State of New Hampshire Supreme Court

NO. 2011-0732

2012 TERM

JUNE SESSION

State of New Hampshire

v.

Alan Lathrop

RULE 7 APPEAL OF FINAL DECISION OF
OSSIPEE DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT ALAN LATHROP

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

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QUESTION PRESENTED

Did the court err in finding Alderberry Lane in Moutonboro a "way" for purposes of the DWI statute, and thus err in convicting Alan Lathrop? (Preserved: NOTICE OF DEMAND FOR FORMAL PROOF OF PUBLIC HIGHWAY OR "WAY" (Sept. 14, 2010), *Appx.* at 5).

STATEMENT OF FACTS

I. Accident and Arrest

During an early evening in September 2010Alan Lathrop was returning from dinner at a Chinese restaurant, RECEIPT, exh. 5, *Appx.* at 57, to his home in Moultonboro. He missed the turn to his house and, too slowly to deploy the airbag, *Trn.* at 37, collided with a low gray concrete utility lid, so that his car rested half on Alderberry Lane and half on his driveway. *Trn.* at 26, 31, 35; ACCIDENT DIAGRAM, exh. 1, *Appx.* at 53. A neighbor called 911. *Trn* at. 51-53. When the police came they arrested him for drunk driving. At trial Mr. Lathrop argued he was not on a "way."

II. Wildwood on Winnipesaukee Association

Mr. Lathrop lives on Alderberry Lane in the "Wildwood on Winnipesaukee Association" subdivision on Long Island. *Trn*. at 16. The development consists of lake-side individual residences, and has a single entrance on Wildwood Drive, such that one cannot get to Mr. Lathrop's home by car without going through it. Alderberry Lane, where Mr. Lathrop lives, is a dead-end street. MAP OF SUBDIVISION, exh. C, *Appx.* at 32; *Trn*. at 16, 22, 25; STATE'S MEMORANDUM OF LAW ¶ 3 (June 27, 2011), *Appx.* at 6; DEFENDANT'S MEMORANDUM OF LAW ¶ III (July 29, 2011), *Appx.* at 10.

At the Wildwood subdivision entrance on Wildwood Drive near the mailboxes, are three signs. The first announces one is entering "Wildwood: A Private Community." SUBDIVISION SIGN, exh. A, *Appx.* at 30(punctuation added). The second demarcates "Wildwood Dr. Pvt." ROAD SIGN, exh. B, *Appx.* at 31 (punctuation added). The third warns:

STOP
DO NOT ENTER
PRIVATE ROAD
MEMBERS & GUESTS
ONLY

WARNING SIGN, exh. D, *Appx.* at 33. There is no gate nor sentry. *Trn*. at 19, 25.

It is not disputed that, like similar lake communities in Moultonboro, the Wildwood subdivision roads, including Alderberry Lane, are privately owned. *Trn*. at 16, 17; STATE'S MEMORANDUM OF LAW ¶ 3; DEFENDANT'S MEMORANDUM OF LAW ¶ III; WARRANTY DEED, exh. E (Sept. 21, 1976), *Appx.* at 34; WILDWOOD ON WINNIPESAUKEE ASSOCIATION BYLAWS, exh. E art. I § 3 (July 3, 1991), *Appx.* at 50. There has been no suggestion the private roads were laid out under authority of statute. *Trn*. at 19, 77.

Alderberry Lane is privately maintained by the Association. Its paving contractor testified, for instance, that his asphalt company works for the Association at its request, and is paid by the Association. *Trn*. at 6-8, 10. The Bylaws of the Wildwood on Winnipesaukee Association specify it has a duty to maintain the roads. BYLAWS, art. I § 3 *and* art. VIII § 3.b.

Snowplowing is an exception, which the municipality does on most private roads in town to assure emergency access. *Trn.* at 17, 22. Although he suggested it might be "political suicide," *Trn.* at 22, to cease private road plowing, the Moultonboro Public Works Director conceded it is a voluntary service and the Town has no contract with the Association or its constituents. *Trn.* at 18, 21. He also testified there is a non-specific plowing line-item in the Town budget, *Trn.* at 19, 21, but did not offer the document nor suggest State money is involved. In addition, police patrol Association roads. *Trn*. at 19 (testimony of former police chief), 25 (testimony of current police sergeant).

