THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0167

State of New Hampshire

v.

Daniel Davis

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE CARROLL COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(10 minute – 3JX argument)

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ISSUE PRESENTED

Whether the trial court properly denied the defendant's motion to suppress the evidence police found during a warrantless search of his residence.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

On June 21, 2019, a Carroll County Grand Jury indicted Daniel Davis ("the defendant") on one charge of possession of a controlled substance with intent to sell (RSA 318-B:2, I). On July 3, 2019, the defendant filed a motion to suppress evidence and the State objected. DA 21-30.

On October 8, 2019, the Carroll County Superior Court (*Ignatius*, J.) held a hearing on the defendant's motion. MH 1. Sargent Dominic Torch of the Conway Police Department testified on behalf of the State and the defendant testified on his own behalf. MH 2. On December 11, 2019, the court denied the defendant's motion to suppress. DA 44. Based on the testimony and photographic evidence submitted at the hearing, the court made the following findings of fact and rulings of law.

B. Trial Court's Findings of Fact and Rulings of Law

1. Findings of fact

The trial court found that on April 6, 2019, a local business owner informed law enforcement that he had recently performed a service call at a residence on Colbath Street in Conway and that marijuana was being grown inside a residential trailer there. MH[1] 6-7. Sgt. Torch and Officer Shawn Baldwin went to the trailer later that day to speak with the residents. MH 8.

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[1] Citations to the record are as follows:
"DB __" refers to the defendant's brief and page number;
"DA __" refers to the appendix attached to the defendant's brief, and page number;

When they arrived at the residence at 18 Colbath Street, the officers observed the front entrance enclosed in a "glassed-in vestibule area." MH 7, 15. The enclosed area was "structurally distinct from the trailer itself, as it had different siding and a different roofline than the trailer and appeared to have been added on to the trailer's original structure." DA 32.

The officers further noted that rest of the doors and windows to the trailer were covered with black plastic. MH 8. The windows to the enclosed vestibule area "had been left unobstructed." DA 32. From the outside, the officers observed electrical wiring and piping protruding from the trailer, consistent with marijuana cultivation. MH 7-8. The officers also heard the sound fans inside the residence and smelled the odor of fresh marijuana from the front yard. MH 7-8.

From outside the vestibule, the officers observed a "closed interior door that appeared to lead into the trailer itself. The interior door was just a few feet inside the exterior door into the enclosed area." DA 33. The two officers entered the vestibule and knocked on the interior door leading into the residence. MH 22. When the officers knocked on the door, a male voice inside asked who was there. MH 8. The court did not credit the defendant's claim that he was asleep when officers knocked and did not hear or respond to the officers. MH 41; DA 33.

The officers announced themselves as police and asked the person to come to the door several times. MH 8-9. The individual inside the residence stopped responding. MH 9. At this point, the officers believed there was a

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"MH __" refers to the transcript of the hearing on the defendant's motion to suppress held October 8, 2018 and page number.

"strong probability that there's a crime going on within that residence" and returned to the street for officer safety reasons. MH 9.

As they walked away, the officers heard "crashing" and "banging" inside the trailer, which the officers identified as someone destroying evidence. MH 9. The officers returned to the trailer and forced entry through the front door. MH 9. The officers swept the trailer for occupants, securing the defendant, as well as mature marijuana plants, grow lights, and other evidence of marijuana cultivation. MH 10. The officers secured the premises and obtained a search warrant. MH 11-12. The defendant was arrested and later charged with possession of a controlled substance with intent to sell (RSA 318-B:2, I).

2. Rulings of law

i. Officers' entry to the enclosed vestibule

The trial court first found that the police did not violate the defendant's reasonable expectation of privacy when they entered the "enclosed area" around the defendant's front door. DA 35. The court assumed that the defendant had a subjective expectation of privacy in the enclosed vestibule and focused exclusively on whether that belief was objectively reasonable. DA 36.

The court noted the fact-intensive nature of the inquiry. In ruling that the defendant lacked a reasonable expectation of privacy in the enclosed area, the trial court relied on *State v. Beauchemin,* 161 N.H. 654, 657 (2011), in which this Court found that a defendant lacked a reasonable expectation of privacy in his front porch.

The court concluded that, like the porch in *Beauchemin*, the defendant did not use the enclosed vestibule space as a living space. DA 38. The enclosed area appeared "structurally distinct from the trailer as it appeared to have been added to the original structure." DA 38. Detached appliances, a broken window, and "the fact that a door into the back of the enclosed area does not appear to have been airtight," all indicated to the court that "the area the officers entered was an access route to the main door of the trailer that strangers has an implied license to enter." DA 38. The court emphasized, moreover, "the fact that the windows into the enclosed area were not covered with black plastic, as were the windows into the trailer strongly indicated that privacy was expected beyond the enclosed area but not in that area itself." DA 38.

