

August 2020

Criminal Law

State of New Hampshire v. Michael Munroe, No. 2018-0433
August 4, 2020
Reversed and remanded

- Whether criminal defendant provided adequate pre-trial notice of defense pursuant to N.H. R. Crim. P. 14(b)(2)(A) and whether witness statements satisfied medical diagnosis or treatment hearsay exception

The defendant was an inmate at the Rockingham County House of Corrections. A fight broke out between the defendant and another inmate resulting in injuries to the other inmate. The defendant was subsequently charged with one count of assault by a prisoner and found guilty. On appeal, the defendant challenged the trial court's decision to strike the defendant's notice of self-defense pursuant to N.H. R. Crim. P. 14(b)(2)(A) due to insufficient factual allegations to support the defense, as well as the trial court's decision to permit a witness to testify over a hearsay objection.

Regarding the notice of defense, the trial court determined the factual grounds set forth in the defendant's notice were insufficient to support a self-defense claim because the notice did not contain any facts to suggest that the injured inmate threatened the defendant. On appeal, the

Supreme Court stated that a defendant's burden for setting forth the basis for a pure defense is not substantial. The Supreme Court held that the trial court erred when it assessed the grounds set forth in the defendant's notice because N.H. R. Crim. P. 14(b)(2)(A) does not allow the trial court to require a defendant to identify evidentiary support for a noticed defense. In doing so, the Supreme Court explained that N.H. R. Crim. P. 14(b)(2)(A) does not distinguish between a notice of a pure defense—a defense the State must disprove beyond a reasonable doubt—and notice of an affirmative defense—a defense a defendant must prove by a preponderance of the evidence. The Supreme Court reversed and remanded the matter for a new trial and held that the defendant shall be entitled to a jury instruction on self-defense as long as the defense was “supported by some evidence.”

Regarding the defendant's hearsay objection, the State elicited testimony from the doctor that treated the injured inmate. The doctor testified to the identity of the injured inmate. On appeal, the Supreme Court held that the trial court unsustainably exercised its discretion in admitting the doctor's testimony because the testimony did not satisfy the hearsay exception set forth in N.H. R. Ev. 802. Specifically, the Supreme Court stated that the statement concerning the injured inmate's identify did not satisfy the second part of the N.H. R. Ev. 802 hearsay exception test because it did not describe medical history, past or present symptoms or sensations, their in-

At-a-Glance Contributor



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ception, or their cause.

Gordon J. MacDonald, attorney general (Sean R. Locke, assistant attorney general, on the brief and orally) for the State. Kristen B. Wilson, Kristen Wilson Law, PLLC, of Portsmouth, for the defendant.

Landlord Tenant

Richard Horton & a. v. David Clemens & a.
August 11, 2020
Affirmed

- Whether an eviction notice that does not contain the same information as the judicial branch form eviction notice is nonetheless legally sufficient because it contains the information required by RSA 540:3.

Landlords brought possessory action against tenants, providing a notice of eviction demanding rent owed. Pursuant to RSA 540:3, the eviction notice gave the tenants seven days' notice of the eviction, specified the reasons for the eviction, and informed the tenants of their right to avoid eviction by paying arrearage and liquidated damages. The tenants objected and moved to dismiss arguing that the landlords' failure to include in the eviction notice the same information that is provided in the judicial branch eviction form rendered the notice fatally defective. The circuit court dismissed landlords' petition to evict defendants for nonpayment of rent because the eviction notice did not contain the same information contained in the judicial branch form eviction notice pursuant to RSA 540:5, II (2007). The landlords appealed.

On appeal, the Supreme Court explained that RSA 540:2, II(a) authorized landlords to terminate a tenancy for nonpayment of rent “by giving to the tenant or occupant a notice in writing to quit the

premises in accordance with RSA 540:3 and 5.” The Supreme Court further explained that pursuant to RSA 540:5, II, although landlords are not required to use forms created by the circuit court when seeking to evict a tenant, a landlord's notice of eviction “shall include the same information as is requested and provided in such forms.” The Court further explained that the language on the judicial branch form eviction notice was not beyond the scope of the circuit court's authority to create forms that comply with existing law because pursuant to RSA 490:26-d, circuit courts have statutory authority to create judicial forms that are necessary for the effective administration of justice and consistent with the circuit court's constitutional obligations to ensure equal access to justice.