Association documents make clear that Association property can be used only by Association members and their invitees. WARRANTY DEED, exh. E (Sept. 21, 1976), *Appx.* at 34 ("The above conveyance of roads, beach and the easement referred to is made to the grantee herein for the common use of all present and future owners of lots as shown on said plan and for any lot owners

of lots that may be further subdivided and developed….”); BYLAWS, art. II § 3.a. (July 3, 1991), *Appx.* at 38 (“Use of Association Property: Each Association Member, their immediate family, their guests, and any tenants in the event that the property is rented, shall be eligible to utilize the Association’s property (Roadways, and Beach area).”) (capitalization altered); SECOND AMENDMENT TO THE BYLAWS OF THE WILDWOOD ON WINNIPESAUKEE ASSOCIATION, exh. E (Aug. 20, 1995), *Appx.* at 50 (expanding class of persons allowed to use Association property to include “limited purpose members”). The warning sign at the entrance implements the intent of the deed and bylaws. WARNING SIGN, exh. D, *Appx.* at 33 (“members and guests only”).

STATEMENT OF THE CASE

Alan Lathrop was charged with a class-B misdemeanor of "driv[ing] a vehicle, a 2000 Mercedes Benz 4-door, upon a way, Alderberry Lane, while under the influence of intoxicating liquor." COMPLAINT (Oct. 4, 2010), *Appx.* at 3.

Before trial Mr. Lathrop demanded proof of "way." NOTICE OF DEMAND FOR FORMAL PROOF OF PUBLIC HIGHWAY OR "WAY" (Sept. 14, 2010), *Appx.* at 5. In the companion ALS proceeding, the Department of Safety found that "[t]he roads within the private community of Wildwood on Winnipesauke, including Alderberry Lane, are not open to public use," and therefore "Alderberry Lane in the Town of Moultonboro is not a way for the purposes of RSA 265-A." REPORT OF HEARINGS EXAMINER (Oct. 20, 2010), *Appx.* at 16. During trial the State attempted to amend the complaint to include other roads, but was unsuccessful. *Trn.* at 13. The court allowed both parties to submit memoranda on whether Alderberry Lane is a "way." STATE'S MEMORANDUM OF LAW (June 27, 2011), *Appx.* at 6; DEFENDANT'S MEMORANDUM OF LAW (July 29, 2011), *Appx.* at 10.

After a trial that took place on portions of two separate days, the Ossipee District Court (*Robert C. Varney*, J.) found that Alderberry Lane is a "way." *Trn.* at 85-86. Mr. Lathrop was found guilty, and suffered a commensurate fine, license revocation, and driver education program. *Trn.* at 86-88; DWI FIRST SENTENCING ORDER, *Appx.* at 21; NOTICE OF REVOCATION (Aug. 8, 2011), *Appx.* at 24; IMPAIRED DRIVER INTERVENTION PROGRAM (Aug. 8, 2011), *Appx.* at 20. Mr. Lathrop requested reconsideration, to which the State objected, and which the court denied. DEFENDANT'S MOTION FOR RECONSIDERATION (Aug. 13, 2011), *Appx.* at 25; STATE'S OBJECTION TO DEFENDANT'S MOTION FOR RECONSIDERATION (Aug. 16, 2011), *Appx.* at 27; ORDER (Sept. 16, 2011), *Appx.* at 29. This appeal followed.

SUMMARY OF ARGUMENT

Alan Lathrop first sets forth the statutory definition of "way," and then argues that Alderberry Lane is not a "way" because it is posted against trespass, and the only people allowed in are those there for specific purposes. He also suggests that a broad construction in this case might have unintended consequences for other areas of the law. Accordingly, Mr. Lathrop requests this Court find Alderberry Lane is not a way, and reverse his DWI conviction.

ARGUMENT

I. New Hampshire's "Way" Statute

New Hampshire's DWI statute provides that it applies to operation "upon any way." RSA 265-A:2.

> "Way" shall mean … any public highway, street, avenue, road, alley, park, parking lot or parkway; any private way laid out under authority of statute; ways provided and maintained by public institutions to which state funds are appropriated for public use; any privately owned and maintained way open for public use; and any private parking lots, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public.

