

Three N.C. Officers Fired After Police Find Racist Comments on Video

The officers in Wilmington, N.C., were fired for misconduct. The recording captured one saying, "We are just going to go out and start slaughtering" black people, according to a report.



By Christine Hauser

June 25, 2020

Three police officers in Wilmington, N.C., were fired after a supervisor found recorded conversations that included racist remarks, slurs and one officer saying he "can't wait" to start "slaughtering" black people, the department announced Wednesday.

Chief Donny Williams of the Wilmington Police Department said in a news conference that the officers were fired for misconduct after an internal investigation.

"The conversations included disrespectful language, hate-filled speech and referred to black people as the N-word," he said. "They also criticized me within this video, several black officers within the agency and made negative comments about individuals outside of the agency. They made negative comments about our Black Lives Matter protests and were critical of our response."

The firings of the officers came as protests over racism and police mistreatment of black people are resounding across the country, along with calls for greater accountability in law enforcement.

The department identified the officers as James B. Gilmore, 48; Cpl. Jesse E. Moore II, 50; and Michael K. Piner, 44. Chief Williams said the investigation began after a supervisor's routine inspection found the accidental activation of a patrol car camera, a device fixed in the back of the vehicles to monitor people in custody.

A summary of the internal investigation report on the conversations was released by the department this week. In one conversation, Officers Piner and Gilmore criticize the protests, with Officer Piner saying the Police Department's only concern was "kneeling down with the black folks," according to the report.

Officer Gilmore said he saw a video on social media that he described as "white people bowing down on their knees and 'worshipping blacks,'" the report said.

In another exchange detailed in the report, Corporal Moore called Officer Piner and referred to a black woman he had arrested the day before, using a racial slur and saying she "needed a bullet in her head right then and move on."

Later in the conversation, Officer Piner told Corporal Moore that he felt a civil war was coming and that he was "ready" and going to buy a new assault rifle. "We are just going to go out and start slaughtering them," the report quotes Officer Piner, referring to black people with an expletive and racial slur.

"I can't wait. God, I can't wait," he said.

Corporal Moore responded that he would not do that. Officer Piner is quoted as saying that society needed a civil war to "wipe 'em off" the map, to which Corporal Moore responded, "You're crazy."

When supervisors confronted the officers with the recordings, each denied being racist and described the pressure that the police were experiencing because of the protests, according to the internal report.

Officer Gilmore told the department that he was unnerved by the video he referred to in conversation because the Bible says not to "bow to any idol," and that he treats everyone fairly.

Officer Piner said he was under great stress from concern for his and his family's safety, the report said. He told supervisors that the comments were "uncharacteristic of him, and he was out of control," according to the report.

Corporal Moore told supervisors that he was off duty, at his home and using his personal phone in the conversation, and that he was extremely stressed and "feeding off of Officer Piner and just venting," the report said.

The three men could not be reached by telephone on Thursday.

According to their termination letters, the three men were fired for standard of conduct violations, while Officer Piner and Corporal Moore also broke the department's policy on criticism and inappropriate jokes and slurs with "hate-filled speech." The department said the three had been police officers since the late 1990s.

Chief Williams said that normally, only a small amount of information is made public, according to personnel laws. "However, in exceptional cases, when it is essential to maintain public confidence in the administration of the city and the Police Department, more information may be released," he said.

"We must establish new reforms for policing here at home and throughout this country," he said. The department was taking the rare step of releasing details and records behind the firings because it was "the right thing to do," he said.

Benjamin David, the district attorney, said in a statement on Wednesday that his office had reviewed and dismissed cases in which the men had been the primary charging officers.

Chief Williams said the department was working with the North Carolina Criminal Justice Training and Standards Commission to determine whether they could maintain their state certification.

"There are certain behaviors that one must have in order to be a police officer, and these three officers have demonstrated that they do not possess it," he said.

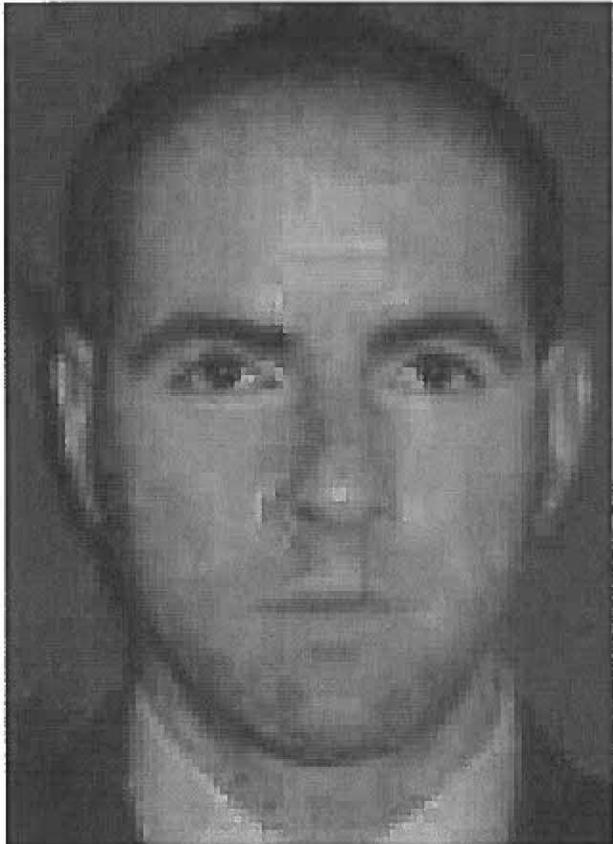
Christine Hauser is a reporter, covering national and foreign news. Her previous jobs in the newsroom include stints in Business covering financial markets and on the Metro Desk in the police bureau. @ChristineNYT

https://www.unionleader.com/news/courts/fired-manchester-cop-sent-racist-messages/article_9e44bd97-7f02-5391-8c11-31d2e84d1d63.html

Fired Manchester cop sent racist messages

By TODD FEATHERS New Hampshire Union Leader
Apr 6, 2019

Text messages sent by a former Manchester police officer from his department-issued phone shed light on a dark aspect of his time in the Special Enforcement Division.



Aaron Brown

Aaron Brown was one of two officers fired last year following an internal investigation into accusations that they used their positions as police officers to coerce women into sex. The Strafford County Attorney's office opened a subsequent criminal investigation into Brown and former detective Darren Murphy. In addition to the sexual assault allegations, investigators looked into messages Brown sent to his wife in which he used violent and racist language and bragged about destroying people's property while executing search warrants.