The landlords' eviction notice did not include the information found in the judicial branch form eviction notice, which provides that: (1) the eviction notice is not a court order requiring tenants to vacate property; landlords may proceed with the eviction process if the tenants remain on the premises; (3) the process will involve being served with a writ; (4) the tenants have a right to dispute the reasons for eviction at a judicial hearing; and (5) tenants must file an appearance before the return date in order to dispute the reasons for their eviction. As a result, because the landlords failed to strictly comply with the requirements of RSA 540 et. seq., dismissing the eviction proceedings was appropriate. The landlords were not prohibited from filing a new eviction notice and a new writ of possession.

Gabriel Nizetic, Plymouth Law Center, of Plymouth, for the plaintiffs. David Clemens and April Hanks, self-represented parties, filed no brief. Stephen Tower, on the brief, New Hampshire Legal Assistance, as amicus curiae.

Compensation Appeals Board

Appeal of Laura Leborgne, No. 2019-0464
August 12, 2020
Reversed and remanded

- Whether the Compensation Appeals Board improperly considered therapists' failure to submit a Workers' Compensation Medical Form within 10 days of the first treatment as part of its determination that the petitioner failed to establish that treatment was reasonable, necessary, and related to workplace injury.

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In May 2011 the petitioner injured herself working as a nurse for the respondent, Elliot Hospital, while transitioning a patient from a chair to a bed. The petitioner was subsequently diagnosed with a trapezius strain and from 2012 to 2016 consistently treated with opioids to control her pain. Beginning in 2016, the petitioner's treating physician in New Hampshire prescribed chiropractic treatments and massage therapy. The petitioner then moved to New York and sought treatment from an orthopedic pain specialist who ordered her to continue massage therapy. The petitioner received massage therapy while in New York from two licensed massage therapists from May 2017 to January 2018. The petitioner paid out of pocket for her treatment. Prior to the start of the petitioner's treatments in New York, the respondent had covered the costs of her massage therapy.

The respondent submitted the bills she incurred for the New York massage treatment, which were denied. The petitioner requested a hearing with the New Hampshire Department of Labor which, after a hearing, denied the petitioner's request for reimbursement. The petitioner then appealed the hearing officer's decision to the Compensation Appeals Board ("CAB"). The CAB afforded substantial weight to the petitioner's New York orthopedic pain specialist's opinion that the massage treatments were reasonable and necessary in managing the petitioner's work related injury. The CAB also found the petitioner's New York orthopedic pain specialist's opinions to be more reasonable and sounder than the respondent's doctor's opinions. Nevertheless, the CAB concluded that the petitioner did not meet her burden of proof that the medical treatments were reasonable, medically necessary, and causally related to the workplace injury. In doing so, the CAB noted that the New York massage therapists did not furnish a Workers' Compensation Medical Form within 10 days of the first treatment as required by RSA 281-A:23, V(c). The CAB denied the petitioner's request for a rehearing. The petitioner then filed an appeal to the New Hampshire Supreme Court.

On appeal, the Supreme Court found that the CAB erroneously considered non-compliance with RSA 281-A:23, V(c) in its determination of whether the petitioner's New York treatment was reasonable, necessary, and related to her workplace injury. The Supreme Court reasoned that failure to meet the requirements of RSA 281-A:23, V(c) is irrelevant to such a determination. Rather, the test is whether a petitioner presents objective evidence showing, that at the time the treatment was ordered, it was reasonable for the peti-

tioner to seek further treatment. Moreover, given the CBS's factual findings and credibility determinations regarding the petitioner and her New York physician, there was no competent evidence in the record upon which to affirm the CAB's decision that the petitioner did not meet her burden. Finally, the Supreme Court rejected the respondent's argument that the petitioner was barred on a stand-alone basis from being reimbursed for the New York treatment because the New York massage therapists failed to comply with RSA 281-A:23, V(c). Rather, the Court ruled that RSA 281-A:23, V(c), which states that "there shall be no reimbursement for services rendered, unless the health care provider or health care facility giving medical, surgical, or other remedial treatment furnishes the report required in subparagraph (b) to the employer, insurance company, or claims adjusting company within 10 days of the first treatment," applies only to health care providers and facilities seeking reimbursement for services rendered—not to a patient-employee who is seeking reimbursement of payments she made out-of-pocket to providers for treatment received.

Mark D. Wiseman, on the brief, and Callan E. Sullivan, orally, Cleveland, Waters and Bass, P.A., of Concord, for the petitioner. Eric G. Falkenham, on the brief and orally, Devine, Millimet & Branch, Professional Association, of Manchester, for the respondent.

Criminal Law

The State of New Hampshire v. Shawn Minson, No. 2019-0124
August 18, 2020
Affirmed

- Whether the trial court erred by denying defendant's motion to suppress evidence obtained resulting from a protective sweep.

