State of New Hampshire Supreme Court

NO. 96-188

1996 TERM

AUGUST SESSION

STATE OF NEW HAMPSHIRE

v.

KEITH PATCH

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF APPELLANT/DEFENDANT, KEITH PATCH

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Keith Patch, a press operator at the Eagle Times, lived at 81 North Street in Claremont for eight years. In November 1994, he met Sandra Gray through work and several months later she moved into his house. On October 12, 1995 the couple had an argument at work. After work Mr. Patch went home and at around midnight Ms. Gray arrived as well. She knocked at the door, but he refused to let her in, and the argument continued. The police came because of the disturbance, and arrested Mr. Patch for simple assault. He spent the night in jail, and by the time he got home in the morning Ms. Gray had changed his locks. *2 Hearing* at 7.

In response, Mr. Patch went to the Claremont District Court and applied for a restraining order against Ms. Gray, which was granted on October 13, 1995. Mr. Patch spent the rest of the day driving around and staying away from his home so that there would be no more trouble and the police would have an opportunity to serve the warrant on Ms. Gray. *2 Hearing* at 4-8.[1]

At around 4:00 that afternoon Officer Pauline LaFleur of the Claremont Police went to Mr. Patch's home. Gray invited the Officer in, and the Officer read the terms of the order and served it. Ms. Gray asked if she could gather some of her things, to which Officer LaFleur agreed. Instead, Gray made several trips to various parts of the house and retrieved several contraband items belonging to Mr. Patch that all were in various cabinets and hidden places, and put them in the plain view of the Officer. Officer LaFleur seized the items and escorted Ms. Gray out of the house. *1 Hearing* at 7-10, 15, 30.

Ms. Gray agreed to go to the police station. There, she was interviewed by Officer

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[1] *1 Hearing* refers to the transcript of Day 1(February 14, 1996) of the suppression hearing; *2 Hearing* refers to Day 2 (February 26, 1996).

LaFleur and Detective Peter Thomas of the New Hampshire Drug Task Force. Gray told them that Mr. Patch is a drug dealer, keeps his stash at a house occupied by one Tom Perras, transports it in the trunk of his car, and where Mr. Patch could probably be found. *1 Hearing* at 20-22.

Based on what they knew, Thomas and LaFleur sought an arrest warrant for Mr. Patch. The warrant was signed by a dispatcher with the Claremont Police Department, Andrew O'Hearne. *Appendix* at 3.

The police went to Keith Patch's parents' house where they arrested Mr. Patch, and made a variety of threats until Patch acquiesced to a search of his car. Patch showed them a bag of marijuana in the trunk, and the police found more in the passenger compartment. *1 Hearing* at 129-30; *2 Hearing* at 10-11. After some further threats Mr. Patch agreed to take the police to Tom Perras's house. Once there, Mr. Patch let the police in, showed them to a desk in an upstairs room, and gave them some more marijuana. *1 Hearing* at 132-33; *2 Hearing* at 14-15. The police, however, searched more broadly, and found still more contraband. *1 Hearing* at 94, *2 Hearing* at 44. At various times during their contact with Mr. Patch he gave the police, both by word and action, the information they sought. The police, however, did not read Mr. Patch his Miranda rights. *Order* at 5-6, *Appendix to Notice of appeal* at 30-31.

Detective Thomas and Officer LaFleur then brought Mr. Patch to the Claremont Police Station, and based on his statements and actions, got warrants to search both Patch's and Perras's house.

Keith Patch was subsequently charged with one count of Possession of Marijuana, a misdemeanor, and two counts of Possession of Marijuana with Intent to Sell, both felonies.

After a suppression hearing, the Sullivan Superior Court, *(Morrill, J.)*, found that the evidence Gray gave to LaFleur was in plain view, the magistrate was authorized to sign an arrest warrant, and that Patch gave consent to search both his car and Perras's house. The Court also found that while Patch made some statements without being Mirandized, the statements were not used by the officers in their warrant applications.

Patch stipulated to facts necessary for a conviction, and was sentenced to three one-year terms in the house of corrections, two of which were suspended on conditions of good behavior, probation, and drug abuse counseling.

This appeal followed.

SUMMARY OF ARGUMENT

Keith Patch first argues that his former girlfriend, Sandra Gray, had no authority to consent to a search of Mr. Patch's residence because once a restraining order was issued she had no authority to be in the place for which she gave consent. He then argues that because the discovery of contraband items in Mr. Patch's residence was not inadvertent, but was the result of deliberate action, the items were not in plain view. Third, he argues that the search violated the terms of the restraining order, which prohibit Ms. Gray from "taking, converting, or damaging" Mr. Patch's property.

Mr. Patch also argues that as a matter of policy, allowing the evidence here to be admitted undermines the intent of the domestic violence statute, will prevent people from calling the police when they are victims of domestic abuse, and will result in a failure to stop domestic violence from happening.

Mr. Patch then argues that the arrest warrant was invalid because it was signed by a magistrate who, as dispatcher for the Claremont Police Department, was not neutral and detached.

Finally, Mr. Patch argues that his consents to search his car and Mr. Perras's house were not voluntarily given, but were the product of police intimidation, and were therefore not valid.

ARGUMENT

I. Sandra Gray had no Authority to Consent to a Search of Keith Patch's Home

The State bears the burden of proving authority to consent to a search. To show that such authority existed, the state must show that Ms. Gray had "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). "Common authority . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 171 n.7; *State v. Cayman*, 130 N.H. 815 (1988). A person cannot lawfully consent when they have no authority to be in the place for which consent was purportedly given. *State v. Beede*, 119 N.H. 620 (1979). Evidence of a sufficient relationship depends upon the extent to which the defendant made efforts to secure his things against the person who gave consent. *State v. Wong*, 138 N.H. 56 (1993) (defendant made no efforts to ensure privacy of items he left with bailee for repair).

