State of New Hampshire
Supreme Court

NO. 2006-0283

2008 TERM

MARCH SESSION

State of New Hampshire

v.

Steve Gubitosi

RULE 7 APPEAL OF FINAL DECISION OF
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT STEVE GUBITOSI

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW HAMPSHIRE CASES

NEW HAMPSHIRE CONSTITUTION & STATUTES

SECONDARY SOURCE

QUESTIONS PRESENTED

I. Did the Merrimack County Superior Court lack jurisdiction over crimes which were alleged to have occurred in Merrimack County, when they were prosecuted by the Belknap County Attorney without special appointment by the court pursuant to RSA 7:33 and RSA 661:9, III, in accord with the New Hampshire Constitution, pt. I, art. 17 and pt. II, art. 71?

II. Did the court err in not dismissing a charge of harassment, as it is unconstitutional on its face and as applied given this Court's holdings in *State v. Brobst*, 151 N.H. 420 (2004) and *State v. Pierce*, 152 N.H. 790 (2005)?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Mr. Gubitosi was charged with several counts of stalking and harassing his former girlfriend.

Some of the events were alleged to have occurred in the Town of Tilton, which is in Belknap County; others in the City of Concord, which is in Merrimack County. Officials from both counties cooperated in the investigation of the contemporaneous incidents giving rise to the criminal charges in each county. OBJECTION TO MOTION TO QUASH (Oct. 31, 2003).

The Tilton charge was appropriately prosecuted by the office of the Belknap County Attorney in the Belknap County Superior Court, and in October 2003, a jury found Mr. Gubitosi guilty. This Court affirmed the conviction. *State v. Gubitosi*, 152 N.H. 673 (2005); *see also*, *State v. Gubitosi*, 153 N.H. 79 (2005).

The Concord charges were separately charged in the Concord District Court. Those charges were nolle prosequi, and then re-filed in the Merrimack County Superior Court. After a State's appeal to this Court regarding the admissibility of evidence, *State v. Gubitosi,* 151 N.H. 764 (2005), the case went forward.

Steve Gubitosi was employed as a police officer for approximately 17 years in the town of Pembroke, which is located in Merrimack County. The Merrimack County Attorney wished to avoid appearance of a conflict of interest, and may have been disqualified for that reason. *See* Annotation, *Disqualification of Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused*, 42 A.L.R.5th 581. Wayne Coull, the Deputy Belknap County Attorney who worked on the Tilton case, first nol prosequi the charges initially filed in the Concord District Court, and then prosecuted the re-filed Concord charges in the Merrimack

County Superior Court. OBJECTION TO MOTION TO QUASH (Oct. 31, 2003), *Appx.* at 19. The Deputy Belknap County Attorney, purporting to represent the State, traveled each day of trial to the Merrimack County Superior Court to conduct the prosecution.

Mr. Gubitosi requested that the court quash the Merrimack County charges on the grounds that it is unlawful for the County Attorney elected by the voters of Belknap County to prosecute crimes which are alleged to have occurred in Merrimack County. MOTION TO QUASH (Oct. 15, 2003), *Appx.* at 17. The Belknap County Attorney objected, and the motion was denied (*Edward J. Fitzgerald, III,* J.). NOTICE OF DECISION (Oct. 31, 2003), *Appx.* at 21. Later he pointed out to the court his belief that the harassment statute under which he was prosecuted was over-broad, MOTION TO DISMISS (Dec. 2, 2005), *Appx.* at 22; OBJECTION TO MOTION TO DISMISS (Dec. 6, 2005), *Appx.* at 25, but the court denied relief. ORDER (Mar. 17, 2006), *Appx.* at 27.

Mr. Gubitosi was ultimately found guilty of two counts of harassment and one count of stalking. INFORMATIONS, 03-S-407, 408, 411, *Appx.* at 32-34; RETURNS (Nov. 22, 2005), *Appx.* at 35-36. This appeal followed.

