

STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.
NORTHERN DISTRICT**

SUPERIOR COURT

State of New Hampshire

v.

Adam Montgomery

Docket No. 216-2022-CR-00020
216-2022-CR-00577

ORDER ON MOTION TO SUPPRESS SEARCH OF PHONE

In Docket No. 216-2022-CR-20, the defendant is charged with second degree assault, endangering the welfare of a child, and interference with custody. In Docket No. 216-2022-CR-577, the defendant is charged with two counts each of armed career criminal, felon in possession, theft, and receiving stolen property. The defendant now moves to suppress the search of a cell phone taken from the defendant during a police interaction on December 31, 2021. The State objects. The Court held a hearing on September 28, 2022. For the reasons that follow, the defendant's motion is DENIED.

Factual Background

At approximately 8:45 a.m. on December 31, 2021, Manchester Police detained the defendant as part of an investigation into the whereabouts of the defendant's daughter, Harmony. The defendant largely refused to speak with the police, who eventually left the scene. Detectives John Dunleavy and Scott Riley subsequently obtained an *ex parte* court order granting custody of Harmony to the Division of Children, Youth, and Families.

At approximately 4:00 p.m. that same day, police again detained the defendant and held him while waiting for Detectives Dunleavy and Riley to arrive and serve him with the *ex parte* order. The police handcuffed the defendant, performed a pat frisk, and emptied his pockets. Among the items on the defendant's person was a cell phone. After the pat frisk was completed, the police removed the handcuffs and permitted the defendant to put his items back into his pockets.

Shortly before the detectives arrived, two officers asked the defendant if he had his phone on him. The defendant reached into his pocket and held up a phone. One of the officers took the phone and handed it to the other, saying that they were going to hold onto it until the detectives arrived. The officer holding the phone asked the defendant about a red light on the screen and whether that meant it was dying. The defendant stated, "Yeah it's dying. And that's not my phone." (State's Ex. 8 at 5:25–:30.) The defendant said the phone belonged to his friend and that he was just using it.

After the detectives arrived and served the defendant with the *ex parte* order, Detective Dunleavy informed the defendant that they were going to be taking his phone. The defendant again stated, "That's not my phone." (State's Ex. 9 at 00:15–:18.) Detective Dunleavy then said, "Okay, but it's ours now, so" (*Id.* at 00:18–:21.) The defendant shrugged indifferently and said, "Okay." (*Id.*) The police later acquired a warrant to search the contents of the phone.

Analysis

The defendant first argues that the phone was unlawfully seized without a warrant. "Part I, Article 19 of the State Constitution protects citizens from unreasonable seizures." State v. Dalton, 165 N.H. 263, 265 (2013). "A warrantless seizure is per se

unreasonable unless it falls within a recognized exception to the warrant requirement.” Id. The State argues that the seizure was justified due to the existence of exigent circumstances. See State v. Robinson, 158 N.H. 782, 798 (2009) (identifying exigent circumstances as exception to warrant requirement).

“Exigent circumstances refer to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search, or seizure, for which probable cause exists, unless they act swiftly and[] without seeking prior judicial authorization.” State v. Steimel, 155 N.H. 141, 147 (2007). “The exigent circumstances exception is satisfied when: (1) the police have probable cause; and (2) the delay caused by obtaining a search warrant would create a substantial threat of imminent danger to life or public safety or likelihood that evidence will be destroyed.” Id. “The primary focus of [the Court’s] inquiry is not on the *sufficiency* of the exigency but rather how the exigency came about.” Robinson, 158 N.H. at 798. “[T]he police cannot themselves create the exigency to justify a warrantless entry.” Id. “In [the Court’s] analysis of whether police presence was the cause of the exigency, two considerations act as ‘guideposts’: (1) the presence or absence of ‘ample opportunity’ to get a warrant; and (2) the degree to which the exigency relied upon by the State was foreseeable.” Id.