In addition, the court found that the exterior door did not have a knocker or doorbell and officers could clearly see the interior door from the outside. DA 39. The court determined that strangers could reasonably believe they had an implied license to enter the enclosed space for the limited purpose of knocking on the door. Consistent with this implied license, police knocked on the door, waited for a response, and so "limited their intrusion to the legitimate investigative purpose for which they had gone to the property." DA 39. Based on this analysis, the court found that officers did not violate the defendant's reasonable expectation of privacy when they entered the enclosed area to knock on the interior door. DA 39.

ii. Forced entry into the trailer

The court then found that exigent circumstances justified the officers' forced entry into the trailer without a warrant. DA 40. According to the trial court, "the officers had probable cause to search the trailer for evidence of illegal drug activity prior to forcing entry through the interior door." DA 40. The court found:

> That standard was satisfied here well before the forced entry. Before the officers even entered the enclosed area to knock on the door, Sergeant Torch's own observations had already strongly corroborated the informant's tip that there was marijuana growing in the trailer. Not only had Sergeant Torch smelled the odor of fresh marijuana coming from the trailer, be he also had recognized the piping and electrical wiring protruding from the trailer as signs consistent with an indoor marijuana grow.

DA 40-41. This alone, the court noted, established probable cause.

When the officers entered the enclosed vestibule, they made additional corroborating observations:

> [T]he sound of fans running inside the trailer, the person inside going silent upon learning that it was the police at the door, and the unusual noises consistent with evidence destruction that began as soon as officers appeared to be leaving the property.

DA 41. All of these facts further contributed to finding the existence of probable cause.

The court then found that exigent circumstances justified the warrantless entry into the trailer. "Here, immediately prior to forcing entry, the officers were faced with circumstances under which it was reasonable to believe that delaying entry would likely result in the destruction of evidence." DA 42.

The court reviewed the evidence that marijuana was being cultivated on the property, the defendant's initial response followed by silence after police identified themselves, and the loud crashing and banging as the officers appeared to be leaving. These facts satisfied the trial court that the officers had reason to believe "that there was a person inside the trailer who wanted to avoid police detection and who began to destroy evidence of the grow upon seeing the officers begin to leave the area." DA 42.

Finally, the court found that the officers did not create the exigency themselves by merely knocking on the door and announcing their presence. DA 44. The court held that the existence of both probable cause and exigent circumstances justified the officers' warrantless entry. DA 44.

Following trial, on February 19, 2020, the defendant was convicted and sentenced to three to fifteen years, all suspended for two years from the date of conviction. DA 45.

This appeal followed.

SUMMARY OF THE ARGUMENT

Police officers did not violate the defendant's reasonable expectation of privacy when they entered the enclosed vestibule of his residence to knock on the interior door.

The officers' subsequent warrantless entry into the defendant's residence was necessary to prevent the destruction of evidence. Under the exigent circumstances exception to the warrant requirement, "[e]xigent circumstances exist where the police face a compelling need for immediate official action and a risk that the delay caused by obtaining a search warrant would create . . . a likelihood that evidence will be destroyed." Officers identified facts that amounted to probable cause for a search before they entered the defendant's residence. After announcing their presence as law enforcement, but before they could secure a warrant, officers heard loud banging and crashing noises in the trailer and reasonably believed that the defendant was destroying evidence. The urgency of the circumstances necessitated the warrantless search.

Alternatively, police would have inevitably discovered the evidence, even if exigent circumstances did not necessitate the warrantless entry. This Court, therefore, should not suppress the evidence police seized following that warrantless entry.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE THAT POLICE FOUND IN THE DEFENDANT'S RESIDENCE.

A. Standard of review

"When reviewing a trial court's ruling on a motion to suppress, [this Court] accept[s] the trial court's factual findings unless they lack support in the record or are clearly erroneous, and [] review[s] its legal conclusions *de novo*." *State v. Boyer*, 168 N.H. 553, 556 (2016).

