

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-20

216-2022-CR-577

MOTION TO SUPPRESS STATEMENTS FROM AFTERNOON OF
DECEMBER 31, 2021

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and respectfully requests this Honorable Court suppress from use at trial all statements he made to law enforcement on the afternoon of December 31, 2021 at approximately 4:00 PM because a) law enforcement failed to advise Mr. Montgomery of his *Miranda* rights prior to commencing questioning , b) law enforcement failed to honor Mr. Montgomery's assertion of his right to silence and c) asserting a constitutional right to silence is inadmissible.

All requests in this motion are based on Part 1, Articles 15 and 19 of the New Hampshire Constitution and the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution. In support of this request, undersigned counsel, asserts as follows:

1. The defendant is charged in docket 216-2022-CR-20 with Second Degree Assault, two Counts of Endangering The Welfare Of Child Or Incompetent, and interference With Custody. In a separate docket, 216-2022-CR-577, he is charged with two counts of Armed Career Criminal, two lesser included charges of Felon in Possession, two counts of Theft and two alternative counts of Receiving Stolen Property.

2. On the morning of December 31, 2021, around 8:45 AM, Manchester Police seized and detained Adam Montgomery and questioned him. Although Montgomery did assert his right to silence, under continued questioning by Det. Dunleavy, Montgomery advised police that he had left his daughter, Harmony, with Crystal (her biological mother) around Thanksgiving 2019 after he and his family had been evicted and forced to live out of his car. He said Crystal had a place

to stay and took Harmony to Massachusetts, and that he hadn't spoken to them since. This seizure and interrogation is the subject of a separate Motion to Suppress Statements from December 31, 2021 and is incorporated herein as if fully stated.

3. After the morning contact with Montgomery, DCYF prepared and was granted an *ex parte* order placing the custody of Harmony Montgomery with DCYF. In the Affidavit in support of the Petition, DCYF referenced the December 31, 2021 morning contact between Manchester law enforcement and Adam Montgomery asserting that "Mr. Montgomery refused in(sic) engage with the police other (than) to say that Harmony was with the mother".

4. Later that same day, around 4:00 PM, Manchester Police again seized and detained Montgomery, this time with the stated intent to serve him with an *ex-parte* order. Law enforcement officers located Montgomery and detained him until Detectives Riley and Dunleavy could serve the *ex-parte* order.

5. Body cam video shows numerous officers, at least six, were involved in the afternoon detention of Montgomery and at least one officer use an assault type of rifle. Montgomery was handcuffed while given a pat down search and the contents of his pockets were put on the ground. After the pat search, Montgomery was uncuffed and allowed to pick up the contents and return them to his pockets. Included in the contents was a cellphone. Subsequently, while still waiting for the detectives to arrive, the cellphone was seized. Law enforcement continued surrounding Montgomery until the detectives arrived.

6. Detectives Riley and Dunleavy arrived at the scene of Montgomery's seizure and detention. Montgomery was permitted to move around the corner of the building where Det. Riley served him the *ex parte* order. He did not provide Montgomery any *Miranda* warnings, advising Montgomery he was not arresting him but that by court order Montgomery was to cooperate. Det. Riley ordered Montgomery to tell him where Harmony was. Montgomery asserted his right to silence.

7. Det. Dunleavy then approached Montgomery and spoke with him. Montgomery asked about the papers and whether he had to sign them. Det. Dunleavy answered and suggested to Montgomery that he cooperate and arrange to speak with him. He also advised Montgomery that he was keeping the cellphone. Montgomery responded to Det. Dunleavy's statements. Det. Dunleavy permitted Montgomery to leave, telling him he was free to go.

THE DEFENDANT WAS IN CUSTODY AND ENTITLED TO *MIRANDA* WARNINGS

8. When a suspect is subjected to custodial questioning by police, his statements are inadmissible at trial unless the suspect has first been warned of and waived his Miranda rights. Miranda v. Arizona, 384 U.S. 436, 479 (1966); State v. Chrisicos, 148 N.H. 546 (2002); State v. Gullick, 118 N.H. 912 (1978); State v. Phinney, 117 N.H. 145 (1977).