SUMMARY OF ARGUMENT

Mr. Gubitosi first sets forth the constitutional provisions that citizens of a county enjoy the responsibility to have crimes in their county prosecuted by the elected officials of their county, and the concomitant right of criminal defendants to be prosecuted by elected officials in the county in which their crimes are alleged to have been committed. He then describes the two simple statutory procedures to be followed when a local prosecutor is unavailable. Mr. Gubitosi then notes that neither procedure was followed in his case, and argues that the State therefore did not properly invoke the jurisdiction of the court. He suggests that the remedy for the failure is to void his convictions and order a new trial.

Mr. Gubitosi then argues that the harassment statute under which he was convicted is unconstitutionally over-broad either facially or as applied to his case.

ARGUMENT

I. Belknap County Attorney had no Authority to Prosecute Mr. Gubitosi in Merrimack County

The office of County Attorney is a constitutional office. The New Hampshire Constitution provides:

> The county treasurers, registers of probate, county attorneys, sheriffs and registers of deeds, shall be elected by the inhabitants of the several towns, in the several counties in the state, according to the method now practiced, and the laws of the state, Provided nevertheless the legislature shall have authority to alter the manner of certifying the votes, and the mode of electing those officers; but not so as to deprive the people of the right they now have of electing them.

N.H. CONST., pt. II, art. 71. *See also Daniels v. Hanson*, 115 N.H. 445 (1975) (citing article 71: "In this State the sheriff is a constitutional officer."); *Opinion of the Justices*, 99 N.H. 540 (1955) (distinguishing between county commissioners, not constitutional officers, with those enumerated in article 71); *Edgerly v. Hale*, 71 N.H. 138, 143 (1901) (citing article 71: holding that sheriff, is a "public officer elected by the people").

Voters of each county have a right to have crimes committed in their county be prosecuted by the County Attorney they elected. *Consortium of Rockingham & Strafford Counties v. U.S. Dep't of Labor*, 722 F.2d 888, n. 3 (1st Cir. 1983) ("although the state legislature may … alter the manner of electing or certifying votes for county officials, it is … limited by a guarantee of the people's right to elect those officials"); *Appeal of Peter McDonough*, 149 N.H. 105 (2003) (county voters have right to ensure votes for county attorney are properly counted); *Murchie v. Clifford*, 76 N.H. 99 (1911) (county voters have constitutional right to elect the county attorney); *Edgerly v. Hale*, 71 N.H. 138, 143 (1901); RSA 655:9 ("To hold the office of … county attorney, … a person must have a domicile in the county for which he is chosen.")

Those accused likewise have a right to be prosecuted by the County Attorney of the county in which their crimes are alleged to have been committed. In *State v. Martineau*, 148 N.H. 259 (2000), the New Hampshire Supreme Court determined that private prosecutions, involving allegations of crime for which incarceration is a possibility, are unlawful. The Court wrote:

> The required accusation [by the appropriate officer] was not a mere form of procedure, but a substantial protection of every citizen against false and malicious charges of crime, – a valuable security of his 'life, liberty, and estate' and of his enjoyment thereof.

Martineau, 148 N.H. at 261-62, *quoting State v. Gerry*, 68 N.H. 495, 498 (1896).

The New Hampshire Constitution similarly provides that it is "essential to the security of the life [and] liberty" that defendants be prosecuted in the county in which their crimes are alleged to have occured. N.H. CONST., pt. I, art. 17 ("In criminal prosecutions, the trial of facts, in the vicinity where they happened, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county or judicial district than that in which it is committed.").

Being prosecuted by the correct prosecutor is a jurisdictional issue. As noted in *Martineau*, the prosecution cannot be maintained if not instituted by the appropriate constitutional officer. Thus *Martineau* repeatedly discusses the matter in terms of "jurisdiction."[1]

---

[1]"Prior to the adoption of the New Hampshire Constitution in 1784, *jurisdiction* of certain criminal cases of minor importance was conferred upon justices of the peace. However, [b]y the common law of the colony, no one could be subjected to a trial for any criminal offense beyond the *jurisdiction* of a justice of the peace, except upon an indictment returned by a grand jury in a case of felony; or in the case of misdemeanors, on such indictment or upon an information filed by the attorney-general. The required accusation was not a mere form of procedure, but a substantial protection of every citizen against false and malicious charges of crime, — a valuable security of his 'life, liberty, and estate' and of his enjoyment thereof.

