STATE OF MAINE
York, ss

Unified Criminal Docket
Biddeford
Docket: CR-2024-4263

STATE OF MAINE }
}
v. }
}
LUCAS LANIGAN }

State's Opposition to Motion to Dismiss

NOW COMES the State of Maine, by and through the undersigned Assistant District Attorney, to oppose the "motion to dismiss charges" dated June 20, 2025. The State will explain that the Court lacks the authority to address the motion; however, as a preliminary observation, this motion serves as a good example of the challenges facing a defendant who chooses to self-represent.

The motion served on the State was unsigned.[1] The motion indicates there were several attachments – none were attached to the copy served on the

[1] Maine Rule of Unified Criminal Procedure 49(d) provides, in part, that papers "shall be filed in the manner provided in civil actions." Maine Rule of Civil Procedure 11(a)(3) requires, in part, that "every pleading, motion and other written request for relief filed with the court by a party who is not represented by an attorney shall be signed by the party." Further, Rule 11(a)(5) indicates, among other details, "if a pleading, motion, or other written request for relief is not signed, it shall not be accepted for filing."

State. While purporting to argue a legal defense, the motion could also be read as an admission to the charges (he cannot claim self-defense without admitting to physical contact with the alleged victim). The motion asks the court to "dismiss the charge of domestic violence aggravated assault with prejudice" because "dismissing this case is in the interest of justice" without apparently recognizing the indictment contains more than one count and the dismissal of a single count would not dismiss the case. While the court may view any of those problems as sufficient reason to either refuse to accept the motion for filing or to summarily dismiss the motion until the Rules are complied with, the State will address the motion, nonetheless.

The motion asks the court to dismiss the charge of domestic violence aggravated assault pursuant to Rule 12(b) of the Maine Rules of Criminal Procedure and the Defendant's constitutional right to self defense under 17-A MRS §108. Rule 12(b)(2) requires "defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or

complaint, ... may be raised only by motion before trial."[2] However, the "Superior Court may not conduct a pretrial hearing on the facts underlying the offense charged in an indictment; an indictment is subject to dismissal for failure to state an offense only when the facts alleged on its face fail to make out an offense against the State. *State v. Storer*, 583 A.2d 1016, 1020 (1990).[3] The Law Court criticized the *Storer* trial court for not simply examining the language in the indictment but going farther and analyzing evidence to determine if the evidence was sufficient. *Id.*, at 1021 (*citing*, *State v. Lagasse*, 410 A.2d 537, 540 (Me. 1980)("[a] pretrial motion addressed to the sufficiency of the evidence to support the indictment is unknown to our criminal procedure").

The instant motion asks this court to examine the conduct at issue and determine whether to apply self-defense sufficiently to dismiss the charge. Such a review is not known in our criminal practice. There can be a narrow

[2] A copy of Rule 12 is attached hereto as a convenience for the pro se defendant (a paper copy when mailed to him and a PDF attached to the email sent to him).

[3] See FN 2.

exception to this practice when (1) the motion presents a question of law, (2) the material facts are not in dispute, and (3) the prosecution does not object. *State v. Strong*, 2013 ME 21, ¶12.[4] None of those circumstances are pled in the motion, nor could they accurately be.

After hearing all the evidence presented at trial, the court must determine whether the defense has been raised and if so, after proper instruction, the jury must then determine whether the State has (1) disproven at least one element of self defense and (2) proven every element of the charge crime beyond a reasonable doubt. *State v. Herzog*, 2012 ME 73.[5] It is not for this court, based on disputed facts as pled in a motion to dismiss, to decide whether the defense is raised and then apply it to those facts as alleged in the motion to justify dismissing a count of the indictment.

Consequently, the court must deny the motion to dismiss.

Dated: 7/10/25

Paul Cavanaugh, Bar #7381
Assistant District Attorney

[4] See FN 2.

[5] See FN 2.

Certificate of Service

The State's response to the Defendant's motion to dismiss, and all noted attachments, were mailed to the Defendant at the address provided in his motion to dismiss; at the address provided on Defendant's bail bond, and emailed to the Defendant at the email address provided in his motion to dismiss:

Lucas Lanigan
13 Grant St.
Springvale, ME 04083

Lucas Lanigan
7 River Road
Sanford, ME 04073

lukelanigan207@gmail.com

Dated: 7/30/25

Paul Cavanaugh, Bar #7381
Assistant District Attorney

(c) Disposition During or at Expiration of Filing Period. Except where a filing agreement expressly provides otherwise as specified in subdivision (d), if the defendant has satisfied each of the filing agreement's conditions, if any, at the conclusion of the agreed upon filing period the defendant is entitled to have the filed indictment, information, or complaint dismissed with prejudice. In this regard, unless the attorney for the State files a motion alleging a violation of one or more of the agreement's conditions by the defendant and seeking to have the criminal proceeding in which the indictment, information, or complaint was filed reactivated by the court, at the expiration of the filing period the clerk shall enter a dismissal of the filed charging instrument with prejudice. In the event the attorney for the State files a motion during or at the end of the filing period alleging a violation of one or more of the agreement's conditions, the attorney for the State is entitled to have the criminal proceeding reactivated by the court if, following a hearing on the motion, the court finds by a preponderance of the evidence that the defendant has violated one or more of the agreement's conditions.

(d) Special Reservations in the Filing Agreement. If the attorney for the State wishes to preserve the right to reinstate a criminal proceeding after the filing period has fully run when no breach of conditions has occurred, or to preserve the right to initiate the same or additional criminal charges against the defendant arising out of the same event or conduct in a separate criminal proceeding while the filing period is running, the attorney for the State must expressly reserve such a right in the written filing agreement and the defendant must expressly agree to it.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the complaint, the indictment, and the information, and the pleas of not guilty, not criminally responsible by reason of insanity, guilty, and nolo contendere. All other pleas and demurrers and motions to quash are abolished, and defenses and objections raised before trial that heretofore would have been raised by one or more of such other pleas or pleadings shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these Rules.

(b) Motion Raising Defenses and Objections.

(1) *Defenses and Objections That May Be Raised.* Any defense or objection that is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections That Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint, other than that it fails to show jurisdiction in the court, may be raised only by motion before trial. The motion shall include all such defenses and objections available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction shall be noticed and acted upon by the court at any time during pendency of the proceeding.

(3) *Time of Making Motions and Filing and Service of Motions.*

(A) Motions to dismiss, motions relating to joinder of offenses, motions seeking discovery pursuant to court order under Rules 16 and 16A, motions to suppress evidence, and other motions relating to the admissibility of evidence shall be served upon the opposing party, but not filed with the court, at least 7 days before the date set for the dispositional conference under Rule 18. If the matter is not resolved at the dispositional conference, the motions shall be filed with the court no later than the next court day following the dispositional conference. If, as a result of the dispositional conference, the party filing motions determines the need to alter or amend a motion previously served, the amended motion must be served upon the opposing party pursuant to Rule 49.

(B) All other motions shall be filed with the court promptly after grounds for the motion arise.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. All issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant, the defendant shall be permitted to plead if the defendant has not previously pleaded. A plea previously entered shall stand. If the motion is

based upon a defect that may be cured by amendment of the complaint or information, the court may deny the motion and order that the complaint or information be amended. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, information, or complaint the defendant shall be discharged.