Strafford County Attorney Tom Velardi eventually concluded that there was insufficient evidence to charge Brown or Murphy with a crime.

In one exchange on May 10, 2017, Brown's wife wrote that it made her nervous that he

might travel to Boston to work a case with the FBI.

"It's all good," Brown wrote. "Besides I got this new fancy gun. Take out parking tickets no problem. FYI 'parking tickets' = black fella."

Brown worked for the Manchester Police Department from July 2007 until his firing in April 2018.

His lawyer, Mark Morrissette, criticized the Strafford County attorney for releasing the text messages and thousands of pages of investigative files, which the Union Leader obtained through a Right-to-Know request.

"The information should not be redistributed, even if it was provided to you or your newspaper. ... I would suggest strongly to the prosecutor that that was a wrongful disclosure," he said, adding that Brown has contested his firing with the state Public Employee Labor Relations Board.

Brown also maintains that "there's not one ounce of truth to those allegations" of sexual assault, Morrissette said.

'Taking over'

In July 2017, Brown sent his wife an internet video of a "crackbunny" fight and wrote, "I am certainly not a racist. I have my proclivities about people ... but those folks are straight up n's ... no two ways about it."

"Serve no place in life or society," he added. "And yet they are completely taking over all parts of daily life."

In other messages, Brown said his superiors were treating him like a "field (expletive)" and repeatedly used the term "parking tickets" to refer to African-Americans.

Manchester Police Chief Carlo Capano, who took over the department after Brown and Murphy had already been fired, said he could not discuss the details of the Brown case because it was a personnel matter.

“The comments are offensive and hate has no place in our community,” Mayor Joyce Craig said in an interview. “I, and I know I can speak for Chief Capano, have zero tolerance for this type of misconduct.”

Scott Spradling, chairman of the city’s police commission, said he believes Brown’s messages are indicative of one bad officer and not a cultural issue within the department.

“Those passages ... are obviously something of concern,” he said. “I don’t necessarily see that as reflective of a culture at Manchester police. I see that as a sad example of an individual and what they’re willing to say.”

Search warrant destruction

Other messages Brown sent his wife suggest violent misconduct on the job.

The couple joked repeatedly about whether he had a chance to “smash (expletive)” while working. On one occasion in January 2018, Brown bragged that he had sneaked past a supervisor while executing a search warrant and “completely wrecked a huge dresser and mirror.”

“Pushed it right over. On purpose,” he wrote.

The state trooper and Manchester officer working the case for the Strafford County attorney investigated that incident and another in which Brown claimed to have smashed a drying rack full of dishes during a search.

When they spoke to Brown in September 2018, after he had been fired, he told them he had embellished the accounts.

But in the same interview, he suggested it was common practice to destroy personal property while executing search warrants.

“So you know myself and my partners would, would always not like think it was funny – but we would get you know – it was, it was amusing to us kinda like to go in and, and do a good job you know and, and just make a, a huge mess while trying to find this stuff ... and then you know kinda like watch the bosses kinda walk around and be like ‘oh my God look what happened here,’ you know,” Brown said, according to a transcript of the interview.

The investigators interviewed other officers who were present for the searches in question; spoke with tenants of the apartments; and reviewed photographs taken before officers searched the homes. They concluded that there was insufficient evidence to prove that Brown caused intentional damage to the dresser and dishes as he claimed in the text messages, according to their notes.

‘A success lol’

It does not appear, based on the Stafford County attorney’s files, that investigators looked as thoroughly into another incident Brown mentioned to his wife.

On Nov. 13, 2017, she asked him how his day was going.

“So far so good,” he wrote back. “Kicked this fellas (genitals) in and ransacked him (sic) place. Overall a success lol.”

Stafford County Attorney Tom Velardi said the investigators could not confirm that assault happened.

“We learned that no such report was ever made by a citizen,” Velardi said. “We also learned that none of these instances was corroborated by the alleged victims when we interviewed them. ... There is nothing to support the proposition that on one of the occasions when Brown was in a private home he, Brown, assaulted someone. If we had gotten that information we would have followed it to its conclusion.”

Woullard Lett, a former police commissioner and president of the Manchester NAACP, said the racism Brown displayed is a societal disease, not something that can be attributed to any one police department or organization, and it will take institution-wide efforts to address it.

“We were able to discover this other stuff (Brown wrote) tangential to the main investigation, it wasn’t that other stuff – this behavior – that brought him to our attention,” Lett said. “There may be folks on the police force now who feel the exact same way, but they know ‘don’t write it down.’”

“I think that part of the challenge that we’re facing is not only the individual attitudes, but also the institutional practices and policies that end up perpetuating this sort of illusionary and jaundiced view of the world,” he added.



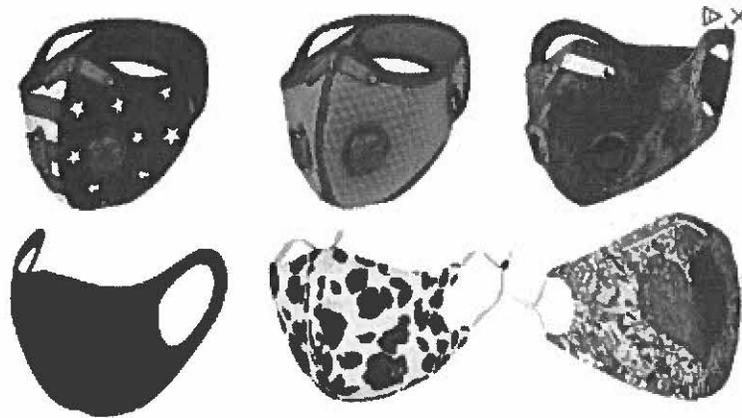
Manchester pays \$45,000 to woman who accused two police officers of sexual coercion



 +3

Fired Manchester officers won't face criminal charges for alleged sex abuse

<]



Only \$9.98

Shop Now

tesyhnet.com



By [HOLLY RAMER \(/byline?byline=By HOLLY RAMER\)](#)

Associated Press

Published: 8/25/2016 5:21:16 PM

A former New Hampshire state trooper caught on video beating a man who led officers on a two-state car chase was given a deferred jail sentence Thursday after pleading guilty to three simple assault charges.

