

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 RE: SEARCH OF PHONE SEIZED FROM THE
DEFENDANT ON DECEMBER 31, 2021**

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and respectfully requests this Honorable Court suppress all evidence obtained from the illegal search and seizure of a cellphone found in the Mr. Montgomery's possession and seized on December 31, 2021. This motion is grounded in Mr. Montgomery's rights under Part I, Articles 2-b and 19 of the New Hampshire Constitution, and the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

As grounds for this motion, the following is stated:

1. The defendant is charged in docket 216-2022-CR-20 with Second Degree Assault, Endangering The Welfare Of Child Or Incompetent, Endangering The Welfare Of Child Or Incompetent, Interference With Custody. In a separate docket, 216-2022-CR-577, he is charged with two counts of Armed Career Criminal, with two lesser included charges of Felon in Possession, two counts of Theft and two counts of Receiving Stolen Property.
2. The defendant is scheduled for a Final Pre-Trial Conference on October 27, 2022. The Court granted the defendant's Motion to Extend Deadline to August 22, 2022 for the filing of this Motion to Suppress.
3. On the morning of December 31, 2021, around 8:45 a.m., Manchester Police seized and detained Adam Montgomery and questioned him. This seizure and interrogation is the subject of a separate Motion to Suppress Statements from December 31, 2021. However, it is relevant that

the police had contact with Montgomery several hours prior to the contact that resulted in the seizure of the cellphone at issue.

4. Later that same day, around 4:00 p.m., Manchester Police again seized and detained Montgomery, this time with the stated intent to serve him with an *ex-parte* order. Apparently, law enforcement officers located Montgomery and detained him until Detectives Riley and Dunleavy could serve the *ex-parte* orders. Thus, it appears that the afternoon contact with Montgomery was pre-planned with several hours between the two seizures.

5. According to the body cam video, numerous officers were involved in the afternoon detention of Montgomery and at least one officer appears to have had an assault type weapon. Montgomery was handcuffed, patted down and the contents of his pockets 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, an officer asked Montgomery for his cellphone while another officer approached and asked Montgomery if he had a cellphone on him. When Montgomery confirmed that he had a cellphone, taking it out of his pocket to show the officers, one officer told Montgomery that he was going to have another officer hold it "for a second... just until the detectives get here". Montgomery told them that it was not his phone, but confirmed that he was using it.

6. Detectives Riley and Dunleavy arrived at the scene of Montgomery's seizure. Det. Riley served Montgomery the papers. Afterwards, Det. Dunleavy had a brief conversation with Montgomery. In that conversation, Det. Dunleavy told Montgomery he was going to be taking his cellphone. Montgomery told him it wasn't his phone and Det. Dunleavy said that was ok, "It's ours now, so". Montgomery was permitted to leave.

7. Det. Duleavy then obtained possession of the phone and placed it in airplane mode. In talking to officers afterwards, Det. Dunleavy stated that the phone was Montgomery's or his girlfriend, Kelsy's. He then spoke to Kelsey who stated the phone was Adam's. One of the officer's advised Det. Dunleavy that he had seen Adam Montgomery face to face with Kayla. On information and belief, this is the contact described in paragraph 29 of the affidavit. Det. Dunleavy stated he was going to get a warrant for the phone and asked the officer (detective) to do a "102" just to say you saw them communicating. He said the reason was more "PC", for a search warrant for his (Montgomery's) phone. Det. Dunleavy apparently saw Adam Montgomery

speaking to Kayla Montgomery shortly thereafter, around the corner from where Montgomery had been detained.

8. On January 28, 2022, Det. Dunleavy made an evidence label (JD 15) for the cellphone seized from Montgomery on December 31, 2021. At that time the phone was in the secure cyber crimes lab in a Faraday box.

9. On January 31, 2022, an application for a search warrant was prepared and approved. The warrant sought to search a Tracfone Blu View 3 (with the backing of the phone blue in color) believed to belong to Kayla Montgomery. It was asserted that there was probable cause to believe the phone contained evidence of the crime of indirect criminal contempt. The specific assertions with regard to the phone seized from Montgomery are contained in paragraph 27 and 28. In paragraph 27, the affidavit described some of the interaction when Montgomery was served with papers on December 31, 2021. Paragraph 28 describes the seizure of the cell phone, to wit:

At the beginning of this interaction with Adam, he was pat frisked for officer safety. A cell phone was located on his person, which was given to Detective Dunleavy. Adam denied that the phone belonging (sic) to , so Detective Dunleavy inquired with Kelsey Small as to the owner of the cell phone. Kelsey stated that the cell phone belonged to Adam. The phone was placed into airplane mode and was later logged into evidence.

