

HILLSBOROUGH, SS
NORTHERN DISTRICT

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT
2002

NOS. 01-S-1869, 02-S-072-073
STATE OF NEW HAMPSHIRE

V.

JASON FULLER

OPINION AND ORDER

LYNN, J.

The defendant, Jason Fuller, is charged with conspiracy to commit burglary, theft by unauthorized taking and receiving stolen property. The charges all arise out of the defendant's alleged participation in the December 5, 2000 burglary of the residence of Chester Chmiola at 56 Grant Street, Manchester. Among the items taken in the burglary were a Baretta handgun and two (2) two-dollar bills. Presently before the court are the following pretrial motions filed by the defendant: (1) Motion to Dismiss (Doc. #4); (2) Motion to Suppress Statement (Doc. #5); and Motion to Suppress (Doc. #6). After reciting the pertinent facts, I address the motions in turn, concluding that the second motion must be granted while the first and third must be denied.

I.

The following facts were established at the May 9, 2002 hearing or are otherwise shown by the record. At approximately 11:40 a.m. on December 5, 2000, Manchester Police Officer Kimberly Goodrich, who was on routine patrol on Hanover Street, was dispatched to the corner of Hanover and Alfred Streets to meet

with a person¹ who had telephoned the police to report that he had observed three suspicious-looking males in the back yard of a residence in the neighborhood where the caller lived. At the time, Goodrich was aware that there had been several recent daytime burglaries in this neighborhood.

Goodrich immediately proceeded to the Hanover-Alfred intersection and met with the caller, who said that the three suspicious males were in their late teens, one possibly being hispanic, and described them as wearing dark and/or neutral colored clothing. Goodrich quickly left the caller and began patrolling the area in search of the trio. Shortly thereafter, Goodrich spoke with one or more landscapers who were working at a nearby church. The landscapers indicated that three teenagers had just walked by them a few minutes ago heading easterly toward Mammoth Road. When Goodrich turned north on Mammoth Road from

¹ Although Officer Goodrich did not identify the caller by name during her testimony, it is important to note that this case does not involve an anonymous tip. As indicated in the text, Officer Goodrich actually met with the person who placed the call to the police when she responded to the intersection of Hanover and Alfred Streets. Because, when the meeting occurred, the caller told Goodrich that the three males had left the area only a few minutes earlier heading north on Alfred Street, Goodrich immediately went to attempt to locate the individuals and, in her haste, did not get the name of the caller at that time. However, while Goodrich was trying to find the three individuals, another officer was assigned to meet with the caller and obtain more detailed information from him, including (presumably) his name. Goodrich testified that she did not speak with this other officer between the time she left and the time she first spotted the defendant and his two companions.

Hanover Street, she observed three teenage males walking southerly on Mammoth Road. One was a white male wearing a gray hooded sweatshirt; the second, also a white male, was wearing a royal blue jacket; and the third was a dark-skinned male wearing a black jacket. Goodrich exited her cruiser and told the three individuals to stop. At this point, all three individuals fled from the officer.

Goodrich radioed for assistance and requested that a perimeter be established around the area in an effort to locate the three individuals. With emergency lights activated, Goodrich proceeded after the individuals. She lost sight of the three for approximately 30 seconds, but then observed the one wearing the blue jacket running easterly on Hanover Street. Goodrich ordered the subject to stop several times, and he finally did so after being boxed-in by Goodrich and another officer who was approaching him from the opposite end of the street. The individual was arrested for resisting detention and was identified as the defendant Jason Fuller.

A search of the defendant at the police station during the booking process revealed that he had in his possession two \$2 bills, which were ink stamped with the date May 1976, and a Fossil wrist watch. Approximately two hours after he was arrested, and following completion of the booking process, the defendant was interviewed by Detective Stacy Howe at the police station. Howe

started the interview by advising the defendant of his Miranda rights. The defendant stated that he desired to speak with an attorney. Howe responded by informing the defendant that the police had found two \$2 bills and a Fossil watch among his belongings, and he proceeded to display to the defendant a clear plastic evidence bag containing these items. The defendant stated that these items belonged to him. Howe then stated that the police "would be showing the items to the victims of today's burglaries to see if they can identify them."

On January 19, 2001, the defendant was indicted on charges of burglary and theft of a firearm in docket numbers 01-S-050 and 01-S-051. The defendant was held in custody from December 5, 2000, the date of his arrest, until September 24, 2001 in lieu of \$15,000.00 cash or surety bail.