Police received information from a confidential informant that the defendant was selling large quantities of drugs and was staying at a motel. The police obtained an arrest warrant for the defendant. The defendant was subsequently arrested at the threshold of his motel room door. In the process of the arrest, police observed women moving in the motel room, which was full of smoke, and one woman quickly turned her back to the officers and the open door while moving her arms and hands. The police then entered the motel room to secure it. Upon doing so, the police discovered money and drugs.

On appeal, the defendant argued that the police violated Part I, Article 19 of

the New Hampshire Constitution and the Fourth Amendment of the Federal Constitution when they performed a protective sweep of the motel room and discovered incriminating evidence. The defendant specifically argued that the trial court erred in denying his motion to suppress because the police lacked specific and articulable suspicion that the motel room harbored someone who posed a danger.

The Supreme Court held that the police had specific and articulable information which, when viewed in its totality, gave rise to a reasonable suspicion justifying a protective sweep. Specifically, the defendant was suspected of selling narcotics which when coupled with the police officers' observations of the women's conduct through the open motel door gave rise to sufficient information to lead a reasonably prudent law officer to believe that the motel room contained dangerous individuals warranting a protective sweep.

Additionally, the Supreme Court determined that the trial court did not abuse its discretion when it denied the defendant's request to reopen the motion-to-suppress record following his conviction, but before sentencing, based upon the disclosure of a new police report that evidenced that the defendant sold drugs at a location in Keene, separate from his motel room. The defendant argued that this information proved that the police only knew he was residing at the motel but not that he was selling drugs from the motel. The Supreme Court ruled that the trial court properly exercised its discretion when it concluded that nothing in the new police report would have impacted its analysis on the motion to suppress because the report corroborated the information the police already had; namely, that the defendant sold drugs and was staying at the motel.

Gordon J. MacDonald, attorney general (Shane B. Goudas, attorney, on the brief and orally) for the State. Christopher M. Johnson, chief appellate defender, of Concord, on the brief and orally, for the defendant.

Public Way Discontinuance

Bellevue Properties, Inc. v. Town of Conway & a., No. 2019-0302
August 25, 2020
Affirmed

- Whether trial court applied the incorrect legal standard to evaluate a town's decision to discontinue a public road and whether trial court erroneously concluded that the interests in discontinuing the road outweighed the interests of plaintiff and public in the road's continuance.

The plaintiff owns a hotel that abuts a retail village owned by the defendants. The hotel and retail village are encircled by a road known as Common Court, half of which is privately owned and maintained by the defendants and the other half of which is public and owned by the Town of Conway. Common Court provides access to both the plaintiff and the defendants' properties. The public had access to the hotel from a variety of ways, one of which included a public road that connected to McMillan Lane, which then connected to the public portion of Common Court. The defendants sought to expand their retail village on an undeveloped parcel of land, portions of which McMillan Lane ran through. As a result, the defendants sought to remove McMillan Lane and replace it with a new road that the defendants would build and maintain at their own expense and which would connect to the public sections of Common Court. In order to do so, the defendants submitted a subdivision application to the Town's planning board. While the application remained pending, the Town held a vote and adopted a warrant article pertaining to the discontinuance of McMillan Lane and through which the defendants would take control of, maintain, and keep open to the public McMillan Lane.

The plaintiff appealed the Town's decision to discontinue McMillan Lane to the superior court. The trial court applied a balancing test that considered the Town's interests not only in reduced maintenance costs but also other Town interests. Following a bench trial, the trial court affirmed the Town's decision because the benefits to the Town resulting from discontinuing McMillan Lane outweighed the plaintiff's interests in its continuance. The trial court found, among other things, that through the discontinuance, the Town would save money in maintenance costs on an annual basis and it would allow for the development of land consistent with the Town's plan. In particular, the Town would gain a new road, valued at approximately \$1 million, at no cost to the public. The trial court rejected the plaintiff's argument that it would cause harm to the plaintiff's business interests because the plaintiff had to rely on the defendants, private entities, to maintain and provide public access to the new road, as it was too uncertain to outweigh the Town's interests in discontinuing the road.