10. In paragraphs 26, 29, 30, 34 and 35, the affidavit described encounters between Adam and Kayla Montgomery on December 29, 30 and 31, 2021.

11. In paragraph 31, the affidavit described that while conducting the investigation, officers determined that Adam Montgomery had a current court order to have no contact with Kayla Montgomery, except as permitted by the family court. In paragraph 32, the affiant described receiving a copy of the court order referenced in paragraph 31. In paragraph 33, the affiant described follow up on the court order wherein he was informed that neither Adam or Kayla Montgomery currently had any proceedings or cases within the Family Division of the Court.

12. Paragraph 36 reveals why police believed the phone seized from Adam Montgomery belonged to Kayla Montgomery -- that on January 27, 2022, the Hillsborough County Department of Corrections forwarded a copy of mail sent from Kayla Montgomery to a Tarah Hilbert. In that letter, Kayla noted that the "last phone I had before the cops took it was called a Bluview3 it was the 2nd cheapest I could get at Walmart." Her description of her phone matched the phone removed from Adam on December 31, 2022.

13. In the affidavit, the affiant noted that the relevant time period for information sought from the phone was December 27 - 31, 2021. However, the affiant requested that the warrant permit a search to include examination of "any and all information on the device". This request was based on the assertion in paragraph 40 that because data can be edited and recovered deleted items may not have correct dates and times, and searching the device for only the time period of 12/17/2021 through 12/31/2021 may not uncover all evidence that actually corresponds to that time period.

THE PHONE WAS ILLEGALLY SEIZED FROM MONTGOMERY WITHOUT A WARRANT

14. The New Hampshire and United States constitutions prohibit unreasonable searches of a person's "possessions" and "effects," respectively. N.H. CONST. pt. 1, art. 19; U.S. CONST. amends. IV, XIV. "Warrantless seizures are per se unreasonable . . . unless they fall within the narrow confines of a judicially crafted exception. The State bears the burden of proving by a preponderance of the evidence that a warrantless seizure falls within a recognized exception." State v. Folds, 172 N.H. 513, 517 (2019). As noted in United States v. Place,

In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it . . .

United States v. Place, 462 U.S. 696, 701 (1983) (citation omitted).

15. In the present case, the police were not permitted to seize the cell phone in Montgomery's possession as they lacked both probable cause that the cell phone contained evidence of a crime as well as the presence of any reasonable exigency. In State v. Ball, 124 N.H. 226 (1983), the Court held that "[e]very warrantless intrusion must be justified by articulable facts which would have supported the issuance of a warrant based on probable cause. The probable cause required for warrantless search and seizure is at least as great as that required to support a warrant." See also State v. Theodosopoulos, 119 N.H. 573, 578 (1979). The Court goes on to say that "[s]eizure on mere suspicion is not enough." Id. at 235. In this case, no reason is given to seize the phone in either the report of the encounter or the body cam video.

16. The State cannot assert exigency in this instance. Exigency means that “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 or create a likelihood that evidence will be destroyed...” State v. Pseudae, 154 N.H. 196, 200 (2006). Exigency is determined based upon the totality of the circumstances, including the foreseeability of the exigency - that is, whether the officers could have anticipated the emergency and had the prior opportunity to obtain a warrant. State v. Santana, 133 N.H. 798, 806 (1991).

17. In this particular case, Det. Dunleavy had contact with Montgomery the morning of December 31, 2022. Questions about a phone did not arise. Det. Dunleavy knew he would have contact with Montgomery again as he waited for the *ex parte* order, and waited for the officers to locate Montgomery for a second time that day. Nevertheless, a warrant was not sought that could be served when the police located Montgomery to serve him the *ex parte* order.

18. When officers detained Montgomery the second time, a pat search was conducted, which revealed a cellphone. Montgomery was allowed to put the contents back in his pockets, including the cellphone. An officer apparently not involved in the initial detention told Montgomery the cellphone would be held until the detectives arrived and seized it. It appears as though the seizure was happenstance pending the arrival of the detectives -- that seizing the cellphone just seemed like a good idea to the seizing officer.

19. Not only was a warrant not obtained for the seizure of the cellphone during that second December 31, 2021 encounter, but no warrant was applied for that day or anytime soon thereafter. In fact, no warrant was sought for thirty one days, three days after law enforcement learned that the phone may have been purchased by Kayla Montgomery.