B. The trial court correctly declined to suppress evidence seized in a warrantless search.

The Fourth Amendment to the United States Constitution provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." US CONST. Amend IV. Part I, Article 19, of the New Hampshire State Constitution provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." "Both of these provisions afford a citizen protection from unreasonable governmental interference with his person and from unreasonable governmental invasion of the privacy of his home*." State v. Chaisson*, 125 N.H. 810, 815 (1984). "In construing the State Constitution, [this Court] refer[s] to Federal constitutional law as only the benchmark of minimum constitutional protection." *Chaisson*, 125 N.H. at 815.

This Court employs a reasonable expectation of privacy analysis to assess claimed violations of those constitutional guarantees. Its requirements are two-fold: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *State v. Goss*, 150 N.H. 46, 49 (2003) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (*Harlan, J.*, concurring).). The trial court correctly found that officers did not violate the defendant's reasonable expectation of privacy.

1. The trial court correctly determined that the officers did not violate the defendant's reasonable expectation of privacy when they entered the enclosed vestibule.

First, the defendant has not exhibited an actual expectation of privacy in the trailer's entryway. The trial court assumed, without ruling, that the defendant had a subjective expectation of privacy. DA 36. But the defendant did not testify to a subjective expectation of privacy in his testimony at the hearing on his motion to suppress. Based on the available record, a fact-finder could conclude that the defendant lacked even a subjective expectation of privacy in this space.

Nor does the defendant identify an expectation of privacy in the enclosed vestibule that society is prepared to recognize as reasonable. "Our State Constitution protects people from unreasonable police entries into their private homes, because of the heightened expectation of privacy given to one's dwelling." *State v. Orde,* 161 NH 260, 264 (2010). Whether the State Constitution protects a particular area as 'the home' requires "asking whether such an area is as deserving of protection from governmental

intrusion as the house." *State v. Mouser*, 168 NH 19, 23 (2015). This is necessarily a fact-intensive question. *Id*. The trial court rightly concluded that the enclosed vestibule was not such an area.

In so ruling, the court relied on this Court's decision in *State v. Beauchemin*, 161 NH 654, 657 (2011). The *Beauchemin* Court considered evidence obtained by a conservation officer while standing on a defendant's front porch. The *Beauchemin* Court noted that police officers have the same implied license to use a home's access route as any other member of the public. "[W]hen conservation officers enter private property to conduct an investigation and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from these places are not covered by Part I, Article 19." *Id* (internal quotations omitted). That Court concluded, "there was testimony that the porch led to the main door of the defendant's residence. The defendant's porch would certainly be a place "visitors could be expected to go" in order to knock on the front door." *Id*.

The defendant primarily contests the trial court's factual determinations. DB 10-13. But such factual and credibility determinations fall within the sound discretion of the trial court, and should not be overturned "unless they lack support in the record or are clearly erroneous." *Boyer*, 168 N.H. at 556. Here, the trial court noted, the "characteristics of the property indicated that the area the officers entered was an access route to the main door into the trailer and strangers had an implied license to enter." DA 38 The court further supported this by noting by the absence of a knocker or doorbell on the outer door of the vestibule. DA 39. This would necessitate entering the space to knock on the main door of the residence.

Nor does the fact that the vestibule was enclosed change the analysis. The trial court found that the enclosed vestibule was a "structurally distinct" add-on to the rest of the trailer. It contained disconnected appliances and exposed wiring and piping, a broken window, and an outside door into the vestibule was not airtight. The court found these facts supported the conclusion that the defendant did not use the vestibule as a living space.

Moreover, unlike the rest of the trailer, the defendant had not covered the windows into this space with black plastic. As the trial court noted, "[this fact] strongly indicated that privacy was expected beyond the enclosed area but not in that area itself." DA 38 Ultimately, the facts indicate that the vestibule did not constitute a living space in which the defendant had a reasonable expectation of privacy. The vestibule formed part of the entrance to the trailer, serving as a space for storage, deliveries, and visitors, both invited and unexpected, to stand while they knocked and awaited an invitation to enter the residence.

Based on these factual findings, the trial court's comparison to *Beauchemin* is appropriate. The *Beauchemin* Court emphasized that the officer restricted his movements to the places that visitors could be expected to go because the porch led to the main door of the residence. Likewise, the enclosed vestibule here led to the front door of the residence. Like the front porch in *Beauchemin*, the vestibule bore characteristics that indicated to the trial court the space was not a living space. DA 38.

The court also highlighted that the area officers entered "was an access route to the main door into the trailer that strangers had an implied license to enter." The property consisted of "unobstructed steps leading up

to the exterior door," and "the exterior door did not have a doorbell or knocker." DA 39. In addition, "the interior door into the trailer was plainly visible from the outside." DA 39. The trial court rightly found that intrusion into this area did not constitute intrusion into a living space and all visitors—including law enforcement—had an implied license to enter this space "for the limited purpose of knocking on the interior door." DA 39. Consistent with this limited license for the public to enter, officers restricted their movements to knocking on the interior door and announcing themselves as law enforcement.