(c) Motion In Limine. The defendant or the State may make a pretrial motion requesting a pretrial ruling on the admissibility of evidence at trial or on other matters relating to the conduct of the trial no later than 7 days before the date set for jury selection. The court may rule on the motion or continue it for a ruling at trial. In determining whether to rule on the motion or to continue it, the court should consider the importance of the issue presented, the desirability that it be resolved before trial, and the appropriateness of having the ruling made by the justice or judge who will preside at trial. For good cause shown the justice or judge presiding at trial may change a ruling made in limine.

RULES 13 AND 14. [RESERVED]

RULE 15. DEPOSITIONS

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material, and that it is necessary to take the witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information, or complaint may upon motion and notice to the parties order that the witness's testimony be taken by deposition and that any designated books, papers, documents, electronically stored information, photographs (including motion pictures and video tapes), or other tangible objects, not privileged, be produced at the same time and place.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) Defendant's Counsel. If a defendant is without counsel the court shall advise the defendant of the defendant's right and assign counsel to represent the defendant pursuant to Rule 44.

583 A.2d 1016
Supreme Judicial Court of Maine.

STATE of Maine
v.
Kathryn STORER and Ralph Storer.

Argued Nov. 1, 1990.
Decided Nov. 30, 1990.

Synopsis

Defendants, charged with unlawful trafficking in scheduled drugs and obstructing government administration, moved to suppress evidence and to dismiss obstruction of government administration charge. The Superior Court, Piscataquis County, Smith, J., suppressed evidence and dismissed charge. State appealed. The Supreme Judicial Court, McKusick, C.J., held that: (1) evidence obtained during search of defendant's home was admissible under independent source exception to exclusionary rule; (2) first bag of marijuana discovered within curtilage of defendant's home was admissible under inevitable discovery exception to exclusionary rule; and (3) trial court improperly analyzed evidence presented at suppression hearing to determine if evidence was sufficient to support conviction for offense of obstructing government administration rather than merely examining legal question of whether indictment language adequately charged crime.

Vacated.

West Headnotes (7)

[1] **Criminal Law** ⇐ Causal nexus; independent discovery or basis or source

Second bag of marijuana legally seized outside of curtilage of house provided independent basis for search warrant of house under independent source exception to exclusionary rule, and thus, search warrant of house was valid, despite being based in part on illegal seizure of bag of marijuana within curtilage of house. U.S.C.A. Const.Amends. 4, 14.

3 Cases that cite this headnote

[2] **Criminal Law** ⇐ Inevitable discovery

Bag of marijuana illegally seized from within curtilage of defendant's home was admissible under inevitable discovery exception to exclusionary rule, where police legally seized second bag of marijuana from outside curtilage of home, legally observed defendant place first bag inside curtilage and search warrant authorized officers to search entire premises. U.S.C.A. Const.Amends. 4, 14.

9 Cases that cite this headnote

[3] **Criminal Law** ⇐ Causal nexus; independent discovery or basis or source

Criminal Law ⇐ Inevitable discovery

Purpose of inevitable discovery doctrine and independent source doctrine exceptions to exclusionary rule are same: to prevent earlier act that violated constitutional right from undermining investigation based on other, legal sources of information. U.S.C.A. Const.Amends. 4, 14.

6 Cases that cite this headnote

[4] **Criminal Law** ⇐ Inevitable discovery

Criminal Law ⇐ Degree of proof

In order for inevitable discovery exception to exclusionary rule to apply, prosecution must establish by preponderance of evidence that information ultimately or inevitably would have been discovered by lawful means. U.S.C.A. Const.Amends. 4, 14.

4 Cases that cite this headnote

[5] **Indictments and Charging Instruments** ⇐ Evidence supporting indictment

Indictments and Charging Instruments ⇐ Sufficiency of accusation

Indictments and Charging Instruments ⇐ Defenses

Trial court improperly analyzed evidence presented at hearing on pretrial motion to dismiss to determine if that evidence was sufficient to support conviction for offense of obstructing government administration rather than merely examining legal question of whether indictment language adequately charged crime, and thus, dismissal of indictment was improper; whether defendant was entitled to defense to crime and whether defendant used force with intent necessary to satisfy elements of charge were for trial. Rules Crim.Proc., Rules 12, 12(b)(1); Fed.Rules Cr.Proc.Rule 12, 18 U.S.C.A.

2 Cases that cite this headnote

[6] **Indictments and Charging Instruments** ⇐ Matters appearing on face of charging instrument

Indictments and Charging Instruments ⇐ Necessity

Superior court may not conduct pretrial hearing on facts underlying offense charged in indictment; indictment is subject to dismissal for failure to state offense only when facts alleged on its face failed to make out offense against State. Rules Crim.Proc., Rule 12.

2 Cases that cite this headnote

[7] **Obstructing Justice** ⇐ Failure to obey command or comply with request of officer; failure to assist

Defendant had obligation to obey even unlawful commands of police, at least, if issued in good faith belief in their lawfulness.

Attorneys and Law Firms

***1017** Garry Greene (orally), Asst. Atty. Gen., Augusta, James E. Diehl, Asst. Dist. Atty., Dover–Foxcroft, for plaintiff.

Marshall A. Stern, Nancy White (orally), Bangor, for defendants.

Before McKUSICK, C.J., and GLASSMAN, CLIFFORD, COLLINS and BRODY, JJ.

Opinion

McKUSICK, Chief Justice.

The State appeals from the order of the Superior Court (Piscataquis County, *Smith, J.*) suppressing evidence seized near and within the Guilford home of defendants Kathryn and Ralph Storer and dismissing a charge of obstructing government administration against Mrs. Storer. The court held that the seizure by a game warden of a bag containing jars of marijuana from behind the Storers' house violated the Fourth and Fourteenth Amendments. The illegality of that seizure, concluded the court, required the suppression not only of that evidence but also of additional marijuana and related paraphernalia found while the police executed a warrant for the search of the Storers' house because the illegal seizure had been one basis for probable cause supporting the issuance of the warrant. By its order, the court further held that the police acted unreasonably by preventing the Storers from reentering their home pending the issuance of a warrant for its search and that accordingly Mrs. Storer could not be convicted of obstructing government administration for her trying to push by a game warden and an officer to gain entrance. On the State's appeal, we vacate the order in all respects.

On November 1, 1989, the Department of Inland Fisheries and Wildlife received an anonymous tip that Ralph Storer had a "jacked" deer in the cellar of his house in Guilford. The next day the three wardens who were assigned to investigate the tip devised a surveillance plan. They decided that one of them would watch the Storers' house while someone placed an anonymous call to warn the Storers that the wardens were coming and to urge them to get rid of any deer meat. The wardens hoped that they would see one of the Storers bring deer parts outside to hide or dispose of them.

At about 8:15 p.m. on November 2, the three wardens drove to the area of Guilford where the Storers live. The Storers' house fronts on Glass Hill Road, approximately 50 yards from its intersection with Route 150, the so-called North Guilford Road. The wardens drove north on Route 150 about 400–500 yards past the Glass Hill Road intersection and dropped Warden Annis off. Annis crossed a tree line that ran along Route 150, walked into a mowed field of some 300 acres, and made his way toward the back of the Storers' house.

Approximately 100 yards from the house he stepped back into the tree line, sat down, and watched the house with his binoculars.