RSA 259:125. "Way" thus has five definitions:

1. "any public highway, street, avenue, road, alley, park, parking lot or parkway";
2. "any private way laid out under authority of statute";
3. "ways provided and maintained by public institutions to which state funds are appropriated for public use";
4. "any privately owned and maintained way open for public use"; and
5. "any private parking lots, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public."

Definition 1 does not apply because Wildwood is not "public." *See e.g. State v. Barkus*, 152 N.H. 701 (2005) (shoulder of Interstate 93 part of public highway). Definition 2 does not apply because even though Wildwood roads are "private," they were not laid out under authority of statue. *See State v. Rosier*, 105 N.H. 6 (1963) (public parking lot laid out under statute). Definition 3 does not apply because Wildwood is not a public institution and no state funds are involved, *see e.g. State v. Gagnon*, 155 N.H. 418 (2007) (municipal fire station parking lot), and because snowplowing alone is not evidence of municipal maintenance. *See Catalano v. Town of Windham*, 133 N.H. 504, 511

(1990) ("Snowplowing alone does not keep a road in a state of repair or preserve it from decline.").
Definition 5 does not apply because Wildwood is not a commercial establishment with areas maintained for the benefit of the public. *See e.g. Manchenton v. Auto Leasing Corp.*, 135 N.H. 298 (1992) (private parking lot). This case thus involves only definition 4. The Wildwood Association roads are privately owned and maintained. The question is whether they are "open for public use."

In *State v. Tardiff*, 117 N.H. 53 (1977), the driver was on a privately owned and maintained road which was "the main service road" for a trailer park. Although *Tardiff* construed "way" as defined under a prior statute, it nonetheless reached the issue of what constitutes roads open to the public. It wrote: "If a road is free and common to all the citizens, then it is a public road."

II. Wildwood Association Roads Are Not Open for Public Use

The Wildwood Association roads are not "open for public use" nor "free and common to all the citizens." They are plainly posted against trespass in accord with New Hampshire's posting statute. RSA 635:4 ("A person may post his land to prohibit criminal trespass and physical activities by posting signs of durable material with any words describing the physical activity prohibited, such as 'No Hunting or Trespassing,' printed with block letters no less than 2 inches in height, and with the name and address of the owner or lessee of such land. Such signs shall be posted not more than 100 yards apart on all sides and shall also be posted at gates, bars and commonly used entrances. This section shall not prevent any owner from adding to the language required by this section."). The sign at the entrance says "stop." Then it says "do not enter." Then it says the only people allowed are "members & guests." Nearby the subdivision sign identifies the owner as "Wildwood: A Private Community." It should not require a gate, a sentry, a moat, or a drawbridge to ensure the public is not invited; clear and articulate signs are statutorily sufficient.

Moreover, Alderberry Lane is a dead end, meaning that nobody passes through or uses it as a shortcut to somewhere else. *C.f. City of Holland v. Dreyer*, 457 N.W.2d 56, 57 (Mich. App. 1990) ("A person using [the] roadway as a shortcut would not be prosecuted for trespassing.").

Just because invitees – residential guests, utility and service providers, deliveries, municipal snowplowers, emergency vehicles – are allowed in does not make the Association roads "open for public use." All such people are invited onto Association roads for specific purposes. If they remain beyond the time and purposes for which they were invited, they risk prosecution for trespass. When roads are truly "open for public use," however, the member of the public determines the type, extent, and longevity of use; a neighbor has no control and no ability to prosecute for trespass. *Frisby v. Schultz*, 487 U.S. 474,

480 (1988) ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum. … Our prior holdings make clear that a public street does not lose its status as a traditional public forum [for purposes of exercising free speech] simply because it runs through a residential neighborhood."). Similarly, casual, unauthorized, and prosecutable entry by members of the public from time to time does not convert the place to public use.

For these reasons, Alderberry Lane is not "open for public use" or "free and common to all the citizens." The State did not prove "way" beyond a reasonable doubt, and thus Mr. Lathrop was wrongfully convicted of DWI.