(continued...)

Just as the Governor of the Commonwealth of Massachusetts has no jurisdiction once s/he steps over the border to enforce laws against the people of the State of New Hampshire, the County Attorney elected by the citizens of Belknap County does not have jurisdiction to step over the border and prosecute crimes occurring in the County of Merrimack.

Because County Attorneys have constitutional duties, because they are answerable to the voters of the county in which they are elected, and because their actions have grave consequences – jail time – to the citizens of that county, the method of their appointment when they are unable to serve cannot be lightly regarded. Thus, by two separate statutes, the Legislature has specified how they are to be temporarily replaced when they cannot carry out their duties.

A. Superior Court Chief Justice Appoints Temporary Replacement: RSA 7:33

New Hampshire law provides:

> There shall be a county attorney for each county … elected biennially by the voters of the county. If the county attorney is absent at any term of court or unable to discharge the duties of the office, the superior court, acting as a body, shall appoint a county attorney … for the time being and allow said appointee such compensation for his or her services as set by the county delegation.

RSA 7:33.

Here the Merrimack County Attorney, because of a potential conflict of interest was

---

[1](...continued)

> Because private citizens could not procure indictments or informations without the active cooperation of a public prosecutor, private citizens could bring criminal prosecutions only if the charged offense lay within the ***jurisdiction*** of the justice of the peace.
>
> "In 1784, a justice of the peace had authority to try and determine, subject to appeal, those criminal offenses only that were punishable by a fine not exceeding forty shillings, by whipping, or by setting in the stocks. It is impossible to determine what term of imprisonment would be an exact equivalent for the pain and disgrace occasioned by twenty stripes laid upon the bare back, or by two or three hours' confinement in stocks located near the meeting-house, or in some other public place. However, it is clear that justices of the peace had ***jurisdiction*** only over minor crimes."

Martineau, 148 N.H. at 261-62 (emphasis added, quotations and citations omitted).

"unable to discharge the duties of the office," making him "absent" from a "term of court." Thus the superior court, presumably through its Chief Justice for the court "as a body," was required to appoint another "for the time being." Some transfer of payment between the two counties would satisfy the compensation provision.

It is not sufficient to argue that this statute applies only when an County Attorney, through resignation or otherwise, is permanently absent from the position. The statute provides that it applies whenever the County Attorney is absent "at any term of court."

The phrase "term of court" appears to be loosely applied by all branches of government. RSA 496:1 demands that "terms of the superior court shall be held annually" in each county, and then requires that there must be "the holding of not less than 2 terms annually in each county." The statute also requires that the "times for holding the terms of court … shall be established by rule of the superior court." But no known superior court rule establishes what that time is.

In *Belkner v. Preston*, 115 N.H. 15 (1975), this Court held, given inequalities among counties regarding numbers and lengths of terms, that statutes of limitations measured by them are unconstitutional. Presumably this reasoning applies to RSA 7:33 as well, and therefore attempting to determine the meaning of the phrase here is futile.

Moreover, the phrase is anachronistic – probably stemming from before courts had judges available year-round. *See e.g.*, SUP.CT.R. 2 ("The supreme court shall have a general term beginning in January of each year and shall hold regular sessions throughout the year."); *State v. Thomson*, 110 N.H. 190, 191 (1970) ("Terms of court have less magical meaning today than they did at common law."); http://www.judiciary.gov.uk/keyfacts/legal_year/index.htm.

Nonetheless, even without delving into common law practice, this Court has used the

phrase in various ways. In *State v. Elbert*, 121 N.H. 43, 46 (1981), this Court appears to have used the phrase, "term of court" to mean, albeit loosely, one particular instance of jury selection. In *State v. Isaac*, 119 N.H. 971, 972 (1979) this Court used the term, again loosely, to mean a particular month. In *State v. Smith*, 119 N.H. 674 (1979), upon the defendant requesting a change in sentence, this Court ruled that the sentencing court loses its authority to alter sentences "where the *term of the court* that sentenced the defendant has expired and the defendant has begun serving his sentence. *Id.* at 676 (emphasis added); *see also State v. Dunn*, 111 N.H. 320 (1971). Although again used loosely, this suggests that "term of court" means the time of jurisdiction over a single case. In *State v. Breest*, 116 N.H. 734, 753, 754 (1976), this Court suggests a narrower meaning – that a verdict and subsequent sentencing in the *same* case were two different terms of court.