Then-trooper Andrew Monaco was arrested in July on charges stemming from his use of force in the arrest of Richard Simone Jr. on May 11, following a 50-mile pursuit from Holden, Massachusetts, to Nashua, New Hampshire. Video captured by a TV news helicopter shows Simone stepping out of his pickup truck, kneeling and placing his hands on the ground as officers assault him.

Assistant Attorney General Susan Morrell said Monaco punched and kned Simone 12 times in 20 seconds. But Morrell said a deferred and suspended 12-month sentence was appropriate given Monaco's instant remorse and willingness to take responsibility.



Left and forgotten? Not these kids

[READ MORE >>](#)

Monaco told a supervisor at the scene he knew his actions were wrong; he resigned from the police force a few days after his arrest. As part of his sentence, the 32-year-old Monaco agreed to perform community service, receive anger management counseling and never work in law enforcement again.

"When you talk about events around the country, there are very few, if any police officers who've stood up in court, admitted what they did was wrong, what they did was a crime and what they did should disqualify them from being a police officer," she said.

Joseph Flynn, 32, of the Massachusetts State Police, also faces charges in the case. A pre-trial conference is set for October.

Monaco was a state trooper for four years. In a brief statement Thursday, he apologized to his fellow officers and the public, but not to Simone. He said he could not explain why he behaved in a way he had always promised himself he would not.

"I was unable to separate the events that occurred during the pursuit from my conduct during the arrest," he said.

An attorney for Simone, who is jailed in Massachusetts on several driving-related charges, said Monaco deserved to spend time behind bars. He described lingering health problems his client endures, including blurry vision, and said the sentence sends a message that there are two sets of rules, one for the public and one for police officers.

"He's (Simone's) explained to his daughter that he broke the law and he has his punishment coming," attorney Joe Comenzo said. "But he's having a very hard time explaining to her how this trooper is going to walk out of this court room today. She saw this police officer brutally beat up her dad for no apparent reason, and he doesn't know how to explain it."

Attorney General Joseph Foster disagreed, saying many first-time offenders do not serve jail time for simple assault nor do they lose their careers, as Monaco did.

But Comenzo said Monaco's willingness to relinquish his law enforcement credentials were likely a moot point given that he'd probably not be able to get another police job since the video was widely circulated. As for Monaco's community service requirement, Comenzo told the judge, "He had a community service job, your honor. He was a police officer."

2020 WL 122728

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of New Hampshire.

The STATE of New Hampshire

v.

Ernest JONES

No. 2019-0057

Argued: November 20, 2019

Opinion Issued: January 10, 2020

Synopsis

Background: Defendant was convicted in the Superior Court, Richard B. McNamara, J., of possession of a controlled drug. Defendant appealed the denial of his motion to suppress evidence.

Holdings: The Supreme Court, Donovan, J., held that:

[1] evidence at suppression hearing was insufficient to support trial court's finding that there was no show of authority during police encounter;

[2] evidence at suppression hearing was insufficient for trial court to consider the manner in which police learned defendant's name and determined that there was a warrant for his arrest; and

[3] trial court improperly concentrated on defendant's cordial and cooperative demeanor during the encounter in determining that defendant was not seized.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (15)

- [1] Criminal Law ⇌ Review De Novo
- Criminal Law ⇌ Search and arrest

When reviewing a trial court's determination of whether a seizure occurred, Supreme Court accepts the trial court's factual findings unless they are unsupported by the record or clearly erroneous; it reviews the trial court's legal conclusion regarding whether a seizure occurred de novo. U.S. Const. Amend. 4; N.H. Const. pt. I, art. 19.

- [2] Arrest ⇌ On Criminal Charges
- Searches and Seizures ⇌ Expectation of privacy

State constitutional provision governing searches and seizures incorporates a strong right of privacy and protects individuals from unreasonable seizures; this protection, however, is only triggered when a person is seized. N.H. Const. pt. I, art. 19.

- [3] Arrest ⇌ What Constitutes a Seizure or Detention

For purposes of state constitution's protections against unreasonable seizures, "seizure" occurs during an encounter with the police when, in view of all the circumstances surrounding the encounter, a reasonable person in the defendant's position would believe that he or she is not free to leave or could not terminate the encounter. N.H. Const. pt. I, art. 19.

- [4] Arrest ⇌ What Constitutes a Seizure or Detention

As a practical matter, citizens almost never feel free to end an encounter initiated by the police; this practical observation, however, does not transform all police encounters into seizures for purposes of the state constitution's protections

against unreasonable seizures. ¹ N.H. Const. pt. I, art. 19.

[5] **Arrest** ← What Constitutes a Seizure or Detention

The analysis of whether a police encounter constitutes a seizure within the meaning of state constitution's protections against unreasonable seizures focuses on whether an officer objectively communicates by means of physical force or a show of authority that he or she is restraining the person's liberty. ¹ N.H. Const. pt. I, art. 19.

[6] **Arrest** ← What Constitutes a Seizure or Detention

When assessing whether a seizure occurred for purposes of state constitution's protections against unreasonable seizures, courts must consider all of the circumstances surrounding the police encounter, and no single factor is dispositive. ¹ N.H. Const. pt. I, art. 19.

[7] **Arrest** ← Particular cases

Evidence at suppression hearing in prosecution for possession of a controlled drug was insufficient to support trial court's findings that there was no show of authority during police encounter with defendant, that officers did not curtail defendant's freedom of movement and never asked him to go anywhere, and that officers did no more than ask defendant questions about his identity, as factors relevant to the determination of whether the encounter constituted a seizure for purposes of state constitution's protections against unreasonable seizures; officer who spoke to defendant did not testify at the hearing, and officer who did testify could not hear other officer's conversation with defendant and did not know if officer told defendant he was not free to leave. ¹ N.H. Const. pt. I, art. 19; ¹ N.H. Rev. Stat. Ann. § 318-B:2, I.

[8] **Arrest** ← What Constitutes a Seizure or Detention

The words exchanged between a police officer and an individual are critical to determining whether the officer made an objective show of authority rising to the level of a seizure, for purposes of state constitution's protections against unreasonable seizures. ¹ N.H. Const. pt. I, art. 19.