On appeal to the Supreme Court, the plaintiff asserted that the trial court applied an incorrect balancing test to evaluate the Town's decision to discontinue the

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road and that the trial court erroneously concluded that the Town's interest in discontinuing the road outweighed the interests of the plaintiff and the public in the road's continuance. The Supreme Court concluded that in assessing an appeal of a public highway discontinuance brought by an abutting landowner, the trial court is not restricted to considering solely the Town's interests in reduced maintenance costs. Rather, the trial court may consider other interests taken into consideration by a town because RSA 231:43, the statute authorizing a town to discontinue certain classes of roads, does not specifically require that there be any particular grounds to justify discontinuance. Further, the Supreme Court rejected the plaintiff's argument that under the balancing test employed by the trial court, its interests outweighed the Town's interests because the plaintiff would have no recourse against the defendants if they, or their successors, do not maintain or otherwise deny access to the road. In doing so, the Supreme Court noted that the plaintiff had current access to the road and the defendants would not cease maintaining the new road or close it to the public based on the defendants' previous history of maintaining other private roads connecting to Common Court. The trial court's factual findings also supported that the plaintiff could obtain an easement over the road. Lastly, the plaintiff failed to identify any evidence that the plaintiff would suffer harm as a result of the discontinuance because hotel guests could continue to access the hotel from at least two other ways.

Roy W. Tilsley and Christina A Ferrari, on the brief, and Mr. Tilsley orally, Bernstein, Shur, Sawyer, & Nelson, P.A., of Manchester, for the plaintiff. Peter J. Malila, Jr. on the brief and orally, Hastings Malia P.A., of Fryeburg, Maine, for defendant Town of Conway. Derek D. Lick, orally, Sulloway & Hollis, P.L.L.C., of Concord, for defendants 13 Green Street Properties, LLC, 1675 W.M.H., LLC, and Settlers' R2, Inc., joined in the brief of Town of Conway.

Political Question

John Burt. & a. v. Speaker of The House of Representatives, No. 2019-0507
August 28, 2020
Reverse and remanded

- Whether the trial court erred in dismissing the plaintiffs' complaint challenging House of Representatives Rule 63 prohibiting carrying or possessing deadly weapons in House Chambers on grounds that the complaint presented a nonjusticiable political question.

Members of the New Hampshire House of Representatives filed suit against the Speaker of the New Hampshire House of Representatives challenging the constitutionality of House Rule 63, which prohibited carrying or possessing a deadly weapon in The House of Representatives. Specifically, the plaintiffs asserted that House Rule 63 violated Part I, Article 2-a of the New Hampshire Constitution, which states all persons have the right to keep and bear arms in defense of themselves, their families, their property and the state. The trial court dismissed the plaintiffs' complaint, reasoning that the issue presented a nonjusticiable question and therefore the

trial court lacked subject matter jurisdiction. In particular, the trial court reasoned that the State Constitution grants both houses of the legislature the authority to settle the rules of proceedings in their own house and that it was not the constitutional duty of the judiciary to review the rules of proceedings within the legislative chambers.

On appeal, the plaintiffs argued that the trial court erred because their challenge to the constitutionality of House Rule 63 presented a justiciable issue. The Supreme Court agreed. The Supreme Court reasoned that a controversy involves a political question "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." While the State Constitution demonstrably commits to the legislature the authority to enact its own internal rules and proceedings—compliance with which are not justiciable—the judicial branch may provide judicial intervention where a claim concerns whether or not a violation of a mandatory constitutional provision has occurred. The Supreme Court concluded that the legislature may not, even in the exercise of its "absolute" internal rulemaking authority, violate constitutional limitations. Therefore, the controversy as to whether House Rule 63 violates the defendants' fundamental right to keep and bear arms under Part I, Article 2-a of the State Constitution is justiciable, and that the trial court erred when it dismissed the complaint.

In reaching its conclusion, the Supreme Court distinguished *State v. LaFrance*, 124 N.H. 171 (1983), a case where the Supreme Court considered the constitutionality of a statute mandating that law enforcement of-

ficers be allowed to wear firearms in any courtroom in the state. There, the Supreme Court reasoned that the statute violated the separation of powers because it infringed upon the judiciary's inherent authority to make its own internal procedural rules. The Supreme Court went on to say in *LaFrance* that "it would not be within the constitutional prerogative of the judiciary to tell either of the other two branches of government who could or could not wear guns in the Executive Council Chamber or in the Representatives' Hall. Here, in distinguishing *LaFrance*, the Supreme Court noted that its commentary on deciding the extent to which any branch of government could regulate deadly weapons in Representatives Hall was dicta and, moreover, that *LaFrance* did not deal with the issue of whether a limitation on an individual's right to bear arms would be constitutional.

The Supreme Court expressed no opinion on whether House Rule 63 was in fact constitutional or not because the trial court did not reach the merits of the constitutional challenge in dismissing the plaintiffs' complaint.

Dan Hynes on the brief and orally, Liberty Legal Services, of Manchester, for John Burt. James S. Cianci, house legal counsel, on the brief and orally, for the Speaker of the New Hampshire House of Representatives

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