The State argued below that RSA 7:33 only applies "when an elected county attorney steps down from his position and the position must be filled by an appointed person for the balance of the term until the next election." OBJECTION TO MOTION TO QUASH (Oct. 31, 2003), *Appx.* at 19. Whatever "term of court" means, however, there is no basis to construe it as a County Attorney's term of office.

Given the reductionist meaning given to the phrase in *Breest*, the phrase "term of court" as used in RSA 7:33 now means that the County Attorney must be replaced according to the dictates of the statute whenever the elected County Attorney is unavailable to perform the duties of office.

B. Superior Court Judge Appoints Temporary Replacement: RSA 661:9, III

A second relevant New Hampshire statute provides:

> If an person holding a county office [enumerated list including County Attorney] becomes temporarily absent or incapacitated, the superior court may, upon application of the county attorney or county commissioners, declare a temporary absence and fill the same for a limited period of time expressed in the appointment.

RSA 661:9, III.

This statute applies when the County Attorney is merely "temporarily absent or incapacitated." In such event the regular County Attorney applies to the superior court for a temporary appointment. This rule is unambiguous and easily followed.

C. Remedy is to Void the Convictions or Order a New Trial

Here, the Merrimack County Attorney was absent or incapacitated in a temporary way due to a potential conflict of interest in a particular case. The Merrimack County Attorney should have applied to the Merrimack County Superior Court for an appointment limited to Mr. Gubitosi's case, perhaps with a designated period of temporary appointment, and perhaps with a designated person to carry out the temporary duties. Had the court approved such an application, all would be well.

By the procedure – or lack – here, two sets of rights were violated: Mr. Gubitosi's right to be prosecuted by the County Attorney in the county which his crimes were alleged, and the citizens of Merrimack County to have their elected officials prosecute crimes occurring in their county. Mr. Gubitosi was sentenced to jail after what was essentially a private prosecution – clearly disallowed by *Martineau* – in which the "State" was not a party and in which the "State" never properly invoked the jurisdiction of the court. Moreover, in the event a stand-in prosecutor

acting without court appointment undertook some conduct that was actionable in a civil case, the failure to properly appoint the correct replacement would result in confusion regarding the proper civil defendant. *See e.g.*, *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997).

Because the simple appointment process was not followed, and instead a person having no mantel of legitimacy from the voters of Merrimack County showed up to prosecute, the court had no jurisdiction and Mr. Gubitosi's convictions are void.

The appropriate remedy is a new trial by a properly-appointed prosecutor. Because the original charges filed in the Concord District Court were purported to have been nolle prosequi by the Belknap County Attorney, who had no authority to do that, they presumably still exist, and may be available as a basis for the new trial.

II. Harassment Statute is Constitutionally Over-Broad

New Hampshire's harassment statute, RSA 644:4,[2] which this court has visited on two reported occasions, makes several types of phone communication illegal. That portion of the statute criminalizing calls which are made anonymously and have a "purpose to annoy, abuse, threaten, or alarm," RSA 644, I(a), was found facially unconstitutional in *State v. Brobst*, 151 N.H. 420 (2004).

Brobst held that although the State has "a legitimate interest in protecting citizens from the effects of certain types of annoying or alarming telephone calls, such as the terror caused to an unsuspecting person when he or she answers the telephone, perhaps late at night, to hear nothing but a tirade of threats, curses, and obscenities, or, equally frightening, to hear only heavy breathing or groaning," *Brobst*, 151 N.H. at 424 (quotation and citation omitted), the statue is

---

[2]RSA 644:4 provides:

I. A person is guilty of a misdemeanor, and subject to prosecution in the jurisdiction where the communication originated or was received, if such person:

(a) Makes a telephone call, whether or not a conversation ensues, with no legitimate communicative purpose or without disclosing his or her identity and with a purpose to annoy, abuse, threaten, or alarm another; or

(b) Makes repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another; or

(c) Insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or

(d) Knowingly communicates any matter of a character tending to incite murder, assault, or arson; or

(e) With the purpose to annoy or alarm another, communicates any matter containing any threat to kidnap any person or to commit a violation of RSA 633:4; or a threat to the life or safety of another; or

(f) With the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected.

