THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
Northern District

State of New Hampshire

v.

Adam Montgomery

Case Nos. 216-2022-CR-00020
216-2022-CR-00577

STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS THE SEARCH OF A CELLPHONE LOCATED ON DECEMBER 31, 2021

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby objects to the defendant's Motion to Suppress re: Search of Phone Seized from the Defendant on December 31, 2021. As grounds therefore, the State submits as follows:

1. On January 4, 2022, the defendant was arrested in Manchester on charges of second degree assault, endangering the welfare of a child (two charges), and interference with custody. All of the charges are related to his daughter, Harmony Montgomery, whose whereabouts are still unknown.

2. Four days earlier, on December 31, 2021, Manchester Police located and spoke with the defendant at two different times. The first was at approximately 8:45 A.M. in a parking lot. The defendant was not placed under arrest or transported to the Manchester Police Department after a brief conversation, and Manchester officers left him not soon after their conversation started. The defendant has moved to suppress Mr. Montgomery's statements that he had not seen Harmony Montgomery since he dropped Harmony off with her biological mother over two years earlier in Thanksgiving of 2019, and then that he knew as of then-recently

that she was well. As stated in its response to the Defendant's initial Motion to Suppress Statement from December 31, 2022, the State does not intend to introduce the defendant's statements made during the morning encounter with law enforcement in its case-in-chief, unless such evidence becomes admissible as a result of the doctrine of "opening the door," *see generally State v. Wamala*, 158 N.H. 583, 589 (2009) (discussing both the "curative admissibility" and "specific contradictions" doctrines), or for impeachment purposes.[1]

3. On that day, the defendant was still the court-ordered custodial parent for Harmony. Later in the day, the Division of Children Youth and Families (DCYF) became the lawful custodians of Harmony Montgomery pursuant to an order of the Court. Manchester Police attempted to find the defendant, serve him with a copy of the order, and locate Harmony. The defendant was found around 4:00 P.M. on a public street in Manchester without Harmony. Officers stayed with the defendant on that street until detectives could arrive to serve him with a copy of the Court's custody order. During this time, the defendant was found in possession of a cellphone, which was seized in order to obtain a search warrant to search its contents for evidence of Harmony's location. At this time, the defendant was not read a copy of the Department's *Miranda* rights form.

4. The defendant asked if he was under arrest. He was told that he was not under arrest, was being served with a Court order to produce Harmony, and must cooperate with officers about where Harmony she was at that time pursuant to that Order. He was handed a copy of the Court's custody order. The defendant told offices that he would not answer any questions.

[1] Likewise, the State may seek to introduce the statements in rebuttal, should they become so admissible and relevant.

5. One of the detectives who arrived was Detective Dunleavy. While holding the copy of the order the defendant asked the detective, "What exactly is this?" Det. Dunleavy explained that it the Court order stated that he no longer had lawful custody of Harmony. The defendant then asked, "Do I have to sign this?" Det. Dunleavy said he did not, but he had to produce where Harmony was. Det. Dunleavy then said that they would be taking the cellphone found on him, to which the defendant replied, "That's not my phone." Det. Dunleavy then asked whether the defendant knew how to get in touch with him should he choose to talk about Harmony, to which the defendant replied "Yep." Det. Dunleavy then told him that the search for Harmony was not going away, to which the defendant replied, "Alright." Det. Dunleavy stated that the investigation was not going away and that it would not look good if the defendant was on the wrong side of it, to which the defendant replied, "Ok", and "Yep." Det. Dunleavy ended their interaction on the street by saying that the defendant had been down this road before and asked whether the defendant knew how to get a hold of him, to which the defendant replied, "Yep." The defendant then walked away from the officers.

6. The defendant's Motion to Suppress fails for several reasons. Primarily, the defendant lacks standing required to object to the search warrant issued for the phone's contents. Part I, Article 19 of the State Constitution provides, in relevant part, that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." N.H. CONST. pt. I, art. 19. This protection against unreasonable searches extends only to those places in which the accused maintains a legitimate expectation of privacy. *See State v. Robinson*, 158 N.H. 792, 796 (2009). "In other words, there is no 'search' triggering constitutional protection unless the defendant's legitimate expectation of privacy has been intruded upon by the State." *State v. Davis*, 174 N.H. 596, 601 (2021).

7. A two-part analysis determines whether a defendant has a legitimate expectation of privacy in a particular area. *State v. Goss*, 150 N.H. 46, 48-49 (2003): (1) whether the defendant has exhibited a subjective expectation of privacy; and (2) whether that expectation is one that society recognizes as reasonable. Id. at 49. "Whether society will recognize a particular individual's expectation of privacy as reasonable does not turn on whether a hypothetical reasonable person would hold the same expectation of privacy, but, rather, 'whether the expectation of privacy is justified or legitimate based upon our societal understanding regarding what deserves protection from government invasion.'" Id., citing *State v. Gates*, 173 N.H. 765, 771 (2020) (quotation omitted).