By contrast, the defendant points to this Court's decision in *State v. Orde*, 161 N.H. 260 (2011). The *Orde* Court found a violation of the defendant's reasonable expectation of privacy when officers standing on the defendant's deck observed marijuana plants growing there. *Orde*, 161 N.H. at 263. However, the facts of *Orde* make it inapposite to the current case. The deck in *Orde* was attached to the side of the house, and not visible from the street. Trees also lined the defendant's property and provided an added layer of privacy. *Id* at 265. The Court also emphasized that no path lead to the deck and a stand of lilac bushes impeded any access to the deck. *Id*.

In holding that the defendant did have a reasonable expectation of privacy, the *Orde* Court found that the officer had exceeded the scope of his implied invitation when he departed from the obvious paths on the property. *Id* at 266. The Court further highlighted that the deck was used for family activities such as dining, barbequing, and sunbathing. *Id* at 267. It found that "society is prepared to recognize a reasonable expectation of privacy in curtilage used for such personal and family activities." *Id*.

The defendant's vestibule bears none of the qualities that entitled the *Orde* deck to a reasonable expectation of privacy. From the available evidence, the defendant did not utilize his vestibule for personal or family activities. Nor was it located behind the home or shielded from the public by a stand of trees. To the contrary, it served as an entry space that visitors, including law enforcement, possessed an implied license to enter.

2. The trial court correctly determined that an exception to the warrant requirement for exigent circumstances applied to the officers' forced entry.

The law presumes that warrantless searches of the home are *per se* unreasonable. *State v. Theodosopoulos*, 119 NH 573, 578 (1979). To overcome this presumption, the entry must fall within a clearly defined exception to the warrant requirement. In this case, the officers relied upon the exception for exigent circumstances. Under the exigency exception, police may search a home without a warrant when probable cause exists to believe that there is evidence of a crime in the home and it would be impracticable to obtain a warrant due to some exigent circumstance. *State v. Robinson*, 158 NH 792, 798 (2009). The state must overcome the presumption of unreasonableness by a preponderance of the evidence. *Theodosopoulos*, 119 NH at 578.

"Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." *State v. Letoile,* 166 NH 269, 273 (2014). The officers had probable cause to search the trailer for evidence of illegal drug activity well in advance of their forced entry.

This investigation began with an eyewitness informant tip about a marijuana grow operation. Sgt. Torch's own observations outside the residence strongly corroborated this tip. Sgt. Torch smelled the odor of fresh marijuana from outside the trailer, saw that the windows of the trailer were covered with black plastic, and recognized the piping and wiring coming out of the trailer as an indicator of marijuana cultivation.

These facts alone, combined with the informant's eyewitness information about the grow operation, supported probable cause for a search. In addition, when the officers entered the vestibule to knock on the door, they heard the sound of fans running in the trailer, which they also identified as a sign of marijuana cultivation. Finally, when they appeared to be leaving, the officers heard unusual noises consistent with evidence destruction. This further corroborated the officers' probable cause.

Exigent circumstances also necessitated a warrantless search. "Exigent circumstances exist where police face a compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant will present a substantial threat of imminent danger to life or public safety or create a likelihood that evidence will be destroyed." *Robinson*, 158 NH at 798. Whether a situation is sufficiently urgent to permit a warrantless search depends upon the totality of the circumstances and is largely a question of fact for the trial court, which [this Court] will not disturb unless clearly erroneous." *State v. Gay*, 169 N.H. 232, 241 (2016).

The high risk of evidence destruction provided the basis for the exigency in this instance. First, for the reasons already noted, the officers had strong reason to believe that the defendant was growing marijuana in this residence. After police knocked on the door, the defendant asked who

was there. The police identified themselves and then encountered a "prolonged silence" from the defendant inside the trailer. When the officers appeared to be leaving, they heard loud crashing and banging. From their training and experience investigating drug crimes, the officers believed these noises indicated the destruction of evidence.

From these facts, the trial court rightly found that "the officers were faced with circumstances under which it was reasonable to believe that delaying would likely result in the destruction of evidence." DA 42. See *State v. Santana,* 133 N.H. 798, 804, 586 A.2d 77 (1991) (agreeing with trial court that "[w]hile the Fourth Amendment and Part I, Article 19 are not relaxed for drug investigations, the ease of destruction of that evidence sets the framework for the determination of exigent circumstances."). Sgt. Torch's testimony—which the court credited—that the defendant was communicative until he learned that the visitors at his door were police officers, seriously undercuts the defendant's claim that he was sleeping during this entire incident.