By clerk's notice of February 27, 2001, these cases were set for trial on June 4, 2001. On or about April 17, 2001, the defendant submitted a notice of intent to plead guilty (NIP) pursuant to a negotiated plea agreement with the State. The plea hearing was set for May 30, 2001. On that date, I rejected the plea agreement and, without objection by the defendant, the cases were rescheduled for trial on July 30, 2001. On July 6, 2001, the State, with the assent of the defendant, moved to continue the trial because the prosecutor had a conflicting trial commitment on July 30. The case was rescheduled for trial on August 20, 2001.

On or about August 15, 2001, the defendant submitted a second NIP. Because of the filing of the NIP, the cases were removed from the August 20 trial list and a plea hearing was scheduled for September 20, 2001. On that date, I again rejected the plea agreement, finding that it was not meaningfully different than the original one which I had rejected. I also ordered that the cases be scheduled for trial as soon as possible.

By clerk's notice of September 21, 2001, the cases were set for trial on October 9, 2001. On September 24, the defendant posted bail and was released. On October 3, 2001, the State filed a new misdemeanor information against the defendant, charging him with receiving stolen property. This charge related to the two \$2 bills allegedly taken from the Chmiola home during the December 5 burglary.

When the defendant failed to appear for the October 5 trial management conference, the court (Barry, J.) issued a capias for his arrest. The defendant was arrested on the capias on October 11. Following a hearing on October 23, I found that the defendant's failure to appear on October 5 was inadvertent, and I therefore ordered that his bail be reinstated. The defendant was released that same day and the trial was rescheduled for November 19. Three days later, on October 26, the defendant was arrested on new charges related to an alleged armed home invasion in Nashua, New Hampshire. The defendant was subsequently indicted in

the Southern District of Hillsborough County on various charges related to the home invasion, and has been held in custody on those charges since October 26, 2001. In addition, on November 13, I revoked defendant's bail on docket numbers 01-S-050, 051 and 1496 pending before this court.

On November 19, the jury was drawn for numbers 01-S-050, 051 and 1496, and the trial was scheduled to commence on November 27.

Prior to the jury being sworn on the 27th, the State nol prossed the cases, apparently because it believed that indictments 01-S-050 and 01-S-051 required the State to prove that the defendant (rather than the two unidentified individuals who were with him on December 5) had personally entered the Chmiola residence and the State was uncertain of its ability to do so.

On December 4, 2001, the State reinstated the receiving stolen property charge relating to the two \$2 bills by filing a new information covering that offense (No. 01-S-1869); and on January 17, 2002, the State reindicted the defendant on charges of conspiring with the two unidentified individuals to burglarize the Chmiola residence (No. 02-S-072), and theft of a firearm from the Chmiola residence while acting in concert with the two unidentified individuals (No. 02-S-073). The three new charges were consolidated and scheduled for trial on May 13, 2002. The defendant filed the dismissal and suppression motions presently before the court on April 12, 2002, and, as noted previously, the

hearing on the motions was held on May 9, 2002. Because I was unable to issue a ruling on the motions prior to the scheduled May 13 trial date, and because the defendant is scheduled for trial in June on the home invasion charges in the Southern District, by order of May 9, 2002, I continued the trial in these cases until September 2002.

II.

The defendant moves to dismiss all three charges against him on the grounds that the State's actions in dismissing the original indictments and information on the eve of trial and then re-charging him with substantially similar offenses has violated his constitutional rights under the due process, speedy trial, double jeopardy and separation of powers clauses of the state and federal constitutions. The State objects, maintaining that none of the defendant's constitutional rights have been violated. When a defendant invokes the protections of both the state and federal constitutions, the court first examines the state claims. State v. Bruce, 147 N.H. 37, 40 (2001). Moreover, inasmuch as the United States Constitution provides no greater protection than the New Hampshire Constitution, no separate federal analysis is required. Id. I therefore reference federal case law only insofar as it may aid my analysis.

A.

First, I find no violation of the defendant's due process

rights. The defendant contends that the State violated his due process rights by incarcerating him for ten months, *nol prosequing* the original charges against him, then reindicting him approximately two months later without first notifying him of the State's intention to reindict. He maintains that the State should be required, at the time it dismisses charges, to inform a defendant whether it reserves the right to reinstitute the charges, so that the defendant may object and ask the court to allow such dismissal only if it is with prejudice. The defendant cites no authority in support of his pre-dismissal notice requirement, nor am I aware of any. Moreover, the absence of pre-dismissal notice in no way prejudices a defendant, since he remains free to file a motion to dismiss any superseding charges that may be filed if there are legitimate grounds upon which to base such a motion. In this case, the defendant has made no allegation or showing that the State's decision to dismiss the original charges was based upon some improper grounds or was designed to gain some tactical advantage. Cf. United States v. Marion, 404 U.S. 307 (1971). The defendant's due process rights have not been violated.

B.

The defendant also contends that the current proceedings violate his right to a speedy trial because of the delay between the time of his original arrest and the time when his trial will

occur. "For purposes of a speedy trial analysis in adult criminal proceedings, the length of the pretrial delay is calculated beginning when the defendant is arrested or indicted, whichever comes first. State v. Justus, 140 N.H. 413, 415 (1995). In evaluating alleged violations of the constitutional right to a speedy trial, the court applies the test articulated in State v. Cotell, 143 N.H. 275, 282 (1998) (citation omitted). The court considers the length of the delay, the reason for the delay, the defendant's assertion of his speedy trial right, and the prejudice to the defendant caused by the delay. Id. In this case, each consideration favors the State.

Initially, it must be noted that the time lapse between the *nol prosequing* of the original charges and the reindictment on the current charges totalled only two months. In addition, trial on the original charges was delayed because defense counsel agreed to a July 6, 2001 continuance requested by the State. See Cotell, 143 N.H. at 283 (articulating rule that defendant cannot blame State for delay resulting from continuance to which he agreed). Furthermore, the defendant failed to appear at the rescheduled trial on October 9, 2001, resulting in additional delay. In addition, prior to filing the present motion in April 2002, the defendant never asserted his right to a speedy trial. See id. (stating defendant's failure to actively pursue speedy trial right weakens argument that he suffered constitutional violation).

Finally, there has been no showing that the defendant suffered any significant prejudice as a result of the delay between arrest and trial in these cases. For a substantial portion of this period the defendant has been incarcerated on unrelated charges arising out of the Nashua home invasion. Moreover, contrary to the defendant's suggestion, should he be convicted on any of the present charges, he undoubtedly will be entitled to pretrial confinement credit for any periods in which he was held in custody solely because of the original or the superseding charges arising out of the Chmiola burglary. In sum, I find that there has been no violation of the defendant's speedy trial rights

C.

The defendant also seeks dismissal of the pending charges on the basis of double jeopardy. The defendant concedes that jeopardy generally does not attach until a defendant is subjected to trial before a factfinder. State v. Pond, 133 N.H. 738, 741 (1990); see also Serfass v. United States, 420 U.S. 377, 388 (1975). Here, the State *not prossed* the previous charges before a jury had been sworn. Therefore, jeopardy did not attach. The defendant argues, however, that because he was subjected to pretrial confinement prior to the State's decision to *not pros* the initial charges, his current confinement constitutes "multiple punishment for the same offense" and therefore violates his right to be free from double jeopardy. I reject this argument. State

v. Goodnow, 140 N.H. 38 (1995), cited by the defendant, is inapposite. In that case, a district court judge had found Goodnow in contempt and sentenced him to sixty days incarceration. Id. at 39. The State later brought additional charges based on the same incident. In the instant case, no punishment of any kind related to the present charges has yet been imposed upon the defendant. There has been no violation of the defendant's right to protection against double jeopardy.

D.

Finally, the defendant asserts that the prosecution's decision to *nol pros* the original charges and reindict the defendant for different crimes somehow violates the separation of powers doctrine found in part I, article 37 of the New Hampshire Constitution. In the defendant's view, allowing the prosecutor to control the amount of a defendant's pretrial incarceration and the timing of trial usurps judicial authority. I find this argument to be without merit. The defendant's pretrial incarceration in these cases resulted in part from his assent to continuances requested by the State or occasioned by his efforts to enter a negotiated plea, in part from his failure to appear at a scheduled court hearing, and in part from his inability to post bail. In every instance, it was the court that made the final determination with respect to bail and scheduling issues. No separation of powers concerns are at stake here.

III.

The defendant moves to suppress his statement to Detective Howe at the police station, in which he admitted that the stolen property belonged to him. He argues that this statement was the fruit of an unlawful interrogation that ensued after he had asserted his right to counsel. Specifically, the defendant contends that Howe's actions in commenting on the items which had been seized from the defendant's person and displaying these items to the defendant amounted to the functional equivalent of interrogation.

"When a defendant is in custody and requests the assistance of counsel, police must cease all questioning and its functional equivalents." State v. Jaroma, 137 N.H. 143, 149 (1993) (quotations and citation omitted); see also N.H. CONST., pt. I, art. 15. The police must scrupulously honor a custodial suspect's invocation of his right to counsel. "Once an accused indicates by any means or manner that he seeks counsel, all interrogation must cease until the accused has the opportunity to confer with counsel." State v. Sundstrom, 131 N.H. 203, 206 (1988) (citation and quotations omitted).

In this case, after the defendant had invoked his right to counsel, Detective Howe prolonged their conversation by telling the defendant that police had found certain items among his personal effects. Although the State suggests that Howe's actions

were merely a follow up to the booking process and were designed "to confirm the inventory of items found during the custody search," at the hearing Howe acknowledged that his attempt to interview the defendant occurred after booking had been completed and had nothing at all to do with the booking process. It is clear that Howe suspected the items in the plastic bag were stolen property, and that his purpose in displaying these items to the defendant was to attempt to obtain a confirmation of his suspicions. I find that Howe's statements amounted to interrogation because he clearly contemplated they would elicit an incriminating response. See Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (defining interrogation as "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"); see also Jaroma, 137 N.H. at 149 (stating "[w]hen officers utter words that they should know are reasonably likely to elicit a suspect's incriminating response, they engage in the functional equivalent of questioning").

IV.

The defendant moves to suppress all evidence seized from his person on the grounds that Officer Goodrich's initial seizure of him was not supported by sufficient reasonable suspicion to justify a Terry stop. See Terry v. Ohio, 392 U.S. 1, 21 (1968)

(stating that officers may make investigatory stops based on less than probable cause). A principal thesis of this argument is the defendant's claim that he was "seized" from the moment Goodrich first "ordered" him and his companions to stop. Although the State contends that Goodrich merely "asked" the trio to stop and asserts that this request did not amount to a seizure, I assume for present purposes that the defendant's characterization is correct and that a seizure occurred when Goodrich first told him to stop. I further assume, without deciding, that this seizure was not supported by a reasonable suspicion. Even making both these assumptions, however, there is no basis for granting the motion to suppress.

What the defendant's argument overlooks is that, regardless of the lawfulness of the original "seizure," by resisting the same and fleeing the officer, the defendant committed a new and independent crime. RSA 642:2 (Supp. 2001) provides that "[a] person is guilty of a misdemeanor when the person knowingly or purposely physically interferes with a person recognized to be a law enforcement official . . . seeking to effect an arrest or detention of the person or another regardless of whether there is a legal basis for the arrest." (Emphasis added.) By fleeing instead of heeding Goodrich's "order" that he stop, the defendant clearly gave the officer probable cause to believe that he had committed a new offense, i.e. resisting detention, whether or not

there was a lawful basis for the officer's attempt to detain the defendant in the first place. See State v. Tucker, 145 N.H. 723, 727 (2001) (holding that failure to advise in-custody defendant of his Miranda rights afforded no basis for suppressing defendant's statement offering a bribe to the officer because the bribe offer constituted "a new crime committed in the officer's presence"); accord. United States v. Dawdy, 46 F.3d 1427, 1431 (8th Cir. 1995) (defendant's resistance to invalid initial stop provided independent grounds for his arrest and for the admissibility of the evidence discovered during the subsequent search of his person). See also United States v. Garcia, 516 F.2d 318, 319-20 (9th Cir. 1975); United States v. Nooks, 446 F.2d 1283, 1288 (5th Cir. 1971); Cooper v. State, 956 S.W.2d 95, 97-98 (Tex.App. 1997).

Indeed, resisting detention is precisely the offense for which the defendant was originally arrested.² And since, from the point of his flight, the police had probable cause to arrest the defendant for violating RSA 642:2, the search of his person which occurred when he was actually apprehended, and which resulted in the seizure of the bills and the watch, was properly undertaken as a search incident to arrest. See State v. Wheeler, 128 N.H. 767, 772 (1986) (once item is seized pursuant to a lawful search

² Compare Dawdy, 46 F.3d at 1436 & n.11 (Lay, J., dissenting) (noting that in that case the arresting officer testified that he arrested the defendant for possession of drugs rather than for resisting arrest).

incident to arrest, police need no independent justification to retain it and use it as evidence of a different crime); State v. Farnsworth, 126 N.H. 656, 662 (1985); State v. Cimino, 126 N.H. 570, 574-75 (1985).

V.

For the reasons stated above, the defendant's Motion to Dismiss and Motion to Suppress are both hereby denied, and defendant's Motion to Suppress Statement is hereby granted.

BY THE COURT:

June 14, 2002

ROBERT J. LYNN
Associate Justice