

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. 2021-0161

State of New Hampshire

v.

Jesse Warren

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
10TH CIRCUIT COURT – DISTRICT DIVISION – SALEM

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**BRIEF FOR THE STATE OF NEW HAMPSHIRE**

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THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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**ISSUES PRESENTED**

- I. Whether the defendant waived his claims by failing to raise them in his first appeal to this Court.
  
- II. Whether the State or Federal constitutions required the trial court to provide the defendant with counsel or conduct an ‘ability-to-pay’ hearing prior to bringing forward the OAS complaint.
  
- III. Whether the trial court was required by statute to provide counsel or conduct an ‘ability-to-pay’ hearing prior to bringing forward the OAS complaint.

## STATEMENT OF THE CASE AND FACTS

In March 2017, the State filed a complaint against the defendant, Jesse Warren, for operating after a suspension – subsequent (OAS) in violation of RSA 263:64, VI. DA<sup>1</sup> 4. The State also filed a notice of intent to seek class-A misdemeanor penalties. DA 6. The State subsequently filed a related complaint for disorderly conduct (RSA 644:2) stemming from the same driving incident. DA 7.

### **A. The Initial Plea and Sentencing**

The defendant retained counsel and negotiated a resolution to both charges. DA 5, 9-10. Pursuant to that agreement, the defendant pleaded guilty to disorderly conduct. SH 3-4. The trial court (*Stephen, J.*) sentenced the defendant to 90 days in the house of corrections with all but 15 days deferred. SH 6. The court also fined the defendant \$1500 and imposed a \$120 penalty fee, with \$1000 suspended for two years. SH 5.

The court placed the OAS complaint on file without a finding, conditioned on the defendant’s good behavior. The court explained this disposition as follows:

So as long as you’re on good behavior, meaning no major motor vehicle violations, no misdemeanors, no felonies, and

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<sup>1</sup> Citations to the record are as follows:

“DA\_\_” refers to the “Appendix to Brief for the defendant – Documents other than appealed decisions” filed with this Court by the defendant;

“DAA\_\_” refers to the “Appendix to Brief for the defendant – Appealed Decisions” filed with this Court by the defendant;

“DB\_\_” refers to the defendant’s brief;

“MH\_\_” refers to the transcript of the defendant’s October 17, 2018 motion hearing;

“SH\_\_” refers to the transcript of the defendant’s March 29, 2018 sentencing hearing;

“T\_\_” refers to the transcript of the defendant’s January 3, 2019 bench trial on the OAS complaint;

you comply with the terms of the disorderly conduct sentence, then after two years the OAS would be dismissed, otherwise it gets placed back on the trial docket. You're going to be able to comply with that, Mr. Warren?

SH 2. The defendant replied, "I will. Thank you." SH 2. The court then conducted a colloquy to confirm that the defendant's plea and waiver of rights was knowing, intelligent, and voluntary. SH 2-4.

Referring again to the OAS complaint, the parties had the following exchange:

**The Court:** Is his history much like you did yesterday with another case, at a level of heightened concerns, or if he slips up you're going to be asking for jail time?

**[The State]:** Perhaps, but I think Mr. Warren's greatest consideration he certainly understands that the way this has been negotiated is for now going to allow him to not be convicted of an additional major motor vehicle offense, which would be enough to make him a habitual offender, so he's got this placed on file driving after suspension case hanging over him for the next two years on any noncompliance. It's going to come forward, and thereafter, if he's convicted of it, he's going to be habitual offender.

**The Court:** So that's a major risk right there.

**[Defense Counsel]:** It is.

**The Court:** So you understand you got to be very careful not to slip up?



**The defendant:** I fully understand.

SH 5.

Following this exchange, defense counsel informed the court that the defendant was having financial difficulties and asked the court to give the defendant thirty days to pay the fine. SH 6. The court instructed the defendant to talk to the clerk's office about that. The defendant ultimately signed a payment plan by which he agreed to pay the \$620 fine plus an additional \$25 fee by April 28, 2018. DA 11. The terms of that agreement stated:

I understand that if I am unable to make payments in the amount(s) stated above [\$645.00] or if I fail to appear in court as ordered that I will be subject to arrest, contempt proceedings, a suspension of my driving privileges, and administrative fee, and additional penalties.

I have read the above and understand the order of the court and consequences of non-compliance.

DA 11. When defendant did not pay the fine, the clerk assessed an additional \$50 fine and recommended to the Department of Motor Vehicles that the defendant's license be suspended. DA 12.

When the defendant had not paid the fine by July 12, 2018, the State filed a motion in which it asked the court to (1) issue a \$695 cash-only bail warrant for the defendant, (2) reinstate the OAS – subsequent complaint, and (3) impose the balance of the defendant's sentence on the disorderly conduct conviction. DA 13. On July 26, 2018, the court issued an arrest warrant for the defendant. DA 14, 17.

On August 30, 2018, the defendant paid the outstanding \$695 fine. DA 15-16. The warrant was vacated and the court scheduled a hearing on the State's motion for October 17, 2018. DA 16-17. On September 11, 2018, the defendant's counsel filed a motion to withdraw, citing the defendant's "fail[ure] to meet his contractual obligations," and noting that the defendant "does not communicate with counsel," and that "[t]here has been a breakdown in the attorney-client relationship." DA 18-19. The court granted this motion on September 20, 2018. DA 19-20.

**B. The October 17, 2018 Motion Hearing**

The defendant appeared *pro se* at the October 17 motion hearing ("the motion hearing") on the State's motion to reinstate the OAS complaint and impose the balance of the defendant's sentence for disorderly conduct. MH 1. The State noted that the defendant would be entitled to counsel on the motion to impose the deferred sentence and that the court would likely continue that portion of the hearing. MH 3.

The State asked the court to reinstate the OAS complaint because the defendant had failed to timely pay the fine on his disorderly conduct conviction. MH 3-4. The defendant informed the court that he had paid the fine after the warrant issued. MH 4.

The court asked the defendant if he wanted the court to appoint counsel to represent him and the defendant confirmed that he did. MH 4. The court instructed him to fill out a financial affidavit. MH 4.

The defendant then asked the court to dismiss the State's motion to impose and reinstate the complaint because he had paid the outstanding balance of his court fines. MH 5. The State objected, arguing, "the State

filed a motion to reinstate the complaint because the defendant hadn't complied and hadn't complied in a time period that the Court gave him to comply." The State further argued that the defendant had enough familiarity with the justice system "to know that court orders mean something. And when you don't abide by the Court's orders, there's a consequence for it." MH 5. The defendant stated that he had multiple cases in New Hampshire and Massachusetts, with "all of them needing fines to be paid." MH 6. He insisted that "as soon as it was brought to [his] attention, [he] came up with the money, and [he] paid it." MH 6.