Meanwhile, the other two wardens made a radio call to a fourth warden, whose wife placed the anonymous warning phone call to the Storers. After waiting in the tree line for 15 to 20 minutes, Warden Annis saw the cellar light switch on. He watched Kathryn Storer, whom he recognized, come out of the cellar door. He saw her approach a chicken or rabbit pen about 40 yards in back of the house and drop a bag to the ground.[1] Mrs. Storer then returned to the cellar and turned off the light. About three minutes later, Warden Annis saw Mrs. Storer go out the front door of her house, cross Glass Hill Road, and throw a second bag into the woods.[2]

Unaware of what Warden Annis had seen, his two colleagues pulled into the Storers' driveway. They went to the front porch, knocked on the door, and asked Mrs. Storer if they could speak with her husband. She told him that he was not home, ***1018** that she had just gotten a call that game wardens were coming with a search warrant, and that she would not say anything until her husband returned. After seeing the wardens leave the front porch, Warden Annis went to Bag 1. When he picked it up, several canning jars containing almost one and three-quarter pounds of marijuana fell out. Warden Annis walked out from behind the house and brought Bag 1 to the wardens in the front who were waiting for Mr. Storer. The wardens decided to call the sheriff's department for assistance.

Within minutes Investigator Bickford arrived. Warden Annis told Bickford what he had seen from the back of the house, described Bag 1 and its contents, and went across the road with Bickford to get Bag 2. That bag also contained marijuana, about one and one-quarter pounds. As soon as Mr. Storer returned home, one of the wardens asked him about the deer, read him his Miranda rights, and told him that they had found marijuana. When Mr. Storer would not consent to a search of the house, he was told that a warrant would be obtained. The Storers left the house in their truck. Before Investigator Bickford and Warden Annis left to get the warrant, Investigator Bickford told the police officer and game wardens who were to remain there to secure the premises and to keep the Storers from going inside if they returned.

Mrs. Storer did come back to the house before Investigator Bickford and Warden Annis returned with the warrant. In an attempt to get inside, she tried to push her way past an officer and a warden who were standing on her porch blocking the front door. Unable to get past them, Mrs. Storer then tried to get into the house through a cellar window. She was immediately arrested.

When Investigator Bickford returned with a warrant, the wardens and police officers searched the house. Inside they found five and one-half pounds of marijuana, plant clippers, and a supply of clear sandwich bags and rubber bands. Both Mr. and Mrs. Storer were indicted for unlawful trafficking in scheduled drugs in violation of 17–A M.R.S.A. § 1103 (Class C) (1983 & Supp.1990).[3] Mrs. Storer was also charged with obstructing government administration in violation of 17–A M.R.S.A. § 751 (1983).[4]

I.

The Suppression of Evidence

[1] Raising their challenge to the conduct of the police and wardens only under the United States Constitution, defendants moved to suppress the marijuana found in Bag 1, the marijuana found in Bag 2, and the marijuana and drug paraphernalia found in the house. The Superior Court suppressed the marijuana in Bag 1, finding that Warden Annis was within the curtilage of the Storers' home when he seized it without a warrant. The court also suppressed the evidence found during the search of the Storers' house, concluding that the warrant was "tainted by the unlawful seizure of the marijuana found [in Bag 1] within the [Storers'] curtilage." The court did not, however, suppress the marijuana that Warden Annis and Investigator Bickford found in Bag 2 across the road from the Storers' house, holding that ***1019** the Storers had no reasonable expectation of privacy in that area and that "the discovery and seizure of this bag was not dependent on the seizure of the first bag."

A. *The Validity of the Search Warrant*

We turn first to the Superior Court's suppression of the evidence seized in the Storers' house pursuant to the search warrant. In this application of the exclusionary rule, the court suppressed as the "fruits of the poisonous tree" evidence that the police and wardens had obtained as a result of an illegal seizure of Bag 1. *See Wong Sun v. United States*, 371 U.S. 471, 484–85, 83 S.Ct. 407, 415–16, 9 L.Ed.2d

441 (1963). The rationale for extending the exclusionary rule to this type of evidence is to deter police from furthering an investigation by engaging in illegal conduct. *See* *Nix v. Williams*, 467 U.S. 431, 442–43, 104 S.Ct. 2501, 2508–09, 81 L.Ed.2d 377 (1984). On the other hand, "[w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Id.* at 443, 104 S.Ct. at 2509. Consequently, the independent source exception to the exclusionary rule "allows admission of evidence which was gained through an independent source as well as the tainted source." *United States v. Silvestri*, 787 F.2d 736, 740 (1st Cir.1986), *cert. denied*, 487 U.S. 1233, 108 S.Ct. 2897, 101 L.Ed.2d 931 (1988); *see also* *Murray v. United States*, 487 U.S. 533, 537, 108 S.Ct. 2529, 2533, 101 L.Ed.2d 472 (1988); *United States v. Moscatiello*, 771 F.2d 589, 602–04 (1st Cir.1985), *vacated on other grounds*, 476 U.S. 1138, 106 S.Ct. 2241, 90 L.Ed.2d 688 (1986).

Because the police's discovery of the marijuana in Bag 2 did not result from the illegal seizure of Bag 1 and it thus provided an independent basis for the search warrant, the independent source exception to the exclusionary rule applies to the evidence obtained during the search of the Storers' house. Probable cause for issuing the search warrant was based in part on the marijuana found in Bag 1 and in part on the marijuana found in Bag 2. The Superior Court found that Mrs. Storer had thrown Bag 2 outside the Storers' curtilage and that it had been legally retrieved by Warden Annis and Investigator Bickford. In this situation the court should have excised from the affidavit used to obtain the warrant all the information it believed had been illegally obtained and then should have determined whether the magistrate would have had probable cause to issue the warrant relying solely on the remaining information. *See* *United States v. Veillette*, 778 F.2d 899, 903–04 (1st Cir.1985), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986). Upon doing so, one readily concludes that Bag 1 was unnecessary to the probable cause showing and that the warrant would have issued even if Bag 1 had not been seized. The indisputably legal seizure of Bag 2 provided the magistrate with ample grounds to issue the search warrant and constituted an independent source for the evidence found in the house during the search pursuant to the warrant.

B. *The First Bag of Marijuana (Bag 1)*

[2] [3] [4] In its challenge to the suppression of Bag 1, the State argues that the Superior Court committed clear error in finding that Warden Annis seized that bag from within the curtilage of the Storers' house. Because the search warrant in any event would not be invalidated by the illegality of the seizure of Bag 1, we need not review the court's factual finding of the extent of the Storers' curtilage. Instead, the dispositive question is whether Bag 1 should be admitted "on the ground that it would ultimately or inevitably have been discovered even if no violation of any consitutional ... provision had taken place." *Nix v. Williams*, 467 U.S. at 434, 104 S.Ct. at 2504. The inevitable discovery exception to the exclusionary rule derives from the independent source doctrine, "but it differs in that the question is not whether the police did in fact acquire certain evidence by reliance upon an untainted source but instead whether evidence found because of a Fourth Amendment violation would inevitably ***1020** have been discovered lawfully." 4 W. LaFave, *Search & Seizure* § 11.4(a), at 378 (2d ed. 1987); *see also* *Murray v. United States*, 487 U.S. at 539, 108 S.Ct. at 2534 ("[t]he inevitable discovery doctrine ... is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered" (emphasis in original)). The purpose of the two exceptions to the exclusionary rule are exactly the same: to prevent an earlier act that violated a constitutional right from undermining an investigation based on other, legal sources of information. *See* *Nix v. Williams*, 467 U.S. at 444, 104 S.Ct. at 2509. In order for the inevitable discovery exception to apply, the prosecution must establish "by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Id.; see also* *Murray v. United States*, 487 U.S. at 543, 108 S.Ct. at 2536.