In the present case, Sandra Gray had no lawful authority over the premises. Any mutual use she had was terminated when Keith Patch ousted her from the premises by a court order barring her from being there.

In *State v. Verhagen*, 272 N.W.2d 105 (Wis. Ct. App. 1978), the defendant's wife and children had moved out, and the wife had commenced divorce proceedings. A court had entered a temporary order giving the husband use of the family house, but allowing the wife to remove her effects. Accompanied by the sheriff, the wife went to the house and got her things. She executed a written consent to search, and also helped the sheriff find contraband items belonging to the defendant. The court held that the wife could not consent to a search because she did not

have access or control for most purposes. Further, as she did not have access and control, the court found that her husband could not have assumed the risk of her consent to search.

In *United States v. Long*, 524 F.2d 660 (9th Cir. 1975), however, the wife was a joint owner of the premises. Thus, the court found that even though the locks had been changed and she no longer lived there, she could waive her husband's fourth amendment rights. In *State v. Ratley*, 827 P.2d 78, 81 (Kan. Ct. App. 1992), the wife had left the home and filed for divorce. The court found that because "there [was] no evidence to show that [the defendant] did anything such as changing locks, obtaining a restraining order, or removing [wife's] possessions from the property in an effort to restrict her common authority or relationship to the property," the wife could consent to a search of the house. Similarly, in *People v. Barry*, 509 N.Y.S.2d 120 (1990), the defendant's girlfriend had left the apartment they shared for 2½ years, after a fight in which the girlfriend alleged physical abuse. The defendant had taken away her keys, but she had left her clothes and other possessions in the apartment. The couple had reconciled the evening before the search and she had in fact stayed there overnight. The Court found she had valid authority to consent to a search. In other cases upholding consent, the consenter generally has a key to the premises. *United States v. Crouthers*, 669 F.2d 635 (10th Cir. 1982); *Sullivan v. State*, 716 P.2d 684 (Okla. Crim. App. 1986); *State v. Madrid*, 574 P.2d 594 (N.M. 1978), *cert. denied,* 576 P.2d 297.

Thus, authority to consent requires either a property interest in the premises, or a lack of some affirmative act by the defendant to keep the consenter away from the premises. In this case, none of these conditions were present; Sandra Gray had no property or bailment interest, and Keith Patch took a clear step to terminate her access, control, and authority to be there.

The motivation of the person giving consent is relevant in excluding the evidence as well. In *Kelley v. State*, 197 S.W.2d 545 (Tenn. 1946), a wife was angry at her husband, and exceedingly hostile to him. She called the police to have him arrested, but he had left their home. The wife then invited the police in, and showed them his contraband. The court held that her antagonism toward him made the situation such that she could not waive his Fourth Amendment rights. Here, Sandra Gray was motivated by jealousy and anger, *1 Hearing* at 14, 18, with the same tenor of emotion as *Kelley*'s wife. Ms. Gray's antagonism toward Mr. Patch took away her ability to act on his behalf and waive his Constitutional rights.

The state may argue that the situation here -- showing the police the contraband once on the premises -- is no different than Ms. Gray bringing the items to the police station, thus making the items admissible. That argument persuaded the United State Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971). The situation here, however, is different. In *Coolidge*, it was clear that the wife had authority to consent to the search, and so the Supreme Court was correct in determining that "[h]ad [the wife], wholly on her own initiative, sought out her husband's [belongings] and then taken them to the police station to be used as evidence against him, there can be no doubt . . . that the articles would later have been admissible in evidence." *Coolidge,* 403 U.S. at 487. That is not the case here, where Gray was prevented by court order from taking the contraband items to the police. Whatever authority she may have once had was taken away by the order. Thus, the *Coolidge* reasoning does not apply and Gray did not have authority to consent.

Even where consent may otherwise be invalid, when the police reasonably believe that the person giving consent has the authority to do so, courts may regard the consent as valid.

Illinois v. Rodriguez, 497 U.S. 177 (1990). Here, however, the police knew that Ms. Gray had no authority to be in the premises. The police officer read the restraining order to Ms. Gray, presumably understanding it herself. *I Hearing* at 25, 31, 59, 60, 101. Thus, the *Rodriguez* exception does not apply.

One hopes that had Sandra Gray said to the officer, "you may search these premises," the officer would have doubted her authority to consent. However, the actions are the same as the words. Ms. Gray's actions should have triggered the officer to doubt her authority and should have lead the officer to refuse to condone Ms. Gray's actions. If the officer wanted to use the evidence, she had a duty to tell Gray to stop retrieving it, and should have then determined probable cause and gotten a warrant to search on the basis of Gray's statements alone -- even statements as to the exact location of contraband items.

Because Sandra Gray had no authority to consent to a search of Keith patch's home, all the evidence gathered there must be suppressed. *U.S. Const.* Amend. IV; *N.H. Const.* Pt. I, Art. 19.

II. The Contraband Sandra Gray Gave to the Police was not in Plain View and Must be Suppressed

When police officers lawfully enter an otherwise protected area, they do not take with them the right to search the protected area, but they are limited by the purposes that bought them there. *State v. Slade*, 116 N.H. 436 (1976). Consent to enter does not carry with it an implied right to search. *State v. Diaz*, 134 N.H. 662 (1991); *State v. MacDonald*, 129 N.H. 13 (1986). In *Arizona v. Hicks*, 480 U.S. 321 (1987), for instance, the police were lawfully in an apartment to investigate a shot that had been fired from the apartment, and were looking for the shooter. They saw, however, what they believed was stolen stereo equipment, and conducted an illegal search when they moved the equipment to check serial numbers. Thus, the plain view doctrine applies only to things that are truly in plain view. New Hampshire's law is well established:

> "In order to justify a search and seizure under the plain view doctrine, the police officer's conduct must meet three tests: the officer must have been lawfully in the place where he or she observed the item to be seized, the officer must have inadvertently discovered the item, and it must be immediately apparent to him or her that the item has evidentiary significance."