[9] **Arrest** ← Particular cases

Record at suppression hearing in prosecution for possession of a controlled drug was insufficient to support trial court's finding that police officer who encountered defendant while investigating a suspicious vehicle report believed defendant would have been free to leave until officers learned there was a warrant for his arrest, as factor in determining whether the encounter constituted a seizure for purposes of state constitution's protections against unreasonable seizures; officer testified that defendant would have been free to leave only after officers figured out what his business in the area was, and there was no evidence as to whether defendant, or only the passenger in his vehicle, was informed of that fact. ¹ N.H. Const. pt. I, art. 19; ¹ N.H. Rev. Stat. Ann. § 318-B:2, I.

[10] **Arrest** ← What Constitutes a Seizure or Detention

The subjective beliefs and intent of police officers during an encounter are relevant to the analysis of whether the encounter constituted a seizure for purposes of the state constitutional protection against unreasonable seizures only to the extent they have been conveyed to the person confronted. ¹ N.H. Const. pt. I, art. 19.

[11] **Arrest** ← Particular cases

Evidence at suppression hearing in prosecution for possession of a controlled drug was insufficient for trial court to consider the manner in which police who encountered defendant while investigating a suspicious vehicle report learned defendant's name and determined that there was a warrant for his arrest, as factor in determining whether the encounter constituted a seizure for purposes of state constitution's protections against unreasonable seizures; officer who testified at the hearing did not and could not testify as to how another officer, who did not testify, learned defendant's name, and there was no evidence as to whether such officer might have taken and held on to defendant's identification. ¹ N.H. Const. pt. I, art. 19; ² N.H. Rev. Stat. Ann. § 318-B:2, I.

[12] **Arrest** ⇨ What Constitutes a Seizure or Detention

An individual is not seized, for purposes of the state constitution's protections against unreasonable seizures, merely because an officer asks to examine his identification; an officer could, however, objectively communicate a show of authority rising to the level of a seizure if the officer retains possession of an individual's identification, because a reasonable person would not feel free to terminate the encounter under such circumstances. ¹ N.H. Const. pt. I, art. 19.

[13] **Arrest** ⇨ Particular cases

Trial court improperly concentrated on defendant's cordial and cooperative demeanor during encounter with police officers investigating a suspicious vehicle report in determining that defendant was not seized during the encounter, for purposes of state constitution's protections against unreasonable seizures; proper focus of the analysis was the conduct of the officers, rather than of the defendant, as it was entirely possible to be cordial and cooperative while assiduously asserting a

desire to terminate a police encounter. ¹ N.H. Const. pt. I, art. 19.

[14] **Arrest** ⇨ What Constitutes a Seizure or Detention

Race is an appropriate circumstance to consider in conducting the totality of the circumstances analysis as to whether a police encounter rose to the level of a seizure, for purposes of state constitution's protections against unreasonable seizures. ¹ N.H. Const. pt. I, art. 19.

[15] **Arrest** ⇨ What Constitutes a Seizure or Detention

Race is not irrelevant to the question of whether a seizure occurred, for purposes of state constitution's protections against unreasonable seizures, but it is not dispositive either. ¹ N.H. Const. pt. I, art. 19.

Merrimack

Attorneys and Law Firms

Gordon J. MacDonald, attorney general (Samuel R.V. Garland, attorney, on the brief and orally), for the State.

Wadleigh, Starr & Peters P.L.L.C., of Manchester (Donna J. Brown on the brief and orally), for the defendant.

Gilles R. Bissonnette, Henry R. Klementowicz, Michael Eaton, and Albert E. Scherr, of Concord, on the brief, for the American Civil Liberties Union of New Hampshire, as amicus curiae.

Opinion

DONOVAN, J.

*1 The defendant, Ernest Jones, appeals an order of the Superior Court (McNamara, J.) denying his motion to suppress evidence that led to his conviction on one count of possession of a controlled drug. See ¹ RSA 318-B:2, I (2017). He appeals, arguing that the trial court erred by: (1)

concluding that he was not seized during his encounter with two Concord police officers; and (2) refusing to consider his race in its seizure analysis. We reverse and remand because the State failed to meet its burden of showing that the defendant was not seized. We also conclude that race is one circumstance that courts may consider in conducting the totality of the circumstances seizure analysis.

I. Facts

The following facts are supported by the record. At approximately 8:00 p.m. on April 28, 2017, Concord Police Officers Mitchell and Begin were dispatched to 22 Allison Street to investigate a suspicious vehicle report. Upon arriving at the residence, the officers observed a pickup truck parked behind the building in “a shared driveway area.” The officers, both of whom were wearing uniforms, parked on the street and did not activate their blue emergency lights. Begin approached the driver’s side of the truck, while Mitchell approached the passenger’s side. The defendant, whom Mitchell perceived to be African-American, was sitting in the driver’s seat and a female was sitting in the passenger’s seat.

Mitchell approached the vehicle “to investigate and find out what [the occupants]’ business was or what the reason was for why the vehicle was there.”¹ Accordingly, he asked the passenger what she was doing there, and she explained that she lived at the residence and the defendant was visiting her. Mitchell informed the passenger that he was investigating a report of a suspicious vehicle. He obtained the passenger’s identification, called her name into dispatch, and was advised that there were no warrants for her arrest.

Mitchell “couldn’t overhear” Begin’s conversation with the defendant, but perceived it to be “very laid[-]back” and noted that there was “no yelling.” Less than 20 minutes after the officers arrived at the address, Mitchell heard over the radio that a bench warrant had been issued for the defendant and the officers arrested him. A search of the defendant incident to his arrest revealed a “tub” of white powder, later identified as fentanyl.

After being indicted for possession of a controlled drug, the defendant moved to suppress the evidence discovered as a result of his encounter with the officers. He argued that the officers unlawfully seized him without reasonable suspicion in violation of [¶] Part I, Article 19 of the New Hampshire

Constitution and the Fourth and Fourteenth Amendments to the United States Constitution when they approached the truck and asked him and the passenger for their identification. The defendant also argued that the trial court should consider his race in conducting its analysis. The State contended that the defendant was not seized when the officers asked for his identification. Begin, the officer who interacted with the defendant, did not testify at the suppression hearing; Mitchell was the State’s sole witness. The trial court denied the defendant’s motion, concluding that no seizure occurred because: (1) the officers made no show of authority; (2) they did not curtail the defendant’s freedom of movement; (3) they parked their cruiser “out of sight”; and (4) the defendant did not feel uncomfortable or threatened and was cooperative throughout the interaction. It also concluded that it would be error to consider the defendant’s race as part of its analysis.

*2 The defendant was subsequently convicted by a jury. This appeal followed.