9. The Court has identified factors which characterize “custody.”

Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement to the degree associated with formal arrest. State v. Turmel, 150 N.H. 377, 382-83 (2003) (citation omitted). In the absence of formal arrest, we must determine whether a suspect’s freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect’s position would have understood the situation. Id. “The location of questioning is not, by itself, determinative: a defendant may be in custody in his own home but not in custody at a police station.” State v. Johnson, 140 N.H. 573, 578 (1995) (quotations and citations omitted).

State v. Jennings, 155 N.H. 768, 772 (2007). The trial court should consider the totality of the circumstances, including a) the suspect’s familiarity with his surroundings, b) the number of officers present, c) the degree to which the suspect was physically restrained, and d) the interview’s duration and character.

A) Surroundings:

10. Montgomery was seized on a sidewalk in Manchester in an area he had frequented. The area was a public, however, given the presence of numerous law enforcement officers, it appeared that non-law enforcement persons could not get near the area where Montgomery was detained.

B) Number of officers present:

11. Several law enforcement officers, at least six surrounded Montgomery, detaining him. It appears that guns were visible. Also visible on the body cam was one assault type rifle being returned to a cruiser, presumably after it was present and visible during the initial seizure.

12. When the two detectives arrived, the other law enforcement officers remained.

C) The degree restrained:

13. Montgomery was detained by several law enforcement officers on three sides and a wall behind him. At first, Montgomery was handcuffed and patted down. Contents were removed from his pockets. He was then uncuffed and able to retrieve the contents removed during the search. Shortly thereafter, cellphone from his person was seized. At least six law enforcement officers remained, keeping watch on Montgomery while waiting for the detectives.

14. When Det. Riley and Dunleavy arrived, Montgomery was allowed to move around the corner of the building where Det. Riley served him the *ex parte* order and spoke to him. Montgomery was not told he was free to leave, but rather told he had to cooperate. Montgomery asserted his right to silence. In fact, Montgomery was not told he could leave until after a brief conversation with Det. Dunleavy during which the detective suggested he cooperate and told him he seized the phone. .

15. The State may argue that Det. Riley told Montgomery that he was not arresting him and thus Montgomery was not in custody. However, merely being advised he is not under arrest is not sufficient to alleviate the reasonable belief that he was not free to leave. See State v. McKenna, 166 N.H. 671 (2014)(custody where two police officers questioned the defendant on his own property after telling him he was not under arrest.)

D) Interviews duration and character:

16. The interview did not last very long, only because Montgomery asserted his right to silence. However, notwithstanding this assertion, as Det. Riley walked away from Montgomery, Det. Dunleavy approached him. During that conversation, Det. Dunleavy attempted to persuade Montgomery it was in his best interest to "get ahead" of the investigation.

17. Because Montgomery was "in custody", he was entitled to *Miranda* warnings prior to Det. Riley ordering him to provide information. Failure to give the warnings and to obtain a waiver render all statements he made after he asserted his right to silence inadmissible, including his assertion itself.

**WHETHER OR NOT MONTGOMERY WAS IN CUSTODY, HIS ASSERTION OF HIS
RIGHT TO SILENCE WAS NOT SCRUPULOUSLY HONORED**

18. If any time before or during interrogation, the defendant asserts the right to remain silent, the police must cease all questioning. Miranda v. Arizona, 384 U.S. 436 473-74 (1966); State v. Laurie, 135 N.H. 438 (1992)(whenever a suspect in custody exercises his option to cut off questioning, the police must scrupulously honor the suspect's desire to remain silent).

19. The standards applicable to pre-*Miranda* non-custodial statements are the same as a post-*Miranda* custodial analysis. State v. Pouliot, 174 N.H. 15, (2021)("Therefore, applying the principles in our post-*Miranda* custodial interrogation cases, we proceed to examine the defendant's pre-*Miranda* non-custodial statements under the totality of the circumstances.")

