

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0161

State of New Hampshire

v.

Jesse Warren

Appeal Pursuant to Rule 7 from Judgment
of the Tenth Circuit Court – District Division – Salem

REPLY BRIEF FOR THE DEFENDANT

Thomas Barnard
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 16414
603-224-1236
(15 minutes oral argument)

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III. THE COURT ERRED BY REINSTATING THE COMPLAINT BECAUSE WARREN WAS NOT REPRESENTED BY COUNSEL AND BECAUSE IT DID NOT FIND THAT HE WAS ABLE TO PAY THE FINE BY THE DEADLINE.

A. Waiver

The State asserts that Jesse Warren could have argued that the Circuit Court erred in an earlier appeal from the Superior Court. SB* 16–17. Based on that premise, the State argues that Warren waived his arguments by not presenting them in that appeal. SB 17. The State’s waiver argument should be rejected because its premise is incorrect. For three reasons, Warren could not have argued that the Circuit Court erred in his earlier appeal from the Superior Court.

First, as a legal matter, there was no Circuit Court judgment to challenge when Warren filed his appeal from the Superior Court. “The effect” of Warren’s appeal from the Circuit Court to the Superior Court for a de novo jury trial was “to vacate th[e Circuit Court’s] judgment.” State v. Green, 105 N.H. 260, 261 (1964). At that point, “[t]he parties st[oo]d as though there had been no [Circuit Court] trial.” State v. Cook, 96 N.H. 212, 214 (1950). With no Circuit Court trial or judgment, there was nothing for Warren to appeal.

Second, Warren’s earlier appeal was from the Superior Court, not the Circuit Court. SB 39 (“Appeal . . . from

* Citations to the record are as follows:
“SB” refers to the State’s brief.

Judgment of the Rockingham County Superior Court”). The Superior Court’s judgment was an “original judgment,” “distinct” from the earlier judgment of the Circuit Court. Id. This Court has no power to review the judgment of one court in an appeal from a different court. See 4 C.J.S. Appeal and Error § 53 (March 2022 update) (“An appellate court has no jurisdiction to decide alleged errors in a related case in separate proceedings that are not part of the appeal.”).

Third, as the parties agreed, the Superior Court lacked subject-matter jurisdiction once Warren waived his right to a jury trial. SB 16. Because the Superior Court lacked subject-matter jurisdiction, this Court, in an appeal from the Superior Court, similarly lacked subject-matter jurisdiction. See id. § 78 (“An appellate court derives its jurisdiction from the lower court, and can have no greater subject matter . . . jurisdiction than the lower court.”). Where a court lacks subject-matter jurisdiction, it is without power to take any action in the case, other than vacatur, dismissal or remand. See Colburn v. Saykaly, 173 N.H. 162, 164 (2020) (“A court does not have power to hear a case concerning subject matters over which it lacks jurisdiction.”). For these reasons, this Court had no power to consider a challenge to the Circuit’s Court’s rulings in the prior appeal.

B. Jeleniewski

The State asserts that State v. Jeleniewski, 147 N.H. 462 (2002) “is analogous” to this case. The State is mistaken. In Jeleniewski, this Court noted that the constitutional right to counsel “attaches when adversary proceedings have commenced,” and that “adversary judicial proceedings are commenced by the filing of a complaint in court.” Id. at 467–68. Because the out-of-state extradition hearing was held three days before the complaint was filed in a New Hampshire court, this Court held, “the defendant’s right to counsel did not attach at the extradition hearing.” Id. at 469.

Here, the State does not dispute that Warren’s right to counsel had already attached prior to the hearing on its motion to reinstate the complaint. SB 18 (“In this case, the defendant’s right to counsel attached upon the filing of the complaints.”). Indeed, the State emphasizes the fundamental shift that occurs when it files a complaint, noting that, prior to the filing of a complaint, “the State is not committed to prosecute, and the defendant is not obligated to defend himself,” but that, after filing, “the defendant is faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” SB 18.

Jeleniewski stands for the unremarkable proposition that there is no right to counsel prior to attachment, which

only occurs when a complaint is filed. It is not relevant to what the State calls “[t]he operative question” in this case: “whether,” after the right to counsel has attached, “the court’s hearing on reinstating the OAS complaint was a ‘critical stage’ of the prosecution.” SB 19.

C. RSA 604-A:2-f

The State asserts that RSA 604-A:2-f, which governs proceedings “for nonpayment of an assessment or nonperformance of community service,” applies only to “a defendant’s repayment obligations for legal services . . . , not to a fine.” SB 34. The State further claims that State v. Brawley, 171 N.H. 333 (2018) “confirms this reading.” SB 33. Again, the State is mistaken.

In Brawley, this Court held that the word “assessment” included legal-service fees, but it did not hold that the word did not include any other obligations. Indeed, the court held that the statute applied to legal-service fees, “among other things.” Id. at 340. It expressly noted that a “fine” was included in the dictionary definition of “assessment.” Id. at 342. Neither Brawley nor anything in the plain language of RSA 604-A:2-f suggests that the statute does not apply to proceedings for the nonpayment of a fine.

D. Harmlessness

Finally, the State argues that even if Warren was entitled to counsel or to an ability-to-pay determination at the

hearing on the State's motion to reinstate the complaint, the violation of those rights was harmless, citing Moses v. Helgemoe, 116 N.H. 190 (1976) (memorandum opinion) and Coleman v. Alabama, 399 U.S. 1 (1970) (remanding for determination of harmlessness). SB 27–28. Moses and Coleman, however, both concerned the denial of counsel at a pre-indictment probable cause hearing. Moses, 116 N.H. at 191; Coleman, 399 U.S. at 3. The purpose of such a hearing is merely to determine whether a defendant can be detained pending indictment. Smith v. O'Brien, 109 N.H. 317, 318, (1969); Coleman, 399 U.S. at 8. Even if the defendant prevails at such a hearing, the State can still obtain an indictment and bring the defendant to trial. Smith, 109 N.H. at 318 (“an accused has no constitutional right that a preliminary hearing shall precede indictment.”); Coleman, 399 U.S. at 8 (“The preliminary hearing is not a required step in an Alabama prosecution. The prosecutor may seek an indictment directly from the grand jury without a preliminary hearing.”).

Here, by contrast, reinstatement of the complaint was a required step; the State could not bring Warren to trial without first prevailing at the hearing on the motion to reinstate that complaint. Thus, Moses and Coleman are distinguishable.

If Warren had been represented by counsel at the hearing on the motion to reinstate the complaint, counsel could have persuaded the court to deny the State's motion due to extenuating financial circumstances and the fact that Warren paid the fine in full, plus penalties, just five months after it was imposed. Similarly, if the court had addressed whether Warren had the ability to pay the fine by the deadline, it may have found that he did not. The record does not establish, beyond a reasonable doubt, that the outcome of the proceeding would have been the same even if Warren's rights to counsel and to an ability-to-pay determination had been honored.

CONCLUSION

WHEREFORE, Jesse Warren respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 1,217 words.

Respectfully submitted,

By /s/ Thomas Barnard
Thomas Barnard, #16414
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

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

/s/ Thomas Barnard
Thomas Barnard

DATED: April 25, 2022