

Lex Loci

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So far, 1992 has been a very productive year for the New Hampshire Supreme Court, resulting in 34 published decisions. The opinions continue to reveal the careful scholarship and thoughtful analysis that have consistently characterized the deliberations of this Court. The Court has made some very significant new law this term, particularly in the areas of criminal procedure and consumer protection.

CRIMINAL PROCEDURE

Criminal cases continue to dominate the docket with almost half of the decisions arising in this area. *State v. Hughes* potentially will have the most widely felt effect of these decisions. In *Hughes*, the Court reconsidered and reversed the mandate it issued in *State v. Hastings*, 120 N.H. 454 (1980), that the State obtain an indictment within 60 days following a felony arrest or show to the satisfaction of the Court that any delay beyond the 60 day period is reasonable. Noting that reforms have been instituted in a number of counties to ensure prompt indictments, the Court stated that the *Hastings* rule "has served its purpose and we see no reason to continue the arbitrary time limitation for indictment." *State v. Hughes*, slip op, at p.6. The law now reverts to the *pre-Hastings* rule that the burden is on the criminal defendant to demonstrate that a delay between arrest and indictment is unreasonable and has materially prejudiced the defendant.

State v. Kiewert involves a lengthy scholarly debate among the justices on the statement against penal interest exception to the hearsay rule, Rule 804(b)(3), in situations where the statement includes inculpatory evidence against a criminal defendant other than the hearsay declarant. *Kiewert* concerned an armed robbery by a Richard Gokey and a man wearing a paper bag with slits for eyes and mouth. According to his wife, Mr. Gokey telephoned her after the robbery and admitted that he, along with the defendant, had committed the robbery. Shortly thereafter, Mr. Gokey committed suicide. The issue on appeal was whether the trial court had correctly admitted the testimony of Mrs. Gokey about her telephone conversation with her husband, which was the only evidence identifying the defendant as the masked accomplice.

On appeal, the defendant urged the Court to narrowly construe the hearsay exception to cover only that portion of the hearsay declaration as disclosed criminal activity on the part of Mr. Gokey, but not on the defendant's part. Declining to follow the case law supporting this approach, Justice Thayer, writing for the majority, held that the entire declaration was admissible under this rule as long as the trial court could find sufficient corroborating circumstances to support the statement's trustworthiness. In a special concurrence, Justice Johnson emphasized the importance of this trustworthiness requirement.

Justice Brock, joined by Justice Batchelder, filed a spirited and impressive dissent urging that the hearsay exception' should be construed consistent with the requirements of the confrontation clauses of the federal and state constitutions. The majority declined to address the constitutional issue because the defendant had failed to preserve the issue for appeal. Nonetheless, Justice Brock argued that the Court should fashion the hearsay exception to afford the same protection to an accused as afforded constitutionally. The confrontation clause in this circumstance requires that the hearsay statement be admitted only if "the statement offered is free enough from the risk of the inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation," which is a much higher standard of trustworthiness than required by the majority's construction of the rule. *State v. Kiewert*, slip op. at p.16 (quoting 5 J.-Wigmore Evidence §1420, at 251 (J.Chadbourn rev. 1974)).

State v. Matos will have immediate and wide-ranging effects on police conduct in the execution of search warrants for drugs. The Court held that the exigent circumstances exception to the knock and announce rule applies per se whenever police execute a search warrant for illegal drugs suspected of being kept in small, easily disposable packages in a residence with traditional plumbing. The Court noted that criminal defendants often flush illegal drugs down the drain while police knock and announce their presence. From now on, the police, when executing such a warrant, may batter the door down without prior notice or request for entry.

In *State v. Chapman*, the Court considered whether a confession made by an intoxicated defendant in custody was voluntary. The defendant, who was wanted on an assault charge, turned himself in to the police at 5:00 p.m. after an afternoon of drinking and was promptly placed under arrest. The interrogation began at 7:00 p.m. and lasted to 9:30 p.m. Finally, at midnight, more than seven hours after the defendant had stopped drinking, a blood test was performed revealing a blood alcohol level of .13%. The Court held that the impaired mental state of the defendant alone could not render his otherwise voluntary confession inadmissible. Without some evidence of coercion by the police, and the Court found none to exist, the confession could not be found to have been involuntary.

Other criminal decisions of note include *State v. Gibbons* (no constitutional right to assistance of counsel in sentence suspension proceeding), *State v. Constant* (conviction of transportation of controlled drug, RSA 265:80, under double jeopardy doctrine prohibits prosecution for lesser included offense of possession of controlled drug, RSA 318-B:2 and :26 (Supp. 1991)), and *State v. Murray* (State must prove that member of public was in fact inconvenienced, annoyed or alarmed to sustain prosecution of disorderly conduct, RSA 644:2).

CONSUMER PROTECTION

The most significant civil case is *Gilmore v. Bradgate Associates, Inc.* in which the Court finally resolved troubling questions about the scope of the Consumer Protection Act, RSA 358-A, raised by the Court in *Rousseau v. Eshleman*, 128 N.H. 564 (1986), *reh'g*

denied, 129 N.H. 306 (1987). In *Gilmore*, the plaintiffs claimed that the defendants had defrauded them in the sale of condominium units and had thereby committed unfair and deceptive trade practices under RSA 358-A.

At issue was the exemption of RSA 358-A:3, I, which excludes from coverage under the Act all transactions that are "trade or commerce otherwise permitted under laws as administered by any regulatory board or office acting under statutory authority of this State or of the United States." In *Rousseau*, the Court construed the exemption broadly to cover attorneys, reasoning that, because the Bar is subject to regulation and discipline by the Court and its Professional Conduct Committee, the practice of law is exempt per se. The decision suggested that any business that is subject to special regulation may be exempt, and, in fact, the Court in *dicta* stated that physicians, electricians, and plumbers "presumably" are exempt as state-regulated professions. *Id.* at 567. Citing *Rousseau*, the defendants in *Gilmore* argued that they were exempt under the Act because condominium sales and development are subject to State regulation, see RSA 356-B.

In *Gilmore*, the Court rejected the reasoning of *Rousseau*, holding the exemption only excludes specific conduct, and not entire businesses or enterprises that are "otherwise permitted" by federal or state law. *Rousseau* was distinguished as "applicable only within the context of attorneys, whose individual conduct and practice is subject to a comprehensive regulatory and disciplinary framework under the jurisdiction of this Court." *Gilmore v. Bradgate Associates, Inc.*, slip op. at p.4.

Justice Horton, in a special concurrence, chastised the majority for abandoning *Rousseau* and stated that *Rousseau's* broad interpretation of the exemption is correct, but requires further refinement. Justice Horton construes the statute to exempt all statutorily regulated industries with the limitation that the regulatory scheme must establish a consumer protection administrative procedure providing "functionally equivalent substantive protection and appropriate dispute resolution procedure" analogous to that afforded consumers under RSA 358-A. *Id.* at 7 (Horton, J. concurrence).

INSURANCE

Two cases of note in this area were issued. The first is *State Farm Mutual Automobile Insurance Company v. Cookinham* in which the Court awarded uninsured motorist coverage to a pedestrian struck by an uninsured vehicle. The plaintiff had been leaning against the insured vehicle of a friend conversing with the friend and others when the accident happened. She and the friend had intended to get into the car and drive away shortly. After the accident, the plaintiff made a claim for uninsured motorist coverage under the friend's policy.

The critical issue was whether the plaintiff was "occupying" the car at the time of the accident. The policy defined "occupying" as being "in or upon or entering into or alighting from" the insured vehicle. The Court found the word "upon" in this context to be ambiguous and therefore construed the definition against the insurer. The Court held

that, because the plaintiff had been physically resting on the car and had intended to ride in it as a passenger, she was "occupying" it and awarded her coverage.

The second case is *Concord General Mutual Insurance Company v. McCarty* in which the Court held that an excavator could not be considered a covered auto under a family automobile policy where the excavator weighed 61,000 pounds, had a top speed of 1.9 miles per hour, had no lights, and was neither inspected by nor registered with the State. The Court further held that the business pursuits exclusion of the plaintiff's homeowner's insurance excluded coverage for the accident in question under that policy.

NEGLIGENCE

Following the weight of authority nationally, the Court in *Manchenton v. Auto Leasing Corp.* held that a car owner cannot be held liable for a car accident caused by a thief who was able to steal the car due to the owner's negligence in leaving the key in the ignition. The Court found that such an accident is not a reasonably foreseeable risk of a failure to safeguard a car and therefore held that the car owner owes no duty of care with respect to parties who might be injured in any resulting accident.

POTPOURRI

Finally, some miscellaneous decisions of note: *State v. Osgood* (coasting of mechanically inoperable motorcycle on highway by defendant was violation of habitual offender statute); *Dupuis v. Click* (alimony payment obligation terminates upon death of obligor and is not obligation of his estate); *Hussey, et al. v. Town of Barrington* (zoning variance recipient has no vested right in improperly issued variance where recipient knew of lack of notice to abutters in original variance proceeding); and *Shargal v. State of NH. Board of Examiners of Psychologists, et al.* (where professional board acted within its authority in conducting investigation, the doctrine of quasi-judicial immunity protected it from liability).