The record compels a finding that the State has made that showing. Even if Warden Annis could not have legally seized Bag 1 without a warrant, he did nothing illegal in watching Mrs. Storer from a position plainly outside the curtilage and seeing her deposit Bag 1 away from the house. *See* *United States v. Dunn*, 480 U.S. 294, 304, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326 (1987). With that observation and the knowledge that Bag 2 containing marijuana was thrown minutes later into the woods across the road from the front of the house, the officers conducting the search would have gone directly to Bag 1 once they had the warrant in hand. The

warrant authorized them to search the Storers' entire premises, including their "outbuildings and curtilage."

II.

Pretrial Dismissal of the Indictment

[5] Kathryn Storer's indictment for obstructing government administration read that "on or about the second day of November, 1989, ... [she] did use force, violence, intimidation or engage in a criminal act, with the intent to interfere with public servants, ... who were in the performance of an official function." In her motion to dismiss the charge, Mrs. Storer alleged that she was not interfering with police functions because the seizure of her house was illegal. She also alleged that she had not used force against the officers but that if she had, she was privileged to defend her property. The court granted her motion on the ground that "[t]he procedure employed by the officers in excluding Mrs. Storer from her residence went beyond the State's need to prevent the destruction or removal of evidence. The officers acted without lawful authority."

[6] We agree with the State that the court erred in dismissing the indictment. The Superior Court may not conduct a pretrial hearing on the facts underlying the offense charged in an indictment; an indictment is subject to dismissal for failure to state an offense only when the facts alleged on its face fail to make out an offense against the State.

Although Mrs. Storer's motion to dismiss does not specify a particular rule of criminal procedure, her pretrial challenge to the indictment can draw its procedural legitimacy only from M.R.Crim.P. 12, the rule governing pleadings and motions before trial. Rule 12, and the Federal Rule of Criminal Procedure on which it is modeled, "abolish archaic procedural forms of raising defenses and objections to the indictment, and ... allow these defenses to be by an appropriate motion." *State v. Perkins*, 275 A.2d 586, 588 (Me.1971). In place of the common law pleadings, Rule 12(a) requires a defendant seeking pretrial rulings to file a "motion to dismiss or to grant appropriate relief."

The types of defenses that may be raised under Rule 12 fall into two categories. "Rule 12(b)(2) reaches defects in the process which must be raised by appropriate motion, or be considered waived. Rule 12(b)(1) is applicable to defenses capable of determination without a trial of the general issue, but which are not waived by failure to raise the issue prior to trial." *State v. Perkins*, 275 A.2d at 587–88. One of the ***1021** defenses that falls into the latter category is "the failure of a charging document to charge an offense." 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 12.3, at 12–9 (1990). "A criminal complaint lacking any of the essential elements of the crime intended to be charged cannot confer jurisdiction upon the court to try an accused and no lawful sentence can be imposed thereunder." *State v. Scott*, 317 A.2d 3, 5 (Me.1974). The historical reason for requiring the indictment to specify an offense stems from the lack of trial records in England:

> If the charging instrument was virtually the entire record and it was impossible for the reviewing court to determine what the evidence was, it is not surprising that courts might have feared that no evidence had been introduced in support of an element that the indictment failed to state.

Ballou, *"Jurisdictional" Indictments, Informations and Complaints: An Unnecessary Doctrine*, 29 Me.L.Rev. 1, 11 n. 69 (1977). The modern purpose of the requirement is to allow the defendant to prepare a defense in light of the charges that are brought by the State. *See id.*

In the case at bar, the Superior Court did more than examine the legal question whether the indictment's language adequately charged the crime of obstructing government administration; it analyzed the evidence presented at the suppression hearing to determine if that evidence was sufficient to support a conviction for that offense. Neither the Maine nor the federal rules provide any authority for such a procedure. *Cf.* *State v. Lagasse*, 410 A.2d 537, 540 (Me.1980) ("[a] pretrial motion addressed to the sufficiency of the evidence to support the indictment is unknown to our criminal procedure"); *see also United States v. Gallagher*, 602 F.2d 1139, 1142 (3d Cir.1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 728 (1980).

[7] Even if the officers acted unlawfully in seizing the Storers' house, an issue we need not resolve here, "[t]he legality of the arrest for obstructing government administration does not turn upon either the legality of the

order ... or [the officers'] knowledge of the legality of that order." *State v. Judkins*, 440 A.2d 355, 359 (Me.1982). Mrs. Storer had an obligation to obey even the unlawful commands of the police, at least if issued in a good faith belief in their lawfulness. *Id.*; *cf.* *State v. Austin*, 381 A.2d 652, 655 (Me.1978) ("under the [criminal] code a person being arrested must not respond violently" to an officer's use of non-deadly force if the officer does not know the arrest is illegal). If Mrs. Storer is entitled to a defense to the crime with which she is charged, the question whether the circumstances warrant the defense is appropriately left for trial. *See State v. Boilard*, 488 A.2d 1380, 1387–90 (Me.1985); 1 C. Wright, *Federal Practice & Procedure* § 191, at 687 (2d ed. 1982) ("[a] pretrial motion is not the proper method of raising a defense or objection that will require the trial of the general issue"). Similarly, a trial is the place to determine if Mrs. Storer used "force" with the "intent" necessary to satisfy the elements of the obstructing justice charge. *See* *United States v. Knox*, 396 U.S. 77, 83 & n. 7, 90 S.Ct. 363, 367 & n. 7, 24 L.Ed.2d 275 (1969) ("the question whether Knox's predicament contains the seeds of a 'duress' defense, or perhaps whether his false statement was not made 'wilfully' as required by [the statute at issue], is one that must be determined initially at his trial," and not in a Rule 12(b)(1) motion). The court should not have dismissed the charge against Kathryn Storer.

The entry is:

Order suppressing evidence and dismissing the charge of obstructing government administration vacated.

All concurring.

All Citations

583 A.2d 1016

Footnotes

1 For convenience of identification, we will refer to the first bag deposited in back of the Storers' house as Bag 1.

2 For the same reason, we will refer to the bag deposited across the road from the Storers' house as Bag 2.

3 The relevant portions of 17–A M.R.S.A. § 1103 read:

> 1. A person is guilty of unlawful trafficking in a scheduled drug if he intentionally or knowingly trafficks in what he knows or believes to be any scheduled drug, and which is, in fact, a scheduled drug....
>
> 2. Violation of this section is:
>
> . . . . .
>
> B. A Class C crime if the drug ... is marijuana in a quantity of more than 2 pounds....
>
> 3. A person is presumed to be unlawfully trafficking in scheduled drugs if the person intentionally or knowingly possesses any scheduled drug that is, in fact:
>
> A. More than 2 pounds of marijuana....

Since the Storers were indicted, the statute has been amended in parts not relevant to this appeal.

4 The pertinent part of 17–A M.R.S.A. § 751 reads:

1. A person is guilty of obstructing government administration if he uses force, violence, intimidation or engages in any criminal act with the intent to interfere with a public servant performing or purporting to perform an official function.

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60 A.3d 1286
Supreme Judicial Court of Maine.

STATE of Maine
v.
Mark W. STRONG Sr.

Docket No. Yor–13–55.
|
Argued: Feb. 13, 2013.
|
Decided: Feb. 15, 2013.

Synopsis

Background: Defendant was charged with multiple counts of invasion of privacy and other crimes. The Superior Court, York County, Mills, J., granted defendant's motion to dismiss charges for invasion of privacy, and State appealed.

