

[REDACTED]

As to the property associated with the tall stack, we find that there is sufficient evidence in the record to support the agency's finding that the stack does function to disperse pollutants, and we are thus not convinced by a clear preponderance of the evidence that the agency decision was unreasonable or unlawful. The use of a stack in this situation is analogous to the use of a discharge tunnel to control thermal discharge pollution, which we have already held to be eligible for tax exemption under RSA 72:12-a (Supp. 1988). *Appeal of Town of Hampton Falls*, 126 N.H. 805, 814-15, 498 A.2d 304, 309 (1985).

■ ■ Accordingly, we find that the real estate under the No. 14 bark-burning boiler is part of a new energy source rather than a treatment facility, and reverse the agency's decision that it qualifies for tax exemption under RSA 72:12-a (Supp. 1988). We affirm the agency's ruling that the No. 14 stack is exempt from property taxes under RSA 72:12-a (Supp. 1988), and we remand the case for proceedings consistent with this opinion.

Affirmed in part; reversed in part; remanded.

All concurred.

[REDACTED]

Merrimack
No. 87-340

THE STATE OF NEW HAMPSHIRE

v.

DWIGHT T. REYNOLDS

December 28, 1988

[REDACTED]

[REDACTED]

pharmacy, soon arrived and admitted the police into the building, where they noticed a gaping hole, approximately three feet by three feet, in the ceiling above the prescription bench. One of the investigating officers concluded that "some tool was used to pierce the roof so you could splinter it and pull it up." Tar on the roof matched the substance on the screwdriver found in the duffel bag. Kirsch noticed that shelf space previously displaying drugs was now empty. The police also found two more pill bottles on the ground between the Modern Pharmacy and the defendant's hiding spot.

The defendant was charged with burglary, a class B felony under RSA 635:1, receiving stolen property, a class A felony under RSA 637:7, and possession of burglary tools, a misdemeanor under RSA 635:1, V. A month later, in June, 1986, Kirsch went to the Concord police station and asked for the drugs found in the duffel bag. The police returned his property, so that he would not suffer any hardship in the operation of his pharmacy, without giving any notice to the defendant. Kirsch then sold the drugs in the ordinary course of his business. The defendant subsequently moved to dismiss all charges, citing the transfer of evidence without notice in violation of RSA 595-A:6. The defendant also moved to suppress all evidence relating to the returned drugs and to forbid reference to them at trial.

The trial court dismissed the receiving stolen property charge and denied the other motions. The court ruled that the State had violated RSA 595-A:6 by returning the drugs to Kirsch without notifying the defendant, but found "no bad faith on the part of the State in doing so. Failure to comply with the statute was as a result of ignorance or neglect." The defendant was convicted at a jury trial on both remaining charges and was sentenced to three and one-half to seven years for the burglary conviction and to twelve months, to run concurrently, for the possession of burglary tools.

The defendant appeals only the burglary conviction. He contends that the State violated the due process clause of the New Hampshire Constitution, N.H. CONST. pt. I, art. 15, by failing to notify him before it returned the drugs to Kirsch. The defendant argues that the trial court's finding of the State's "ignorance or neglect" was equivalent to a finding of culpable negligence, and that suppression of the evidence was an appropriate remedy. Because the State demonstrated the absence of both bad faith and culpable negligence, and the defendant failed to demonstrate that the loss of evidence prejudiced him, we affirm the conviction.

■ This court recently described the standard for determining whether the State's loss or destruction of evidence violated due process:

"[O]nce a defendant demonstrates that the State has lost or destroyed apparently relevant evidence, the State has the burden to demonstrate that it acted both with good faith, in the sense that it was free of any intent to prejudice the defendant, and without culpable negligence. (Citation omitted.) If the State carries that burden, the defendant may not claim any relief unless he demonstrates that the lost evidence was material, to the degree that its introduction would probably have led to a verdict of not guilty, and that its loss prejudiced him by precluding the introduction of evidence that would probably have led to a verdict in his favor. (Citation omitted.)"

State v. Murray, 129 N.H. 645, 648, 531 A.2d 323, 325 (1987).

■ The defendant does not contest the trial court's finding that the police acted in good faith, but asserts that the court's characterization of the State's action as the result of "ignorance or neglect" amounts to a finding of negligence, and precludes the State from demonstrating that it acted without culpable negligence. The defendant has mistakenly assumed that ordinary neglect and culpable negligence are equivalent. Culpable negligence has been defined, in a different context, to be "[s]omething more than mere negligence." *State v. Strescino*, 106 N.H. 554, 556, 215 A.2d 706, 708 (1965) (quoting *State v. Soucy*, 97 N.H. 233, 234, 84 A.2d 838, 840 (1951)). Culpable neglect is "censorious, faulty or blamable," *Mitchell v. Smith*, 90 N.H. 36, 38, 4 A.2d 355, 357 (1939); it is "more than the failure to use ordinary care," *Coffey v. Bresnahan*, 127 N.H. 687, 693, 506 A.2d 310, 314 (1986) (quoting *Holway v. Ames*, 100 Me. 208, 211, 60 A. 897, 898 (1905)).

■ We have recognized this required element of culpability in previous evidence destruction cases. In *State v. Baillargeon*, 127 N.H. 782, 784, 508 A.2d 1051, 1053 (1986), this court agreed with the trial court that although relevant evidence had been lost, there was "no credible evidence of *gross negligence* or lack of good faith on the part of the State." (Emphasis added.) When we delineated the standard in *Murray*, we examined the record and found that the State's actions evinced "good faith and *freedom from culpability*." *Murray*, *supra* at 649, 531 A.2d at 326. (Emphasis added.) Culpable negligence is less than gross negligence but more than ordinary negligence. See *Coffey v. Bresnahan supra*. The State thus