State v. Maguire, 129 N.H. 165, 169 (1987). *Accord State v. Murray*, 134 N.H. 613 (1991); *State v. Cote*, 126 N.H. 514 (1985); *State v. Ball*, 124 N.H. 226 (1983).

In requiring inadvertent discovery, New Hampshire follows the traditional rule set forth in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), rather than the later federal rule of *California v. Horton*, 496 U.S. 128 (1990). In *State v. Slade*, 116 N.H. 436 (1976), a gun had been fired inside a trailer. After the defendant fled, the police lawfully entered and found a bullet hole and powder burns in a curtain, a bullet hole in the window frame, and a shell casing lying below the frame. While the evidence was readily discoverable, it was found after some deliberate scrutiny and not inadvertently. This Court suppressed the evidence, finding that it was

not in plain view.

In the present case, the evidence was also not inadvertently discovered. It cannot be considered in plain view, and must be suppressed. *U.S. Const.* Amend. IV; *N.H. Const.* Pt. I, Art. 19.

At the suppression hearing, both officer LaFleur and Sandra Gray testified that Gray's actions in retrieving the contraband and giving it to LaFleur was deliberate. Gray testified that:

Q: And then you started pulling out various items and putting them on the table?
A: Yes.
Q: One of those items was a black box?
A: Yes.
Q: The black box was closed --
A: Yes.
Q: -- when you put it on the table? And that came from a closet, is that right?
A: Yes.
Q: Then you opened a bureau drawer. Whose bureau drawer was that?
A: Keith's.
Q: So, you opened his bureau drawer and took some -- some items out of the bureau?
A: Yes.
Q: Do you recall what those were?
A: Zig-zags and baggies that he kept his pot in.
Q: Then there was a cupboard I think you said up above a table?
A: Yes.
Q: And is that a kitchen cupboard sort of thing?
A: Yes.
Q: And what did you take out of there?
A: A canister of seeds.
Q: And then there was something from underneath the table?
A: In the living room.
Q: In the living room. Okay. And what was that?
A: His rolling tray and a blue container of seeds, roach clips.

Cross Examination of Sandra Gray, *1 Hearing* at 18-19.

Officer LaFleur testified that:

"Q: And so you were standing where in the apartment or sitting where in the apartment when you went over the order?
A: Standing in the kitchen.
Q: Standing in the kitchen. Okay. . . . So then she went into, I assume, some other room and got a bag and got some clothes and went to the bathroom and got personal items, is that correct?
A: Yes.
Q: And you testified that she was upset. She didn't understand why she had to leave the apartment. She was angry or crying.
A: Did she? Yes.
Q: Did I hear you say she was crying?
A: (The witness nods her head in the affirmative.)
Q: Okay. And then at some point she started talking to you about Keith's activities involving drugs?
A: Right.
Q: And she said to you do you want some of this stuff?
A: Hm-hum.
Q: And she went to a closet and got a black box of some kind?
A: A closet in the kitchen.
Q: The closet off the kitchen?
A: Yes, it's right in the kitchen.
Q: And she got a black box?
A: Yes.
Q: Right? And she handed you that box?
A: Yes.
Q: And at that point you opened that box to see what was in it, is that correct?
A: I, like I said before, I believe she opened it for me, but I don't recall exactly.
Q: Well, do you recall making an incident report regarding this?
A: Yes, I did.
Q: Okay. And if in your incident report you made the statement of she first went to a closet in the kitchen and pulled out a black box. She handed this box to me and then went into the living room. That would probably then be pretty much the sequence that you -- that it happened, is that correct?
A: Yes.
Q: Hum -- and then she went into the living room and took out something else. Do you recall what that was?
A: She pulled out the silver tray from underneath the -- an end table type piece of furniture.
Q: And what did she do with that?
A: She handed that to me as well.
Q: And were you still in the kitchen?

A: No, I follow the people.
Q: You went into the living room with her?
A: Yes.
Q: Which I assume is right off the kitchen?
A: Yes, it is.
Q: I mean, just a matter of feet, right?
A: Right.
Q: Okay. She handed you that and what did you do with that?
A: I took it.
Q: You took it. Okay. Do you recall whether she went over to some cupboard in the kitchen over the table and took out any items and handed them to you?
A: Yes, that was the third item.
Q: Okay. So she went -- do you recall what that item might have been?
A: Something about straining seeds or something. I don't recall exactly what the item was.
Q: And do you recall whether she took any items out of Keith's bureau drawer and handed them to you?
A: No, I don't recall that.
Q: You have no reason to believe though that if she testified that she did that, that she, in fact, didn't do that, do you?
A: Do I --
Q: In other words, if she told us that -- that she went into Keith's dresser drawer and got some item, a bag of marijuana, for instance, and gave it to you, you don't have any reason to believe that she, in fact, didn't go get that out of the dresser drawer?
A: I would have followed her into the bedroom and I do not recall going back into the bedroom with her."

Cross examination of Officer Pauline LaFleur, *1 Hearing* at 61-65.

While there is some dispute between the witnesses on some points, it is apparent that all the items given to LaFleur by Gray were in closed places before Gray ferreted them out. Moreover, while there is no testimony about how long this process took, it is clear that it was done with deliberation and care, that it did not occur in a mere split-second, and that the process was observed fully by Officer LaFleur. These are not the elements of inadvertent discovery.

Because the discovery of the evidence was not inadvertent, it constitutes a search. *State v. Slade*, 116 N.H. 436 (1976). In New Hampshire, "[a] search ordinarily implies, a quest by an

officer of the law, a prying into hidden places for that which is concealed." *State v. Coolidge*, 106 N.H. 186, 191 (1965), *appeal after remand*, 109 N.H. 403 (1969), *rev'd on other grounds*, 403 U.S. 443 (1970), *reh'g denied*, 404 U.S. 874 (1971). While not done by the officer's hands, Gray pried into hidden places with the acquiescence and under the vigilant eye of Officer LaFleur, for that which was concealed.