The court denied the defendant's motion to dismiss the State's motion to reinstate the OAS complaint. The court noted, "these orders have meaning, and they need to be followed." MH 6. It instructed the defendant to fill out the necessary financial affidavit so that the court could determine if it needed to appoint counsel. MH 6. The defendant questioned whether it was "absolutely necessary" that he obtain counsel. MH 8. The court reiterated that the defendant might face jail time after the arguments on the motion to impose and the trial on the reinstated OAS complaint. MH 8. The court replied that the defendant should "absolutely consider having an attorney" and again urged the defendant to fill out a financial affidavit. MH 9. Finally, the State recommended, and the court set, personal recognizance bail for the defendant. MH 9.

### **C. The Defendant's Bench Trial**

The court held a bench trial on January 3, 2019. At the outset, the court heard the parties' arguments on defense counsel's motion to reconsider the court's order reinstating the OAS complaint. DAA 5-6.

Defense counsel argued that reinstating a complaint was “a period of conditional liberty” equivalent to bringing forth a deferred or suspended sentence. T 7. Defense counsel acknowledged, however, that reinstating a complaint was “a step removed” because “there actually has to be a conviction first.” Nevertheless, defense argued, the defendant should have been afforded a due process hearing before the complaint was reinstated to determine whether the defendant’s failure to pay the fine was “willful noncompliance” of the court’s order. T 8.

In response, the State made two arguments. First, it argued that the motion to reconsider was untimely. The defendant’s hearing, at which the OAS complaint was reinstated, occurred on October 17, 2018 and the defendant did not file his motion for reconsideration until December 3, 2018, well beyond the ten-day period for filing such a motion. T 9-10.

Second, the State argued that even if the defendant was entitled to due process, the court had afforded the defendant appropriate due process at the October 17, 2018 hearing. T 10. The State noted that the court had inquired about why the defendant failed to pay the fine and the defendant had responded that he had other cases pending and had forgotten the fine. T 11. The State also noted that the defendant was represented by counsel at the time the court ordered the fine and that the defendant and his counsel had requested and received additional time to pay it. T 10. The defendant did not contend at the hearing that he was unable to pay the fine or demonstrate that he had requested more time to pay it, beyond the initial thirty days that the court gave him. T 11. Instead, the State argued, the defendant “ignored it” or “disregarded it.” T 11.

The trial court agreed with the State on both points. T14. It found that the defendant's motion to reconsider was untimely and that the October 17, 2018 hearing provided the defendant with sufficient due process. T14.

Following this ruling, the court held a bench trial on the OAS complaint. T 15-48. It found the defendant guilty of driving after a suspension. T 48. The court sentenced the defendant to 180 days in the house of corrections, with 160 days suspended. T 61. It also imposed an \$1800 fine with \$1350 of that suspended. T 61. On the State's motion to impose the disorderly conduct conviction, the court re-suspended the fine and did not impose the deferred jail sentence. T 52.

The defendant appealed his OAS conviction to the Superior Court for a *de novo* jury trial. He subsequently waived his right to a jury trial and the Superior Court (*St. Hilaire, J.*) convicted based on the State's offer of proof. On appeal, the parties agreed that the Superior Court was required to remand the case to the Circuit Court upon waiver of the defendant's right to a jury trial. *State v. Warren*, No. 2019-0701 (N.H. Jan. 29, 2021). This Court agreed and remanded to the Superior Court with instructions to remand it to the Circuit Court. *Id.*

Upon remand, the Circuit Court re-imposed its earlier sentence and stayed that sentence pending appeal. DA 51. This appeal followed.

### **SUMMARY OF THE ARGUMENT**

- I. The defendant has waived the claims in this appeal under this court's waiver doctrine, because he did not raise them in his prior appeal, despite having incentive to do so.
  
- II. The October 17, 2018 hearing was not a "critical stage" of the prosecution necessitating the assistance of counsel under the State or Federal constitutions. The act of bring forward the complaint was ministerial, required by the court's prior order, and the presence of counsel would not have altered the result.

Likewise, the requirements of due process did not necessitate the presence of counsel at the October 17, 2018 hearing. Unlike the situations contemplated by this Court's decision in *Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982), there was no risk that the court might immediately convert the complaint into a prison sentence or otherwise deprive the defendant of liberty without a trial.

Similarly, because, unlike *Bearden v. Georgia*, 461 U.S. 660, 669 (1983), the defendant was not subject to immediate incarceration for his failure to pay his fine. Therefore, the guarantees of due process did not require the court to hold an "ability-to-pay" hearing prior to bringing forward the OAS complaint. Moreover, once counsel was appointed for the defendant, defense counsel filed a motion for consideration with respect to the court's decision to bring

the OAS complaint forward. Specifically, the defendant raised in that motion that the complaint should not be brought forward because of an inability to pay. When it denied the motion, the trial court considered and rejected this argument on the merits

Finally, because the act of bringing forward the complaint was ministerial and did not affect the defendant's right to a fair trial, if the court erred, the error was harmless beyond a reasonable doubt.

- III. The defendant has failed to preserve his statutory claims under RSA 604-A:2 and :3 and RSA 604-A:2-f that he raised for the first time in this appeal. Even if the defendant had preserved those claims, they are meritless. RSA 604-A:2 and RSA 604-A:3 are no more protective of the defendant's rights than the State and Federal constitutions and neither provision purports to create a separate right to counsel beyond that which the State and Federal Constitutions provide. The other statute upon which he relies, RSA 604-A:2-f, is also inapplicable because the defendant was not "incarcerated after a final hearing for nonpayment of an assessment," which is the circumstance against which that statute protects.

## ARGUMENT

### **I. THE DEFENDANT HAS WAIVED HIS CLAIMS BECAUSE HE DID NOT RAISE THEM IN HIS FIRST APPEAL TO THIS COURT.**

“The waiver doctrine, like the law of the case doctrine, serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and appeals. . . . But it “differs from the law-of-the-case doctrine in that it arises as a consequence of a party's inaction, not as a consequence of a decision [of this Court].” *State v. Robinson*, 170 N.H. 52, 61 (2017) (internal quotations omitted). “[W]hether there is a waiver depends . . . on whether the party had sufficient incentive to raise the issue in the prior proceedings.” *Id.* (quoting *U.S. v. Ticchiarelli*, 171 F.3d 24, 32-33 (1<sup>st</sup> Cir. 1999)) (cleaned up). “This is a type of waiver that hinges ... on the party's inaction in failing to raise the issue in a manner consistent with the court's general policy against piecemeal appeals.” *St. Clair v. Com.*, 451 S.W.3d 597, 613 (Ky. 2014) (cleaned up).

Prior to the instant appeal, the defendant brought an appeal from the Superior Court’s verdict in this case. See *State v. Warren*, No. 2019-0701 (N.H. Jan. 29, 2021) (unpublished). In that appeal, the defendant argued that the Superior Court lacked subject matter jurisdiction and that the State presented insufficient evidence to prove the OAS charge. In its memorandum in lieu of brief, the State conceded that the Superior Court lacked jurisdiction to conduct a second bench trial in this case. This Court



remanded to the Superior Court and instructed a further remand to the District Court. *id*; DA 48.