20. While in limited circumstances, an item may be seized to secure it while a warrant is obtained, this is not such a case. In Illinois v. McArthur, 531 U.S. 326 (2001), the police excluded a resident from his trailer home while the police sought a search warrant. The Court examined whether a short term seizure of the trailer is “reasonable” under the federal constitutional prohibitions on unreasonable search and seizure. Rather than set forth “a per se rule of unreasonableness” the Court indicated it must “balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.” Id. At 331. The Court ultimately concluded “the police imposed the restraint for a limited period of time, namely, two hours.” Id. The Supreme Court held that “[a]s far as the record reveals, this time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the

warrant....Given the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible.” Id.

21. The current case is distinguishable from McArthur as the property seized in that case was withheld for only two hours prior to the search warrant being obtained. The Court in McArthur made it clear that the police’s diligence in obtaining a search warrant was a significant factor when concluding the seizure was reasonable. Id. at 332.

22. Furthermore, the privacy interest in a person’s phone, particularly in light of Riley v. California, 134 S.Ct. 2473, 2485 (2014), is perhaps on par with, if not greater than, the privacy interest in a person’s home. The Court in Riley held: “Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.” Id. at 2491.

23. New Hampshire has enacted a constitutional right to privacy. Part 1, Article 2-b states: An individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent. (December 5, 2018).

24. Here, the phone seized was the phone Montgomery was using and potentially contained all of the type of information considered in Riley. Accordingly, the seizure was unreasonable under both the State and Federal Constitutional prohibitions on unreasonable search and seizure, and the right to privacy in personal information. The results of the search must be suppressed.

THE WARRANT OBTAINED 31 DAYS AFTER THE SEIZURE EXCEEDED THE SCOPE OF PROBABLE CAUSE

25. Both the Fourth and Fourteenth Amendments to our Federal Constitution and Part I, Article 19 of our State Constitution prohibit unreasonable searches and seizures by the government. Under these provisions a search pursuant to a warrant is reasonable only if the warrant is based on a magistrate’s finding of probable cause. State v. Carroll, 131 N.H. 179, 184 (1988). Evidence derived from a search not based on probable cause is the fruit of an illegal search and must be suppressed. State v. Gravel, 135 N.H. 172, 184 (1991). The police must obtain a search warrant to search the *contents* of a person’s phone even if the phone is obtained

legally through a constitutional exception to the warrant requirement. Riley v. California, 134 S.Ct. 2473, 2491 (2014).

26. In the first instance, as stated above, the defendant asserts that the phone was not obtained legally through a constitutional exception to the warrant requirement. Irrespective of that illegality, the warrant and attendant search were not reasonable in scope. The search was illegal for this reason as well.

27. The United States Supreme Court made clear that an individual has a compelling interest in the privacy of his or her cell phone in light of the vast quantity of personal data contained therein:

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone’s capacity allows even just one type of information to convey far more than previously possible. The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Id. at 2489.

28. The Riley court emphasized the privacy interests of a phone’s owner in the broad swath of information stored in a person’s cell phone. Id. (“This particular template authorized the seizure of virtually every piece of data that could conceivably be found on the phone, noting that a wholesale search of a phone ‘would typically expose the government to far *more* than the most exhaustive search of a house.’”)

29. Given the constitutional privacy rights pursuant to Part 1, Article 2-b, N.H. Constitution, any search of a cell phone must be narrowly tailored. While Montgomery did not claim ownership of the phone, he did acknowledge that it was the phone he was using. Thus, it was

likely, and indeed the affidavit anticipated, that it contained Montgomery's personal information, the content of which was private.

30. The defendant asserts that the search warrant in this case is invalid to the extent that it permitted a search of the phone beyond the relevant time period of December 27, 2022 though December 31, 2022, as the magistrate "reflected an improper analysis of the totality of the circumstances". See State v. Norman, 171 N.H. 103, 108, (2018).

31. The affidavit for the warrant sought a search and examination of "any and all information on the device". The warrant authorized a search of items contained within Attachment B, the content of which was as follows;

1. All records on the Device of the crime of Indirect Criminal Contempt:

- a) Telephone number;
- a) Electronic serial number, telephone number, and any other identifying numbers or account that may be stored within the Device or any memory or SIM cards which may be in the Device;
- b) Contact list, address book, calendar, schedule and date book entries;
- c) Text and MMS history (incoming, outgoing, sent, draft, deleted, saved/stored on the cell phone, SIM card and/or memory card);
- d) All information retrievable from the phone regarding mobile instant messages, message alerts, text messaging applications, chat logs, emails and attachments;
- e) All locally stored voicemail messages and greetings;
- f) Photographs (including camera photos) and videos (to include all formats of pictures or clips);
- g) Any information that is saved to the phone regarding any social networking sites or vendors;
- h) Any GPS data stored on the phone;
- i) Any records of call history and caller ID;
- j) Applications stored on the phone; and
- k) Documents, storage files, records, notepads, and other data.