20. Here, Montgomery asserted his right to silence to Det. Riley. At that point, no further attempts to obtain information from him were permitted. However, as Det. Riley walked away from Montgomery, Det. Dunleavy approached. Montgomery asked him if he had to sign the papers he had been served. Dunleavy answered his questions but then sought to persuade Montgomery to speak with police. This was not scrupulously honoring Montgomery's desire to remain silent and statements made in response to Det. Dunleavy must therefore be suppressed.

MONTGOMERY'S ASSERTION OF HIS RIGHT TO SILENCE IS INADMISSIBLE

21. Use of the assertion of the right to silence at the time of arrest and after receiving *Miranda* warnings violates the Due Process Clause of the Fourteenth Amendment. Doyle v. Ohio, 426 U.S. 610, 619(1976).

22. It is well-settled law in this jurisdiction that "use of pre-arrest silence in the State's case-in-chief, in which the defendant does not testify, is unconstitutional." State v. Remick, 149 N.H. 745, 747(2003).

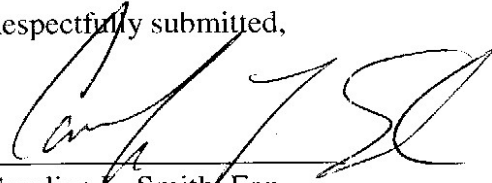
23. Here, Montgomery asserted his right to silence. This assertion is not admissible.

24. In conclusion, all of Montgomery's statements to police the afternoon of December 31, 2021, including his assertion of his right to silence, must be suppressed .

Wherefore, Adam Montgomery requests that this Honorable Court:

- A. Grant a hearing on this motion;
- B. Suppress the statements that he made to law enforcement on the afternoon of December 31, 2021; and
- C. Grant such further relief as justice requires.

Respectfully submitted,



Caroline L. Smith, Esq.

N.H. Bar #5992

Paige Buckley

N.H. Bar #272328

N.H. Public Defender

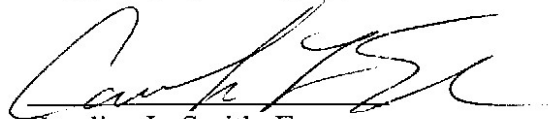
408 Union Avenue

Laconia, NH 03246

(603) 524-1831

CERTIFICATE OF SERVICE:

I hereby certify that a copy of this MOTION TO SUPPRESS STATEMENTS has been forwarded to the Office of the Attorney General on this 19th day of August, 2022.



Caroline L. Smith, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

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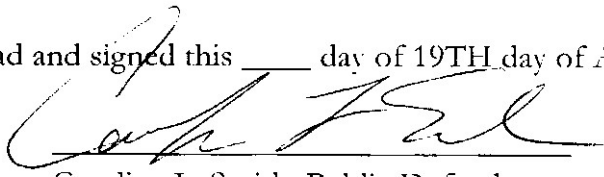
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AFFIDAVIT

BEFORE ME, the undersigned Notary Public/Justice of the Peace, personally came and appeared:

CAROLINE L. SMITH, NH PUBLIC DEFENDER

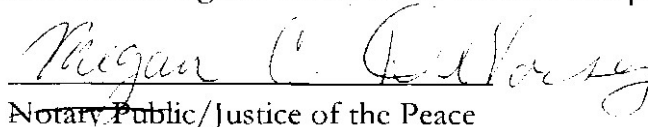
who after being sworn by me to tell the truth, did state that she is a Public Defender representing Adam Montgomery, that all facts alleged in the foregoing motion are based on (1) the police reports and other discovery provided by the prosecution and (2) the recordings provided by the prosecution, and that the statements of fact in the motion are true and correct to best of her information and belief.

Read and signed this ____ day of 19TH day of August, 2022 at Laconia, NH.



Caroline L. Smith, Public Defender

Read, affirmed and signed before me at the time and place described.



Notary Public/Justice of the Peace

My commission expires May 1, 2024