That first appeal provided the defendant a sufficient opportunity to raise the claims that he has brought in this appeal. If his jurisdictional argument had failed, this Court would have addressed the substantive arguments on the merits of the defendant's case. Appellate counsel was aware of this possibility, evidenced by the decision to include a sufficiency argument in the original appeal. The facts giving rise to his present claims were fully developed at the time of the prior appeal and available for the defendant to pursue.

Moreover, counsel should have been aware of them. In order to fashion a sufficiency argument, counsel would have reviewed the record, which included both the hearing on the motion to reinstate the complaint and the district Court bench trial. SA . In fact, appellate counsel cited to both of these transcripts in his original brief. SA . Appellate counsel did not pursue them, choosing instead to argue a sufficiency claim. Because he had sufficient opportunity and incentive to raise these issues in his original appeal, and because the defendant did not raise any of the issues in that appeal that he raises in this subsequent appeal, this Court should decline to consider them.

## II. THE DEFENDANT’S CONSTITUTIONAL CLAIMS ARE MERITLESS.

### A. The hearing on the State’s motion to reinstate the OAS complaint was not a “critical stage” of the prosecution.

Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel in criminal proceedings. “A criminal defendant’s right to counsel under both the State and Federal Constitutions attaches when adversary proceedings have commenced through a formal charge, preliminary hearing, indictment, information, or arraignment.” *State v. Jeleniewski*, 147 N.H. 462, 467–68 (2002). This marks the start of adversarial proceedings because, “[u]ntil a complaint is filed in court, the State is not committed to prosecute, and the defendant is not obligated to defend himself.” *Id.* (quoting *State v. Chaisson*, 123 N.H. 17, 29 (1983)). “Once the complaint is filed, the defendant is faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” *Id.* (internal quotations omitted). “The right to counsel is designed to give a defendant the benefit of legal advice when making important decisions regarding the case.” *Id.* at 468.

In this case, the defendant’s right to counsel attached upon the filing of the complaints. By placing the OAS complaint on file, the circuit court effectively suspended that complaint. While it was suspended, the defendant’s counsel withdrew, after the defendant paid the \$695 fine late. The defendant, therefore, appeared without counsel at the October 17, 2018 motion hearing. At that hearing, the court postponed ruling on the request to impose the deferred sentence, but ruled on the State’s request to bring the

OAS complaint forward. The operative question, therefore, is whether the court's hearing on reinstating the OAS complaint was a "critical stage" of the prosecution requiring the assistance of counsel.

The October 17, 2018 hearing did not constitute a "critical stage" of the prosecution necessitating the assistance of counsel. "The assistance of counsel is provided at critical stages of criminal proceedings in order to preserve a defendant's right to a fair trial." *State v. Delisle*, 137 N.H. 549, 550 (1993). A critical stage is one at which "substantial rights of a criminal accused may be affected," *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). "This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself." *United States v. Ash*, 413 U.S. 300, 310 (1973). As the record reflects, none of the defendant's substantial rights was implicated at this hearing, nor was he denied a fair trial. The defendant did not enter a plea at the hearing, he was not held on bail, he made no statements about the facts of the underlying OAS charge, and no witnesses were examined or evidence admitted.

*Jeleniewski* is analogous. In that case, this Court considered whether a defendant's right to counsel attached at an out-of-state extradition hearing. *Id.* at 463-64. After considering the reasons underlying the right to counsel outlined above, this Court concluded that the right did not attach at the extradition hearing. *Id.* at 468. The Court reasoned that "an extradition hearing has a modest function not involving the question of guilt or innocence, and is not a criminal proceeding within the meaning of the sixth amendment." *Id.* (quoting *Judd v. Vose*, 813 F.2d 494, 497 (1st Cir. 1987)).

The Court further noted that “[a]n extradition proceeding is not a mechanism used to inquire into the merits of a specific charge” and “the scope of inquiry at such proceedings does not involve the type of preliminary inquiry that traditionally occurs at critical stages between initial arrest and trial.” *Id.* at 469.

The *Jeleniewski* Court’s reasoning applies with at least equal force in this case. The hearing was held on the State’s motion to reinstate the OAS complain and impose the balance of the defendant’s sentence on the disorderly conduct charge. The court deferred ruling on imposing the balance of the defendant’s disorderly conduct charge until he had appointed counsel. The hearing, therefore, had the modest function of reinstating the complaint and did not involve the merits of the underlying OAS charge or any question of the defendant’s guilt or innocence. Arguably, this hearing was less adversarial than the extradition hearing in *Jeleniewski*, because the defendant’s personal liberty was not at issue. The State made clear at the hearing that it was asking for personal recognizance and was not seeking bail. MH 9.

The defendant argues that this hearing constituted a critical stage of the prosecution because the reinstatement of the complaint was adverse to the defendant and “that consequence could have been avoided or mitigated if [the defendant] was represented by counsel.” DB 26. But he has not explained how counsel could have “avoided or mitigated” the court’s decision to bring forward the complaint and the record belies this claim.

At the original sentencing hearing, neither the court, nor the defendant’s counsel stated that the reinstatement of the complaint would be conditioned on a finding of *willful* non-payment. The court stated, “[if] you

comply with the terms of the disorderly conduct sentence, then after two years the OAS would be dismissed, otherwise it gets placed back on the trial docket.” SH 2. The defendant agreed to this condition while represented by counsel. SH 2. “In construing a court order, [this Court] look[s] to the plain meaning of the words used in the document.” *In the Matter of Sheys & Blackburn*, 168 N.H. 35, 39 (2015). It is undisputed that the defendant paid the fine on August 30, 2018, more than four months after the agreed-upon April 28 deadline. Therefore, under the terms of the defendant’s plea, bringing forward the OAS complaint was an automatic consequence of his late payment. The State’s motion alerted the court to the defendant’s non-compliance, which caused the court to bring the OAs complaint forward.

Thus, for all of the above reasons, the October 17, 2018 hearing was not a “critical stage” of the prosecution requiring the assistance of counsel. The defendant had counsel appointed after that hearing and maintained appointed counsel throughout the case thereafter. This Court should, therefore, affirm the judgment below.

**B. The Due Process and Equal Protection Clauses of the State and Federal Constitutions also did not require the defendant to have appointed counsel.**

The defendant also argues that the due process guarantees of Part I, Articles 2 and 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution required the appointment of counsel for the motion hearing. DB 28-31. He points to this Court’s decision in *Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982), which held

that defendants have a due process right to counsel in proceedings related to parole and probation violations, imposition of suspended sentences, and other revocations of conditional grants of liberty. His reliance on *Stapleford*, however, is misplaced.

The *Stapleford* Court specified six situations that carried a significant liberty interest worthy of due process protection: “(1) parole violations, (2) violations of probation, (3) when a case marked continued for sentencing is brought forward, (4) when a suspended sentence is to be revoked, (5) when some condition set by the court has not been met and incarceration is the proposed remedy, or (6) whenever the defendant requests that a suspended sentence be continued and the State contests the request, such as the case at bar.” *Stapleford*, 122 N.H. at 1088.

