State of New Hampshire Supreme Court

NO. 98-461

2000 TERM

AUGUST SESSION

STATE OF NEW HAMPSHIRE

v.

PAUL HILL

RULE 7 APPEAL FROM FINAL DECISION

BRIEF OF AMICUS CURIAE, PATRICIA WELSH

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Can a person be guilty of false report to law enforcement when an officer witnessed the person engage in the conduct for which s/he was being arrested?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In Paul Hill's case, officers saw Mr. Hill leaving a bar impaired, followed him to his home, and arrested him there for driving while intoxicated and disobeying a police officer. Upon being booked, Mr. Hill identified himself with a false name.

Patricia Welsh's case is similar. Ms. Welsh was arrested during a meeting at the University of New Hampshire at which representatives of the Walt Disney company were recruiting applicants for an internship program. The meeting took place on the University campus in a large public room in the student union building, and was attended by UNH students. The meeting consisted of Disney representatives describing the program and playing a promotional video, and former interns presenting testimonials about their experience.

Ms. Welsh sought to educate the students about Walt Disney's third-world employment practices, which include paying 28 cents per hour or less, hazardous working conditions, and suppression of employee efforts to unionize. During the meeting, other protesters, wearing masks with white skull-and-crossbones over a likeness of Mickey Mouse, held signs and distributed leaflets. University of New Hampshire officers observed Ms. Welsh speaking loudly, for which she was arrested and charged with disorderly conduct.

Ms. Welsh was handcuffed, placed in a cruiser, and escorted by UNH officers to the University's booking station. Upon being asked for identification, she reported falsely that her name was "Patricia Rosemary Roland."

The charges of disorderly conduct were later dropped, but Ms. Welsh was found guilty of false report to law enforcement in the Durham District Court (*G. Taube*, J.).

Her appeal followed. *State v. Welsh*, N.H. Sup. Ct. No. 2000-069. Because the issue raised in her appeal the same as in this case, Ms. Welsh sought permission to stay consideration of her appeal pending the outcome of *State v. Hill* and to file this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Patricia Welsh, *amicus curiae*, first argues that a conviction under New Hampshire's false report statute requires proof the defendant intended that the officer be actually persuaded that another person did the crime, and further, that the officer undertake some action, such as instigating an investigation, based on the intended belief.

She then argues that when, as in hers and Paul Hill's cases, an officer observes the conduct for which the defendant is arrested, it is logically impossible that providing a false name can be for the purpose of inducing the officer to believe that another person committed the crime.

Finally, Ms. Welsh canvasses the legislative history and other states' cases to support her contention that her conduct is not criminalized by New Hampshire's statute.

ARGUMENT

I. One Cannot Be Guilty of False Report When an Officer Observes the Illegal Conduct

A. The False Report Statute Requires Inducement

New Hampshire law provides that a person is guilty of false report to law enforcement if she "[k]nowingly gives or causes to be given false information to any law enforcement officer with the purpose of inducing such officer to believe that another has committed an offense." RSA 641:4,I

"Inducing" has two similar, but distinct, meanings. First, it means "to lead or move by persuasion or influence." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2nd ed.), *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 2000.

But it has a more active meaning too. "Inducing" means "to bring about, produce, or cause." RANDOM HOUSE DICTIONARY. Webster's defines it as "to call forth or bring about by influence or stimulation." MERRIAM-WEBSTER'S. As usual though, the OED is most complete: To induce is

> "To lead (a person), by persuasion or some influence or motive that acts upon the will, to some action, condition, belief, etc.; to lead on, move, influence, prevail upon (any one) *to do* something."

OXFORD ENGLISH DICTIONARY (emphasis and parentheses in original).

Courts have recognized the active extent of the word. In *People v. Springs*, 300 N.W.2d 315 (Mich. App. 1980), for example, the court distinguished "inducing" from "encouraging." The court said inducing implies "an active leading to a particular action" while "encouraging indicates a less active role" which "falls short of persuading." *Springs*, 300 N.W.2d at 319. *See, e.g., LaPage v. United States*, 146 F.2d 536 (8th Cir. 1945) (telephone call requesting woman to

return to defendant's house of prostitution, which caused woman to make the interstate trip, was "inducing" for purposes of federal crime). Inducement implies effect; and when it fails to produce it, it fails to be an inducement. A doctor has not induced labor, for example, if labor is not the consequence of the work.

The New Hampshire statute requires an intent to induce. Thus, to be guilty, the defendant must intend that the officer be persuaded that another person did the crime, and further, must intend that the officer undertake some action, such as instigating an investigation, based on the belief. Merely telling a lie is not enough. The purpose of the lie must be to produce belief and action. If a woman, when asked her age, deducts a few years, the conceit about her age is legally meaningless unless and until it dissuades authorities from investigating her further, takes her off the hook, or makes room for some innocent suspect a few years older.

