom stall alone, shut the stall door and latched it. See Goss, 150 N.H. at 49 (recognizing an individual's right to privacy in discarded trash); Ball, 124 N.H. at 231 (the New Hampshire Constitution provides greater protection for its citizens than the United States Constitution). Because a privacy right does exist, the court next addresses whether the officers conducted a warrantless search of the stall, and, if so, whether exigent circumstances existed to justify the search.

II. The Search

The State asserts that Officer Fitzgerald did not conduct a search when he stood on the toilet within the adjacent stall to see inside the defendant's stall. The State argues that a search involves prying into hidden places, whereas Officer Fitzgerald was in an unprotected area in which he was invited by store employees.

A "search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed." State v. Pellicci, 133 N.H. 523, 533 (1990) (quotation omitted). The New Hampshire Supreme Court has held that a canine sniff in a vehicle to determine what controlled substances are concealed within is a search. Id. The Court came to this conclusion because the use of the canine was "a prying by officers into the contents of [the defendant's] possession, which, concealed as they were from public view, could not have been evident to the officers before the prying began." Id.

This court finds that Officer Fitzgerald conducted a search when he stood on the toilet seat in the adjacent stall to peer over the partition wall into the defendant's stall. The defendant and his activities were hidden from public view, and could not be seen before the officer stood on the toilet of the adjacent stall. Officer Fitzgerald was, therefore, prying into a hidden place, the handicapped stall, to search for the concealed defendant. Accordingly, the court must determine whether an exception to the warrant requirement justified the search.

III. Exigent Circumstances

"A warrantless search is *per se* unreasonable and invalid unless it comes within one of the recognized exceptions to the warrant requirement." State v. Livingston, 153 N.H. 399, 402 (2006). If a search is unreasonable, the fruits of the search will be suppressed. State v. Chaisson, 125 N.H. 810, 819 (1984). The burden is on the State to prove the constitutionality of a warrantless search by a preponderance of the evidence. State v. Theodosopoulos, 119 N.H. 573, 578 (1979).

"Under the exigent circumstances exception, the police can make a seizure without a warrant where they have probable cause to seize and exigent circumstances

exist." State v. Pseudae, 154 N.H. 196, 200 (2006). "Probable cause is established where a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." State v. McMinn, 144 N.H. 34, 38 (1999) (quotation omitted). The defendant argues that the officers did not have probable cause to search the defendant's stall because they did not have probable cause to believe that a crime was being committed within the stall. The State asserts that because the officers were searching for the defendant, not criminal activity, they had probable cause to believe the defendant was in the stall.

Here, the officers arrived at Wal-Mart with knowledge that a man suspected of stealing merchandise was in the restroom, possibly armed with a hunting style knife. The employees, who saw the defendant enter with a knife, pointed the officers in the direction of the restroom, where only one stall was occupied. Accordingly, the officers had probable cause to believe that the defendant had just committed a theft, and that the defendant was located in that particular stall, armed with a weapon.

Exigent circumstances "exist where the police face a compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant will present a substantial threat of imminent danger to life or public safety." State v. MacElman, 149 N.H. 795, 798 (2003) (quotations omitted). A logical extension of the exigent circumstances exception exists where police action is necessary to prevent the likely escape of a suspect or destruction of evidence. See Biggar, 716 P.2d at 495. "Whether a situation is sufficiently urgent to permit a warrantless search depends on the totality of the circumstances." Theodosopoulos, 119 N.H. at 580.

At the time Officer Fitzgerald looked into the defendant's stall, he had reason to

believe that a man was in the stall with a hunting style knife who had just committed a theft. Officer Fitzgerald looked over the stall in order to assure his own safety, at a time when the defendant knew of the officers' presence in the restroom, and could anticipate the reason for their presence. At that point, the officers faced a compelling need for immediate official action, and a risk that the delay to obtain a warrant might substantially threaten the defendant's life and safety, or the life and safety of the officers. The officers also faced the possible destruction of any evidence contained within the stall. Because Officer Fitzgerald had probable cause to conduct the search, and because exigent circumstances existed, the warrantless search of the stall was proper.

Because the court finds that the warrantless search was proper under the exigent circumstances exception, the court need not address the State's plain view argument. Accordingly, although the defendant has a reasonable expectation of privacy in the bathroom stall, because the court finds the officers' search of the stall was a warrantless search justified by probable cause and exigent circumstances, the defendant's motion to suppress is **DENIED**.

So **ORDERED**.

April 30, 2008
DATE

TINA L. NADEAU
Presiding Justice