II. Analysis

The defendant argues that the State failed to meet its burden of showing that he was not seized during his encounter with the officers. We agree.

[1] When reviewing a trial court’s determination of whether a seizure occurred, we accept its factual findings unless they are unsupported by the record or clearly erroneous. See State v. McInnis, 169 N.H. 565, 569, 153 A.3d 921 (2017). We review its legal conclusion regarding whether a seizure occurred de novo. See id. We first consider the defendant’s claim under the State Constitution, and turn to federal opinions for guidance only. Id. Both parties agree that the burden at the suppression hearing rested upon the State. See [¶] State v. Ball, 124 N.H. 226, 234, 471 A.2d 347 (1983).

[2] [3] [¶] Part I, Article 19 of the New Hampshire Constitution incorporates a “strong right of privacy” and protects individuals from unreasonable seizures. [¶] State v. Beauchesne, 151 N.H. 803, 812, 868 A.2d 972 (2005); see State v. Daoud, 158 N.H. 779, 782, 973 A.2d 294 (2009). This protection, however, is only triggered when a person is seized. See Daoud, 158 N.H. at 782, 973 A.2d 294. A seizure occurs during an encounter with the police when, in view of all the circumstances surrounding the encounter, a reasonable person in the defendant’s position would believe that he or she

is not free to leave or could not terminate the encounter. State v. Joyce, 159 N.H. 440, 444, 986 A.2d 642 (2009).

[4] [5] We recognize that, “as a practical matter, citizens almost never feel free to end an encounter initiated by the police.” ¹ State v. Rodriguez, 172 N.J. 117, 796 A.2d 857, 863 (2002); see United States v. Tanguay, 918 F.3d 1, 5-6 (1st Cir. 2019) (noting that “few people ... would ever feel free to walk away from any police questioning” (quotation and brackets omitted)); ² United States v. Thompson, 546 F.3d 1223, 1226 n.1 (10th Cir. 2008) (describing the notion that a reasonable person would feel free to disregard the police as potentially “unrealistic”). This practical observation, however, does not transform all police encounters into seizures. See McInnis, 169 N.H. at 569, 153 A.3d 921; see also United States v. Fields, 823 F.3d 20, 25 (1st Cir. 2016). The analysis thus focuses on whether an officer objectively communicates by means of physical force or a show of authority that he or she is restraining the person's liberty. See McInnis, 169 N.H. at 570, 153 A.3d 921; see also Fields, 823 F.3d at 25.

[6] When assessing whether a seizure occurred, courts must consider all of the circumstances surrounding the encounter, Joyce, 159 N.H. at 444, 986 A.2d 642, and no single factor is dispositive, ³ United States v. Smith, 423 F.3d 25, 29 (1st Cir. 2005). Here, the evidence presented by the State was insufficient to allow the trial court to weigh all of the circumstances surrounding the encounter and determine whether the defendant was seized. Specifically, the trial court did not have sufficient evidence before it to properly assess whether Begin objectively communicated a show of authority or the manner in which the officers identified the defendant and learned about his bench warrant. Instead, the trial court made factual findings and considered circumstances that are unsupported by the record.

*3 [7] [8] First, the trial court had insufficient evidence to determine whether Begin explicitly communicated that he was restraining the defendant's freedom through a show of authority, because Begin did not testify. The words exchanged between a police officer and an individual are critical to determining whether the officer made an objective show of authority rising to the level of a seizure. See ⁴ Beauchesne, 151 N.H. at 814, 868 A.2d 972 (noting the importance we have placed upon whether the officer “used language indicating that compliance was not optional” in conducting a seizure analysis (quotation omitted)). However, the State

failed to present any evidence which would have permitted the trial court to determine either the content or nature of Begin's discussion with the defendant. For example, Mitchell did not know, and thus the trial court was unable to weigh, whether Begin told the defendant that he was not free to leave, which is a circumstance suggesting a show of authority. See Joyce, 159 N.H. at 445, 986 A.2d 642.

Yet, the trial court found that “there was no show of authority,” and that the “officers did not curtail the Defendant's freedom of movement,” “never requested the defendant to go anywhere,” and “did no more than ask him questions about his identity.” However, these factual findings concerning what the officers said or did are unsupported by the record. Mitchell could not testify as to what Begin said or did because he could not hear Begin's conversation with the defendant, and as Mitchell acknowledged, he had been directing his attention to the passenger until he was informed of the defendant's warrant. It was thus improper for the trial court to make factual determinations regarding these circumstances or to consider the weight of these “facts” in its analysis.

[9] Second, the trial court found that Mitchell testified that “the Defendant would have been free to leave until [the officers] learned that there was a warrant out for him.” Yet, Mitchell testified that the defendant would have been free to leave only after the officers “had figured out what [the defendant's and his passenger's] business was,” because at that point they “had dispelled any sort of suspicion.” The trial court's finding regarding when Mitchell believed the defendant would have been free to leave is thus unsupported by the record.

[10] We note that “the subjective beliefs and intent of the officers are relevant” to the seizure analysis “only to the extent they have been conveyed to the person confronted.”

⁵ United States v. Smith, 794 F.3d 681, 687 (7th Cir. 2015); see State v. Riley, 126 N.H. 257, 263, 490 A.2d 1362 (1985). Mitchell told the passenger that the truck was the focus of a suspicious vehicle report, but, based upon the sparse evidence in the record, the trial court could not properly determine whether the defendant was similarly informed or told that he was not free to leave until the officers learned what his business was. The absence of such evidence prevented the trial court from determining the level of investigative pursuit the defendant was subjected to and from weighing whether this circumstance constituted a show of authority. See Joyce, 159 N.H. at 445, 986 A.2d 642 (concluding that the

defendant was seized when police called for a narcotics dog, in part, because he could reasonably believe that he would not be allowed to leave until the police “completed their investigation”); *see also* Smith, 794 F.3d at 687 (weighing in favor of concluding that a seizure occurred the fact that officers “intended to and in fact did communicate to [the defendant] precisely what was going on — that he was a suspect in their investigation and was not free to leave before submitting to their questioning”).

[11] Third, the trial court could not consider how Begin identified the defendant because Mitchell did not and could not testify as to how Begin learned the defendant's name.² In its objection to the defendant's motion to suppress, the State asserted that the defendant was identified through his state identification card and an officer called his name into dispatch to determine his warrant status. Assuming that the defendant was identified in this manner, the trial court could not determine or consider whether Begin took and retained possession of the defendant's identification card while conducting the warrant check or promptly returned it to the defendant. Indeed, the State presented no evidence on this issue.

