State of New Hampshire
Supreme Court

NO. 2005-0044

2005 TERM

JULY SESSION

STATE OF NEW HAMPSHIRE

v.

SETH O'DONNELL

RULE 7 APPEAL FROM FINAL DECISION
OF CONCORD DISTRICT COURT

BRIEF OF DEFENDANT, SETH O'DONNELL

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

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QUESTIONS PRESENTED

I. Does New Hampshire's implied consent statute, which provides that by driving on a way a person is deemed to have consented to a blood alcohol test "if arrested," apply only after the person is arrested?

Preserved in Defendant's Motion to Suppress – Non-Consensual Field Sobriety Tests (Aug. 19, 2004) and Defendant's Response to State's Objection to Motion to Suppress – Non-Consensual Field Sobriety Tests (Aug. 31, 2004).

II. Are the results of a horizontal gaze nystagmus test inadmissible when the test was improperly administered?

Preserved in Motion to Suppress #4 – Incorrect Administration of Horizontal Gaze Nystagmus Physical Examination (Sept. 1, 2004).

III. Was the opinion testimony of an officer improperly allowed when the officer was not qualified as an expert, and when the opinion was based only on the officer's impressions?

Preserved by contemporaneous objection during trial, *TrialTrn.* at 33-34.

IV. Was there insufficient evidence of Driving While Intoxicated when the only evidence of intoxication was the officer's unqualified opinion and the results of an improperly administered horizontal gaze nystagmus test?

Preserved during trial, *passim.*

V. Was there insufficient evidence of Speeding when the only evidence was the estimate of a police officer that Mr. O'Donnell was going 40 miles per hour in a 30 mile-per-hour zone?

Preserved during trial, *passim.*

VI. Should the court have dismissed the charge of Driving While Intoxicated when the arresting officer in bad faith prevented Mr. O'Donnell from procuring a blood test which would have established his innocence?

Preserved in Defendant's Motion to Dismiss (Sept. 2, 2004).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Shortly after midnight on July 11, 2004, Mr. O'Donnell was driving on the wide four-lane Main Street in Concord, New Hampshire. *TrialTrn*. at 10.[1] He saw two pedestrians starting to cross the street. The police and the defendant agree that although they were not in a cross-walk, *TrialTrn*. at 5, 12, 51, and were walking between cars diagonally parked on the side of the street, *TrialTrn*. at 10, 12, 52, Mr. O'Donnell saw them, *TrialTrn*. at 6, blew his horn, *TrialTrn*. at 4, and slowed for them. *TrialTrn*. at 12, 51, 58. The police and the defendant also agree that although the pedestrians stopped to wait for Mr. O'Donnell to go by, they were in no danger. *TrialTrn*. at 13, 59.[2]

A Concord police officer monitoring traffic Main Street saw all this. *TrialTrn*. at 3. Although Mr. O'Donnell believed he was complying with the 30 mile-per-hour speed limit, *TrialTrn*. at 52, the officer "estimated the speed to be approximately 40 miles per hour." *TrialTrn*. at 4.

Consequently the officer followed Mr. O'Donnell for a quarter-mile down Main Street, during which Mr. O'Donnell made no driving errors. *TrialTrn*. at 13. The officer lit his blue lights and Mr. O'Donnell pulled to the side of the road in a safe manner. *TrialTrn*. at 14. Mr. O'Donnell fully cooperated, *TrialTrn*. at 53, and gave the officer his license. *TrialTrn*. at 16.

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[1] Abbreviations to the record are as follows: Citations to the transcript of the motions hearing held before Judge Brackett Scheffy on October 1, 2004 are designated as "*Mot.Hrg.*" Citations to the transcript of the trial held before Judge Michael Sullivan on December 8, 2004 are designated as "*TrialTrn.*"

[2] The trial court's order states that "[t]wo pedestrians in a crosswalk had to stop in their tracks to avoid contact with [Mr. O'Donnell's] vehicle." ORDER, *Appx.* at 27. The order, however, is at odds with the testimony of Mr. O'Donnell and the police officers.

The officer testified he smelled alcohol, *TrialTrn*. at 6-7, and shortly another officer arrived. *TrialTrn*. at 7. Mr. O'Donnell told the officers he had had two beers – one at each of two different bars. *TrialTrn*. at 7, 51, 58. Although there is some dispute as to how long before the stop the beers were consumed, *TrialTrn*. at 7, 8, 24, 33, 51, the court's finding that the time was one-and-a-half hours comports with the evidence.