The situations contemplated by *Stapleford* differ from this case significantly. Most crucially, the deprivations of conditional liberty for which *Stapleford* sought to provide safeguards all occur after final disposition of a defendant’s case. It is telling that the *Stapleford* Court noted that “[t]he standard of proof in these proceedings need not be proof beyond a reasonable doubt because this has already been accomplished in the underlying trial.” *Id.* at 1089. In those instances, courts can and do incarcerate a defendant immediately after finding that the defendant violated the terms of the grant of conditional liberty.

In this case, however, the court deferred ruling on the State’s request to impose the balance of the defendant’s disorderly conduct sentence until after the defendant had obtained appointed counsel. The only action taken by the court at the hearing was to bring the OAS complaint forward and to take steps to ensure the defendant could acquire appointed counsel. Once

counsel had been appointed, the defendant was protected from any risk to his liberty at that stage by the full panoply of rights afforded to a criminal defendant, including the right to a trial and the requirement that the State prove its case beyond a reasonable doubt. These constitutional safeguards insulated the defendant in a way that someone accused of a parole or probation violation is not protected. His case is, therefore, inapposite to the situations contemplated in *Stapleford*.

More broadly, “[t]he ultimate standard for judging a due process claim is the notion of fundamental fairness.” *State v. Mwangi*, 161 N.H. 699, 703 (2011). “Fundamental fairness requires that government conduct conform to the community’s sense of justice, decency and fair play.” *Id.*

The record reflects that the defendant received the full range of due process – including the advice of counsel – when he assented to the terms of his plea agreement. The trial court explained the terms of the agreement, including the requirement that the defendant comply with the terms of the disorderly conduct sentence, *i.e.* pay the fine for that conviction. SH 2. The court explained that if the defendant complied with these terms, “then after two years the OAS would be dismissed, otherwise it gets placed back on the trial docket.” SH 2. The court asked the defendant whether he was going to be able to comply with those terms and the defendant stated that he would be able to comply with them. SH 2.

The court then conducted a thorough colloquy with the defendant to ensure that his waiver of rights was knowing, intelligent, and voluntary. SH 3-4. The court confirmed this with the defendant’s counsel, who assured the court that he and the defendant “had long conversations about it.” SH 4. When the State reiterated that the placed-on-file OAS complaint was

“going to come forward” for “any noncompliance” with the terms of the plea, SH 5, the court reinforced for the defendant that this was a “major risk,” asking, “So you understand you got to be very careful not to slip up?” SH 5. The defendant replied, “I fully understand.” SH 5. The court repeated again, “you risk being certified if the [OAS complaint] is placed on the trial docket and if you’re convicted.” SH 6. Finally, defense counsel informed the court that the defendant had financial difficulties and the court instructed him to arrange a payment plan with the clerks. SH 5-6. The record reflects that the defendant did this and was given thirty days to pay the fine. DA 11.

Based on the record, the defendant was well advised of his obligations under the terms of his plea and the consequences for non-compliance, all while he was represented by counsel. The court also gave the defendant an additional month to pay his fine. The record contains no evidence that the defendant reached out to the court to make arrangements to extend his time to make this payment beyond the deadline. Instead, he allowed four months to pass without making any arrangements or payments. Under these circumstances, the court’s decision to bring forward the OAS complaint against the defendant without first appointing counsel did not violate notions of fundamental fairness. Accordingly, the defendant’s due process argument must fail.



**C. The Due Process and Equal Protection Clauses of the State and Federal Constitutions did not require the court to hold an ability-to-pay hearing.**

The defendant also argues that the due process and equal protection principles of Part I, Articles 2 and 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution required the trial court to conduct an ability-to-pay hearing before it could bring forward the OAS complaint. DB 36. To support this argument, the defendant relies on the United States Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660, 669 (1983). DB 36-40. But the defendant's reliance on *Bearden* is misplaced.

Contrary to the defendant's claim, the facts of *Bearden* are meaningfully distinguishable from the facts of this case. In *Bearden*, the defendant pleaded guilty to theft, the court withheld entering a guilty finding and placed the defendant on probation for three years. *Id.* at 662. When the defendant failed to pay the fine and restitution that accompanied his probation, the State filed a motion to revoke that probation. *Id.* at 663. The court held an evidentiary hearing, revoked the defendant's probation, and sentenced him to prison. *Id.* The court did not conduct any inquiry to determine the defendant's ability to pay the fine and restitution. *Id.* at 873. The United States Supreme Court reversed the conviction and held that "if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." *Id.* at 668–69.

The facts of this case put it in a different posture than *Bearden*. The *Bearden* Court was concerned about “punishing a person for his poverty.” *Id.* at 671. Because he had already pleaded guilty, Bearden benefitted from none of the constitutional and procedural safeguards that are afforded to a criminal defendant before and during trial. As a result, “the court automatically turned a fine into a prison sentence.” *Id.* at 674. The ultimate issue in *Bearden* was the deprivation of a conditional grant of liberty without due process. This fact pattern places *Bearden* in the realm of cases contemplated by this Court’s decision in *Stapleford*, discussed above in Section II.B.

That same concern does not exist in this case. As the defendant concedes, “incarceration was not an inevitable result of the court’s order; Warren was first tried and found guilty, and even then, the court was not required to impose a sentence of incarceration.” DB 39. The risk to the defendant if he failed to pay the fine was not that the court would automatically convert his fine into a prison sentence, but rather that the OAS complaint would be brought forward for prosecution.

Unless we assume the outcome of the defendant’s trial was a foregone conclusion, a notion that runs contrary to the fundamental presumption of innocence, the defendant was not in a position similar to *Bearden*. Unlike *Bearden*, the defendant had an entire pre-trial and trial process separating him from possible incarceration, along with all of the constitutional and procedural rights that attend to that, including appointed counsel. Thus, because this case is distinguishable from *Bearden*, and because the principles of due process and equal protection do not otherwise require the court to conduct an ability-to-pay hearing before reinstating the

complaint, this Court should reject the defendant's argument on this point and affirm his conviction.

**D. Even if the defendant was technically required to have counsel or an ability-to-pay hearing before the OAS complaint was brought forward, the errors were harmless.**

If this Court concludes that the defendant should have had prior to bringing the OAS complaint forward, it should nevertheless affirm his conviction because the error was harmless beyond a reasonable doubt. "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *State v. Dupont*, 149 N.H. 70, 74 (2003).

There is precedent for the application of the harmless error doctrine in these circumstances. In the context of reviewing a petition for writ of habeas corpus, this Court has found that the denial of counsel at a probable cause hearing and arraignment was harmless error. *Moses v. Helgemoe*, 116 N.H. 190, 191 (1976). Likewise, the United States Supreme Court has found that denial of counsel in a pretrial hearing was subject to harmless error review. *See Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (holding that a defendant was entitled to counsel at a preliminary hearing and remanding for a harmless error analysis.).