Holdings: The Supreme Judicial Court, Levy, J., held that:

[1] dismissal of 46 counts of invasion of privacy presented reasonable likelihood that State's prosecution would be seriously impaired, as grounds for pretrial interlocutory review;

[2] trial court was not precluded from considering additional proffered facts not alleged in indictment; and

[3] persons who had engaged services of prostitute did not have reasonable expectation to be safe from video surveillance at residence, studio, and business office where prostitute conducted her business, and thus, were not entitled to privacy.

Affirmed; remanded.

West Headnotes (8)

[1] Criminal Law ⇐ Right of Prosecution to Review

When determining whether to exercise its jurisdiction over a State's interlocutory appeal from the pretrial dismissal of an indictment, the Supreme Judicial Court considers whether under all the circumstances the lower court's ruling has produced a significant setback to the State's attempt to bring the accused to justice. 15 M.R.S.A. § 2115–A(1).

[2] Criminal Law ⇐ Right of Prosecution to Review

Trial court's dismissal of 46 counts of invasion of privacy presented reasonable likelihood that State's prosecution would be seriously impaired, as grounds for pretrial interlocutory review; dismissed counts constituted majority of offenses, they alleged criminal activity that was wholly separate from and not customarily associated with remaining counts of promotion of prostitution, dismissal presented question of public importance in that it involved video surveillance—which was lawful in many situations and increasingly common in modern society. 15 M.R.S.A. § 2115–A(1).

1 Case that cites this headnote

[3] Criminal Law ⇐ Indictment or Information

State waived claim on interlocutory appeal that defendant's motion to dismiss indictment on charges for invasion of privacy was not filed by deadline set for pretrial motions, where State did not raise timeliness exception until after trial court heard and granted motion. Rules Crim.Proc., Rule 12(b)(2).

[4] Indictments and Charging Instruments ⇐ Motion or application

Trial court was not precluded from considering additional proffered facts not alleged in indictment in determining whether State alleged offenses of invasion of privacy, where defendant's motion to dismiss raised question of law whether victims had reasonable expectation of privacy while engaged with prostitute, State did not oppose trial court's consideration of

facts, and indictment did not provide specific information of places at which alleged violations of privacy took place. 17–A M.R.S.A. § 511(2).

1 Case that cites this headnote

[5] **Indictments and Charging Instruments** ⇐ Defects in charging instrument

Indictments and Charging Instruments ⇐ Matters appearing on face of charging instrument

An indictment is subject to dismissal for failure to state an offense only when the facts alleged on its face fail to make out an offense against the State, which strips the court of jurisdiction to try the accused.

1 Case that cites this headnote

[6] **Indictments and Charging Instruments** ⇐ Construction as a whole

Courts should not look beyond the four corners of an indictment to determine whether it charges a crime.

[7] **Disorderly Conduct** ⇐ Privacy, surveillance, and eavesdropping

Persons who had engaged services of prostitute did not have reasonable expectation to be safe from video surveillance at residence, studio, and business office where prostitute conducted her business and, thus, were not entitled to privacy, as required to support charges for invasion of privacy. 17–A M.R.S.A. § 511(1)(B).

1 Case that cites this headnote

[8] **Criminal Law** ⇐ Review De Novo

The Supreme Judicial Court's review of the proper construction of a criminal statute is de novo.

2 Cases that cite this headnote

Attorneys and Law Firms

*1287 Kathryn L. Slattery, District Attorney, Justina A. McGettigan, Dep. Dist. Atty., and Patrick H. Gordon, Asst. Dist. Atty. (orally), for appellant State of Maine.

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Sarah A. Churchill, Esq., Nichols & Webb, P.A., Saco, on the briefs, for amicus curiae Alexis Wright.

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

Opinion

LEVY, J.

[¶ 1] The State of Maine appeals from an order of the trial court (*Mills, J.*) granting Mark W. Strong's motion to dismiss part of an indictment for failure to adequately charge forty-five counts of violation of privacy (Class D), 17–A M.R.S. § 511(1)(B), (3) (2012), and one count of conspiracy to commit a violation of privacy (Class E), 17–A M.R.S. §§ 151(1)(E), 511(1)(B), (3) (2012). The State contends that the court erred in granting the M.R.Crim. P. 12(b)(2) motion because it was untimely and the indictment adequately charges offenses pursuant to the applicable statutes. We affirm the court's order.

I. BACKGROUND

[¶ 2] On October 3, 2012, Strong was charged by a fifty-nine-count indictment that included twelve counts of promotion of prostitution (Class D), 17–A M.R.S. § 853 (2012); one count of conspiracy to commit promotion of prostitution (Class E), 17–A M.R.S. §§ 151(1)(E), 853; forty-five counts of violation of privacy (Class D), 17–A M.R.S. § 511(1)(B), (3); and one count of conspiracy to commit a violation of privacy (Class E), 17–A M.R.S. §§ 151(1)(E), 511(1)(B), (3). The counts charging a violation of privacy contained nearly identical language and read:

> On or about between [month, date, and year] and [month, date, and year], in Kennebunk, YORK County, Maine, **MARK W STRONG SR,** did

> intentionally install or use on one or more occasions in a private place, without the consent of the person or persons entitled to privacy therein, a device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place.

Strong pleaded not guilty to all of the charges, and the court ordered that the parties file pretrial motions by December 6, 2012.

[¶ 3] On January 22, 2013, the first day of jury selection, Strong moved, pursuant ***1288** to M.R.Crim. P. 12(b), to dismiss the forty-six counts of the indictment involving charges of violation of privacy. Two days later, and while jury selection was still in progress, the court held a hearing on the motion. At the hearing, Strong argued that the crime of violation of privacy, 17–A M.R.S. § 511(1)(B), does not occur if the alleged victim is engaged in criminal activity at the time of the violation of privacy. Specifically, Strong contended that an alleged victim who is, at the time of the alleged violation of privacy, engaging a prostitute in violation of 17–A M.R.S. § 853–B (2012), on premises controlled by the prostitute, is not a "person ... entitled to privacy" in a "private place" as those terms are used in section 511(1)(B). The State countered that the statute protects the privacy rights of victims, whether or not they are engaged in illegal activity.

[¶ 4] The court then inquired whether all of the affected counts of the indictment concern the same activity and, specifically, whether there was "any other purpose" for each alleged victim to have been at the alleged prostitute's "place of business." In response, the State made an offer of proof to establish that the key facts underlying the privacy counts demonstrated that the alleged victims were "persons entitled to privacy" in a "private place," as required by section 511(1)(B).

[¶ 5] In its offer of proof, the State represented that the alleged prostitute with whom Strong cooperated and conspired had engaged in sex for money with the victims in three locations:

> It first starts out at [the alleged prostitute's] residence. And then there is a larger studio, where the windows are covered. And there is a third situation where there is, like, a two-room business suite that [the alleged prostitute] has rented on a second floor, that she has to unlock the door for people to come in and then lock the door when they come in. They arrive. Essentially, the door is locked.... [O]n the ground floor, the windows were covered so people couldn't see in. And then when they were on the second floor, the windows weren't covered but people couldn't see in because they were on the second floor.

The State also represented that the victims went to these locations for the sole purpose of engaging a prostitute, and were with the alleged prostitute for "usually anywhere from 30 minutes up to several hours." Further, "some went one or two times; some went many, many, many times."