Officer LaFleur claims she had no chance to stop Gray from retrieving item after item. *1 Hearing* at 124. However, that was not the case. If Gray had gathered all the items out of view of the officer and the presented them to the officer as a bundle, Officer LaFleur's impotence may be believable. However, it is clear that Gray recovered the items one at a time, in sequence, from different places, with the Officer following Gray from place to place.

> "Q. And where did -- where did you find these -- where were these items in that apartment?
> A. The rolling tray was under his side stand in his living room. The bags and zig-zags were in his bureau drawer, tall bureau drawer. The black box with the marijuana in it was in the closet off the -- from the kitchen. There was a bag of seeds up in the cupboard above the table."

Direct Examination of Sandra Gray, *1 Hearing* at 9. Officer LaFleur could have stopped Gray's actions. Further belying LaFleur's credibility is that LaFleur admits she conducted a subsidiary search. She opened a closed box, *1 Hearing* at 9, and rearranged things that were plainly not in sight. LaFleur admitted this was a search. *1 Hearing* at 102.

LaFleur had a duty to stop Gray's actions, a duty under the Fourth Amendment to the United States Constitution, Article I, Part 19 of the New Hampshire Constitution, and pursuant to the restraining order.

Once the exclusionary rule applies, there is the additional question of whether only the first item, which arguably was inadvertently discovered, should be suppressed; or whether all the

items given to LaFleur by Gray should be suppressed. The totality of the circumstances demands suppression of all items. If the bringing of the first item by Gray to LaFleur was genuinely a surprise, and LaFleur followed the law by taking a statement from Gray rather than allowing Gray to go back again and again for more items, then it would perhaps be reasonable to suppress just the first item. But where the Officer allowed Gray to continue to bringing items, all of them must be suppressed. The purpose of the exclusionary rule is to deter police misconduct, and to prevent the police from profiting by it. *E.g., Terry v. Ohio*, 392 U.S. 1 (1968). While it may not have been misconduct to view the initial item, it was misconduct for the Officer to allow Gray to keep them coming. That misconduct is what the exclusionary rule is designed to prevent, and the police should not profit from it. In addition, because the evidence found as a result of the Ms. Gray's action gave rise to the rest of the case, all succeeding evidence should be suppressed as well.

III. The Search of the Patch House Violated the Terms and the Policy of the Restraining Order

A. The Search Violated the Terms of the Restraining Order

Keith Patch applied for, and on October 13, 1995 received, a restraining order against Sandra Gray from the Claremont District Court. *Appendix* at 2. Among other things, the order temporarily retrained Ms. Gray from "entering the premises wherein the plaintiff [Patch] resides." The order also restrained her "from taking, converting or damaging property in which plaintiff has a legal or equitable interest," and from "from harassing, intimidating or threatening plaintiff, plaintiff's relatives, or other household members." The court added that the police should escort Ms. Gray out of the house.

The conduct of Ms. Gray violated the terms of the order. At the outset, it is clear that both Officer LaFleur and Ms. Gray were aware of the terms of the order. *1 Hearing* at 25, 31, 59, 60, 101. Nonetheless, the Officer stood by while Ms. Gray gave LaFleur items that the Officer knew belonged to Mr. Patch. *1 Hearing* 22, 26, 32, 61-5, 101, 103.

First, by seizing Mr. Patch's belongings, Ms. Gray took, converted, and damaged property in which Mr. Patch had a legal or equitable interest. That was precisely Ms. Gray's purpose. *1 Hearing* at 22. A claim that Gray was merely showing the items to the police is weak; Ms. Gray knew, as any person would, that the certain outcome of her action was that Mr. Patch would lose his things. Not only were Mr. Patch's belongings both taken and converted, they were also damaged, as it is not reasonable to think one can get contraband returned from the police.

Second, Ms. Gray violated the prohibition against harassing Mr. Patch. There are few more harassing, intimidating, or threatening situations imaginable than having one's contraband given to the police.

The purpose of the exclusionary rule is to deter police misconduct, and to prevent the police from profiting by it. *E.g., Terry v. Ohio*, 392 U.S. 1 (1968). The police stood by watching, even welcoming, this violation of the order. It was misconduct to do so, and the police should not be allowed to profit from it. Accordingly, the evidence given by Gray to LaFleur should have been suppressed. *U.S. Const.* Amend. IV; *N.H. Const.* Pt. I, Art. 19.

B. The Search Violated the Policy of the Domestic Violence Statute

The purposes clause of the New Hampshire statute "Relative to the Protection of Persons from Domestic Violence" provides that:

> "It is the public policy of this state to prevent and deter domestic violence through equal enforcement of the criminal laws and the provision of judicial relief for domestic violence victims.
>
> "It is the purpose of this act to preserve and protect the safety of the family unit for all family or household members by *entitling victims of domestic violence to immediate and effective police protection* and judicial relief. This act shall be liberally construed to the end that its purpose may be fulfilled."

1979 *N.H. Laws* 377:1, I & II. The legislature plainly stated that the legal force of the State should be employed to stop domestic violence. The legislature directed the courts to construe the act liberally so that its legislative purpose is fulfilled. The criminal code is to be construed to promote justice. RSA 625:3 (emphasis added).

Not all victims of domestic abuse come to the law with clean hands. Some who call on the aid of the law are involved in criminal activities, and some have criminal records.[2] When a person needs the help of the law it is because s/he is a victim. Victims will not call the police knowing that doing so is tantamount to turning themselves in. For this Court to allow that is a persuasive reason for a battered person to never seek the help of the police, to never halt their own battering, and to never stop domestic violence. Surely that does not fulfill the goals of the legislation.