B. An Intent to Induce the Officer Who Observed the Misconduct is a Logical Impossibility

When a defendant lies about their identity while in police custody, as did both Mr. Hill and Ms. Welsh, it is inconceivable that the defendant intended the lie to alter either belief or action. The defendants knew, of course, as well as the police knew, that it was the defendant being arrested. The lie may have been for the purpose of delay, avoiding embarrassment, or some other reason. But because of the obvious connection between the officer's observation and the defendant's initial arrest, there cannot be an intent to induce either belief or action.

Everything substantive in these cases happened outside the realm of the defendants' words. An officer witnessed a disturbance and determined the cause of it. If the arrestee, on questioning, says she is Indira Ghandi, or Priscilla Presley, or a blend of the two, it cannot make a difference.

The defendant's nomenclature, whether comical or irritating, did nothing to undermine what the arresting officer knew empirically. The misnomer can make no difference because it can make no inducement.

In these circumstances, an intent to induce is a logical impossibility. Because the officers *saw* the defendants committing the acts for which they were being arrested, it is not possible for the defendants to induce the officers to believe others committed it. Because the officers were aware that the person in front of them – whatever her name – did the acts, they could not possibly be induced, and in fact were not. Thus, the defendants' conduct – or anyone's conduct which was observed by officers – cannot constitute the crime of false report to law enforcement.

The impossibility is borne out in both Ms. Welsh's and Mr. Hill's cases. There is no known evidence in either case that the officers either believed or took action on the defendants' lies. Rather, there was a figurative roll of the eyes in both.

II. Legislative History

The false report to law enforcement is a specific intent crime in New Hampshire. The statute provides that a person is guilty not merely with a generalized criminal intent, but only if she "[k]nowingly gives or causes to be given false information to any law enforcement officer with the purpose of inducing such officer to believe that another has committed an offense." RSA 641:4,I.

A. Genesis of the False Report Statute

The current false report statute was enacted in 1971. *See* RSA 641:4 (legislative history note). Its genesis, along with most of New Hampshire's criminal law, was the general recodification of the State's criminal code. 1971 LAWS 518:1.

In its report to the General Court, the legislative study committee which recommended the statute noted:

> "This is a modified version of the Model Penal Code, § 241.5, and replaces RSA 572:49 (1967 Supp.) which defines a similar offense."

Report of the Commission to Recommend Recodification of Criminal Law (Frank R. Kenison, Chairman) at 91 (1969), (*appendix* at 19). *See State v. Bergen* 141 N.H. 61 (1996) (use of Model Penal Code and commentary to construe statute); *State v. Dufield*, 131 N.H. 35 (1988) (same).

B. False Report Statute Replaced the Former RSA 572:49

The former RSA 572:49, repealed upon passage of the criminal code recodification, did not contain the specific intent of the current statute. It provided simply:

> "Whoever, knowing the same to be false, makes or causes to be made a false alarm or a false report of crime or that an explosive or other dangerous substance threatens the safety of any person, persons or property, shall be punished by a fine of not more than one hundred dollars or imprisoned for not more than six months."

RSA 572:49 (Supp. 1971, the last collection of New Hampshire statutes containing the statute before recodification and repeal), (*appendix* at 20).

Certainly the former RSA 572:49, as noted by the Kenison Commission, defines a similar crime to the then-proposed false report statute. But there are two differences. The repealed statute does not make a crime the act of giving a false name upon arrest. It was aimed instead at a person reporting a crime that did not occur such as creating a bomb scare when there is no bomb, or reporting a theft when nothing was stolen.[1] Because of this, the repealed statute also did not contain a requirement that the state allege and prove an intent to induce the police to believe another person committed the crime.

Thus the new statute broadened the definition of false report. Under the old statute, Ms. Welsh clearly would not be liable. No doubt cognizant of its charge to merely recodify[2] New Hampshire's criminal code and not to create new crimes, while the Kenison Commission broadened the statute, it was careful to not broaden it too far.

By requiring the specific intent, the statute did not make an arrestee liable for false report unless the person attempts to avoid detection of the underlying crime by misleading the police and blaming it on another person, and having the police believe and act on the deception.

In contrast to the New Hampshire statute, the Nebraska false reporting statute, for example, includes a specific intent only to "impede the investigation of an actual criminal matter." NEB. REV. STAT. § 28-907(a). Thus, the Nebraska court approved a conviction under the statute when the defendant provided a false identity for another person. *State v. Nissen*, 395 N.W.2d 560 (Neb.

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[1]Such acts are currently criminalized in RSA 641:4, II.

[2]"The governor shall appoint a commission consisting of three persons learned in the law who are authorized and directed to supervise the work necessary to revise, codify, and amend the criminal laws of this state and to arrange the same in a systematic annotated and condensed form, so far as they deem wise, according to the general scheme and plan of the Revised Statutes Annotated." 1967 LAWS 451:1.