The officer instructed Mr. O'Donnell that he would be subjected to field sobriety tests, and Mr. O'Donnell acquiesced. *TrialTrn*. at 28.

On the side of the road, the officers administered a horizontal gaze nystagmus test (HGN), which the police say Mr. O'Donnell failed. *TrialTrn*. at 29. Mr. O'Donnell was not able to take a walk-and-turn test because of a back injury. *TrialTrn*. at 30, 54, 58. No other tests were done, and there was no other evidence of intoxication. The police testified that Mr. O'Donnell was able to stand with his feet together and hands at his side during the HGN, *TrialTrn*. at 35-36, he didn't have red, bloodshot, or glassy eyes, *TrialTrn*. at 16, 34-35, his face was not flushed, his speech was not slurred, *TrialTrn*. at 17, 34-35, and despite his very large body, *TrialTrn*. at 50-51, he had no trouble getting out of his truck and did not stumble or fall. *TrialTrn*. at 17.

Mr. O'Donnell was taken to the Concord Police Station, a trip that took under five minutes. *TrialTrn*. at 48. When the officers asked him to submit to a breath test, Mr. O'Donnell repeatedly insisted he wanted a blood test instead. *TrialTrn*. at 31-33, 64. After the officers gave him a minute to consider, Mr. O'Donnell decided to comply, *TrialTrn*. at 47, 55-56, but the officers deemed his actions a refusal. *TrialTrn*. at 33.

At the station Mr. O'Donnell was placed under arrest, *TrialTrn*. at 31, for three charges – Speeding and Driving While Intoxicated, and also Contempt of Bail. The Contempt of Bail

charge arose because Mr. O'Donnell was then on bail from the Auburn District Court on condition of good behavior. The Contempt of Bail was ultimately dismissed by the District Court because under *State v. Auger*, 147 N.H. 752 (2002), "good behavior" does not include the commission of violation-level offenses, and both speeding and DWI are violations. ORDER ON DEFENDANT'S MOTIONS, *Appx.* at 24. Nonetheless, because Contempt of Bail is a misdemeanor, Mr. O'Donnell was taken to the Merrimack County House of Corrections, pending arraignment the next morning. The effect of the fabricated Contempt of Bail arrest was that it precluded Mr. O'Donnell from procuring an independent blood-alcohol test, which he believes would have proven his non-intoxication.

Mr. O'Donnell was found guilty of Speeding and Driving While Intoxicated – both violations. He was sentenced accordingly. This appeal followed.

SUMMARY OF ARGUMENT

Mr. O'Donnell first notes that New Hampshire's implied consent statute provides that a person is deemed to have consented to a blood alcohol test "if arrested." He argues that "if arrested" means after arrest, but not before. He points out that because tests were administered before arrest, and he did not consent, the statute does not apply. Because there was no other basis on which to admit the test, it was allowed as evidence in violation of Mr. O'Donnell's constitutional rights.

Mr. O'Donnell then recalls recent law providing that the results of a horizontal gaze nystagmus test are admissible only if a proper foundation is laid including the proper administration of the test. He notes that during trial the State conceded that the test was improperly administered. He thus argues that the court erred by admitting the results into evidence.

Mr. O'Donnell then points out that one of the few bits of evidence of intoxication was the opinion of the officer. He argues that because the officer was not qualified as an expert, and because the officer did not provide any rational basis for his conclusion anyway, the opinion should not have been allowed into evidence.

Mr. O'Donnell then lists the scanty evidence of intoxication – the officer's unqualified opinion and the results of an improperly administered horizontal gaze nystagmus test – and argues that it was insufficient for conviction.

He notes that the evidence of speeding was similarly insufficient – consisting of only the officer's estimate that Mr. O'Donnell was going 40 miles per hour in a 30 mile-per-hour zone.

Finally, Mr. O'Donnell points out that he repeatedly insisted upon getting a blood-alcohol test, but that the police locked him up on a fabricated charge which preventing him from developing exculpatory evidence in violation of his rights.

ARGUMENT

I. Implied Consent Statute Does Not Apply Because Mr. O'Donnell Was Not Under Arrest

New Hampshire law provides that by driving, people imply their consent to "physical tests and examinations" to determine whether they are impaired. *See e.g., State v. Greene,* 128 N.H. 317 (1986). The implied consent law applies, however, only after arrest.