The police assert that the terms of the restraining order do not apply when the items taken are contraband. *1 Hearing* at 101. To the contrary; the exception should flow the opposite direction. This court should announce a rule that the plain view exception to the warrant requirement does not apply to contraband seen in the course of serving a domestic violence order.

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[2]Because of the social and political imperative to stop domestic violence, nearly all information about criminal behavior collected by sociologists, demographers, and criminologists concern the batterer rather than the victim. While much is known about perpetrators, no statistics can be found on the likelihood that a victim of domestic violence will also have a criminal record, or be involved in on-going criminal activity. One study sheds some light on the issue, however. In 1985, among victims of minor violence, 14% had used illicit drugs within the past year; among victims of severe battering, 24% had used illicit drugs during the past year. Glenda Kaufman Kantor & Murray Straus, *Substance Abuse as a Precipitant of Wife Abuse Victimization*, 15 AMERICAN JOURNAL OF DRUG & ALCOHOL ABUSE 173 (1989).

IV. A Justice of the Peace Employed by the Police Department Cannot be a Neutral and Detached Magistrate

An issuance of a warrant for arrest is a judicial act. *State v. Fields*, 119 N.H. 249 (1979); *State v. Kellenbeck*, 124 N.H. 765 (1984). Justices of the Peace are "*judicial* officers of inferior rank," *Opinion of the Justices*, 131 N.H. 443, 448 (1989) (quotations and citations omitted, emphasis added), and are therefore permitted to issue arrest warrants, RSA 592-A:5. "[F]ourth Amendment freedoms cannot properly be guaranteed if [arrests] may be conducted solely within the discretion of the Executive Branch." *United States v. United States Dist. Court*, 407 U.S. 297, 316-17 (1972). The extreme example of mixing the branches of government was struck down in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), in which the Attorney General, also the chief prosecutor in the case, signed a warrant ostensibly in his role as Justice of the Peace.

The magistrate who signs an arrest warrant must be "neutral and detached," pursuant to both the federal and state constitutions. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972); *State v. Canelo*, 139 N.H. 376 (1995). The magistrate may not be a mere "rubber stamp" for the police. *Aguilar v. Texas*, 378 U.S. 108 (1964).

"Detached" is defined as "separate, unconnected, isolated." *Webster's 3rd International Dictionary Unabridged.* The magistrate must be "disinterested." *Dalia v. United States*, 441 U.S. 238, 255 (1979). Thus, clear lines must be drawn between the executive branch police and the judicial branch Justice of the Peace signing the warrant.

While mere personal association with police officers, without more, does not disqualify a magistrate from issuing a warrant, *Tabb v. State*, 297 S.E.2d 227 (Ga. 1982), in the present case there is much more. Andrew O'Hearne, the J.P. who signed Mr. Patch's arrest warrant, was the Claremont Police Department's dispatcher. *1 Hearing* at 40, 66, 68. As an employee, his

continued employment and ultimately his paycheck depended upon keeping the good graces of his boss and colleagues. In fact, Dispatcher O'Hearne satisfied his employers, as he was made an officer of the Claremont Police Department a short time after he signed the warrant in the present case. *1 Hearing* at 103-04.

Employees of the police are far to closely associated with law enforcement to be neutral and detached. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (police officers *per se* disqualified from signing warrants); *People v. Trujillo*, 712 P.2d 1079 (Colo. Ct. App. 1985) (a pecuniary interest in the issuance of a warrant prevents a person from being neutral and detached); *State v. Holloway*, 311 S.E.2d 707 (N.C. Ct. App. 1984) (office held by person issuing warrant must be independent of connection with any law enforcement activity or authority which would destroy the independent judgment on which the warrant requirement relies); *State v. Neslund*, 690 P.2d 1153 (Wash. 1984) (neutral and detached magistrate requires that there be severance and disengagement from the activities of law enforcement); *State v. Curtin*, 332 S.E.2d 619 (W. Va. 1985) (magistrate cannot act as a mere agent of prosecutorial process). The dispatchers of the Claremont Police Department routinely work closely with officers to help them fill out forms, make the Department paperwork flow, and to file and record official papers. *1 Hearing* at 70-72.

Because Dispatcher O'Hearne was an employee of the Claremont police department, and because he had a pecuniary interest in satisfying his colleagues and superiors, he was acting as an agent of the police and his position was not sufficiently severed or disengaged from the activities of law enforcement to maintain an independent judgement. Accordingly, he may not sign warrants. The arrest warrant he signed was therefore invalid, and the evidence gained pursuant

to it must be suppressed. *U.S. Const.* Amend. IV; *N.H. Const.* Pt. I, Art. 19. As the existence of the warrant was used to cajole the defendant into revealing evidence against himself, all evidence produced from Mr. Patch must also be suppressed. *Id.*

During the suppression hearing, the state advanced the theory that because the dispatcher is in a different chain of command, he therefore remained neutral and detached. *Order* at 4, *Appendix to Notice of Appeal* at 4. While such a theory may hold in a large metropolitan police department with hundreds of officers and numerous dispatchers, it seems irrelevant in a small force having few officers and a single dispatcher on a shift.[3] Moreover, there doesn't seem to be much of a separate chain of command in the Claremont Police Department. According to police testimony, the officers work for the sergeant, and so does the dispatcher. Even this bit of formal separation does not seem to matter much, as the officers regard the dispatcher simultaneously as a colleague, one to whom they give orders, and one who when entreated by an officer will fulfill the request. *1 Hearing* at 69.

The State has put forth a second theory that because the dispatcher did not have any investigatory function in this case, he remained neutral and detached. *Appendix to Notice of Appeal* at 20; *Order* at 4, *Appendix to Notice of Appeal* at 4. This theory would seem to turn on the assumption that if the dispatcher has no investigatory functions, then he remains in the judicial branch rather than being a member of an executive department. The fact that he is employed by an executive department and routinely does executive functions, however, is inescapable, and therefore he is incapable of being neutral and detached. *Vaughn v. State*, 287

[3]Claremont had just 31 fill-time, and 5 part-time, officers. New Hampshire Municipal Association, *1995 Wage, Salary and Fringe Benefit Survey*, 18.