[¶ 6] The court granted Strong's motion and dismissed the privacy counts, concluding that based on the indictment and the State's offer of proof, the State could not prove the crimes as alleged. After a recess, the State moved the court to reconsider its dismissal, arguing, for the first time, that Strong's motion was not timely. The court denied the motion to reconsider, and the State filed this interlocutory appeal pursuant to 15 M.R.S. § 2115–A(1) (2012) and M.R.App. P. 21. Strong immediately filed in this Court a motion to dismiss the appeal, which we denied, and to expedite the appeal, which we granted.

II. DISCUSSION

[¶ 7] We consider two questions: (A) whether we should reconsider our denial of Strong's motion to dismiss this interlocutory appeal, and (B) whether the court erred in dismissing the privacy counts of the indictment. We address each in turn.

A. Interlocutory Appeal

[1] [¶ 8] Title 15 M.R.S. § 2115–A(1) permits the State to bring certain pretrial interlocutory appeals on questions of law, including an appeal

> ***1289** from a pretrial dismissal of an indictment, information or complaint; or from any other order of the court prior to trial which, either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing either serious impairment to or termination of the prosecution.

When determining whether to exercise this jurisdiction, we "consider whether under all the circumstances the lower court's ruling has produced a significant setback to the State's attempt to bring the accused to justice." *State v. Drown*, A.2d 466, 470–71 (Me.1982); ***see also*** *State v. Brackett*, 2000 ME 54, ¶¶ 6–7, 754 A.2d 337.

[2] [¶ 9] Here, the circumstances of the court's dismissal of the forty-six privacy counts present a reasonable likelihood that the State's prosecution of Strong has been seriously impaired. The dismissed privacy counts constitute the majority of the criminal counts brought against Strong. They allege criminal activity that is wholly separate from and not customarily associated with the remaining counts alleging crimes of promotion of prostitution. *See* 17–A M.R.S. §§ 151(1)(E), 853. Further, the legal basis for the dismissal presents a question of great public importance because it involves a criminal statute forbidding, among other things, video surveillance—a phenomenon that is lawful in many situations and increasingly common in modern society. Under these circumstances, the exercise of our authority to consider this interlocutory appeal pursuant to 15 M.R.S. § 2115–A(1) is warranted and we decline to reconsider our earlier denial of Strong's motion to dismiss the State's appeal. *See Drown*, 447 A.2d at 470–71.

B. Dismissal of the Counts Charging Violation of Privacy

[¶ 10] The State contends that the court erred in dismissing the privacy counts because (1) Strong's motion was untimely, and (2) the indictment adequately charges a crime pursuant to 17–A M.R.S. § 511(1)(B).

1. Timeliness

[3] [¶ 11] The State failed to raise its timeliness objection until after the court had heard and granted the motion to dismiss, and thus it has failed to preserve the issue for appellate review. *See* *State v. Dolloff*, 2012 ME 130, ¶ 39 n. 11, 58 A.3d 1032 (stating that "an objection must be made within a reasonable time of the offending [action] to be preserved"); *see also* M.R.Crim. P. 12(b)(2).

2. Adequacy of the Indictment

[4] **[5]** [¶ 12] "[A]n indictment is subject to dismissal for failure to state an offense only when the facts alleged on its face fail to make out an offense against the State," which strips the court of jurisdiction to try the accused. *State v. Storer*, 583 A.2d 1016, 1020–21 (Me.1990). Although the State has not objected to it here, we have consistently rejected the practice of considering facts not alleged on the face of an indictment in determining whether the indictment charges an offense. *See, e.g.*, *id.* at 1021; *see also* 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 12.1 at IV–57 (Gardner ed.1995). Some courts, however, have recognized a narrow exception to this rule in the "unusual circumstance" in which the motion presents a question of law, the material facts are not in dispute, and the prosecution does not object to the court's consideration of those facts. *United States v. Yakou*, 428 F.3d 241, 247 (D.C.Cir.2005) (quotation marks omitted); *see also* *United States v. Flores*, 404 F.3d 320, 324–25 (5th Cir.2005).

[6] [¶ 13] This case presents just such an "unusual circumstance." The ***1290** challenge raised is a question of law, the proffered facts are not in dispute, and, most important, the State did not oppose the court's consideration of those facts. Moreover, the basis for the court's inquiry into the underlying facts is evident: the indictment provided no specific information regarding the alleged crimes. It omitted the names of the alleged victims; offered no description of the places at which the alleged violations of privacy took place; and did not allege that those places were, as the statute requires, places in which a person "may reasonably expect to be safe from surveillance, including, but not limited to, changing or dressing rooms, bathrooms and similar places." 17–A M.R.S. § 511(2) (2012); *see also* 17–A M.R.S. § 32 (2012) (providing that the elements of a crime include all "attendant circumstances"); *Drown*, 447 A.2d at 470 (observing that the indictment should "be sufficiently specific that it enables [a] defendant to prepare his defense and

protects him against further jeopardy for the same offense"). Although we reemphasize the rule that courts should not look beyond the four corners of an indictment to determine whether it charges a crime, based on the highly unusual circumstances presented here, the trial court acted well within the bounds of its discretion in evaluating the adequacy of the indictment as augmented by the State's offer of proof. *See* *Yakou*, 428 F.3d at 247.

[7] **[8]** [¶ 14] We next turn to the plain language of the statute. *See State v. Paradis*, 2010 ME 141, ¶ 5, 10 A.3d 695 (per curiam). Our review of the proper construction of the statute is de novo. *See State v. Jones*, 2012 ME 88, ¶ 6, 46 A.3d 1125. Section 511(1)(B) provides,

> A person is guilty of violation of privacy if ... that person intentionally ... [i]nstalls or uses in a private place without the consent of the person or persons entitled to privacy in that place, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place.

17–A M.R.S. § 511(1)(B). Section 511 specifically defines a "private place" as "a place where one may reasonably expect to be safe from surveillance, including, but not limited to, changing or dressing rooms, bathrooms and similar places." *Id.* § 511(2).

[¶ 15] The State contends that section 511(1)(B) extends to any place in which a person disrobes in private, regardless of whether that person is engaging in criminal conduct at the time. [1] In contrast, Strong contends that persons engaged in criminal activity have no reasonable expectation to be safe from surveillance, and ***1291** therefore that section 511(1)(B) does not encompass persons who are engaging a prostitute in violation of 17–A M.R.S. § 853–B. Because the statute is reasonably susceptible to more than one construction, it is ambiguous and we turn to its legislative history for guidance. [2] *See Carrier v. Sec'y of State*, 2012 ME 142, ¶ 12, 60 A.3d 1241, 2012 WL 6720686; *Paradis*, 2010 ME 141, ¶ 5, 10 A.3d 695.

[¶ 16] When first enacted in 1976, section 511 defined a "private place" to mean "a place where one may reasonably expect to be safe from surveillance but does not include a place to which the public or a substantial group has access." P.L.1975, ch. 499, § 1. The comment immediately following the text of the bill as enacted states that the provision was intended "to prevent [the] seeing or hearing of things that *are justifiably expected* to be kept private." 17–A M.R.S.A. § 511 cmt. (2006) (emphasis added). Through amendments in 1999 and 2008, the Legislature revised the definition of "private place" by removing the language excluding "a place to which the public or a substantial group has access" and adding the language, "including, but not limited to, changing or dressing rooms, bathrooms and similar places." *See* P.L.2007, ch. 688, § 2; P.L.1999, ch. 116, § 1.