The trial court further found that, because their conduct prior to the forced entry was reasonable, the officers did not create the exigency. DA 43. The officers arrived at the residence for a lawful "knock-and-talk" procedure, seeking voluntary cooperation in their investigation. In addition, as the trial court noted, "it is unlikely that the officers could have obtained a search warrant prior to arriving at the property based on the confidential informant tip alone, and they were not required to turn back and apply for a warrant the moment probable cause developed." DA 43 (citing to *State v. Rodriguez*, 157 NH 100, 108 (2008)).

Nor did the officers engage or threaten to engage in unlawful conduct. See, *e.g. Kentucky v. King*, 536 U.S. 452, 461-62 (2011) ("Where. . . the police did not create exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed."). The trial court correctly found that the officers had probable cause to search the residence and exigent circumstances necessitated an exception to the warrant requirement. Because their warrantless entry was justified, the subsequent search warrant rested on valid probable cause.

3. If exigent circumstances did not apply, the search was justified by the inevitable discovery doctrine.

This court has routinely held that "where the trial court reaches the correct result on mistaken grounds, [it] will affirm if valid alternative grounds support the decision." *State v. Beede*, 156 N.H. 102, 106 (2007). Here, even if exigent circumstances did not provide an exception to the warrant requirement, the search was justified by the inevitable discovery doctrine. Under this doctrine, "illegally seized evidence is admissible if a search was justified, and the evidence discovered illegally would inevitably have come to light in a subsequent legal search. *State v. Robinson*, 170 NH 52, 58 (2017).

This Court has not ruled on what the State must prove to demonstrate inevitable discovery. *State v. Broadus*, 167 NH 307, 314-15 (2015). The *Broadus* Court cited to the United States Court of Appeals for the First Circuit's decision in *United States v. Almeida*, 434 F.3d 25, 28 (1st

Cir. 2006), which held that an analysis of inevitable discovery entails three questions:

> first, whether the legal means by which the evidence would have been discovered was truly independent; second, whether the use of the legal means would have inevitably led to the discovery of the evidence; and third, whether applying the inevitable discovery rule would either provide an incentive for police misconduct or significantly weaken constitutional protections.

These considerations favor application of the inevitable discovery in the present case.

As the trial court found, the officers had sufficient evidence for probable cause before they ever stepped foot in the vestibule of the defendant's trailer. The officers arrived at the property following an informant's tip about a grow operation on the property. Upon arrival, the officers made immediately observations that corroborated this tip. The officers noted the odor of fresh marijuana, the windows covered with black plastic, pipes and wiring coming out of the trailer, all consistent with a grow operation.

The officers then had ample evidence to obtain a warrant, if exigent circumstances had not intervened. Assuming that the defendant had not actively hidden or destroyed evidence, a lawful warrant-based search would have inevitably led to the discovery of the marijuana plants, grow lights, and other grow operation equipment. Because the legal means of evidence gathering were both independent and inevitable, the first two *Almeida* factors weigh in favor of applying the inevitable discovery doctrine.

The third *Almeida* question is also satisfied because applying the inevitable discovery doctrine here provides no incentive for police misconduct or weakened constitutional protections. Prior to the warrantless entry, the police made a good faith attempt to secure the defendant's cooperation and investigate the informant's tip. Armed with probable cause for a search warrant, the officers entered the trailer only when they reasonably believed that evidence would be lost if they waited for a warrant. Applying inevitable discovery here incentivizes sound investigation, not police misconduct.

Nor would inevitable discovery weaken constitutional protections. Only by destroying evidence could the defendant have changed the inevitable discovery of his grow operation. Defendants have no constitutional right to hide or destroy evidence, so applying the inevitable discovery in this matter neither condones police misconduct, nor undermines constitutional protections.

CONCLUSION

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

The State requests a ten-minute 3JX oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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December 7 2020

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CERTIFICATE OF COMPLIANCE

I, Zachary Lee Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,563 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.

December 7, 2020 */s/Zachary Lee Higham*
Zachary Lee Higham

CERTIFICATE OF SERVICE

I, Zachary Lee Higham, hereby certify that a copy of the State's brief shall be served on Stephen T. Jeffco, Esquire, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

December 7, 2020 */s/Zachary Lee Higham*
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