II. As used in paragraph I, ""communicates" means to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer. For purposes of this section, ""computer" means a programmable, electronic device capable of accepting and processing data.

III. In any complaint or information brought for the enforcement of RSA 644:4, I(f), it shall not be necessary for the state to negate any exception, excuse, proviso, or exemption contained therein and the burden of proof of any exception, excuse, proviso, or exemption shall be upon the defendant.

unconstitutionally over-broad because it "applies to any call made to anyone, anywhere, at any time, whether or not conversation ensues, if the call is placed merely with the intent to annoy or alarm," such that "the act constituting the offense is complete when the call is made, regardless of the character of conduct that ensues." In addition, the Court said, "the State has a legitimate interest, under certain circumstances, in preserving the sanctity of the home and the privacy that it affords." *Id*. *Brobst* (quotation and citation omitted).

Thus this Court set forth the conditions upon which harassing phone calls could be constitutionally prosecuted: if they were made "late at night," included "a tirade of threats, curses, and obscenities" or "heavy breathing or groaning," and otherwise violated the sanctity or privacy of one's home.

In *State v. Pierce*, 152 N.H. 790 (2005), the *Brobst* test was applied to section (f) of the statute, which purports to criminalize the same conduct as section (a) construed in *Brobst*, provided the caller was "previously notified that the recipient does not desire further communication." This Court held that the previous-notification requirement does not materially narrow the too-broad scope of potential conduct, and in accord with the requirements of *Brobst*, held it unconstitutional.

Now section (b) of the statute is at issue. It criminalizes "repeated communications at extremely inconvenient hours or in offensively coarse language" when there is a "a purpose to annoy or alarm." The statute does not require *both* inconvenient hours *and* coarse language; rather it allows the State to allege *either* inconvenient hours *or* coarse language. Mr. Gubitosi was charged under the "coarse language" provision. INFORMATION 03-S-408, *Appx.* at 33.

By requiring a call to either be at inconvenient hours or contain coarse language,

section (b) does narrow the scope of potential criminal conduct to some extent. But that is not narrow enough. *Brobst* required *both* types of narrowing, whereas section (b) – and the information under which Mr. Gubitosi was convicted here – allows either one or the other.

The over-breadth concern in *Brobst* was that a caller, seeing his neighbor's house burning, might legitimately call, with a purpose to annoy and alarm, to alert the neighbor of the fire. The concern in *Pierce* was that the same caller might call with the same purpose, again legitimately, even though he had been earlier warned to not contact the neighbor. Here the over-breadth concern is the same caller, with the same purpose to annoy and alarm, might use coarse language in alerting the neighbor of the fire. Such a call would have equal legitimacy as the *Brobst* and *Pierce* calls, yet under the terms of the statute be a crime. This can be distinguished from a charge based on inconvenient hours, because a legitimate fire alarm is always more convenient than the alternative.

If the jury convicted Mr. Gubitosi of a charge that included *both* inconvenient hours *and* coarse language, constitutional requirements would be met. But because only coarse language was charged, the conviction must be reversed.

CONCLUSION

In light of the forgoing, Steve Gubitosi requests that all Merrimack County convictions should be voided, or set for a new trial; in the alternative, he requests that the harassment conviction be reversed.

Respectfully submitted,

Steve Gubitosi
By his Attorney,

Law Office of Joshua L. Gordon

Dated: March 7, 2008

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

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Steve Gubitosi requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issue raised in this case is important to the jurisdiction, and the procedure necessary to establish it, of trial courts in all cross-county prosecutions, and because the issue is novel in New Hampshire.

I hereby certify that on March 7, 2008, copies of the foregoing will be forwarded to Stephen D. Fuller, Esq., Senior Assistant Attorney General.

Dated: March 7, 2008

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

APPENDIX