2. As used above, the term "records" includes all the foregoing items of evidence in whatever for and by whatever means they may have been created or stored, including any form of computer or electronic storage (such as flash memory or other media that can store data) and any photographic

form.

32. The warrant permitted a wholesale unlimited search of the phone when probable cause was very limited--to the dates of December 27, 2021 through December 31, 2021. It placed no limitations on the time period to be searched, thus allowing the search to be conducted for the life of the phone. Nor did the warrant limit the search to only communications between Kayla and Adam Montgomery, thus allowing information about communication with any and all persons ever communicated with on the phone to be seized. The warrant also authorized information that was not in the form of communication between the user of the phone and other people, i.e. applications stored on the phone, and documents, storage files, records, notepads and other data. To the extent that GPS data was requested, that too was authorized for the life of the phone, not the 5 days for which probable cause may have existed. No probable cause was set forth to justify the wholesale search that was authorized.
33. In paragraph 40 of the affidavit, it was noted that while the relevant time period for information sought from the phone was December 27 - 31, 2021, "any and all information", was sought under the guise that the dates of messages on the phone may not correspond to the actual dates of the messages, i.e., that data can be edited and recovered deleted items may not have correct dates and times. This assertion fails to provide probable cause for a whole sale search beyond the relevant time period for several reasons. First, there was no probable cause to support that this type of phone, the "2nd cheapest" Kayla Montgomery was able to purchase at Walmart, was capable of permitting the manipulation of the meta data. Second, the affiant asserts no special knowledge or training to support the general assertion of alterations of data, nor of the capability of the phone itself or Montgomery, himself, to make such changes. (The defendant may seek additional discovery regarding this assertion as well

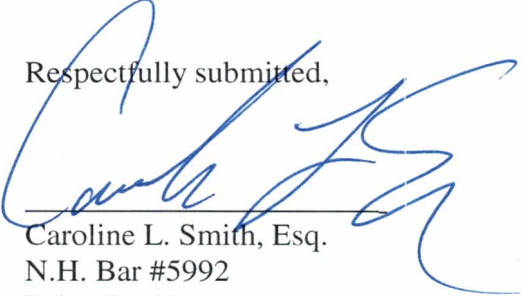
as present expert testimony to establish that the assertion is not valid). Further, nothing in the affidavit suggested that Montgomery was likely to be engaging in such alterations or that he was concerned about investigation into contact with Kayla Montgomery so that he would have reason to seek to alter data regarding this contact. Rather, the affidavit alleged that Montgomery met and communicated with Kayla in public places, including in front of law enforcement. Compare State v. Page, 172 N.H. 146, 55 (2019) (affidavit contained indications that the defendant may have engaged in manipulation of photographic data because he had given multiple inconsistent stories regarding the injuries to the victim and had rescinded his consent to search).

CONCLUSION

34. For all of the reasons stated above, the contents obtained by the State as a result of the search of the cell phone seized from Montgomery on December 31, 2021 must be suppressed.

Wherefore, Adam Montgomery requests that this Honorable Court:

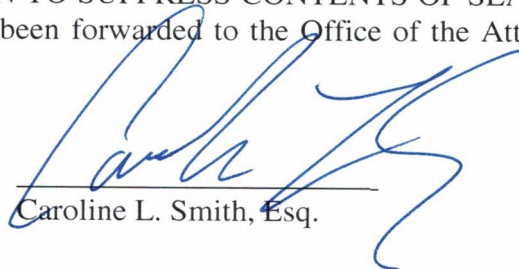
- A. Grant this motion and suppress the content of the cellphone seized from Adam Montgomery on December 31, 2021; or
- B. Hold a hearing on this motion; and
- C. Grant such further relief as justice requires.

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 CONTENTS OF SEARCH OF PHONE SEIZED DECEMBER 31, 2021 has been forwarded to the Office of the Attorney General on this 17 day of August, 2022.



Caroline L. Smith, Esq.

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 RE; SEARCH OF PHONE SEIZED FROM THE
DEFENDANT ON DECEMBER 31, 2021.**

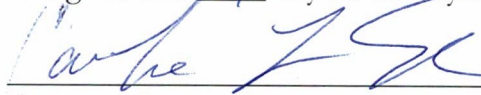
AFFIDAVIT

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

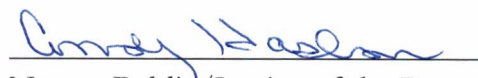
CAROLINE L. SMITH, NH PUBLIC DEFENDER

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 17 day of 1st 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