[¶ 17] Thus, the Legislature's overall purpose in criminalizing certain violations of privacy cannot be understood as an effort to broadly protect individuals' subjective expectations of privacy. The purpose is more focused, requiring that certain objective factors be present as well. The place involved must be "a place where one may *reasonably* expect to be safe from surveillance." 17–A M.R.S. § 511(2) (emphasis added). Further, a person's desire to keep private what transpires within that place must be a *justifiable expectation*, and, therefore, objectively reasonable. *See* 17–A M.R.S.A. § 511 cmt. (2006).

[¶ 18] Applying these standards to the unique facts delimited by the counts of the indictment as augmented by the State's offer of proof, the persons who entered and disrobed in the places described in the offer of proof—a residence, studio, and business office where a prostitute conducted her business—may have held a subjective expectation of privacy. [3] Nevertheless, they cannot qualify as "persons entitled to privacy" in those places for purposes of the objective requirements of section 511(1)(B) because, as established by the State's offer of proof, their sole purpose for being present in those places was to engage a prostitute. Places of prostitution and people who knowingly frequent them to engage a prostitute are not sanctioned by society. Accordingly, it is objectively unreasonable for a person who knowingly enters a place of prostitution for the purpose of engaging a prostitute to expect that society recognizes a right to be safe from surveillance while inside. [4]

***1292** [¶ 19] Because the relevant counts of the indictment, as augmented by the State's offer of proof, failed to adequately

charge the offense of violation of privacy, the court properly granted Strong's motion to dismiss.

The entry is:

Judgment dismissing counts 3, 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 21, 22, 23, 25, 26, 27, 28, 29, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 44, 45, 47, 48, 49, 50, 52, 53, 54, 55, 57, 58, and 59 is affirmed. Case remanded for further proceedings consistent with this opinion.

All Citations

60 A.3d 1286, 2013 ME 21

Footnotes

1 Although the State urges us to construe 17–A M.R.S. § 511(1)(B) (2012) in light of the Fourth Amendment jurisprudence addressing unreasonable searches and seizures, that body of law provides little guidance. Nowhere in section 511 is there any indication that the Legislature intended to make the rights protected by the statute coextensive with the rights protected by the Fourth Amendment. In addition, there is no logical correlation between the Fourth Amendment and the circumstances addressed by section 511, when, for example, many persons who could expect to be safe from surveillance within the meaning of the statute might nonetheless lack standing to assert Fourth Amendment rights. *See State v. Filion*, 2009 ME 23, ¶ 13, 966 A.2d 405 (observing that a defendant who asserts a violation of the Fourth Amendment occurring at a location belonging to or controlled by a third person must demonstrate that he or she had a reasonable expectation of privacy based on several factors, including the defendant's possession, ownership, or prior use of the property; the legitimacy of the defendant's presence on the property; the defendant's ability to exclude others from the property; the defendant's access to the property if owned by another who is not present; and the defendant's subjective expectation of privacy).

2 Section 511(1)(B)'s description of the conduct it prohibits is less specific than are similar statutes in other jurisdictions. *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/26–4 (LEXIS through Pub. Act 97–1163 except Pub. Act 97–1150 of the 2012 Legis. Sess.); N.H.Rev.Stat. Ann. § 644:9 (LEXIS through Ch. 290 of 2012 Legis. Sess.); N.Y. Penal Law §§ 250.40, 250.45 (LEXIS through 2012 released chapters 1–505).

3 The State's offer of proof did not address whether any of the unidentified persons who are the alleged victims of the privacy counts knew or had reason to know that they might be subject to surveillance while with the prostitute. We have assumed for purposes of our analysis that none did.

4 Having reached this conclusion, we need go no further. We therefore do not decide whether, as Strong contends, a violation of section 511(1)(B) can never be committed if a person otherwise entitled to privacy is engaged in criminal activity at the time of the privacy violation. Nor do we address the parameters of the right to privacy outside the bounds of section 511(1)(B) and the unique circumstances of this case.

44 A.3d 307
Supreme Judicial Court of Maine.

STATE of Maine
v.
Richard HERZOG.

Docket No. Was–11–452
|
Submitted on Briefs: April 26, 2012.
|
Decided: June 5, 2012.

Synopsis
Background: Defendant was convicted in the District Court, Machias, Romei, J., of domestic violence assault. Defendant appealed.

Holdings: The Supreme Judicial Court, Saufley, C.J., held that:

[1] defendant was not acting in self-defense when he punched his wife in face, and

[2] by considering whether State met its burden of persuasion that defendant had not acted in self-defense, trial court necessarily considered predicate query whether self-defense justification was in issue.

Affirmed.

West Headnotes (8)

[1] **Criminal Law** ⇐ Necessity of Objections in General

For an unpreserved error or defect to be "obvious," there must be (1) an error, (2) that is plain, and (3) that affects substantial rights; if these conditions are met, the Supreme Judicial Court will exercise its discretion to notice an unpreserved error only if it also concludes that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings. Rules Crim.Proc., Rule 52(b).

1 Case that cites this headnote

[2] **Criminal Law** ⇐ Self-defense

When asserting a self-defense justification, a defendant bears the burden of production to generate the issue with sufficient evidence, though the State bears the burden of persuasion to disprove the defense.

5 Cases that cite this headnote

[3] **Criminal Law** ⇐ Self-defense

If the court concludes that the self-defense issue has been generated, the fact-finder must then determine whether the State has satisfied its burden of persuasion by disproving at least one element of self-defense and establishing each element of the charged crime beyond a reasonable doubt. 17–A M.R.S.A. § 108(1).

4 Cases that cite this headnote

[4] **Criminal Law** ⇐ Self-defense

In the event of a jury trial in which the issue of self-defense is raised, to ensure the jury's proper understanding of the law, a court must provide the jury, as fact-finder, with an appropriate instruction regarding the self-defense justification.

1 Case that cites this headnote

[5] **Criminal Law** ⇐ Trial

When the court is acting as the fact-finder, no jury instructions are prepared or given.

[6] **Criminal Law** ⇐ Review

Appellate review of a trial court's finding on a claim of self-defense during a bench trial is aided if the court first explicitly states that self-defense is in issue and then announces its findings regarding the self-defense justification and the elements of the crime; however, the court has never been required to formulaically recite the process for considering such a claim,

so long as the judgment demonstrates that it properly applied the law and held the State and the defendant to the proper burden of production and persuasion. 17–A M.R.S.A. § 108(1).

2 Cases that cite this headnote

[7] Assault and Battery ⇐ Provocation and self-defense

Defendant was not acting in self-defense when he punched his wife in face, as defense to charge for domestic violence assault; defendant had locked himself in barn, defendant blocked wife's entry into barn when he opened door in response to her knocking, wife used reasonable amount of force to get past him when he unlocked door, and defendant's use of force by punching wife in face during her attempt to get past him was unreasonable. 17–A M.R.S.A. §§ 108(1), 207–A(1)(A).

[8] Criminal Law ⇐ Deliberations; matters considered

By considering whether State met its burden of persuasion that defendant had not acted in self-defense when he punched his wife in face, trial court necessarily considered predicate query whether self-defense justification was in issue, in trial for domestic violence assault. 17–A M.R.S.A. § 108(1).

3 Cases that cite this headnote

Attorneys and Law Firms

***308** Jeffrey W. Davidson, Esq., Machias, for appellant Richard Herzog.

Carletta Bassano, District Attorney, and Jeffrey Baroody, Asst. Dist. Atty., Prosecutorial District VII, Machias, for appellee State of Maine.

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

Opinion

SAUFLEY, C.J.