S.E.2d 277 (Ga. Ct. App. 1981) (Justice of the Peace who was also a deputy sheriff *per se* disqualified as neutral and detached magistrate even though appointment with sheriffs's office was honorary, did not involve law enforcement duties, and was unpaid); *People v. Payne*, 381 N.W.2d 391 (Mich. 1985) (magistrate who served as deputy sheriff not required to be actively involved in ferreting out crime either from investigatory or prosecutorial standpoint in order for issuance of warrant to be struck down, nor was proof of any actual pro-police bias).

Moreover, it appears that Dispatcher O'Hearne routinely had investigatory functions. The police admitted that upon officers' requests, O'Hearne "ran" license plate numbers and criminal records checks, both of which were admittedly investigatory functions. *1 Hearing* at 104-05. And in fact O'Hearne assisted in the investigation of *this* case after the warrant was obtained. *1 Hearing* at 105.

The state has advanced a third theory that because Dispatcher O'Hearne was a civilian, he remained a neutral and detached magistrate. *1 Hearing* at 40-41; *Order* at 4, *Appendix to Notice of Appeal* at 4. However, the line between an officer and civilian employee of a police department is thinner than the state may wish. RSA 259:78, in the motor vehicle code, defines a police officer as any "officer authorized to make arrests or serve process." RSA 188-F:23, I, in the police standards and training code, defines a police officer as "any appointed or elected employee of a police department . . . who is responsible for the prevention, detection or prosecution of crime or the enforcement of the [various] laws of this state . . . ." RSA 105:2 requires that "[a]ppointment shall be made in writing, under the hands of the selectmen, and recorded, with a certificate of the oath of office thereon, by the town clerk." No particular words of swearing-in are prescribed, and it is not clear that an oath is required. In addition, the

magistrate, as an employee of the police department, is "responsible for the prevention, detection or prosecution of crime or the enforcement of the [various] laws of this state" to some degree. During the course of his day he no doubt learns confidential information about on-going investigations, and is expected to exercise discretion in revealing them. The dispatcher here cannot be compared to the janitor who sweeps the police station floors, as that person clearly has no law enforcement duties. Thus, while probably there is a formal difference between a police officer and a civilian employee, the line is not as bright as the state may assert.

A reasonable person walking into the police station to report a crime or for other business would probably assume that Dispatcher O'Hearne was a police officer. Claremont Dispatchers wear a uniform on duty, complete with navy blue shirts, gray pants, and a gold badge, cloaking them with the authority of the Department. *1 Hearing* at 67-8. While the Claremont Dispatcher's uniform differs slightly in color and style from the Claremont Officer's uniform, it would take a practiced eye and some knowledge to know, upon entering the station, one was not talking to an Officer.

Having a J.P. on the working staff is nothing more than a ruse by the Claremont Police Department to avoid having to go upstairs to the Claremont District Court for a Judge. In *Coolidge*, the United States Supreme Court was incredulous with the testimony, reprinted in the Reports, which revealed that the Manchester Police Department got warrants signed by simply having one of its officers be a J.P. *Coolidge*, 403 U.S. at 452. While the practice in this case is not identical to *Coolidge,* it is but one small step removed, and equally unconstitutional.

Finally, given *Coolidge*, decided over 25 years ago, and similar law pursuant to the New Hampshire Constitution, the Claremont police should have known their practice was at least questionable. Thus, they cannot claim a good-faith belief that the warrant was issued correctly.

V. The Searches of Keith Patch's Car and of Thomas Perras's House Were Not Consensual, and Were Unlawful

In New Hampshire, lawful consent to search must be freely, voluntarily and knowingly given. *State v. Pinder*, 126 N.H. 220 (1985).

> "Where the State seeks to justify a warrantless search by alleging that the defendant consented, the State must show from all the surrounding circumstances that the consent given was free, knowing and voluntary. The burden of proof is on the State is to demonstrate voluntary consent by a preponderance of the evidence. Whether the consent given by the defendant was in fact voluntary or was, rather, the product of coercion, express or implied, is a question of fact to be determined by the trial court from the totality of the circumstances. We will not disturb the trial court's finding unless it is without support in the record."

State v. McGann, 124 N.H. 101, 105-6 (1983). The totality of the circumstances are determined by an objective standard that encompassing many factors. *State v. Baroudi*, 137 N.H. 62 (1993).

The police may not gain consent by claiming they will obtain a warrant regardless of the defendant's consent as that would be a mere "acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543 (1968); *State v. Hastings*, 137 N.H. 601 (1993) (principle stated; consent found valid on facts). In *Dotson v. Somers*, 402 A.2d 790 (Conn.1978),

> "the officers represented to [the consenter] that objection to their entry would be futile, since they could get a search warrant and return, and that this might be embarrassing for her. There is no evidence in the record about the accuracy of this representation as a prediction absent the warrantless search. At the very least the statement failed to convey to a lay person that the issuance of a search warrant involves the exercise of discretion and judicial power, and is not a mere ministerial act. . . . [T]he intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant."

Dotson, 402 A.2d at 794.

The police may not procure consent through any type of force or intimidation. *Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("'consent' that is the product of official intimidation or

harassment is not consent at all"). In *State v. McGann*, 124 N.H. 101, 106 (1983), this Court invalidated a supposedly consensual search because the defendant opened his car only to avoid damage after police told him they were going to break into it. In *Lightford v. State*, 520 P.2d 955 (Nev. 1974), a search of a house was invalidated because the consent was given after the officer suggested the possibility of kicking down the door if the defendant refused to use his key.