1986). The New Hampshire legislature, however, did not use such broad language which criminalizes any impediment to an investigation. Instead, to be found guilty in New Hampshire the defendant must have had an intent to implicate another person.

C. The Legislature Explicitly Rejected a Suggestion to Make it a Crime When an Arrestee Falsely Identifies Herself

As noted, before the 1971 recodification of the criminal code, New Hampshire had a statute similar to the current one. The only difference between the statute as proposed by the Kenison Commission and the statute as it exists today is in section I; the legislature in 1971 added to the Kenison Commission's proposal the words "or causes to be given." For the purposes of this case, however, the Commission's proposal and the current statute are identical. *Compare* current RSA 641:4 with proposed RSA 586:4 contained in *Report of the Commission to Recommend Recodification of Criminal Law* (Frank R. Kenison, Chairman) at 91 (1969) (*appendix* at 19).

During its deliberations on the Kenison Commission's proposal, the legislature heard from the Chief of the Londonderry Police, Chief Ball, who was then active in the Chiefs of Police Association and testified on many parts of the Kenison Commission's proposed recodification. At a joint hearing before both the House and Senate Judiciary Committees on November 18, 1970, convened to review the Kenison Commission draft recodification, Chief Ball testified that he

> "would like to see an additional paragraph where it [would be] a violation to give false information to an officer. In this case, I am thinking of perhaps where they give you a wrong name or some such thing, it would be a violation under the law. I would like to see that included."

Criminal Codification Commission, Hearing held Nov. 18, 1970, at 34 (*appendix* at 24).

It is apparent, however, that no such addition was made. When a legislature considers and rejects a

proposal, courts must construe the resulting statute cognizant that the rejected proposal is not included. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quotation and citations removed); *see e.g., State v. Crawley*, 447 A.2d. 565, 568 (N.J. 1982) (legislature's consideration of proposal, ultimately rejected, shows intent to not include proposal in law). Chief Ball suggested a provision that would address precisely the situations now before this court. The legislature rejected it.

Based on this history, it cannot now be maintained that Ms. Welsh or Mr. Hill can be charged with a crime explicitly considered and rejected by the legislature.

D. False Report Statute is Based on the Model Penal Code, § 241.5

If the court nonetheless finds that the statute criminalizes the conduct here charged, the court must carefully scrutinize the intent provision. For a conviction the state must prove that the defendant intended to induce the police to believe a crime had been committed by another person, and also intended that the police instigate an investigation based on the belief.

The model code upon which New Hampshire's false reporting statute is based provides:

> "(1) Falsely Incriminating Another. A person who knowingly gives false information to any law enforcement officer *with purpose to implicate another* commits a misdemeanor.
> "(2) Fictitious Reports. A person commits a petty misdemeanor if he:
> (a) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or
> (b) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident."

MODEL PENAL CODE, § 241.5 (emphasis added) (*appendix* at 25).

The conduct contemplated by section (2) of the model code is largely governed by current New Hampshire statute RSA 641:4, II and other portions of Chapter 641 and is not applicable here. The specific intent portion of section (1) of the model code has been italicized.

The commentary to the Model Penal Code recognizes several problems inherent in the false report statute.

Without the specific intent in RSA 641:4, the statute would broadly make a criminal of anybody who "knowingly gives . . . false information" to a police officer. Giving information is, of course, speech. The American Law Institute, which issued the Model Penal Code, recognized constitutional limits on speech – the First Amendment, which limits government's ability to criminalize speech generally, and the Fifth Amendment, which regulates the use of speech in the criminal context. It also recognized policy problems with the statute if the specific intent provision had not been included.

The commentary to the Model Penal Code cites *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967). The *Friedman* court was "concerned that open discussions between members of the public and law enforcement officials would be threatened by treatment of oral and unsworn false statements." MODEL PENAL CODE, § 241.5 *commentary* n.1 at 159, (*appendix* at 25). It

continues, "[b]eneficial dialogue between citizens and law enforcement officials is unlikely to be deterred . . . in view of the stringent culpability showing that must be made." *Id.*, n.2 at 161, (*appendix* at 26). The drafters were concerned that without the specific intent provision, the statute "would seem to include even a suspect's denial of guilt, conduct that has been held beyond the reach of [a] federal statute" on fifth amendment principles. *Id*, n.1 at 160, *citing Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962). *See e.g.*, *State v. Pandozzi*, 347 A.2d 1 (N.J. Super. 1975) (defendant's "exculpatory no" was held to not be crime of false report even though it was a lie). Without the provision, the statute is probably unconstitutional under both the federal fifth amendment and the New Hampshire Constitution, pt. 1, art. 15. With the specific intent provision, the statute still regulates speech, but may be constitutional based on other First Amendment principles. *See Schenck v. United States*, 249 U.S. 47 (1919).