> Any person who drives a vehicle upon the ways of this state shall be deemed to have given consent to physical tests and examinations for the purpose of determining whether such person is under the influence of intoxicating liquor or controlled drugs, and to [other] tests of . . . blood, urine, or breath, for the purpose of determining the controlled drug content of such person's blood or alcohol concentration *if arrested* for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or controlled drugs or while having an alcohol concentration of 0.08 or more, or in the case of a person under the age of 21, 0.02 or more.

RSA 265:84 (emphasis added). The statute provides that a "person . . . shall be deemed to have given consent . . . if arrested."

"If" is a conditional word. *See, e.g, In re Morey's Estate,*113 N.H. 84, 86 (1973); *Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex.App. 1997) ("While no particular words are necessary to create a condition, such terms as 'if,' 'provided that,' 'on condition that,' or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise."); *In re Terry H.*, 47 Cal.Rptr.2d 791, 793 (Cal.App. 1995) ("if ingested" connotes a possibility, not an actuality); *Wood v. Board of County Com'rs of Fremont County,* 759 P.2d 1250, 1253 (Wyo. 1988) ("Words commonly used in a conveyance to denote the presence of a fee simple estate subject to a condition subsequent include 'upon express condition that,' 'upon condition that,' 'provided that,' or 'if.'").

Because the statute only applies "if arrested," consent to field sobriety tests is implied only when the condition of arrest is fulfilled – i.e., only after arrest. If a person has not been arrested, consent is not implied. *See State v. Rocheleau*, 117 N.H. 792 (1977); *State v. Slayton*, 116 N.H. 613 (1976) (both decided under prior law).

This makes sense in the statutory scheme. RSA 265:87, for instance, distinguishes between field sobriety tests generally, and those performed "post-arrest." Post-arrest tests require that the officer inform the arrestee of the consequences of refusal. There are consequences – suspension of licence, use at trial of the refusal as an indication of awareness of impairment, *see* RSA 265:88-a & 265:92 – *because* consent is implied after arrest, but not before.

This also makes sense in the constitutional scheme. Consent becomes implied only after arrest because arrest requires probable cause. If this were not the case, an officer could stop a person for no reason at all and conduct field sobriety tests. Because no-reason stops are beyond the authority of the police, *see e.g., State v. Boyle*, 148 N.H. 306 (2002), by requiring that the arrest occurs before consent is implied the statute simply comports with basic constitutional requirements.

Here Mr. O'Donnell had not been arrested when he was told to perform field sobriety tests. He had been stopped for speeding, which is a *Terry*-stop, and not an arrest. *State v. Hight*, 146 N.H. 746, 748 (2001); *State v. McBreairty*, 142 N.H. 12 (1997). Mr. O'Donnell was not arrested until some time later. *TrialTrn*. at 30, 31, 45-46, 48.

There is nothing in the record to suggest that Mr. O'Donnell was asked to consent or that he did consent. Rather he complied with a show authority – two officers at the scene in uniforms and carrying weapons, after midnight with blue lights flashing. *Mot.Hrg*. at 41; *TrialTrn*. at 19.

Mr. O'Donnell was *told* to take the tests; the officer testified that he "informed him that I would be conducting field sobriety tests." *TrialTrn*. at 28. If he had not complied with the command, he may have been liable for disobeying a police officer. RSA 265:4; RSA 642:2; *see also Saviano v. Director, N.H. Div. of Motor Vehicles*, 151 N.H. 315 (2004); *State v. Ricci*, 144 N.H. 241 (1999). Thus Mr. O'Donnell did not knowingly, voluntarily, or intelligently waive his rights against unlawful searches and seizures. N.H. CONST., pt. I, art. 19. Because the field sobriety tests were performed in violation of Mr. O'Donnell's rights, the results must be suppressed. *State v. Canelo*, 139 N.H. 376 (1995).