An initial lack of consent is good evidence that consent was not given voluntarily. *United States v. Pulvano,* 629 F.2d 1151 (5th Cir. 1980); *Dotson v. Somers*, 402 A.2d 790 (Conn. 1978); *State v. Wilmart*, 450 N.W.2d 703 (Neb. 1990) (consent not voluntary as defendant "vacillated as to whether to permit officer to search"); *cf. State v. Green*, 133 N.H. 249, 259 (1990) (initial refusal not necessarily invalidate subsequent consent unless evidence shows coercion).

The fact that a person is in custody when consent is given casts some doubt on the voluntariness of the consent. In *Pirri v. State*, 428 So. 2d 285 (Fla. App. 1983), during a *Terry* stop, the police ordered the defendant to put his hands on the roof of his car, and then called for other officers. When they arrived, the defendant was ordered to empty his pockets. During the interrogation, the defendant consented to a search of his car, in which contraband was found. The court held that "[b]ecause of the coercive setting and the officer's failure to notify the defendant of his right to refuse the search, the defendant's compliance with the officer's request might possibly be deemed acquiescence to authority, but it certainly does not rise to the level of free and voluntary consent to search." *See also Hall v. State*, 399 So. 2d 348 (Ala. Crim. App. 1981); *Smith v. State*, 576 S.W.2d 957 (Ark. 1979); *Commonwealth v. Beasley*, 430 N.E.2d 437, 438 (Mass. App. Ct. 1982) (consent involuntary because defendant under arrest, guarded by officers, keys had been taken, and not informed of right to refuse)

Under the totality of circumstances in the present case, Mr. Patch did not voluntarily consent to a search of his car. According to his testimony:

"Q: What did Detective Thomas or Officer Lafleur say to you at that time?
A: Detective Thomas wanted me to open the trunk of my car
Q: And what did you say to him?
A: I told him I didn't want to do that.
Q: Then -- then what happened? What did he say?
A: Well he said that he'd search my parents' house and at that point I still refused.
Q: So, when you say he told you he'd search your parents' house, how did he phrase that?
A: If I didn't open the trunk of the car that he would search my parents' house and look for whatever he was looking for.
Q: And what did you say in response to that?
A: I refused to still open the trunk.
Q: And so what did he say after you refused the second time?
A: He shoved the arrest warrant in my face and told me if I didn't cooperate and open the trunk that he would arrest me and go get a search warrant and get what was in the trunk.
Q: Okay. You say he shoved a search [sic] warrant in your face. You mean he had it in his hand and just held it up in front of you?
A: Yes, he went just like this to me right in front of my face. (Witness indicates.)
Q: Had you seen the arrest warrant prior to that?
A: He had it in his hands when he was at the door.
Q: Okay. Did you have an opportunity to read that warrant or did he just hold it up there in front of you?
A: No, I didn't. He just kind of put it up there quickly and just put it back down.
Q: So, he told you if you did not cooperate --
A: Yes.
Q: -- that he would arrest you and then get a search warrant?
A: Yes.
Q: What did you do next?
A: I opened the trunk of the car."

Direct examination of Keith Patch, *2 Hearing* at 10-11. After the search of the car, the police prevailed on Mr. Patch to bring them to Thomas Perras's house:

"Q: What happened next?
A: At this point [Detective Thomas] walked up to me and asked, said that -- hum -- we know that you keep the rest of your stash at Tom's house and we want to go there.
Q: And what did you tell him?
A: I told him I couldn't do this.
Q: Did he say just Tom or did he use a last name?
A: Just Tom.
Q: Okay. And you told him you could not do that?
A: Yes.
Q: What did he do next or what did he say next?
A: Well, he said that he would leave Tom out of it 'cause from his understanding he had nothing to do with it. At this point I still refused to want to go out there.
Q: Then what did they, after you refused a second time, what did they say?
A: He said that he would go get Tom out of work and go get a search warrant and just kick the door in and get what is at Tom's house."

Direct examination of Keith Patch, *2 Hearing* at 14-15. Detective Thomas's version of the events is more spare:

"Q: What occurred once you arrive at his parents' residence?
A: We went to the door. We knocked on the door. And the door was answered by I believe it was his father. We said that we wanted to talk to Keith. His father went and got Keith and we brought Keith outside to talk with him.
Q: Did you have an arrest warrant for Mr. Patch at that time?
A: Yes, we did.
Q: What was that arrest warrant for?
A: Possession of marijuana.
Q: Did you tell Mr. Patch that you had an arrest warrant for him at the time when you went and spoke with him at his parents' residence?
A: No, we did not.
Q: What did the conversation with Mr. Patch consist of at his parent's residence?
A: We told him that Miss Gray had given Detective Lafleur some marijuana items, that we wanted to look into the trunk of his vehicle.
Q: Did you tell him he was under arrest at that time?
A: No, we did not.
Q: What was Mr. Patch's response when you told him you wanted -- you wanted to look into his vehicle?
A: He said that he didn't want to let us into the trunk of his vehicle. He didn't want to open it.

Q: And what did you do next?
A: I asked him why he didn't want to open it. That we knew what was in the -- in the trunk of the -- of the vehicle.
Q: What did he say when you told him that?
A: He got very angry, had a -- a cup in his hand, threw the cup on the ground, made a derogatory statement and walked over towards the back of the vehicle.[4]
Q: And what did he do once he was by the back of he vehicle.
A: After Detective Lafleur, I mean, Officer Lafleur asked him about any weapons in the trunk of the vehicle, then opened up the trunk of the vehicle, reached inside, pulled out a bag and handed it to me and said, 'there, that's all of it.'"