Because of these concerns, if the statute contemplates the conduct charged here, the specific intent provision is necessary to the statute. To avoid constitutional problems, the intent provision must be strictly construed. *See State v. Williams*, 92 N.H. 377 (1943) (ambiguous criminal statutes to be construed in favor of the accused); *Johnson v. State*, 542 A.2d 429 (Md.App. 1988). This means that for a conviction the state must prove the defendant intended to make the police believe another person committed the crime, and the defendant further intended to have the police instigate an investigation based on that belief.

III. Other States' Construction of Similar Statutes

Several states have adopted some or all of the same model code upon which the New Hampshire statute is based. Cases decided under them show that an arrestee giving a false name does not amount to the crime of false reporting unless the state can show the arrestee had the specific intent to induce the police to believe another person committed the crime for which the arrestee was arrested and to have the police act on that belief.

In *Johnson v. State*, 542 A.2d 429, 437-38 (Md.App. 1988), the defendant, after being arrested, gave a false name and date of birth, two fictitious addresses, and lied about his prior convictions. The court construed Maryland's statute which is based on the Model Penal Code. The court set forth the four elements necessary to prove the crime. To be guilty of false reporting a person:

> "1) makes or causes to be made a false statement, report or complaint
> 2) to any police officer . . .
> 3) knowing the same, or any material part thereof, to be false, and
> 4) with intent:
> a) to deceive, and
> b) to cause an investigation or other action to be taken as a result thereof."

Johnson, 542 A.2d at 435 (paragraphing in original). The court reversed the conviction, holding that while the defendant "lied in response to questioning,"

> "the processing officer's brief futile attempt to verify [his] false responses to routine booking or processing questions . . . was not the kind of investigation . . . contemplated by the statute. Furthermore, we do not believe the giving of false information in response to routine questioning by the police, even though it is likely to hinder or delay an investigation already underway, is the type of false statement"

which the legislature intended to criminalize. *Id.* at 437-38. *See also Choi v. State*, 560 A.2d 1108 (Md. 1989) (statute criminalizes only statements which tend to instigate an investigation,

not statements made during on-going investigation).

In *Commonwealth v. Soto*, 650 A.2d 437 (Pa. Super. 1994), the court also construed a statute based on the Model Penal Code. The police attempted to serve a bench warrant on Wilda Soto. Although she denied being Wilda Soto and instead told police she was one Marisol Rodriguez, her babysitter's name, police later learned she was who they were looking for. The court set forth the elements.

> "To prove this crime . . . (1) the defendant must have made the statement to a law enforcement officer; (2) the defendant's statement must be false; (3) the defendant must know the statement is false; and (4) the defendant must intend to implicate another."

Soto, 650 A.2d at 110. The court reversed the conviction based on the facts. It wrote, "[f]alsely identifying oneself is not the same as intentionally implicating another individual," and found that there was no evidence that "led the officers to suspect Rodriguez had committed a crime." *Id.*

In *City of Columbus v. Fisher*, 372 N.E. 2d 583 (1978), police detained Gregory Fisher on suspicion he had escaped from custody. He told the police his name was Albert Fisher, but supplied his correct birthday and social security number. Police later learned he was, in fact, Gregory Fisher. Mr. Fisher offered as explanation that he often used the fictitious name because he found that his criminal record prevented him from getting a job. In reversing the conviction, the court construed the ordinance which was based on the Model Penal Code. If found that the specific intent to mislead must be strictly enforced. If not, the police could prosecute mere misstatements made in response to police questioning even though they do not implicate other people nor cause the police to follow fictitious leads.

In *People v. Craig*, 26 Cal.Rptr.2d 184 (Cal.Super. 1993), the defendant reported, then retracted, an allegation that police had stolen his money during a traffic stop. The court reversed his conviction for false report finding that the false reporting statute was "intended to deter false reports of crimes and the resulting inconvenience and danger to other members of the public." *Id.* at 187. Here, the court said, the "appellant's complaint did not cause the sheriff's department to take any action that may have resulted in danger or even inconvenience to any member of the public." *Id.*

These cases demonstrate that to prove the crime the state must show that the defendant intended to make the police believe the false statement and to instigate an investigation based on the belief. Since that did not (and logically could not) occur here, the defendants are not guilty of the crime charged.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of the defendants.

Respectfully submitted,

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By her Attorney,

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Dated: August 7, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Patricia Welsh requests that Attorney Joshua L. Gordon be allowed that time for oral argument as the court deems appropriate.

I hereby certify that on August 7, 2000, copies of the foregoing will be forwarded to Janice Rundles, Assistant Attorney General, and to Jenifer Bensinger, Assistant Appellate Defender, counsel for Paul Hill.

Dated: August 7, 2000

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APPENDIX