II. HGN Test Was Not Admissible as Evidence Because the Test Was Improperly Administered

In *State v. Dahood*, 148 N.H. 723 (2002), this Court determined that Horizontal Gaze Nystagmus (HGN) tests are scientifically based and useful to determine whether a person is impaired by alcohol. The tests are admissible, however, if "the proper foundation is established." *Dahood*, 148 N.H. at 735. "[T]to establish a proper foundation, the State must put forth evidence that the police officer who administered the HGN test is trained in the procedure and that the test was properly administered at that time." *Id.*

Although the officer in Mr. O'Donnell's case was trained, the State conceded the test was not properly administered. The instruction manual for the HGN test, *see Dahood*, 148 N.H. at 732-33, requires that during administration of the procedure, officers stop moving the stimulus at the point nystagmus is detected to verify whether the involuntary jerking of the eyeball continues. *TrialTrn.* at 43. The officer who administered the test on Mr. O'Donnell did not do that. *TrialTrn.* at 44. The instructions also require a check for equal tracking on both eyes, but the officer didn't do that either. *TrialTrn.* At 38. Moreover, despite his training, the officer apparently did not learn how to administer the test properly, as he was unaware of having to stop the stimulus and check for equal tracking. *TrialTrn*. at 48.

Because the scientific validity of HGN under *Dahood* turns on whether the test was properly administered, improper administration and inadequate training makes the test inadmissible. Here the HGN was virtually the only evidence upon which Mr. O'Donnell's conviction was based, making proper administration critical. As the test here was improperly administered by an inadequately trained officer, it was unlawful for the trial court to have considered the evidence.

III. Opinion Testimony by Arresting Officer Not Qualified as an Expert Was Inadmissible

Over the defendant's objection, the officer who arrested Mr. O'Donnell provided expert opinion evidence:

> Q: During the two hour period that you spent with Mr. O'Donnell, did you form an opinion of whether or not he was intoxicated?
> A: Yes. I did.
> Q: What was – what is that opinion?
> A: In my opinion, I felt that he was intoxicated.
> Q: And, what's that based upon?
> A: Just my observations and the way he was acting; the test that I conducted and in speaking with him, the odor of alcohol on his breath, just the encompassing whole time spent with him.

TrialTrn. at 34.

In order for a witness to provide opinion evidence, the witness must be qualified as an expert. N.H. R. EVID. 701-703, *Dowling v. L.H. Shattuck, Inc.*, 91 N.H. 234 (1941). Although the officer is an accomplished member of the Concord Police Department, he was not recognized as an expert in Mr. O'Donnell's trial. The State did not attempt to qualify him as an expert, and the court made no finding that he was an expert. Unlike *State v. Turmel*, 150 N.H. 377 (2003), for example, where the officer was certified in the field of drug recognition, the officer in Mr. O'Donnell's case did not demonstrate any knowledge, experience, or training outside of being a police officer.

Opinion evidence must be rationally based on either the facts of the case or information unique to the area of the witness's expertise:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

State v. Fernandez, __ N.H. __ (decided May 23, 2005).

In Mr. O'Donnell's case, the officer (even if qualified as an expert) was not called upon to rely on information unique to any field of expertise, and the opinion was not based on any admissible or inadmissible facts. The officer's observations of an odor of alcohol is explained by the admission that Mr. O'Donnell had had two beers. The test the officer based his opinion on was the improperly administered HGN. Other than that, the officer testified that his opinion was based on "[j]ust my observations and the way he was acting," "in speaking with him," and "just the encompassing whole time spent with him." These are impressions, not facts. And the impressions go against the existing evidence – the officer could point to nothing about "the way he was acting" that betrayed intoxication. If he could, no doubt the officer would have said something about it.

The officer was thus improperly allowed to offer opinion evidence even though he was unqualified, and based on nothing but his impression. Because the trial court's order of conviction is based in large part on "the arresting officers observations of Defendant," the error is prejudicial, and the conviction should be reversed.

IV. Insufficient Evidence of Intoxication for a Finding of Guilt Beyond a Reasonable Doubt

The State offered little evidence that Mr. O'Donnell was intoxicated.

The officer's opinion was that Mr. O'Donnell failed the nystagmus test. Even if the test were properly administered, HGN is at most circumstantial evidence. *Dahood*, 148 N.H. at 734 (results of HGN "are admissible as circumstantial evidence of intoxication"). "When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict." *State v. Lorton*, 149 N.H. 732, 733 (2003). Despite the officers' knowledge that Mr. O'Donnell had a back injury, there was no effort to exclude pain medication or any other reason Mr. O'Donnell might have failed the test. *Dahood*, 148 N.H. at 732.

HGN is "not sufficient alone to establish intoxication." *Dahood*, 148 N.H. at 734. But the only other evidence the State produced was the smell of alcohol – also circumstantial – and the officer's opinion that he was intoxicated.