[¶ 1] Richard Herzog appeals from a judgment of conviction of domestic violence assault (Class D), 17–A M.R.S. § 207–A(1)(A) (2011), entered in the District Court (Machias, *Romei, J.*), and from his sentence, which included a two-year period of probation. The court properly applied the law of self-defense and did not err in its factual findings. Thus, we affirm the judgment of conviction. With regard to the sentence, the State concedes that the term of probation exceeded the statutory maximum. *See* 17–A M.R.S. § 1202(1) (2011). Accordingly, we correct that portion of the sentence and affirm the sentence as corrected.

I. BACKGROUND

[¶ 2] Viewed in the light most favorable to the State, the trial evidence supports the facts found by the trial court. *See State v. Diecidue*, 2007 ME 137, ¶¶ 2, 10, 931 A.2d 1077. On March 31, 2011, Richard Herzog's wife returned to the Herzogs' Jonesport property after visiting a family member in the hospital with her adult daughter. Herzog was intoxicated and drinking in the barn. Herzog's wife went out to the barn while dinner was cooking, and she and Herzog had an argument about his drinking. Herzog's wife went back into the house but later returned to the barn to tell her family that dinner was ready. She found that the door was locked. Herzog opened the door but stood in her way. She tried to get past him to go up the stairs to speak with her son and daughter, whom she believed to be upstairs. Herzog hit her with enough force to give her a red mark and swelling under her eye and to cause her to fall backward.

[¶ 3] The Herzogs' daughter called the police, and Herzog was charged by complaint with domestic violence assault (Class D), 17–A M.R.S. § 207–A(1)(A). Herzog pleaded not guilty, and the court held a nonjury trial.

[¶ 4] At trial, Herzog testified that his wife had pushed him and that he was defending himself. Based on other testimony, the court found that Herzog's wife had used a reasonable amount of force to get past Herzog to get upstairs and that Herzog had used offensive force against her, not a reasonable

amount of force to defend himself. The court specifically found Herzog's wife's testimony to be more credible than his.

*309 [¶ 5] The court found Herzog guilty and sentenced him to twenty days in jail, all suspended, and two years of probation with conditions, including the condition that he could not possess or use unlawful drugs or alcohol. The court ordered that he be evaluated by the probation department and complete whatever counseling was recommended. Herzog was also required to pay $10 to the Victims' Compensation Fund. Herzog appealed.

II. DISCUSSION

A. Self–Defense

[¶ 6] Herzog contends that the court erred in failing to first determine whether self-defense was in issue and then determine whether the State met its burden of disproving self-defense beyond a reasonable doubt.

[1] [¶ 7] Because Herzog did not object to the court's analysis of his self-defense claim, or otherwise raise the issue with the trial court, we review this issue only for obvious error. *See* M.R.Crim. P. 52(b). The test for obvious error is set forth in *State v. Pabon:*

> For an error or defect to be obvious for purposes of Rule 52(b), there must be (1) an error, (2) that is plain, and (3) that affects substantial rights. If these conditions are met, we will exercise our discretion to notice an unpreserved error only if we also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings.

2011 ME 100, ¶ 29, 28 A.3d 1147.

[2] [¶ 8] When asserting a self-defense justification, a defendant bears the burden of production to generate the issue with sufficient evidence, though the State bears the burden of persuasion to disprove the defense. *State v. Ouellette,* 2012 ME 11, ¶¶ 8–9, 37 A.3d 921. By statute, a person is justified in using force to defend himself or herself from an aggressor in specified circumstances:

> A person is justified in using a reasonable degree of nondeadly force upon another person in order to defend the person ... from what the person reasonably believes to be the imminent use of unlawful, nondeadly force by such other person, and the person may use a degree of such force that the person reasonably believes to be necessary for such purpose. However, such force is not justifiable if:
>
> ....
>
> **B.** The person was the initial aggressor, unless after such aggression the person withdraws from the encounter and effectively communicates to such other person the intent to do so, but the other person notwithstanding continues the use or threat of unlawful, nondeadly force....

17–A M.R.S. § 108(1) (2011).

[3] [¶ 9] When a defendant presents evidence that may generate a self-defense justification, a trial court must first determine whether self-defense is in issue as a result of that evidence. *See* 17–A M.R.S. § 101(1) (2011); *Pabon,* 2011 ME 100, ¶ 33, 28 A.3d 1147. If the court concludes that the self-defense issue has been generated, the fact-finder must then determine whether the State has satisfied its burden of persuasion by disproving at least one element of self-defense and establishing each element of the charged crime beyond a reasonable doubt. *See Ouellette,* 2012 ME 11, ¶ 17, 37 A.3d 921.

[4] [¶ 10] In the event of a jury trial, to ensure the jury's proper understanding of the law, a court must provide the jury, as fact-finder, with an appropriate instruction regarding the self-defense justification. *See id.* ¶¶ 13, 15, 17. The provision *310 of this instruction demonstrates that the court has determined that self-defense is in issue.

[5] [6] [¶ 11] When, as here, the court is acting as the fact-finder, no jury instructions are prepared or given. Appellate review is aided in these circumstances if the court first explicitly states that self-defense is in issue and then announces its findings regarding the self-defense justification and the elements of the crime. *See id.* We have never, however, required a trial court to formulaically recite the process for considering a self-defense claim, as long as the court's judgment demonstrates that it has properly applied the

law and has held the State and the defendant to the proper burdens of production and persuasion.

[7] [8] [¶ 12] Here, by reaching the question of whether the State met its burden to disprove the self-defense justification beyond a reasonable doubt, the court necessarily demonstrated that it had determined the justification to be in issue. *See* 17–A M.R.S. § 101(1); *Pabon*, 2011 ME 100, ¶ 33, 28 A.3d 1147. The court then weighed the evidence to determine whether the State had met its burden of proof. Through its consideration of the evidence, the court found that Herzog's wife did not use unlawful, nondeadly force against Herzog and that Herzog was the aggressor. The court explicitly found that Herzog's wife provided more credible testimony, and the court credited her account of the events in finding that Herzog was not acting in self-defense and that he had committed the crime. Nothing in these findings suggests that the court misunderstood the parties' burdens.

[¶ 13] The court did not err in its application of the law, and competent evidence in the record supports the court's ultimate findings that the State disproved the self-defense justification and established the elements of domestic violence assault beyond a reasonable doubt. *See Ouellette*, 2012 ME 11, ¶ 17, 37 A.3d 921; *Diecidue*, 2007 ME 137, ¶ 10, 931 A.2d 1077; *see also* 17–A M.R.S. §§ 207(1)(A), 207–A(1)(A) (2011) (providing that a person is guilty of domestic violence assault if the person "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person" who is "a family or household member").

B. Probation

[¶ 14] The State concedes that the court was not authorized to impose two years of probation as part of this sentence. The sentence did not include a requirement that Herzog complete a batterers' intervention program, which is a prerequisite to the imposition of a two-year term of probation for this Class D crime. *See* 17–A M.R.S. § 1202(1), (1–B) (2011). We therefore correct the sentence by adjusting the period of probation to one year, consistent with section 1202(1). *See State v. White*, 2001 ME 65, ¶ 3, 769 A.2d 827 (providing that a jurisdictional infirmity in a sentence may be raised on direct appeal and will be remedied if it appears plainly on the record). As modified, we affirm the sentence.

The entry is:

Judgment of conviction affirmed. Sentence modified to decrease the period of probation from two years to one year. Sentence affirmed as modified.

All Citations

44 A.3d 307, 2012 ME 73

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