Application of the harmless error doctrine is appropriate in this case because there was no prejudice to the defendant from the absence of

counsel at the October 17, 2018 hearing. The defendant agreed to the payment condition as a term of his March 29, 2018 guilty plea on the disorderly conduct charge. SH 4-5. When he failed to timely pay that fine, the result was predetermined by the agreement he made with the court. He was, therefore, on notice that this would be the outcome of the hearing before it began.

Additionally, once counsel was appointed for the defendant, defense counsel filed a motion for consideration with respect to the court's decision to bring the OAS complaint forward. Specifically, the defendant raised in that motion that the complaint should not be brought forward because of an inability to pay. While the court denied the motion as untimely, it also rejected it on the merits. DAA 6. Moreover, counsel represented the defendant up to the point in late August when he paid the fine. If the defendant had needed more time to pay because of financial constraints, he could have petitioned the court, through his counsel, for that additional time.

The October 17, 2018 hearing itself became largely ministerial and did not affect the defendant's right to a fair trial. The defendant did not enter a plea at the hearing and no evidence was presented that undermined the defendant's case on the merits. The one fact that was elicited – that the defendant failed to timely pay his fine – was already in the court's own records before the trial. Thus, because the defendant suffered no prejudice from the alleged errors prior to bringing the OAS complaint forward, the alleged errors were harmless beyond a reasonable doubt.

**III. THE DEFENDANT’S STATUTORY CLAIMS ARE NOT PRESERVED AND, IF PRESERVED, ARE MERITLESS.**

**A. The defendant’s claims under RSA 604-A:2 and :3 and RSA 604-A:2-f are not preserved.**

Generally, this Court does not consider issues raised on appeal that were not presented to the trial court. *State v. Batista-Salva*, 171 N.H. 818, 822 (2019). The defendant bears the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief before the trial court. *State v. McInnis*, 169 N.H. 565, 573 (2017).

At the hearing on the State’s motion, the defendant moved to dismiss the State’s motion to bring forward the OAS complaint, arguing that he had paid the fine, albeit long after the deadline to do so had passed. MH 5-6. The defendant now contends that his statements at the hearing, that he “had several cases open” in New Hampshire and Massachusetts and “all of them needing fines to be paid” were sufficient to preserve this argument that his non-payment was due to inability. DB 40. But the remainder of the defendant’s statement, “[a]s soon as it was brought to my attention, I -- I came up with the money, and I paid it” contradicts this claim. That statement suggests that he simply neglected or forgot about this fine among the others he owed. At best, the defendant’s statements are ambiguous. They do not meet the specificity requirement for preservation of an objection, particularly one based on the particular statutory provisions to which he now refers.

Moreover, this Court does not have to speculate as to what arguments counsel would have made at the hearing. After the hearing, the defendant’s appointed counsel filed an untimely motion for reconsideration

that rested entirely on a due process argument and did not reference any statutory provisions. DA 27-32. Counsel's passing reference to *Bearden*, which involved a Fourteenth Amendment due process claim, cannot cure the failure to preserve these specific statutory claims for appellate review. Because he raises this novel statutory argument for the first time on appeal, this Court should decline to consider them.

**B. RSA 604-A:2 and RSA 604-A:3 are not more protective of the defendant's rights than the State and Federal Constitutions.**

Even if this Court reaches the merits of this claim, the trial court did not violate RSA 604-A:2 and :3. The first of these two provisions, RSA 604-A:2, states:

In every criminal case in which the defendant is charged with a felony or a class A misdemeanor and appears without counsel, the court before which he or she appears shall advise the defendant that he or she has a right to be represented by counsel and that counsel will be appointed to represent him or her if he or she is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, if the defendant indicates to the court that he or she is financially unable to obtain counsel, the court shall instruct the defendant to complete a financial statement under oath in such form as designated by the unit of cost containment. If after review of the financial statement under oath and application of the rules established pursuant to RSA 604-A:10, IV the court is satisfied that the defendant is financially unable to obtain counsel, the court shall appoint counsel to represent him or her.

This statute codifies the process by which courts administer the right to counsel. See generally 1 New Hampshire Practice, Criminal Practice and

Procedure § 18.01, at 498 (R. McNamara 2019) (“The constitutional right to counsel is effectuated by the provisions of RSA 604-A:2.”). Nothing in that provision purports to create a separate right to counsel beyond that which the State and Federal Constitutions provide.

Likewise, RSA 604-A:3 requires that “[a] defendant for whom counsel is appointed shall be represented by counsel from his initial appearance before the court at every stage of the proceedings until the entry of final judgment.” This provision outlines the timeframe for which counsel is appointed. It codifies the State and Federal constitutional requirements of counsel at critical stages of the prosecution. But like RSA 604-A:2, it does not purport to create a statutory right to counsel beyond what the State and Federal constitutions require.

*State v. Vest*, 744 P.2d 288 (Or. Ct. App. 1987), to which the defendant analogizes (DB 18-23), is inapposite. In that case, the court specifically barred the defendant’s court-appointed counsel from representing her at a diversion termination hearing on a DUI charge. When it considered whether to vacate Vest’s conviction, the Court of Appeals of Oregon noted several key facts: (1) “[b]oth parties could present evidence and cross-examine witnesses [at the termination hearing];” (2) “The hearing was adversarial and trial-like;” (3) “in the subsequent [trial], the state could use evidence obtained at the termination hearing;” (4) “[a]t the time of sentencing, the court could also take into account that it had been established at the diversion termination hearing that defendant had failed fully to fulfill the terms of the diversion agreement;” and (5) “the termination hearing was an integral step in the processing of the [DUI] charge.” *State v. Vest*, 88 Or. App. 101, 106 (1987).

These facts, which militated in favor of vacating Vest's conviction, did not exist at the defendant's hearing. The hearing was brief and more akin to a status conference than an adversarial evidentiary hearing. The State presented no evidence and the defendant made no admissions at the motion hearing that could have been used at the subsequent OAS trial.

While it is true that the court could consider at sentencing the fact that the defendant failed to timely pay his fine, this information was a matter of court record. If defense counsel had been appointed and had appeared at this hearing, counsel could not have prevented the trial court from considering that fact. Finally, the brief motion hearing in this case was not "an integral step" in the defendant's OAS case. In fact, it is possible that the court could have granted the State's motion without holding a hearing at all.

**C. RSA 604-A:2-f is inapplicable because the defendant was not "incarcerated after a final hearing for nonpayment of an 'assessment.'**

The defendant's claim that he was entitled to counsel and an ability-to-pay hearing under RSA 604-A:2-f is meritless. That statute pertains to the provision of counsel in proceedings for the repayment of costs and fees incurred by the state in the course of representing a criminal defendant.