The common indicia of intoxication are bloodshot eyes, *State v. Watson*, 151 N.H. 537 (2004); *State v. Wiggin*, 151 N.H. 305 (2004), glassy eyes, *State v. L'Heureux*, 150 N.H. 822 (2004); *State v. Stern*, 150 N.H. 705 (2004), flushed face, *State v. Lorton*, 149 N.H. 732 (2003); *State v. Parmenter*, 149 N.H. 40 (2002), slurred speech, *State v. Littlefield*, __ N.H. __ (decided June 16, 2005); *State v. Yates*, __ N.H. __ (decided May 23, 2005), swaying or stumbling, *State v. Fee*, 126 N.H. 78 (1985); *State v. Toto*, 123 N.H. 619 (1983), and falling down. *State v. Leary*, 133 N.H. 46 (1990).

As noted, the State conceded that Mr. O'Donnell was able to stand with his feet together and hands at his side during the HGN, thus showing that he fully possessed his balance. He didn't

have red, bloodshot, or glassy eyes. Nor was his face flushed. His speech was not slurred. Mr. O'Donnell had no trouble getting out of his truck and did not stumble or fall.

The State conceded that Mr. O'Donnell saw the pedestrians, that he blew his horn for them, and braked to slow down for them. He drove well when the police followed him. Except for the officer's estimate of speeding, there is no evidence of poor or unsafe driving.

Although Mr. O'Donnell was not happy with submitting to a breath test, within moments he indicated he was willing, and consistently volunteered for a blood-alcohol test. Although the officers construed his attitude as a refusal, it does not betray a consciousness of guilt. *State v. Hull*, 149 N.H. 706 (2003). Mr. O'Donnell simply distrusts a particular type of test.

The court found that Mr. O'Donnell had two beers that evening, an hour-and-a-half before he was driving on Main Street. Mr. O'Donnell stands over 6 feet tall, *TrialTrn*. at 51, and weighs 375 pounds. *TrialTrn.* at 50-51. *See State v. Wheeler*, 120 N.H. 496 (1980) (use of standard chart to calculate blood-alcohol level by knowing body weight and number of drinks consumed). Weighing so much, and having had such a small amount of alcohol such a long time before he was stopped makes it unsurprising that Mr. O'Donnell was not intoxicated.

In *State v. Lorton*, 149 N.H. 732 (2003), this Court reversed a DWI conviction because the evidence consisted of an odor of alcohol, red and glassy eyes, a red and flushed face, and poor performance in the walk-and-turn and one-leg-stand tests. Because all the evidence was circumstantial, this Court found that there was insufficient evidence of intoxication.

In Mr. O'Donnell's case, there is even less evidence than in *Lorton*. This Court should thus reverse. In other cases in which there were HGN tests, all had plenty of the common indicia of intoxication corroborating the HGN. *See State v. Wiggin*, 151 N.H. 305 (2004); *State v. Stern*,

150 N.H. 705 (2004); *State v. Parmenter*, 149 N.H. 40 (2002).

The court's order of conviction says that "[t]wo pedestrians in a crosswalk had to stop in their tracks to avoid contact with [Mr. O'Donnell's] vehicle." ORDER, ***Appx.*** at 27. This is at odds with the testimony of all witnesses and cannot be given credence. The court's finding of guilt was based only on "[t]he operation of the motor vehicle on Main St. with pedestrians along with the arresting officers observations of Defendant." ORDER, ***Appx.*** at 27. The court made no mention that the State's proof was beyond a reasonable doubt, and it wasn't.

Because what little evidence there is is all circumstantial, the State made no effort to rebut alternative explanations, and Mr. O'Donnell showed none of the common indicia of intoxication, he cannot be found guilty beyond a reasonable doubt. Accordingly, the conviction must be reversed.

V. Insufficient Evidence of Speeding for a Finding of Guilt Beyond a Reasonable Doubt

The State also offered little evidence that Mr. O'Donnell was speeding – the only evidence was the officer's estimate. While an estimate of speed from an experienced police officer may be a sufficient basis on which to make a stop, *see State v. Sterndale*, 139 N.H. 445 (1995), an estimate alone is not proof beyond a reasonable doubt. Had Mr. O'Donnell been racing down Main Street at some very high speed, or had the officer been able to time how long his car took to travel a known distance such that speed could be calculated, perhaps the observations of the officer would be sufficient for a conviction. But here the speed limit was 30 miles per hour and the officer estimated Mr. O'Donnell's speed at 40 miles per hour. A ten mile-per-hour difference is marginal, making the possibility of error too great for proof beyond a reasonable doubt.