“Probable cause is judged by an objective standard.” State v. Stern, 150 N.H. 705, 709 (2004). “The test is whether a person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched and that what is sought . . . will aid in a particular apprehension or conviction.” Id. Here, the police were investigating the whereabouts of the defendant’s five-year-old daughter whom they had recently learned had not been seen in two years. Defendant was the court-ordered

custodial parent. A person of ordinary caution would be justified in believing that a custodial parent would have information pertaining to their child on their phone. Additionally, Detective Dunleavy testified that during the morning interaction both the defendant and his girlfriend told the police that the defendant had lost his phone.¹ It is reasonable to infer that there was information on the phone that the defendant did not want the police to obtain. Therefore, there was probable cause to believe that the defendant's phone contained information pertinent to the investigation. Moreover, as noted by the State, data on a phone is easily removed, and the phone itself is easily destroyed or otherwise disposed of. Having served the defendant with the *ex parte* order and informed him of the nature of the investigation, there was a risk that such information might be removed or destroyed before the police could obtain a warrant.

While the defendant argues the police had ample opportunity to obtain a warrant before their second encounter with the defendant, the Court disagrees. Because the defendant had told the police in the morning that he had lost his phone, the police had no reason to obtain a warrant to search the defendant's phone prior to discovering a phone on his person during the afternoon encounter. Moreover, the police seized the defendant in the afternoon in order to serve the *ex parte* order on him. The discovery of the phone on the defendant's person was inadvertent and not foreseeable.

¹ The Court notes that it suppressed the defendant's interaction with the police in the morning of December 31, 2021. (See Margin Order dated September 13, 2022 (Doc. 26).) However, at the September 28 hearing, both parties agreed that the defendant's statements are relevant to the state of mind of police during the afternoon of December 31 and go to the totality of circumstances. See Sept. 28, 2022 Hr'g at 9:44:30–9:45:15.

Based upon the totality of the circumstances, the Court finds the police have established both probable cause and the existence of an exigency that justified the warrantless seizure of the defendant's phone. Therefore, the initial seizure was lawful.

The defendant next raises a number of issues with the subsequent search of the phone. However, the Court finds that the defendant lacks standing to challenge the search because he abandoned the phone. "When a person abandons a possession, . . . he or she gives up the right to be secure from unreasonable searches of that possession." State v. Westover, 140 N.H. 375, 380 (1995). "To determine whether there is abandonment in the fourth amendment sense, the . . . court must focus on the intent of the person who is alleged to have abandoned the place or object." United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989). "The test is an objective one, and intent may be inferred from words spoken, acts done, and other objective facts." Id.

"[O]ne who disclaims ownership is likely to be found to have abandoned ownership." United States v. Zapata, 18 F.3d 971, 978 (1st Cir. 1994); see also United States v. Iraheta, 764 F.3d 455, 461 (5th Cir. 2014) ("A defendant who abandons or disclaims ownership of property prior to the search does not have standing to challenge a search subsequent to his abandonment or disclaimer of that property."); State v. Fosmire, 135 So.3d 1153, 1156 (Fla. Ct. App. 2014) ("A defendant who voluntarily abandons property or disclaims ownership lacks standing to challenge its search and seizure."). "Phrased another way, disclaiming ownership is tantamount to declaring indifference, and thus negates the existence of any privacy concern in a container's contents." Zapata, 18 F.3d at 978.

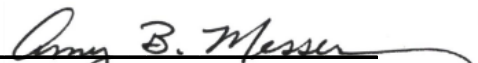
Here, the defendant disclaimed ownership of the cell phone twice when interacting with police in the afternoon of December 31. After the phone was first taken from him on December 31, when asked the meaning of a red light on the phone, the defendant said, "Yeah it's dying. And that's not my phone." (State's Ex. 8 at 5:28.) Shortly thereafter, when Detective Dunleavy informed the defendant that they were going to be taking his phone, the defendant again said, "That's not my phone." (State's Ex. 9 at 00:18.) Based on these clear disclaimers of ownership, the defendant relinquished his privacy interest in the phone, and thus lacks standing to challenge the subsequent search.

While "this rule applies only if no Fourth Amendment violation occurred prior to the abandonment and an abandonment cannot be deemed voluntary when it results from an earlier Fourth Amendment violation," United States v. Truong Son Do, 62 F. Supp. 3d 1236, 1246 (N.D. Okla. 2014), for the reasons set forth above, the police's initial warrantless seizure of the phone was justified by the exigent circumstances exception. Therefore, the Court finds the defendant's abandonment of the phone was voluntary. Thus, he lacks standing to challenge the search of the phone.

Accordingly, for the foregoing reasons, the defendant's motion to suppress is DENIED.

SO ORDERED.

October 19, 2022
Date



Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/19/2022