*4 [12] We acknowledge that an individual is not seized merely because an officer asks to examine his identification. Joyce, 159 N.H. at 445, 986 A.2d 642. An officer could, however, objectively communicate a show of authority rising to the level of a seizure if the officer retains possession of an individual's identification, because a reasonable person would not feel free to terminate the encounter under such circumstances. *See* McInnis, 169 N.H. at 570, 153 A.3d 921 (weighing the fact that an officer did not obtain identification documents from a defendant in favor of finding no seizure occurred); *see also* Commonwealth v. Lyles, 453 Mass. 811, 905 N.E.2d 1106, 1110 (2009) (noting that when an officer requested and retained an individual's identification to run a warrant check, a “reasonable person simply would not relinquish his identification to the police and continue on with his business”); State v. Daniel, 12 S.W.3d 420, 427 (Tenn. 2000) (concluding that “when an officer retains a person's identification for the purpose of” running a warrant check, “no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification”). Without evidence regarding the manner by which Begin identified the defendant, however, the trial court could not weigh this circumstance.³

[13] Finally, the trial court improperly concentrated on the defendant's demeanor in determining that no seizure occurred. It found that the defendant was “cordial and cooperative” with the officers and that he did not feel “uncomfortable or threatened,” and weighed these factors in favor of finding that the defendant was not seized. Even if we assume that the limited record supports the trial court's findings on this circumstance, our case law instructs trial courts to “focus[] the definition of seizure on the police officer's conduct, and not the individual's conduct,” because this “results in the same State constitutional implications for similar police conduct.” Beauchesne, 151 N.H. at 813, 868 A.2d 972. It may be entirely possible for an individual to be “cordial and cooperative” while assiduously asserting his or her desire to terminate an encounter with the police, only to be told that compliance is required, which would constitute a show of authority suggesting seizure. *See* INS v. Delgado, 466 U.S. 210, 216-17, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984) (“[I]f the person refuses to answer and the police take additional steps ... to obtain an answer,” then a seizure may have occurred); Morgan v. Woessner, 997 F.2d 1244, 1253-54 (9th Cir. 1993) (concluding that an individual was seized, in part, because he communicated to a police officer his unwillingness to cooperate and the officer continued to demand compliance).

[14] [15] Accordingly, we conclude that the State failed to meet its burden of showing that the defendant was not seized before the officers learned of the warrant for his arrest. Although we reach our conclusion irrespective of the defendant's race, we observe that race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis. *See* State v. Hight, 146 N.H. 746, 750-51, 781 A.2d 11 (2001) (considering the races of a Caucasian police officer and an African-American suspect in deciding whether the State purged the taint of an unlawful detention followed by a consent to search). As the Seventh Circuit has concluded, “race is ‘not irrelevant’ to the question of whether a seizure occurred,” but “it is not dispositive either.” Smith, 794 F.3d at 688; *see* United States v. Mendenhall, 446 U.S. 544, 558, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (noting that the defendant's race was “not irrelevant” to determining whether she consented to accompany police officers).

*5 The State does not argue that the officers possessed reasonable suspicion to seize the defendant. See Joyce, 159 N.H. at 446, 986 A.2d 642 (explaining the reasonable suspicion standard that justifies an investigatory seizure). We therefore conclude that his seizure violated his rights under Part I, Article 19 of the New Hampshire Constitution and that the trial court erred in denying the motion to suppress. See State v. Morrill, 169 N.H. 709, 715, 156 A.3d 1028 (2017). Because we conclude that the defendant prevails under the State Constitution, we need not undertake a separate federal analysis. See id. at 717, 156 A.3d 1028.

For the reasons stated above, we reverse the denial of the defendant's motion to suppress. We reverse the defendant's conviction and remand.

Reversed and remanded.

HICKS, BASSETT, and HANTZ MARCONI, JJ., concurred.

All Citations

--- A.3d ----, 2020 WL 122728

Footnotes

- 1 Mitchell had been informed that the landlord did not know to whom the vehicle belonged.
- 2 Mitchell testified that he "believe[d]" Begin "would have called the [defendant]'s name into dispatch."
- 3 We observe that the trial court considered circumstances relevant to the seizure analysis, such as the location of the police cruiser and that the defendant was not chased by an officer, that were supported by the record. See Beauchesne, 151 N.H. at 815, 868 A.2d 972; State v. Licks, 154 N.H. 491, 494, 914 A.2d 1246 (2006). However, it did not consider several other relevant circumstances that were also supported by the record. For example, two officers wearing uniforms appeared at the scene, the encounter took place during the evening, in a private driveway, lasted less than 20 minutes, while the defendant was seated in a parked truck, the police officers did not activate their blue lights, and each officer approached an opposite side of the truck. See Joyce, 159 N.H. at 442, 445, 986 A.2d 642; Licks, 154 N.H. at 493, 914 A.2d 1246; State v. Steeves, 158 N.H. 672, 676, 972 A.2d 1033 (2009). Some of these circumstances weigh in favor, and some against, finding that a seizure occurred. Even taking them into account, however, we conclude that without evidence regarding the verbal exchange between the defendant and Begin, the State failed to meet its burden.

 KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Beauchesne, N.H., March 4, 2005
146 N.H. 746
Supreme Court of New Hampshire.

The STATE of New Hampshire,
v.
Dorian HIGHT.

No. 99-576.
|
Sept. 6, 2001.

Synopsis

Following bench trial, defendant was convicted in the Keene District Court, Tenney, J., of possession of controlled drug. Defendant appealed, challenging denial of his motion to suppress evidence. The Supreme Court, Nadeau, J., held, as a matter of first impression, that officer's unlawful continued detention of defendant during motor vehicle stop "tainted" defendant's consent to search of his vehicle and his person, and state failed to purge this taint.

Reversed and remanded.

West Headnotes (9)

- [1] **Arrest** ⇌ Reasonableness; reason or founded suspicion, etc

With respect to the lawfulness of an investigative stop, the State Constitution is at least as protective as the Federal Constitution. U.S.C.A.

Const.Amend. 4;  Const. Pt. 1, Art. 19.