Direct examination of Detective Thomas, *1 Hearing* at 129-30. Regarding the search of Perras's house, Thomas said:

Q: After he, Mr. Patch, handed you that bag out of the trunk, what happened next?
A: Uh -- we talked about going to the residence where the -- the rest of the -- we believed the rest of the marijuana was stored. Mr. Patch agreed to take us there.
Q: Did you threaten Mr. Patch in any way prior to his agreeing to take you to the Perras residence?
A: No.
Q: Did you tell him that you were going to arrest him if he didn't take you there?
A: No, we did not.
Q: Did you have any further conversation with Mr. Patch prior to his agreeing to take you to the Perras residence?
A: Uh -- I don't recall whether it was prior or right after his agreeing. We did ask him if he had a key which he told us he did have to the residence.
Q: Did you at some point go the Perras residence with Mr. Patch and Officer Lafleur?
A: Yes, we did.
Q: And how did you do that?
A: We went in Officer Lafleur's cruiser.

Direct examination of Detective Thomas, *1 Hearing* at 132-33.

The police version of the story is that Mr. Patch just gave up the "jig," said a figurative

[4]Although not relevant to the issues here, under cross-examination Mr. Patch admitted having a glass in his hand before he opened the trunk. *2 Hearing* at 37.

"aw shucks," and opened the trunk of his car. Mr. Patch's version is much more compelling, and more believable. For the search of the car, the police threatened that they either didn't need a warrant, or would go get one; for the search of Perras's house, the police simply threatened to go get one. Saying they didn't need a warrant is contrary to law, *State v. Murray,* 135 N.H. 369 (1992), as is saying they would knock down Mr. Perras's door, *State v. Matos*, 135 N.H. 410 (1992). Saying they would simply get a warrant is an unlawful claim of authority, and an assertion of a mindless ministerial act. Either way, Mr. Patch's purported consents were mere acquiescence. Waving the arrest warrant in Mr. Patch's face was both a claim of authority and an effort to show police force; the threat to search his parents' house, get Mr. Perras out of work, and to knock down the door were successful efforts to intimidate. Mr. Patch testified that he was scared. *2 Hearing* 28. It is clear in any case that Mr. Patch was in custody at the time. It is undisputed that he initially resisted consenting, probably twice, *2 Hearing* at 36, to the search of his car; and at least twice resisted consenting to a search of Perras's house. As for the search of the passenger compartment of the car, Mr. Patch claims that the police simply extended their unlawful search of the trunk without permission. *2 Hearing* at 13-14. The police claim that Mr. Patch blithely consented. *1 Hearing* at 44.

Given these circumstances, Mr. Patch's consents were not voluntarily given. Instead, the search of both the car and Mr. Perras's house were incident to Mr. Patch's arrest, but because Mr. Patch was not in the proximity of his car or of the house, the searches do not lawfully fit into the search-incident exception. *State v. Murray*, 135 N.H. 369 (1992). Accordingly, the fruits of the search of Mr. Patch's car and of Mr. Perras's house should have been suppressed. *U.S. Const.* Amend. IV; *N.H. Const.* Pt. I, Art. 19.

Moreover, even if Mr. Patch consented to the search of Mr. Perras's house, the police went far outside of the scope of consent. At most, Mr. Patch gave the police a cooler, and told them that a set of scales resting on a desk was his. *1 Hearing* at 94, *2 Hearing* at 44. The police however, proceeded to escort Mr. Patch back to the police car and then search the entire contents of the desk. There police had plenty of time to obtain a warrant for the search, but failed to get one. *State v. Murray*, 135 N.H. 369 (1992). There were no exigent circumstances, and the search does not fit in to any other known exception to the warrant requirement. Accordingly, even if Mr. Patch did consent to a limited search, items which were found outside of the scope of his consent should have been suppressed. *State v. Diaz*, 134 N.H. 662, 664 (1991).

CONCLUSION

The evidence Ms. Gray gave to the police should have been suppressed. As it gave rise to the rest of the case, the prosecution against Mr. Patch should be dismissed. In the alternative, the warrant for Mr. Patch's arrest, signed by a magistrate who was not neutral or detached, should have been quashed; and in addition, the evidence turned up in the non-voluntary consent searches of Mr. Patch's car and Mr. Perras's house should have been suppressed. Moreover, a criminal prosecution against Mr. Patch points out the policy shortcomings of allowing those who use the domestic violence statute to have their request for help turned against them, and for that reason the case should be dismissed. Based on the forgoing, Mr. Patch requests these remedies, and any other that justice may require.

Respectfully submitted,

Keith Patch
By his Attorneys,

Law Office of Joshua L. Gordon

Dated: December 30, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Keith Patch request that Attorney Jonathan L. Springer be allowed 15 minutes for oral argument.

I hereby certify that on December 30, 2000, a copy of the foregoing will be forwarded to the office of the Attorney General.

Dated: December 30, 2000

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APPENDIX

Restraining Order

Warrant

RSA 105:2

"Such appointment shall be made in writing, under the hands of the selectmen, and recorded, with a certificate of the oath of office thereon, by the town clerk."

RSA 188-F:23, I

"'Police Officer' means any appointed or elected employee of a police department or any appointed employee of a sheriff's department, the fish and game department, the department of safety, or any special agent appointed by the state liquor commission which is administered by the state or any of its political subdivisions and who is responsible for the prevention, detection or prosecution of crime or the enforcement of the penal, traffic, highway, boating, liquor, or bingo and lucky 7 laws of this state or any of its political subdivisions."

RSA 259:78

"'Police officer' shall mean any constable, peace officer, or other officer authorized to make arrests or serve process."

RSA 592-A:5

"A justice of the peace throughout the state may issue his warrant for any offense committed in any county, which may be directed to the sheriff of any county or his deputy or to any constable or police officer of any town in the state."

RSA 625:3

"The rule that penal statutes are to be strictly construed does not apply to this code. All provisions of this code shall be construed according to the fair import of their terms and to promote justice."

United States Constitution, Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New Hampshire Constitution, Part 1, Article 19

"Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law."