III. Dangers of Broad Construction; New Hampshire Land Use Policies

Beyond Mr. Lathrop's situation, there is some danger in holding that Alderberry Lane is"open for public use." Many areas of the law use the same or closely similar phrases, and such a holding would have impacts beyond the DWI statute. A few are listed:

> • Whether a place is where free speech can be exercised depends in part whether upon the extent and patterns of public use. *See e.g.*, *State v. Harvey*, 108 N.H. 139, 140-41 (1967) (whether parade permit must be granted dependent in part upon "public use of highways"); *State v. Cox*, 91 N.H. 137 (1940) *aff'd sub nom. Cox v. State of New Hampshire*, 312 U.S. 569 (1941); *Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662, 286 Cal. Rptr. 427 (1991) (whether citizens had right to gather and protest on private parking lot dependent in part on whether it is "so devoted to public use that it can be deemed the functional equivalent of the traditional public forum historically provided by town centers, public streets and public sidewalks"); *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (anti-abortion protests in front of doctor's residence).
>
> • Whether the government or utilities may take property for eminent domain depends in part upon whether it intends a public use. *See e.g.*, N.H. CONST. pt. I, art. 12 ("But no part of a man's property shall be taken from him, or applied to public uses, without his own consent or that of the representative body of the people."); *Huard v. Town of Pelham*, 159 N.H. 567, 574 (2009) (quoting constitution); *State v. 4.7 Acres of Land*, 95 N.H. 291, 295(1948) ("It has never been deemed essential that the entire community or any considerable part of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the Constitution."); *In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 30 (2010) ("In determining whether the purpose for which property is being condemned is a public use, we must accordingly consider the extent to which the proposed project will benefit the public."); *Conway v. New Hampshire Water Res. Bd.*, 89 N.H. 346 (1938) (whether a dam is a "public use").
>
> • Whether land may become public by prescription or adverse possession depends upon the extent and patterns of public use. *See e.g.*, RSA 229:1 ("Highways are only such as are laid out in the mode prescribed therefor by statute, or roads which have been constructed for public travel over land which has been conveyed to a city or town or to the state by deed of a fee or easement interest, or roads which have been dedicated to the public use and accepted by the city or town in which such roads are located, or roads which have been used as such for public travel, other than travel to and from a toll bridge or ferry, for 20 years prior to January 1, 1968, and shall include the bridges thereon."); *Blagbrough v. Town of Wilton*, 145 N.H. 118 (2000) (holding that bridge and driveway did not have sufficient public use); *Gill v. Gerrato*, 156 N.H. 595 (2007) (holding that public use of lane was aged); *Mahoney v. Town of Canterbury*, 150 N.H. 148, 151, (2003) (evidence "indicates use by people other than the owners of the land through which the road runs").

• Whether and to what extent municipalities have adopted streets depends in part on the extent and patterns of public use. *See e.g.*, *Hersh v. Plonski*, 156 N.H. 511 (2007); *Catalano v. Town of Windham*, 133 N.H. 504 (1990).

While this Court could of course limit its construction of "open for public use" to just the definition of "way," the phrase is too common for such close parsing.

Finally, construing "open for public use" to include land that has been clearly posted is not in accord with New Hampshire's land use policies. Although there are other models of handling public access to private property, the centuries-long tradition in New Hampshire and northeastern states is that the public is allowed unless land is posted. Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004) (reviewing history of and differing approaches to open-land policies); RSA 635:4 (public allowed unless land posted against trespass); RSA 508:14 (landowners immune from liability for public recreational uses of private land). Whatever the outcome here, it is reasonable to expect that the behavior of careful landowners, associations, condominiums, and others will be affected. If, for example, Mr. Lathrop prevails and this Court considers Alderberry Lane private and not a public way, owners who intend complete privacy will mimic the signs erected by Wildwood Association. Those who intend the traffic laws to be enforced on their otherwise private "ways" will post more narrowly. But if this Court holds for the State and finds that Wildwood's signs are not sufficient to declare private roads non-public, careful owners will be forced to resort to gates, sentries, or other more aggressive means, thus undercutting New Hampshire's long-standing land-use policy.

CONCLUSION

For the foregoing reasons, this Court should find that Alderberry Lane in Moultonboro is not "open for public use" and thus not a way pursuant to the drunk-driving statute. It should also reverse Alan Lathrop's conviction.

Respectfully submitted,

Alan Lathrop
By his Attorney,

Law Office of Joshua L. Gordon

Dated: June 4, 2012

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Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Alan Lathrop requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on June 4, 2012, copies of the foregoing will be forwarded to Stephen Fuller, Senior Assistant Attorney General.

Dated: June 4, 2012

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Joshua L. Gordon, Esq.