There are a number of reported cases which hold that an officer's estimate of speed, corroborated by some device such as radar or the cruiser's speedometer, is sufficient to support a conviction for speeding. *See e.g., In re B.D.S.*, 603 S.E.2d 488 (Ga.App.2004).

There are few, however, holding that an uncorroborated estimate is sufficient. Those that do generally have some exceptional fact making the estimate peculiarly reliable. For instance, in *People v. Olsen*, 239 N.E.2d 354 (N.Y. 1968), the court wrote:

> It is true, as the defendant argues, that a police officer cannot testify with precise accuracy as to speed of a vehicle. This does not mean, however, that his estimate of speed, based upon considerable experience, must be ignored in all cases. A police officer's estimate that a defendant was traveling at 50 to 55 miles per hour in a 30-mile-an-hour zone should be sufficient to sustain a conviction for speeding. On the other hand, his testimony, absent mechanical corroboration, that a vehicle was proceeding at 35 or 40 miles per hour in the same zone might for obvious reason be insufficient, since, it must be assumed that only a mechanical device could detect such a slight variance with accuracy sufficient to satisfy the burden necessary to sustain a conviction. While it may be difficult in a particular case to determine whether the variance between the estimated speed and maximum

> permissible speed is sufficiently wide, so that we may be certain beyond a reasonable doubt that the defendant exceeded the permissible limit, we believe that, in the instant case, the variance of 20 to 25 miles above the speed limit was clearly sufficient to justify a finding of guilt. We note, of course, that the trial court's decision to credit such testimony should be based upon all the facts and circumstances of the case, including the nature and extent of the opportunity which the officer had to view the moving vehicle.

People v. Olsen, 22 N.Y.2d at 232, 239 N.E.2d at 355, 292 N.Y.S.2d at 422 (citations omitted); *see also, e.g., Jackson v. State*, 572 S.E.2d 60 (Ga.App. 2002) (estimate of 90 miles per hour in a 55 mile-per-hour zone).

In Mr. O'Donnell's case, the officer's estimate was 40 miles per hour in a 30 mile-per-hour zone – a variance of just 10 miles per hour. The difference is too small for a court to be sure, beyond a reasonable doubt, that he was speeding. There was no other evidence of speed – Mr. O'Donnell saw the pedestrians, braked for them, tooted his horn, and created no danger. The conviction should thus be reversed.

VI. DWI Charge Should Be Dismissed Because Police Prevented Mr. O'Donnell from Obtaining an Independent Blood Alcohol Test

Upon being asked to take a breath test, Mr. O'Donnell repeatedly made clear his wish to have a blood test because he was confident he would later be able to use it to prove his innocence. Using a frivolous charge, the police had him taken to jail for the night where he was unable to get a test. The police action was in bad faith, constituted prosecutorial misconduct, and violated Mr. O'Donnell's constitutional right to present all favorable proofs. N.H. CONST., pt. I, art. 15. Accordingly the DWI charge should be dismissed.

New Hampshire takes prosecutorial misconduct seriously. *State v. Dowdle*, 148 N.H. 345, 348 (2002) ("We have cautioned prosecutors, on more than one occasion, to avoid conduct that could potentially prejudice a criminal defendant and have made clear that we would take a firm stand when addressing the consequences of such tactics."). Too often, however, it escapes meaningful punishment. Bennett Gershman, PROSECUTORIAL MISCONDUCT § 14:1 (2002) (cited in *State v. Krueger*, 146 N.H. 541 (2001)).

Although the term prosecutorial misconduct may not be susceptible of a concise definition, the common theme in the reported cases appears to be a showing of bad faith. *See, e.g., State v. Bain*, 145 N.H. 367, 372 (2000) (prosecutor misleading court regarding trial scheduling; noting trial court made bad faith finding); *State v. Dayutis*, 127 N.H. 101, 103 (1985) (impermissible topics in opening statement); *but see Appeal of Morgan*, 144 N.H. 44, 55 (1999) (target of administrative proceeding disallowed from questioning witness; "When considering the propriety of an investigation or prosecution by a government official, only the official's conduct, not his motivation, is relevant."). "Misconduct" may refer "generally to improper conduct or