RSA 604-A:2-f states:

I. No defendant shall be incarcerated after a final hearing for nonpayment of an assessment or nonperformance of community service unless counsel has been appointed for a defendant who is indigent or such defendant has executed a valid waiver of counsel for the final hearing. Incarceration of such defendant may occur only if the court, after having conducted an ability to pay or ability to perform final hearing



at which the court has made a specific inquiry of the defendant concerning his or her financial circumstances and his or her reasons for nonpayment or nonperformance, finds that the defendant willfully failed to pay the assessment or perform the community service.

[ . . . ]

III. The court shall appoint counsel to represent an indigent defendant at a final hearing on an ability to pay or perform held pursuant to this section if incarceration is a possible outcome of the final hearing.

The defendant argues that he was entitled to counsel under 604-A:2-f “because incarceration was a possible outcome of the hearing[.]” DB 28. Specifically, he argues that (1) he could have been held on preventative detention, and (2) “if the reinstated complaint resulted in a conviction, the court could sentence Warren to incarceration.”

But the plain language of the statute and this Court’s prior decisions do not support the defendant’s argument. First, the statute refers to representation of counsel at a “final hearing for nonpayment of an assessment.” Read in conjunction with the neighboring provision, RSA 604-A:9 (Repayment), this provision plainly contemplates proceedings in connection with a repayment order for counsel fees and expenses and administrative service assessment following a criminal case. RSA 604-A:9, I(a)-(b).

This Court’s decision in *State v. Brawley*, 171 N.H. 333, 340 (2018), confirms this reading. In *Brawley*, this Court observed that “RSA 604-A:2-f was enacted for the purpose of providing certain procedural protections to indigent defendants who fail to pay an ‘assessment’ or perform community

service to satisfy their obligations to, among other things, repay the State's costs and expenses associated with their public defense." *Id.* Moreover, this Court found "no distinction between a defendant's repayment obligation under RSA 604-A:9 and an 'assessment' under RSA 604-A:2-f[.]"

The 'assessment' in RSA 604-A:2-f, therefore, refers to a defendant's repayment obligations for legal services following the final disposition of his case, not to a fine levied as part of a defendant's sentence. The motion hearing in this case was not a final hearing for nonpayment of an 'assessment.' It was a hearing on the State's motion to bring forward a complaint. This statute is, therefore, inapplicable to the present case.

Additionally, the defendant was not entitled to a separate ability-to-pay hearing under RSA 604-A:2-f. nothing in the text of the statute or this Court's analysis of that text in *Brawley* purports to relieve a defendant of the consequences for failing to pay the fine associated with a judgment against him. This would constitute an entirely novel reading of this statute, and one completely divorced from the statutory scheme in which it sits. Such an outcome runs counter to this Court's policy to "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *State v. Maxfield*, 167 N.H. 677, 679 (2015).

Applying this statute to the current case would lead to absurd results. For example, RSA 604-A:2-f, II requires that "[p]rior to conducting an ability to pay or ability to perform final hearing, the court shall . . . [i]nform the defendant that he or she may be immediately incarcerated if the court finds that he or she has willfully failed to comply with the court's prior order to pay an assessment or perform community service[.]" If this statute applied in this case, the court would have been required to give this

warning, even though immediate incarceration for his failure to pay, without first conducting a trial, was not a possible outcome. Therefore, because the statute does not apply to the type of proceeding at issue, this Court should decline to find that the trial court violated RSA 604-A:2-f.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its Attorneys,

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April 4, 2021

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**CERTIFICATE OF COMPLIANCE**

I, Zachary L. Higham hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,466 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 4, 2022

/s/ Zachary L. Higham  
Zachary L. Higham

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the State's brief shall be served on Senior Assistant Appellate Defender Thomas Barnard, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

April 4, 2022

/s/ Zachary L. Higham  
Zachary L. Higham

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0701

State of New Hampshire

v.

Jesse Warren

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

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BRIEF FOR THE DEFENDANT

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### QUESTIONS PRESENTED

1. Whether the trial court lacked subject matter jurisdiction.

Issue raised for the first time on appeal. See In the Matter of Gray & Gray, 160 N.H. 62, 65 (2010).

2. Whether the State presented sufficient evidence to prove operating after suspension.

Issue raised as plain error.

## STATEMENT OF THE CASE

Warren was charged in the Tenth Circuit – District Division – Salem, (hereinafter “Circuit Court”), with operating after suspension (subsequent offense), alleged to have occurred on February 10, 2017. A 3, T 7.\* The charge was “placed on file without a finding.” A 4, T 7, 13. On July 12, 2018, the State filed a motion to bring the complaint forward. A 4, MH 3. The court, (Stephen, J.), ordered that the complaint be brought forward. A 4, MH 1, 6. After a bench trial in the Circuit Court, on January 3, 2019, the court, (Stephen, J.), found Warren guilty. DT 48. Warren was fined \$1500, with \$1125 suspended for two years, and ordered to serve one hundred eighty days in jail, with all but twenty days suspended for a period of two years. DT 60.

Warren appealed to the Rockingham County Superior Court, (hereinafter “Superior Court”), for a *de novo* jury

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\* Citations to the record are as follows:

“AD” refers to the attached addendum containing the order from which Warren appeals.

“A” refers to the appendix to this brief.

“SH” refers to the transcript of the sentencing hearing in the 10th Circuit – District Division – Salem, (hereinafter “Circuit Court”) on March 29, 2018.

“MH” refers to the transcript of the motion hearing in the Circuit Court on October 17, 2018.

“DT” refers to the transcript of the bench trial in the Circuit Court on January 3, 2019.

“PT” refers to the transcript of the final pre-trial conference held in the Rockingham County Superior Court, (RCSC), on October 24, 2019.

“T” refers to the transcript of the bench trial held in the Superior Court on November 6, 2019.

trial. A 5, DT 61-62. He waived his right to a jury and requested to proceed with a bench trial. T 3. The court, (St. Hilaire, J.), held a bench trial on November 6, 2019 and found Warren guilty. AD 24, T 9. Warren was fined \$1500, of which \$1125 was suspended. A 7, T 19-20. Warren was also sentenced to one hundred eighty days in the House of Corrections of which one hundred sixty-five days were suspended. A 6, T 19-20. The court deemed the fine satisfied, awarded Warren fifteen days of pre-trial credit, and ordered that the sentence run concurrent to another matter adjudicated in the Circuit Court. Id.

## STATEMENT OF THE FACTS

On February 10, 2017, Salem Police Officer Rob Farah conducted a motor vehicle stop on a black Dodge, operated by Warren.<sup>1</sup> T 3. Warren provided Farah with a New Hampshire non-driver identification card. T 4, 5. Farah asked Warren if he provided the non-driver identification because his license was suspended. T 5. Warren “stated that his license should not be suspended.” T 5.

Farah went back to his cruiser to check Warren’s record and learned that Warren’s license was suspended. T 5. After informing Warren that his license was suspended, Farah arrested him. T 5.

Warren’s “driver’s history” also reflected that his license was suspended at the time of the stop. T 7. The State did not offer any evidence that Warren was informed of the suspension by the court, the Department of Motor Vehicles, or any other person or government department. At the time of the stop, Warren had a prior conviction, within the past seven years, for operating after suspension. T 5-6.

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<sup>1</sup> The parties agreed to proceed by offers of proof in lieu of testimony. T 3.

## SUMMARY OF THE ARGUMENT

1. When Warren waived his right to a *de novo* jury trial, the Superior Court lost subject-matter jurisdiction over the case. The court was required, by statute and court rules, to remand the matter to the Circuit Court for imposition of the sentence imposed by the Circuit Court. RSA 599:1, N.H. R. Crim. P. 21(a)(2). Thus, this Court must vacate the conviction and remand the matter to the Superior Court with instructions to remand the matter to the Circuit Court, pursuant to RSA 599:1.

2. Should this Court find that the Superior Court had subject matter jurisdiction, Warren's conviction must be reversed because the State's factual proffer did not assert evidence sufficient to prove beyond a reasonable doubt that Warren knew his driver's license was suspended.



## I. THE SUPERIOR COURT LACKED SUBJECT MATTER JURISDICTION

Warren was charged with operating after suspension - subsequent offense, a class A misdemeanor, in the Circuit Court. A 3. The court, (Stephen, J.), found Warren guilty, DT 48, and after pronouncing its sentence, noted Warren's appeal to superior court. DT 60-62. On January 7, 2019, the matter was transferred to the Superior Court for a jury trial. A 5; see RSA 599:1; N.H. R. Crim. P. 21(a)(2).

Warren did not have a jury trial in the Superior Court as required by RSA 599:1. Instead, he elected to waive his right to a jury trial and asked to proceed with a bench trial. PT 2; T 3. The Superior Court first learned of Warren's decision to waive jury at the final pre-trial conference on October 24, 2019. PT 2-3, 5. It scheduled a bench trial for November 6, 2019. PT 6.

Prior to the commencement of the bench trial, the court acknowledged that the matter was "an appeal from the circuit court trial" and was a "trial *de novo*." T 3. In lieu of witnesses, the parties agreed to proceed by offer of proof. Id. After hearing the State's offer of proof, the court entered a finding of guilty, T 9, and sentenced Warren. T 19-21.

The superior court's jurisdiction to hear *de novo* appeals from circuit court is conferred by statute. State v. Whitney, 172 N.H. 380, 382 (2019). Thus, "determining the jurisdiction

of the superior court in this case is a matter of statutory interpretation, which presents a question of law subject to . . . *de novo* review.” Id. In matters of statutory interpretation, this Court is “the final arbiter of the legislature’s intent as expressed in the words of the statute considered as a whole.” State v. Thompson, 165 N.H. 779, 782 (2013) (quotation and citation omitted). It “first examine[s] the language of the statute, and where possible . . . appl[ies] the plain and ordinary meaning to the words used.” Id. The Court “interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language it did not see fit to include.” Id. It “interpret[s] a statute in the context of the overall statutory scheme and not in isolation.” Id.

The superior court has concurrent jurisdiction over misdemeanors with the circuit court. State v. Blouin, 110 N.H. 202, 203 (1970). If, however, a misdemeanor prosecution begins in the circuit court, the superior court’s authority to hear the matter is limited to appeal for a *de novo* jury trial, pursuant to RSA 599:1; see also RSA 502-A:12, I; N.H. R. Crim. P. 21(a)(1) & (2).<sup>2</sup>

RSA 599:1 provides that, if a defendant who has appealed to the superior court for a *de novo* jury trial

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<sup>2</sup> The State has the right to *nolle prosequi* the complaint in the district division and file an information in the superior court. Hammell v. Warden, 146 N.H. 557, 557-61 (2001).

waives the right to jury trial after the case has been appealed, the superior court shall forthwith remand the case to the circuit court for imposition of the sentence originally imposed by the circuit court, and the defendant may appeal questions of law arising therefrom to the supreme court.

RSA 599:1 (emphasis added); see also N.H. R. Crim. P. 21(a)(2). Thus, the statute's plain and unambiguous language strips the superior court of subject matter jurisdiction when a defendant waives the right to a jury trial on a *de novo* appeal. See Gray, 160 N.H. at 65 (looking to the plain language of statute to determine subject matter jurisdiction). Further, when this Court has construed RSA 599:1, the Court has determined that “[t]he clear import of the statutory scheme is that cases within their jurisdiction which are begun in the district courts shall be tried there, subject to appeal and trial *de novo*.” State v. Dickson, 116 N.H. 175, 177 (1976).

“Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought: the extent to which a court can rule on the conduct of persons or the status of things.” Appeal of Cole, 171 N.H. 403, 408 (2018). “A court lacks power to hear or determine a case concerning subject matter over which it has no jurisdiction.” Id. A court cannot acquire subject matter jurisdiction over a case by agreement of the parties, Gordon v. Town of Rye, 162 N.H.

145, 149 (2011), and a party may not waive a challenge to subject matter jurisdiction. In the Matter of Gray & Gray, 160 N.H. 62, 65 (2010). Subject matter jurisdiction may be challenged by a party “at any time during the proceeding, including on appeal.” Id. (citation omitted). Whether the trial court had subject matter jurisdiction is a question of law reviewed by the Court *de novo*. Maldini, 168 N.H. at 194.

Warren was convicted in the Circuit Court of a class A misdemeanor and exercised his right to a *de novo* jury trial in the Superior Court. Shortly after the matter was docketed with the Superior Court, Warren waived his right to a *de novo* jury trial and announced his desire to proceed with a bench trial. Once Warren waived his right to a jury, the Superior Court no longer had subject matter jurisdiction. Thus, this Court must vacate the court’s judgment and remand the matter to the Superior Court with instructions to remand, in turn, to the Circuit Court in accordance with RSA 599:1 and N.H. R. Crim. P. 21(a)(2).<sup>3</sup> See Maldini v. Maldini, 168 N.H. 191, 193 (2015) (judgement vacated and remanded for dismissal for lack of subject matter jurisdiction); Daine v.

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<sup>3</sup> Upon remand to the Circuit Court and imposition of the original sentence, Warren plans to appeal the Circuit Court's rulings directly to this Court pursuant. See RSA 599:1 (“In the event the defendant waives the right to jury trial after the case has been appealed, the superior court shall forthwith remand the case to the circuit court for imposition of the sentence originally imposed by the circuit court, and the defendant may appeal questions of law arising therefrom to the supreme court.”). Any discussion of the merits of such an appeal would be premature at this time.

Daine, 157 N.H. 426, 427 (2008) (order vacated and underlying action dismissed for lack of subject matter jurisdiction).

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION.