2 Cases that cite this headnote

- [2] **Criminal Law** ⇌ Review De Novo
Criminal Law ⇌ Evidence wrongfully obtained

When reviewing a trial court's ruling on a motion to suppress, the Supreme Court accepts the trial court's factual findings unless they lack support in the record or are clearly erroneous; however, the Supreme Court's review of the trial court's legal conclusions is de novo.

4 Cases that cite this headnote

- [3] **Arrest** ⇌ Reasonableness; reason or founded suspicion, etc

For a police officer to undertake an investigatory stop, the officer must have a reasonable suspicion—based on specific, articulable facts taken together with rational inferences from those facts—that the particular person stopped has been, is, or is about to be, engaged in criminal activity.

 Const. Pt. 1, Art. 19.

8 Cases that cite this headnote

- [4] **Automobiles** ⇌ Conduct of Arrest, Stop, or Inquiry

Any expansion of the scope of a traffic stop to include investigation of other suspected illegal activity is constitutionally permissible only if the officer has a reasonable and articulable suspicion that other criminal activity is afoot.  Const. Pt. 1, Art. 19.

8 Cases that cite this headnote

- [5] **Criminal Law** ⇌ Attenuation or dissipation purging taint

Evidence obtained during a consent search that stems from an unlawful detention during a motor vehicle stop is not subject to suppression per se; rather, the court asks whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.  Const. Pt. 1, Art. 19.

7 Cases that cite this headnote

- [6] **Criminal Law** ⇌ Purpose of Exclusionary Rule

The exclusionary rule is calculated to prevent, not to repair; its purpose is to deter to compel respect for the constitutional guaranty in the

only effectively available way by removing the incentive to disregard it.

- [7] **Searches and Seizures** ⇐ Prior official misconduct; misrepresentation, trick, or deceit
- When determining whether the state has purged the taint of an unlawful detention followed by a consent to search, the following factors are relevant to consider: (1) the temporal proximity between the police illegality and the consent to search, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. ¶ Const. Pt. 1, Art. 19.

13 Cases that cite this headnote

- [8] **Searches and Seizures** ⇐ Custody, restraint, or detention issues
- The evidence obtained by the purported consent of an individual who is unlawfully detained during a motor vehicle stop should be held admissible only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality. ¶ Const. Pt. 1, Art. 19.

3 Cases that cite this headnote

- [9] **Automobiles** ⇐ Detention, and length and character thereof
- Searches and Seizures** ⇐ Custody, restraint, or detention issues
- Police officer's unlawful continued detention of defendant during motor vehicle stop "tainted" defendant's consent to search of his vehicle and his person, and state failed to purge this taint, where defendant gave consent while he was unlawfully detained, there were no intervening circumstances, such as officer informing defendant of his right to refuse consent, and officer engaged in flagrant misconduct by seeking consent to search based on innocuous facts that defendant had driven to city, attended "frat party" there and was returning

to college in another state. ¶ Const. Pt. 1, Art. 19.

11 Cases that cite this headnote

Attorneys and Law Firms

**12 *747 Philip T. McLaughlin, attorney general (Stephen D. Fuller, attorney, on the brief and orally), for the State.

Law Office of Joshua Gordon, of Concord (Joshua L. Gordon on the brief and orally), for the defendant.

Opinion

NADEAU, J.

The defendant, Dorian Hight, appeals his conviction for possession of a controlled drug in violation of RSA 318-B:2 (1995) after a bench trial before the Keene District Court (Tenney, J.). The defendant challenges the trial court's denial of his motion to suppress evidence obtained during a consent search conducted following a motor vehicle traffic stop. We reverse and remand.

The following facts are undisputed. At 8:40 p.m. on the evening of May 9, 1999, the defendant, an African American male, was pulled over by an officer of the Chesterfield Police Department for going 47 MPH in a 35 MPH zone and for having a defective taillight. The defendant was accompanied in the vehicle by two Caucasian passengers.

Upon approaching the defendant's vehicle, the officer asked the defendant to state his place of origin and destination. He responded that he had just left Boston and was en route to Landmark College in Vermont. The officer asked the defendant to produce his driver's license and automobile registration, which he did. After determining that the defendant's license and registration were valid, the officer returned to the defendant and asked him step out of the vehicle to answer some **13 questions. At this time, the officer still had possession of the defendant's license and registration.

The officer again asked the defendant to state his place of origin and his destination. The defendant again responded that he had come from Boston, where he and his passengers had been "hanging out," and that he was going to Vermont. The

officer told the defendant that he thought it was a long way to drive just to “hang out.” The defendant responded that they had also gone to a “frat party” while in Boston.

The officer, indicating that he was concerned the defendant had picked up drugs in Boston, asked him for permission to search the vehicle for drugs. The defendant consented to the search, which yielded no contraband. The officer then asked and was given *748 permission to pat the defendant down for weapons and to search his person and his wallet for drugs. The officer found a container that held a small amount of marijuana in the defendant's back pocket. He also found a package of rolling papers in the defendant's wallet. The two passengers were not searched. Subsequently, the officer arrested the defendant for possession of a controlled drug and returned the defendant's license and registration. The defendant was later convicted and appealed.

[1] [2] On appeal, the defendant argues that the officer unlawfully detained him longer than necessary to write a traffic ticket, and, therefore, his subsequent consent to search was “tainted” by the unlawful detention. We address the defendant's claims first under the State Constitution. *See State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347 (1983). With respect to the lawfulness of an investigative stop, the State Constitution is at least as protective as the Federal Constitution. *See State v. Wallace*, 146 N.H. 146, —, 772 A.2d 892, 894 (2001). Therefore, we need not engage in a separate federal analysis and look to federal cases for guidance only. *See State v. Farrell*, 145 N.H. 733, —, 766 A.2d 1057, 1063 (2001). When reviewing a trial court's ruling on a motion to suppress, we accept the trial court's factual findings unless they lack support in the record or are clearly erroneous. *See Wallace*, 146 N.H. at —, 772 A.2d at 894. Our review of the trial court's legal conclusions, however, is *de novo*. *See id.*

[3] “In order for a police officer to undertake an investigatory stop, the officer must have a reasonable suspicion—based on specific, articulable facts taken together with rational inferences from those facts—that the particular person stopped has been, is, or is about to be, engaged in criminal activity.” *Id.* (quotation omitted); *see also Terry v. Ohio*, 392 U.S. 1, 20–21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We have applied the *Terry* standard to motor vehicle stops. *See State v. Pellicci*, 133 N.H. 523, 528–29, 580 A.2d 710 (1990).