wrong behavior," *Morgan*, 144 N.H. at 52, and bad faith generally "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will. It contains the element of intent to do wrong in some degree, actual or necessarily inferable." *Browning v. Fidelity Trust Co.*, 250 F. 321, 325 (3rd Cir. 1918) (contract dispute). Although conduct such as ordinary misjudgment, *In re Ash*, 113 N.H. 583, 586 (1973) (sheriff countermanding county attorney's order prohibiting gambling at county fair), or mere exaggeration, *In re Spookyworld, Inc.*, 346 F.3d 1 (1st Cir. 2003) (bankruptcy), do not constitute bad faith, it is "not limited to its narrow sense of an intentional disregard of duty or an intent to injure." *Indian Head Bank v. Corey*, 129 N.H. 83, 87 (1986) (attorneys fees).

Thus, prosecutorial misconduct generally "connotes an intentional flouting of known rules or laws." *See, Ex parte Peterson*, 117 S.W.3d 804, 816 (Tex. Crim. App. 2003) (prosecutor not comply with *Brady* discovery requirements); *Commonwealth v. DeCicco*, 744 N.E.2d 95 (Mass.App.Ct. 2001) (prosecutorial misconduct difficult to define, but "even a dog knows the difference between being stumbled over and being kicked.") (*Brown, J.*, dissenting, quotation omitted).

Prosecutorial misconduct extends to all law enforcement officers. *See In re Ash*, 113 N.H. 583, 586 (1973) (sheriff).

When the defendant requests dismissal of criminal charges, he must make a showing of prejudice. *See State v. Chace*, 151 N.H. 310 (2004) (letter to defendant recommending guilty plea insufficient prejudice to justify dismissal); *State v. Bain*, 145 N.H. 367, 373 (2000) ("court was required to find prejudice before dismissing the charges as a sanction for prosecutorial misconduct"); *State v. Dayutis*, 127 N.H. 101, 103 (1985) ("The standard for reversible error . . .

is that the prosecutor must be shown to have acted in bad faith . . . and the defendant must be prejudiced thereby.").

In Mr. O'Donnell's case, the police put him in jail in bad faith. In *State v. Auger*, 147 N.H. 752 (2002), this Court clearly stated that "good behavior" does not include the commission of violation-level offenses. All citizens, including police officers, are charged with knowledge of the law. *State v. Stratton*, 132 N.H. 451, 457 (1989) ("Ignorance of the law is no excuse."), *citing State v. Carver*, 69 N.H. 216, 219, 39 A. 973 (1897) ("It is elementary, as well as indispensable to the orderly administration of justice, that every man is presumed to know the laws of the country in which he dwells, and also to intend the necessary and legitimate consequences of what he knowingly does."). As noted, prosecutorial misconduct includes "an intentional flouting of known rules or laws." *Ex parte Peterson*, 117 S.W.3d 804, 816 (Tex. Crim. App. 2003). Under *Auger* and *Stratton*, the police cannot merely say they didn't know.

The misconduct clearly prejudiced Mr. O'Donnell, thereby warranting dismissal. Because alcohol is metabolized, blood-alcohol dissipates over time. *State v. Schneider*, 124 N.H. 242 (1983). By being taken to jail the police made it impossible for Mr. O'Donnell procure exculpatory evidence. In *Jordan v. State*, 132 N.H. 34, 36 (1989), this Court held that because of the propensity for alcohol to dissipate, a defendant cannot avoid the consequences of refusing to take a breath test by intentionally taking action to "kill time." The police should be held to the same standard here. By fabricating a charge and thereby not allowing him to get a breath test, the police eclipsed Mr. O'Donnell's constitutional right to present all favorable proofs. *See State v. Graf*, 143 N.H. 294, 296 (1999) (right to produce all favorable proofs guarantees defendant right to produce evidence).

Accordingly, the DWI charge should be dismissed.

CONCLUSION

In accordance with the foregoing, Mr. O'Donnell respectfully request this honorable Court to suppress results of field sobriety tests, including HGN, and to reverse both convictions.

Respectfully submitted,

Seth O'Donnell
By his Attorney,

Law Office of Joshua L. Gordon

Dated: July 19, 2005

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Seth O'Donnell requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on July 19, 2005, copies of the foregoing will be forwarded to Stephen Fuller, Senior Assistant Attorney General.

Dated: July 19, 2005

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX