The State of New Hampshire
Superior Court

Rockingham, SS.

STATE OF NEW HAMPSHIRE

V.

RONALD BEAUSOLEIL

NO. 218-2013-CR-0282

ORDER ON DEFENDANT'S MOTION FOR PRE-INDICTMENT DISCOVERY

On March 12, 2013, the defendant was charged by felony complaint in the 10th Circuit Court—District Division—Plaistow with 2 counts of Aggravated Felonious Sexual Assault. On March 18, 2013, the Circuit Court found probable cause and the case was bound over to the Superior Court. The defendant has not yet been indicted. On March 20, 2013, the defendant filed a motion for pre-indictment discovery pursuant to RSA 604:1-a. The State has objected.

RSA 604:1-a provides:

> After an accused person has been bound over to the superior court and prior to indictment, he shall have the same rights to discovery and deposition as he has subsequent to indictment, provided that all judicial proceedings with respect thereto shall be within the jurisdiction of the superior court, and notice of petition therefor and hearing thereon shall be given to the county attorney, or the attorney general if he shall have entered the case.

In construing statutory language, the Court must interpret a statute

> "according to the fair import of [its] terms and to promote justice." RSA 625:3 (2007). In doing so, [the Court] must first look to the plain language of the statute to determine legislative intent. Absent an ambiguity [the Court] will not look beyond the language of the statute to discern

> legislative intent. [The Court's] goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. Accordingly, [the Court will] interpret a statute in the context of the overall statutory scheme and not in isolation.

State v. Etienne, Nos. 2004-833, 2006-919, slip op. at 8 (N.H. Dec. 21, 2012) (quotation and citations omitted).

"New Hampshire does not follow the common law rule that criminal statutes are to be strictly construed." Derosia v. Warden, 149 N.H. 579, 579 (2003) (citing RSA 625:3). Rather, the Court must "construe the Criminal Code provisions according to the fair import of their terms and to promote justice." Id. (quotation and citation omitted). "In doing so, [the Court] first look[s] to the plain language of the statute to determine legislative intent." State v. Hull, 149 N.H. 706, 709 (2003) (citation omitted). When there is more than one reasonable interpretation of a statute, it is also appropriate for the Court to examine the legislative history of those provisions to determine the meaning of the language contained in the statute. See In re Liberty Assembly of God, 163 N.H. 622, 627 (2012) ("We review legislative history to aid our analysis when the statutory language is ambiguous or subject to more than one reasonable interpretation.").

The defendant claims that this statute "is clear and unambiguous and unequivocally provides that Mr. Beausoleil has the right to pre-indictment discovery as would otherwise be required by Rule 98 after indictment." Defendant's Motion For Pre-Indictment Discovery ¶7 at 2. Far from being plain and unambiguous, the statute merely provides that the defendant shall have the same rights to obtain discovery after indictment as he does before indictment. Superior Court Rule 98 governs the rights of a

defendant to discovery after indictment. That rule does not provide the defendant with the right to all available discovery immediately upon indictment. Rather, Rule 98 gives the State 10 days after arraignment to turn over statements made by the defendant. N.H. Super. Ct. R. 98(A)(1). The State has 30 days after arraignment to turn over other discovery materials, such as statements of other witnesses which the State intends to use at trial, expert reports, and copies of exhibits, the defendant's criminal record, and any exculpatory materials. See N.H. Super. Ct. R. 98(A)(2). In this county, a defendant may not be arraigned for up to three weeks after the indictment is handed up by the Grand Jury. Therefore, under Rule 98 the State is not obligated to provide most of the discovery in those cases for nearly seven weeks after the indictment. Thus, the defendant's argument that he is entitled to an order compelling the State to turn over all discovery materials immediately after the case is bound over is not consistent with Rule 98. RSA 604:1-a creates an obvious question regarding what the defendant is entitled to after the case is bound over.

When a statute is ambiguous, the Court may look to legislative history to help interpret the meaning of the language. RSA 604:1-a was enacted in 1971. See 1971 N.H. Laws 506:1. As initially introduced in the N.H. House of Representatives, HB164 gave the superior court the same power to grant discovery to a defendant after he was arrested as the court had to compel discovery after indictment. See House and Senate Bills and Resolutions (1971) ("The Superior Court sitting in equity shall have the same power to grant discovery to accused persons, after they have been arrested and prior to indictment, as the power they have to grant discovery subsequent to indictment."). The prime sponsor of the bill explained that there was often a long wait before indictment

and there was no authority for a defendant to seek depositions until after indictment. See Hearing on HB164 before N.H. H.R. Comm. On Judiciary at 3 (Feb. 17, 1971). Then-Assistant Attorney General David Souter testified in favor of the bill during the hearing before the N.H. Senate. He explained that the bill was intended to address a 1906 decision that prevented discovery until after indictment. See Hearing on HB164 before N.H. Sen. Jud. Comm. at 1 (Apr. 6, 1971). He testified that the bill was beneficial to both sides because the Grand Jury only met twice a year and there would be often long delays where nothing would happen on the case without pre-indictment discovery. Id. He explained that allowing earlier discovery would help resolve cases quicker. Id. He raised a concern, however, with permitting discovery while the case was still in the district court. Id. at 2. Allowing discovery prior to bind-over, might delay the probable case hearing while the defendant pursued discovery and it would burden the county attorney's office which was not involved in the case at the district court level. Id.; see also N.H. Sen. Jour. at 406 (Apr. 13, 1971). Souter had previously raised these same concerns when he testified before the House Committee on the Judiciary. See Hearing on HB164 before N.H. H.R. Comm. On Judiciary at 3 (Feb. 17, 1971). Based on these comments, the Attorney General's Office volunteered to propose new language for the bill. The proposed amendment is identical to the current statute. See N.H. H.R. Jour. at 334-35 (Mar. 4, 1971).

In order to understand the meaning of RSA 604:1-a, it is important to understand the historical context in which that statute was enacted. The rules of discovery in criminal cases were much different than they are today. Then-Assistant Attorney General Souter's testimony in favor of the bill suggests as much. The 1906 case

referenced by Souter's testimony was State v. Naud, 73 N.H. 531 (1906). In that case the defendant was charged with larceny in Manchester police court. Id. at 531. After the case was bound over to superior court for indictment, the defendant's lawyer noticed his intent to take a deposition of the key witness in the case. Id. At the time, the statute gave the defendant the right to take a deposition of any witness. See N.H. Pub. Stat. 225:13 (1900). A justice of the peace authorized the defendant's request to take the deposition. Naud, 73 N.H. at 532. The State objected and the superior court ruled that the defendant was not entitled to take a deposition. Id. at 531. The defendant appealed. The New Hampshire Supreme Court ruled that the statute authorizing depositions in criminal cases required that an indictment be issued before the defendant could pursue that form of discovery. Id. at 532. The Court concluded that because no indictment had been issued when the defendant noticed his intent to take a deposition, the justice of the peace had no authority to permit such a deposition to be taken. Id.

In State v. Myal, 104 N.H. 188 (1962), the New Hampshire Supreme Court discussed the same issue in the context of a misdemeanor case. In Myal, the defendant was charged with the misdemeanor crime of being drunk and disorderly. Id. at 188. Prior to arraignment in municipal court, the defense counsel noticed his intent to take a deposition pursuant to RSA 517:13. Id. That statute was the same as at issue in Naud. The defendant argued that he needed to continue the arraignment and take a deposition before he decided what plea to enter in municipal court. Id. at 189. The Court rejected that position, reasoning that under the language of the statute a defendant was not entitled to take depositions until a case was pending against him. Id.

The Court concluded that until the defendant was arraigned and entered a plea there was no case pending so the statute did not entitle him to take a deposition. Id. at 190.

In 1971, with the exception of the statutory right to take depositions, a defendant's right to discovery even after indictment was limited. As the New Hampshire Supreme Court noted: "the right to compel the production of written statements, investigations and reports after indictment is closely circumscribed." State ex rel. McLetchie v. Laconia District Court, 106 N.H. 48, 51 (1964). The decision of the New Hampshire Supreme Court in State ex rel. Regan v. Superior Court, 102 N.H. 224 (1959), illustrates this point. In that case the defendants were charged with capital murder. Id. at 225. Prior to trial, the defendants sought an order of the superior court to compel the police to produce all photographs and police reports in the possession of the investigating officers and to answer questions about their investigation during a deposition. Id. at 225-26. The trial court granted the defendants' motion for discovery and the State appealed. Id.

On appeal the New Hampshire Supreme Court explained that at common law there was no right to discovery of any kind in a criminal case prior to trial. Id. at 226-27. The Court further observed that until 1869 no statute granted a defendant the right to conduct discovery of any kind. Id. at 227. In that year, the legislature authorized the defendant to take the deposition of any witness in a criminal case. See N.H. Gen. Laws 229:12 (1878). The right to a deposition, however, specifically prevented the party taking a deposition from compelling the other side to disclose trial witnesses, written exhibits, or other information in advance of trial regarding how the opposing party was going to prove its case. Regan, 102 N.H. at 227. The Court further noted that in capital

murder cases the State was only compelled to produce a list of witnesses 24 hours prior to the start of trial. Id. The Court reasoned that these statutory provisions were the sole extent of discovery required to be produced by the prosecution prior to trial. Id.

The prevailing mentality was that if the State was required to produce any evidence, police reports, witness statements or other information about how it intended to prove its case prior to trial the disclosure of such information could result in perjury or destruction of evidence. Id. at 228. The Court concluded that production of evidence at trial was sufficient to protect the defendant's due process rights in most cases. Id. The Court therefore held that the superior court's order granting the defendants' motion for pretrial discovery in the capital murder case was error. Id. at 229. The Court observed that in certain cases upon a specific showing that a defendant's rights would be jeopardized, the superior court could exercise its discretion to permit limited pretrial disclosure of evidence, police reports, or other material that we would call "discovery" today. Id. at 229-30.

The world of criminal prosecution is a much different place today than it was in 1971 when RSA 604:1-a was enacted. Subsequent to Regan, the United States Supreme Court held that the prosecution was required to turn over exculpatory evidence to the defense. See Brady v. Maryland, 373 U.S. 83 (1963). Nonetheless, the defendant's right to discovery was still highly restricted. See, e.g., Britt v. North Carolina, 404 U.S. 226, 235-39 (1971) (Douglas, J., dissenting) (noting that many states had highly restrictive rules of discovery in criminal cases but that some jurisdictions were beginning to liberalize the rule of discovery for criminal defendants); State v. Coolidge, 109 N.H. 403, 414-17 (1969), rev'd on other grounds, 403 U.S. 443 (1971).

Certainly, the practice of essentially "open-file" discovery well in advance of trial that prevails today was unheard of at that time. A defendant could be charged and bound over to the superior court for long periods of time prior to indictment. In fact, as noted above, in some counties the grand jury met only twice a year. There was no practical method by which a defendant could conduct discovery prior to indictment in 1971 and the rule announced in Naud prevented a defendant from even requesting a motion for a deposition before indictment.

Viewed in this context, RSA 604:1-a is not a legislative directive requiring the Court to permit a defendant immediate discovery of all material in the State's possession prior to indictment. In fact, such an interpretation could have an extremely detrimental effect on the administration of justice. To interpret the statute as the defense requests would render the timeframes for automatic disclosure contained in Rule 98 meaningless. Anytime the defense requested pre-indictment disclosure the State would be obligated to produce all police reports, exhibits, and other discovery in its possession. This would imposed a tremendous burden on the prosecution that is not contemplated by Rule 98 – and certainly was not within the realm of consideration by the legislature in 1971 when RSA 604:1-a was enacted.

In addition, granting pre-indictment discovery as a matter of course could have a significant impact on the indictment process. The grand jury plays an important role in the criminal justice system. See State v. Gerry, 68 N.H. 495, 498-500 (1896); see also Powell v. Pappagianis, 108 N.H. 523, 525 (1968) ("[The grand jury] is an engine for discovery which may protect the innocent as well as disclose the identity of the wrongdoer."). As part of its responsibility to determine whether there is probable cause

to proceed with a criminal charge, the grand jury has broad powers to investigate whether a crime has occurred. See Powell, 108 N.H. at 525. In furtherance of that investigative role, the grand jury can subpoena witnesses and other evidence. See United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991). Grand jury proceedings occur in secret in order to protect the integrity of the investigation. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). Premature disclosure of investigative leads can have a serious detrimental impact on the ability of the grand jury to do its job. See In re State (Bowman Search Warrants), 146 N.H. 621, 627-28 (2001) (discussing harms that may occur to grand jury investigation if police reports are prematurely disclosed to a suspect in the investigation).

In light of the history of RSA 604:1-a and these public policy considerations, the Court must return to the meaning of the language in the statute which provides that that the defendant "shall have the same rights to discovery and deposition as he has subsequent to indictment." In 1971, the defendant had a right to conduct depositions of any witness in the case. See RSA 517:13 (1974). That statute was amended in 1990 to require a showing of necessity before a defendant can take a deposition. 1990 N.H. Laws 206:1; see also State v. Rhoades, 139 N.H. 432, 434 (1995). RSA 604:1-a certainly would still permit the defendant to file a motion with the superior court to seek a deposition of a witness after the case is bound over but prior to indictment. Additionally, the defendant may file a motion seeking specific types of discovery before the time frames outlined in Rule 98. This was certainly within the scope of RSA 604:1-a when that statute was enacted. See Regan, 102 N.H. at 229-30. Moreover, such an approach is consistent with Rule 98(E). That provision permits the defendant to file a

motion seeking discovery beyond the automatic disclosures mandated by Rule 98. See N.H. Super. Ct. R. 98(E). The Court can then balance the defendant's request against the reasons the State presents in opposing pre-indictment disclosure. See N.H. Super. Ct. R. 98(E) (requiring motion for additional discovery to include "the reasons, if any, given by the opposing party for refusing to provide such materials"). The superior court can then determine whether to deny the discovery request, restrict the pre-indictment discovery, or defer the disclosure of discovery. See N.H. Super. Ct. R. 98(I). Given the secrecy of the grand jury investigation, as well as the defendant's constitutional right not to disclose avenues of defense investigation, the Court can consider *ex parte in camera* written submission regarding both the reasons that the defense is requesting discovery before the timeframes contained in Rule 98 and the basis for the State to object to such a pre-indictment discovery request. See N.H. Super. Ct. R. 98(I).

This Court has certainly considered the rulings of other superior court orders cited by the defendant. While this Court respects the decisions of other trial court orders, those rulings have no precedential value. More importantly, those decisions have not recognized the apparent conflict between the language of RSA 604:1-a and the timeframes imposed by Rule 98. Nor have those decisions considered the legislative history and historical context of discovery at the time RSA 604:1-a was enacted. For the reasons detailed in this order, this Court respectfully declines to follow the decisions of other superior courts on this issue.

In the context of this case neither party's pleading is adequate to allow the Court to exercise its discretion in ruling on the request for discovery. The defense motion contains no information regarding why obtaining discovery prior to the automatic

disclosure deadlines in Rule 98 is needed for his defense. In other words, the defense must articulate some good faith reason why the State's compliance with the automatic disclosure deadlines in Rule 98 is not adequate to permit him to prepare a defense in this case. Conversely, the State merely alleges in the most generic terms that premature release of investigative information "could hamper" the grand jury investigation. To assert this basis for resisting pre-indictment disclosure the State must present some good faith basis for the Court to conclude that pre-indictment disclosure might impair the grand jury's investigative function. To be clear, however, the burden is on the defense seeking pre-indictment disclosure to meet the requirements of Rule 98(E) since the defense is seeking discovery beyond the automatic discovery deadlines established for disclosure after indictment. This is the only right the defendant has to discovery post-indictment that is not covered by the automatic timelines set forth in Rule 98. See RSA 604:1-a (the defendant "shall have the same rights to discovery and deposition as he has subsequent to indictment."). Accordingly, the defendant's motion is denied without prejudice to renew the request after complying with Rule 98(E).

SO ORDERED.

April 16, 2013
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DATE

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N. William Delker
Presiding Justice