THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0404

State of New Hampshire

v.

Corey V. Donovan

Appeal Pursuant to Rule 7 from Judgment
of the Merrimack County Superior Court

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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I. THE COURT ERRED BY DENYING DONOVAN'S MOTION TO SUPPRESS.

In his opening brief, Donovan argued that the trial court erred by concluding that he was not seized until his formal arrest and denying his motion to suppress on that ground. DB* 21–30. In its brief, the State argues, among other things, that if Donovan was seized prior to his formal arrest, the court still correctly denied his motion to suppress because the seizure was justified by the community-caretaking exception to the warrant requirement. SB 23–27. Donovan files this reply brief to respond to that argument.

There are several flaws with the State's community-caretaking argument. First, the police had no indication that the situation involved anything other than two people sleeping in a legally parked vehicle, which the State has recognized is "the responsible choice" for tired drivers. Div. of Motor Vehicles, N.H. Dep't of Safety, State of New Hampshire Driver Manual 7 (May 2020) ("Before getting too tired, stop driving, pull off at the next exit or rest area to take a 15 to 20 minute nap or find a place to sleep for the night."). The police had no reason to believe that the occupants were experiencing any sort of medical distress. Compare State v. Boutin, 161 N.H. 139, 143 (2010) (community caretaking did

* Citations to the record are as follows:
"DB" refers to Donovan's opening brief;
"SB" refers to the State's brief.

not justify driver's seizure where Jeep was legally parked in a pull-off area) and State v. Boyle, 148 N.H. 306 (2002) (community caretaking exception did not justify driver's seizure where officer "had no reason to believe that [he] needed [aid]") with State v. Pate, 2020-0033 (N.H. Dec. 16, 2020) (3JX, non-precedential) (community caretaking justified opening driver's door where caller reported that driver was "nonresponsive," caller could not tell whether the driver was breathing, officer observed driver "slumped over the center console," and vehicle was running and wiper blades were on, even though it was not raining).

Second, the officers' actions demonstrated that they knew that the occupants were sleeping and not in need of any aid. They kept silent and used hand gestures to avoid waking them. They expressed intense interest in the contents of the Jeep, but no interest in the well-being of its occupants. At the suppression hearing, none of the four officers testified that they were concerned about the occupants' health.

Third, even if the police had some reason to be concerned about the health of the occupants, any such concern could have been addressed without seizing them. See Boutin, 161 N.H. at 144 (noting that, in many circumstances, the police can perform community-caretaking functions "in a nonintrusive manner and without seizing the occupants of a vehicle.").

The biggest problem with the State's community-caretaking argument, however, is that the State did not make the argument in the trial court. "This [C]ourt has consistently held that [it] will not consider issues raised on appeal that were not presented in the lower court." Vention Med. Advanced Components v. Pappas, 171 N.H. 13, 27 (2018), as amended (Oct. 23, 2018).

The State acknowledges that it did not make its community-caretaking argument below, but argues that it failed to do so "because the trial court found that no stop occurred." SB 27. The State appears to suggest that it is entitled to serially litigate a motion to suppress — first arguing only that no search or seizure occurred, and then, if and only if the court finds that a search or seizure did occur, arguing that it was justified by an exception to the warrant requirement.

This Court should reject that suggestion. When a litigant objects to a motion, it is the litigant's responsibility to articulate all the grounds for the objection before the motion is decided. Loeffler v. Bernier, 173 N.H. 180, 188 (2020) (litigant not entitled to serially litigate motion for partial summary judgement because "it is in the interest of judicial economy to require a party to raise all possible objections at the earliest possible time," particularly those that "were apparent at the time [the litigant] filed [its] objection,"

brackets omitted). If the litigant fails to do so, then any unarticulated grounds for objection may be deemed waived. See N.H. R. Crim. P. 43 (the purpose of a motion for reconsideration is to raise "points of law or fact that the court has overlooked or misapprehended," not arguments that the losing party has overlooked).

The State attempts to characterize its new community-caretaking rationale as an "alternative ground[]" for affirmance. SB 27. An alternative ground for affirmance is a one that was raised below but not relied upon by the trial court. Doyle v. Comm'r, N.H. Dep't of Resources & Economic Dev., 163 N.H. 215, 222 (2012) (the "alternative grounds" rule does not apply to issues that were not raised in the trial court). Here, because the State did not raise its community-caretaking argument below, it does not constitute an alternative ground for affirmance. Rather, it simply constitutes an argument that the State waived by failing to raise it in the trial court.

When an appellate court concludes that a trial court erred, it should endeavor to place the parties, to the extent possible, in the position they would have been in had the trial court not erred. Here, had the trial court not erred, it would have concluded that the police seized Donovan before his formal arrest. Because the State did not argue that such a seizure was justified, it would have granted Donovan's motion

to suppress. Any subsequent attempt by the State to raise, for the first time, a community-caretaking argument would have been rejected. The State should not be placed in a better position — and Donovan in a worse position — merely because the trial court erred by concluding that Donovan was not seized prior to his formal arrest.

Finally, any doubt about the status of the State's community-caretaking argument is resolved by State v. Santana, 133 N.H. 798 (1991). In Santana, the trial court denied the defendant's motion to suppress evidence found during a warrantless search of an apartment, concluding that the search was justified by the exigent-circumstances exception to the warrant requirement. Id. at 800–04. On appeal, the State defended the trial court's ruling, but it also advanced a new argument: even if the trial court erred by finding that the exigent-circumstances exception applied, the evidence was still admissible under the independent-source exception to the exclusionary rule. Id. at 807.

After finding that the court erred by finding that the exigent-circumstances exception applied, this Court addressed the State's new argument. Id. It held that "the State, during suppression proceedings, must raise and preserve alternative grounds for the admission of evidence claimed to have been unconstitutionally seized, in addition to the arguments upon which it ultimately prevailed below, in

order for this court to consider those grounds on appeal." Id. at 808. In support of this holding, it noted that the United States Supreme Court had held that "[t]he Government . . . may lose its right to raise" grounds for denying a motion to suppress by "fail[ing] to raise such questions in a timely fashion during the litigation." Id. at 808 (citing Steagald v. United States, 451 U.S. 204, 209 (1981)). Because "the defendant and the trial court never had the opportunity to consider [the independent-source exception] or the development of facts that might or might not have supported that argument," this Court declined to consider the argument on appeal, and reversed the denial of the suppression motion. Id. at 809.

Here, as in Santana, the State's failure to raise its argument in the trial court deprived the defendant and the trial court of the opportunity to consider the argument and the development of facts that might or might not have supported it. This Court should hold that the State waived its new community-caretaking argument.

CONCLUSION

WHEREFORE, Corey V. Donovan respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 1,315 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Zachary Higham, Assistant Attorney General, through the electronic filing system's electronic service.

/s/ Thomas Barnard
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DATED: January 18, 2022