If this Court finds that the Superior Court had subject matter jurisdiction over Warren's *de novo* appeal even after he waived his right to a jury, this Court should nevertheless reverse his conviction because the State presented insufficient evidence to support a conviction during its offer of proof. Warren was alleged to have operated a motor vehicle while his license was suspended. A 3. The offense was charged as a class A misdemeanor because Warren had a prior conviction within seven years. Id.; T 5; RSA 263:64, VI (providing for misdemeanor penalties if the complaint alleges that the person had a prior conviction in New Hampshire within seven years of the subsequent offense). The State was required to prove beyond a reasonable doubt:

(1) that [Warren's] license to drive had been suspended or revoked; (2) that [Warren] drove a motor vehicle after such suspension; and (3) that [Warren] did so with *knowledge of the revocation or suspension of his license to drive*.

State v. Curran, 140 N.H. 530, 532 (1995); see also State v. Kardonsky, 169 N.H. 150, 153-54 (2016) (same).

The parties agreed to proceed by offers of proof. T 3. However, the State still bore the burden of proving its case

beyond a reasonable doubt. See State v. Daoud, 141 N.H. 142, 147 (1996) (State's evidence and defendant's offer of proof insufficient for defendant to sustain burden to prove affirmative defense); see also T 3 (court observes that "it's the State's burden"). Warren stipulated only to having a prior conviction for operating after suspension within seven years. T 5-6. As was his right, Warren did not present any evidence through his own offer of proof and did not concede any other fact or element of the charged offense. U.S. CONST. Amend. V; N.H. CONST. pt. I, art. 15.

The trial court found that, "[b]ased on the offer of proof . . . you were operating a motor vehicle and . . . your license was suspended at the time." T 9, AD 24. Addressing the element of "knowingly" the court observed that Warren's furnishing Farah with a nondriver's ID was "an issue." T 9-10, AD 24. The court further reasoned, "I think . . . any driver would notice if they had [a] nondriver's ID instead of a regular driver's license." T 10. With these findings, the court entered a finding of guilty. T 9, AD 24. In doing so, the court erred.

- A. There was insufficient evidence to prove that Warren knew his license was suspended.

The State failed to introduce sufficient evidence to support a finding, beyond a reasonable doubt, that Warren

knew of his license suspension at the time he drove. A “person acts knowingly with respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist.” RSA 626:2, II(b). “A defendant’s intent often must be proved by circumstantial evidence and may be inferred from the defendant’s conduct under all the circumstances.” State v. Vincelette, 172 N.H. 350, 354 (2019). When evidence of intent is solely circumstantial, all reasonable conclusions consistent with innocence, based on the evidence, must be excluded. Id. When reviewing claims of insufficiency, this Court considers all the evidence in the light most favorable to the State. State v Hull, 149 N.H. 706, 712 (2003).

The State presented no evidence that Warren knew of his license suspension when he was stopped by Farah. It did not represent that a notice of suspension was sent to Warren’s last known address. See RSA 263:64, II (“Evidence that the notice of suspension or revocation was sent to the person's last known address as shown on the records of the division shall be *prima facie* evidence that the person was notified of the suspension or revocation.”). Nor was there evidence that Warren was informed of the suspension by any other means. The evidence offered by



the State as to Warren's knowledge consisted only of his statement to Farah that his license "should not be suspended." T 5. However, even assuming the court disbelieved Warren's statement to Farah, this did not equate to evidence of knowledge. See Commonwealth v. Gonzalez, 858 N.E.2d 1122, 1126 (Mass. App. Ct. 2006) ("just because testimony is disbelieved does not make the contrary view fact; there must still be credible evidence as to that other view."); Viner v. Sweet, 12 Cal. Rptr. 3d 533, 542 (Ct. App. 2004) ("disbelief of Lightstone's testimony does not constitute affirmative evidence of the contrary proposition."); State v. Hart, 605 A.2d 1366, 1374 (Conn. 1992) ("the jury may not infer the opposite of a witness' testimony solely from its disbelief of that testimony.").

Evidence that Warren handed Farah a nondriver's ID did not conclusively prove his mental state. While this could suggest the conclusion that Warren knew his license was suspended, it was equally reasonable to conclude that Warren only knew he did not have a valid license, a distinct and separate offense. See RSA 263:1, I ("No person...shall drive any motor vehicle upon any way in this state unless such person has a valid driver's license..."). Any finding that Warren knew his license was suspended was purely

speculative and did not amount to proof beyond a reasonable doubt.

B. This Court must reverse Warren's conviction.

While Warren did not preserve this claim, this Court should find plain error. The Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. State v. Hanes, 171 N.H. 173, 182 (2018); Sup. Ct. R. 16-A. To find plain error: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. Id.

Although plain error is “used sparingly ... and is limited to those circumstances in which a miscarriage of justice would otherwise result,” Hanes, 171 N.H. at 182, this Court has found that convictions based on insufficient evidence constitute plain error. State v. Houghton, 168 N.H. 269, 273-74 (2015); State v. Guay, 162 N.H. 375, 380-84 (2011); see also State v. Bergeron, No. 2016-0088 at \*5 (N.H. June 30, 2017) (non-precedential order).

For the reasons stated above, the trial court erred by entering a conviction for operating after suspension and the error was plain. The error was prejudicial because it

resulted in Warren's conviction. The error seriously affects the fairness, integrity, or public reputation of judicial proceedings because Warren stands convicted of a misdemeanor for which there was not sufficient evidence.

Because there was insufficient evidence to sustain a conviction, the Court should reverse.

## CONCLUSION

WHEREFORE, Jesse Warren respectfully requests that this Court vacate the conviction and remand the matter to the Rockingham County Superior Court, with instruction to remand the matter to the Tenth Circuit – District Division – Salem, in accordance with RSA 599:1.

Alternatively, this Court should reverse the conviction.

Undersigned counsel requests 10 minutes 3JX.

Warren raises subject matter jurisdiction for the first time on appeal and therefore no order is appended to the brief. The trial court's order of conviction, appealed under plain error, was in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 3033 words.

Respectfully submitted,

By /s/ Anthony J Naro  
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served on the Criminal Bureau of the New Hampshire Attorney General's office through the Court's electronic filing service.

/s/ Anthony J. Naro

DATED: May 28, 2020

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**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Rockingham County

Rockingham Superior Court

**State v. Jesse Warren****218-2019-CR-00039**ORDER


After a trial based solely on offers of proof, the Court finds that the defendant was operating a motor vehicle on a public way while knowing that his license was suspended by the NH Director of Motor Vehicles. He handed the officer a drivers' ID rather than a license. The defendant has a prior operating after suspension conviction from January 28, 2016. Accordingly, the defendant is found GUILTY of the charge of operating after suspension subsequent.

The Court issues a sentence based on the defendant's record, balanced with the fact that the defendant entered a plea on a disorderly conduct in connection with this charge. <sup>1</sup>

Please see attached sentencing form under this docket.

November 6, 2019

Date

  
\_\_\_\_\_  
Judge Daniel I. St. Hilaire

**Clerk's Notice of Decision  
Document Sent to Parties  
on 12/05/2019**

<sup>1</sup> The Court notes that the defendant was not disorderly but an agreement was made to enter a plea on this offense to avoid having three major motor vehicle convictions on his record which would subject him to habitual offender certification.