8. Irrespective of the immediate needs for seizure in the case at bar, the defendant here has no standing as he has no legitimate expectation of privacy to another person's cellphone. First, the defendant denied that the phone belonged to him at the time Det. Dunleavy informed him that the police would be taking the phone. In addition, the defendant is not charged with criminal possession of the phone, so the phone itself does not grant him automatic standing to object to how it was treated. The defendant here has not asserted and cannot sustain an assertion that he had any privacy interest in the contents of the cellphone at issue. Second, the defendant has no recognized, particular individual expectation of privacy in a phone he does not own, and as such, none of his Fourth Amendment rights could have been violated. See *United States v. Lindsey*, No. CRIM. 10-15 JNE JJK, 2010 WL 4822939, at *30 (D. Minn. July 20, 2010), *report and recommendation adopted in part,* No. CRIM. 10-15 JNE JJK, 2010 WL 4822925 (D. Minn. Nov. 22, 2010), *aff'd in part*, 702 F.3d 1092 (8th Cir. 2013) (no requisite standing when the defendant did not own, possess, or control the cell phone for any length of time other than immediately before the police seized it); see also *Christensen v. Cnty. of Boone,*

IL, 483 F.3d 454, 461 (7th Cir. 2007) (defendant officer had no legitimate expectation of privacy in a cell phone belonging to someone else as "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."); *quoting Rakas v. Illinois*, 439 U.S. 128, 134 (1978); *see also United States v. Curry*, No. CRIM. 07-100-P-H, 2008 WL 219966, at *8 (D. Me. Jan. 23, 2008) (disclaiming ownership of a cell phone prior to its search relinquishes any reasonable expectation of personal privacy with regard to it at the time of the search).

9. Having no violation of his rights under Part I, Article 19 of the State Constitution, or the Fourth Amendment under the United States Constitution for someone else's phone that he specifically denied owning prior to its search, the defendant has no standing to object to the search of the phone's contents regardless of the reasons authorized by the Court or the timing of that authorization.

10. Assuming *arguendo* that the defendant has standing to challenge the seizure and search, the seizure was valid due to the exigent circumstances exception to the warrant requirement. When the phone was seized, police were investigating a missing seven-year-old girl who hadn't been seen in approximately two years. The defendant was identified as Harmony's custodial parent, and there is a fair inference that evidence of a child will be found on the custodial parent's phone (photos, messages about the child, etc.). The defendant was apparently unwilling to cooperate with police efforts to locate Harmony; therefore, the police had probable cause to seize the phone found on his person based on the likely evidence it would hold of whether he knew Harmony's whereabouts or not. In addition, exigency is plain in this case. Data on a phone is transitory and easy to erase, and after this second police contact of the day the

defendant would have more motive than ever to destroy any evidence of Harmony on his phone. The police were apparently not aware during their earlier interaction on that day that the defendant had a phone; during this second interaction, at the point when the defendant was being released from police custody, police had exigent circumstances to seize the phone before he could destroy or damage the phone or the data it contained.

11. The defendant faults the State for the delay in obtaining a search warrant for the phone. The State notes that the warrant was obtained approximately three days after it was learned that the phone belonged to Kayla Montgomery. Under *State v. Stacey*, 171 N.H. 461, 464–66 (2018), the delay in obtaining a search warrant was not constitutionally deficient. *Stacey* holds that the Court must apply a balancing test, balancing the nature and quality of the intrusion on the individual's constitutionally protected interests against the important of the governmental interests alleged to justify the intrusion. *Id.* at 465. Here, weighing in support of the delay being permissible are the facts that the phone was seized based on probable cause (as opposed to reasonable suspicion), that the police diligently pursued their investigation, and that the defendant never asked for the phone to be returned. *See id.* at 465–66. Indeed, the defendant's possessory interest in the phone is minimal at best, because not only did he never ask for its return, but just a few days later, on January 4, 2022, he was arrested and he has been held on preventative detention ever since; the defendant could not have possessed the phone even if police had wanted to return it. Furthermore, the defendant denied the phone was his as soon as he was told the phone would be retained. This also weighs against any claim that the defendant had a possessory interest in the phone, let alone one that was burden by the time period between the officers taking possession of the phone and the Court's search warrant.

12. Finally, the defendant faults the State for what he describes as exceeding the scope of the probable cause in this case. The State notes that the New Hampshire Supreme Court recently recognized in *State v. Page*, 172 N.H. 46, 54–55 (2019), the ability of data on a cell phone to be manipulated in such a way that permits the expansion of the search of such data. For example, "a user could employ various applications or methods to manipulate a file's extension or its date and time signifiers." *Id.* at 55 (noting also that file deletion could destroy data indicating when a photograph was taken, sent, or received). While the search warrant affidavit in *Page* did contain indications that the defendant there might have deleted or manipulated data on his cellphone, the *Page* decision never says that such evidence is necessary prior to expending the scope of search; instead, the *Page* decision simply says that the expert evidence about data manipulation "takes on greater significance in light of the allegations in the affidavit. *Id.* It is a fair assumption that the majority of people delete at least some data from their cell phone with some regularity, whether innocently or nefariously, but the need to expand the search would still be the same.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Deny the defendant's Motion to Suppress Statements Search of the Cellphone Found on December 31, 2021;

(B) In the alternative, schedule a hearing on the matter; and

(C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Attorney General

Date: August 29, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to counsel for the defendant via the electronic case filing system.

/s/ Benjamin J. Agati
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