[4] There is no dispute that the officer's stop of the defendant for speeding and a broken taillight was a lawful investigatory stop. We have previously held, however, that the scope of an investigatory stop “must be carefully tailored to its underlying justification[,] must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *State v. Wong*, 138 N.H. 56, 63, 635 A.2d 470 (1993) (quotation and ellipsis omitted). “[A]ny expansion of the scope of [a motor vehicle] stop to include investigation of other suspected illegal activity is [constitutionally] permissible ... only if the officer has a reasonable and articulable suspicion that other criminal *749 activity is afoot.” Annotation, *Permissibility Under Fourth Amendment of Detention of Motorist by **14 Police, Following Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense*, 118 A.L.R. Fed 567, 573 (1994); *see also* 4 W. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.2(f), at 65 (3d ed.1996).

The State concedes that the officer did not have a reasonable and articulable suspicion of other criminal activity which would justify detaining the defendant beyond the time necessary to check the defendant's license and registration. The question before us is what effect, if any, did the defendant's continued and unlawful detention have on his subsequent consent to search his vehicle and his person.

We have not yet had occasion to consider this issue. The United States Supreme Court, however, has expressly held that when consent to search is the product of an unlawful detention, such consent is “tainted” by the illegality of the detention. *See Florida v. Royer*, 460 U.S. 491, 507–08, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Although *Royer* did not involve a motor vehicle stop, we agree with Justice Stevens that when deciding the validity of consent that is the product of an unlawful detention during a motor vehicle stop, “[t]he proper disposition follows as an application of [the] well-settled law [articulated in *Royer*].” *Ohio v. Robinette*, 519 U.S. 33, 51, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (Stevens, J., dissenting).

[5] [6] Rather than adopting a *per se* rule suppressing evidence obtained during a consent search that stems from an unlawful detention, however, we ask “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *State v. Cobb*, 143

N.H. 638, 650, 732 A.2d 425 (1999) (quotation omitted). “We require the government to demonstrate that any taint of an illegal search or seizure has been purged or attenuated not only because we are concerned that the illegal seizure may affect the voluntariness of the defendant’s consent, but also to effectuate the purpose of the exclusionary rule.”

¹ *United States v. Melendez-Garcia*, 28 F.3d 1046, 1054 (10th Cir.1994). “The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter to compel respect for the constitutional guaranty in the only effectively available way by removing the incentive to disregard it.” *Id.* (quotation omitted).

[7] *750 When determining whether the State has purged the taint of an unlawful detention followed by a consent to search, we find instructive the following factors considered relevant by the United States Supreme Court: (1) “the temporal proximity between the police illegality and the consent to search”; (2) “the presence of intervening circumstances”; and (3) “the purpose and flagrancy of the official misconduct.” *Id.* (citing ² *Brown v. Illinois*, 422 U.S. 590, 603–04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)).

[8] These factors should not be confused with the factors we consider to determine whether consent is voluntary. *See, e.g.*, ³ *State v. Sawyer*, 145 N.H. 704, —, 764 A.2d 936, 938 (2001).

While there is a sufficient overlap of the voluntariness and [the tainted] fruits tests that often a proper result may be reached by using either one independently, it is extremely important to understand that (i) the two tests are not identical, and (ii) consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality.

⁴ *Melendez-Garcia*, 28 F.3d at 1054–55.

[9] We now turn to the three factors as applied to this case. First, there is absolute **15 temporal proximity between

the unlawful detention and the defendant’s consent since the defendant gave consent *while* he was unlawfully detained.

Second, there were no intervening circumstances, such as the officer informing the defendant of his right to refuse consent, that would purge the taint of the unlawful detention and support a conclusion that the consent was an “act of free will.” *State v. Pinder*, 126 N.H. 220, 225, 489 A.2d 653 (1985); *see also* ⁵ *United States v. McGill*, 125 F.3d 642, 644 (8th Cir.1997) (concluding that the defendant’s understanding of his right to refuse consent was intervening circumstance), *cert. denied*, 522 U.S. 1141, 118 S.Ct. 1108, 140 L.Ed.2d 161 (1998).

In fact, the circumstances in this case strongly suggest that the defendant’s consent was not an act of free will independent of the unlawful detention. Given the seamless transition from the valid traffic stop to the unlawful detention and subsequent consent, there is a serious risk that the defendant felt some compulsion to consent because he believed he was still under the lawful authority of the officer at the time the officer requested his consent. The officer’s *751 continued possession of the defendant’s license and registration also makes it less likely that the defendant’s consent was an act of free will. Finally, the officer—a Caucasian—had just accused the defendant—an African American male in his twenties—of drug trafficking and had not informed the defendant that he had a right to refuse to consent. Given these numerous factors which suggest the absence of free will, we find the lack of any intervening circumstances all the more compelling.

Regarding the third factor, we are troubled by the purpose and flagrancy of the official misconduct in this case. It is disconcerting that the officer sought consent to search not only the defendant’s car, but his person, based upon such innocuous facts as he had driven to Boston with a purpose to “hang out,” he had attended a “frat party” there and he was returning to college in Vermont.

Although consent searches have long been an acceptable method of law enforcement, we have previously admonished that it is good policy for police officers to advise persons that they have a right to refuse to consent to a warrantless search. *See State v. Osborne*, 119 N.H. 427, 433, 402 A.2d 493 (1979). The failure of this officer to inform the defendant that he could refuse to consent and the absence of any reasonable basis for the officer to suspect the defendant of criminal activity gives rise to the *appearance*, even if not the reality, that the officer’s purpose was to engage in a

“fishing expedition” for incriminating evidence by exploiting the defendant’s ignorance of his constitutional rights. *See State v. Palamia*, 124 N.H. 333, 338, 470 A.2d 906 (1983). That the officer was Caucasian, the defendant was African American and the officer’s suspicions did not extend to the defendant’s two Caucasian passengers is also troublesome.

We conclude, therefore, that the State has failed to purge the taint of the defendant’s unlawful detention and that the evidence procured through the defendant’s consent should have been suppressed. Accordingly, we conclude that the trial court’s denial of the defendant’s motion to suppress

was erroneous. We need not address the voluntariness of the defendant’s consent.

Reversed and remanded.

BROCK, C.J., and BRODERICK, DALIANIS and DUGGAN, JJ., concurred.

All Citations

146 N.H. 746, 781 A.2d 11

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.