

NEW HAMPSHIRE SUPREME COURT

No. 2013-CR-0182

THE STATE OF NEW HAMPSHIRE
Appellee,

v.

STEPHEN SOCCI
Defendant / Appellant

ON APPEAL FROM JUDGMENT AND SENTENCE
OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF
DEFENDANT – APPELLANT
STEPHEN SOCCI

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying a Motion to Suppress, where Drug Task Force officers conducted an unconstitutional warrantless search of the defendant's property including the area around a garage, and the defendant's later consent to search was tainted by that unconstitutional search?

Issue preserved by Motion to Suppress, App. A3, State's Objection, App. A5, evidentiary hearing including oral argument, and trial court's ruling. Add. 7

2. Whether the trial court erred in denying a Motion to Suppress, where, under the totality of the circumstances, Socci's consent was not given freely, knowingly and voluntarily?

Issue preserved by Motion to Suppress, App. A3, State's Objection, App. A5 evidentiary hearing including oral argument, and trial court's ruling. Add. 7

¹ References to the record are as follows:

"T." refers to the transcript of the August 1, 2012 hearing on motion to suppress;
"Add." refers to the Addendum to this brief, which is found at the end of the brief;
"App." refers to the separately-bound Appendix to this brief.

STATEMENT OF THE CASE

A Rockingham County Grand Jury indicted Stephen Socci under the Controlled Drug Act, alleging that on or about August 10, 2011, he possessed five or more pounds of marijuana with the intent to sell. App. A2. A second indictment, arising out of the same facts, charged Socci with Manufacturing a Controlled Drug, alleging that he knowingly manufactured marijuana in a quantity of five pounds or more. App. A1.

Socci filed a Motion to Suppress, alleging that the warrantless search of his home and garage violated his right to be free of unreasonable searches and seizures under Part I, Article 19 of the State Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution. App. A3. The State filed an Objection to the Motion to Suppress, claiming that Socci consented to the search. App. A5.

On August 1, 2012, the lower court (Delker, J.) convened a hearing and heard the testimony of two members of the Rockingham County Drug Task Force, Socci, and his wife. The court denied the motion. App. A18. After a stipulated facts trial, the court found Socci guilty. App. A21.

The court held a sentencing hearing on February 20, 2013. On the Manufacturing Controlled Drug indictment, the court sentenced Socci to twelve months in the house of correction, stand committed, followed by two years probation, and a \$5000.00 fine. Add. 2. On the Possession with Intent indictment, the court sentenced Socci to not less than five and not more than ten years in the state prison, all of the minimum and maximum terms suspended, not to be brought forward after five years. Add. 5. The court also required Socci to obtain an evaluation from a licensed alcohol and drug abuse counselor, and comply with all treatment recommendations. Add. 36. The court stayed the sentence pending appeal. App. 1.

STATEMENT OF FACTS

On August 10, 2011, Melissa Socci (“Melissa”) was alone in the kitchen of her Londonderry home, preparing a bottle for her baby, when she saw two police vehicles pull into her driveway. T. 56. The Socci’s house sits well off Wilson Road, on a rural, wooded plot of land, at the end of a long, curving driveway. T. 5, 7, 33, App. A13, A17 (Exhibits). Melissa’s husband Stephen (“Socci”) was at work. T. 59. As Melissa watched through her window, two officers got out of one of the vehicles and began to walk around and, as the trial court put it, “inspect” her detached garage, while two other officers got out of the other cruiser and approached her side porch. T.56-58; App. A8.

DEA agents had identified Socci, among others, as a customer of a store in Massachusetts that sold “marijuana grow equipment and grow chemicals.” T. 5. The agents contacted the Rockingham County Drug Task Force (RCDTF), which consists of officers from several different law enforcement agencies. T. 4-5, 14-15. Federal agents informed RCDTF that they had conducted “knock and talk” operations – unannounced visits to private homes and efforts to gain consent for a warrantless search – for several repeat customers of the store. T. 20. These efforts had borne fruit, uncovering marijuana grow operations. T. 20. RCDTF thus arrived with the intention of questioning Socci about the grow equipment and chemicals, and with the “hope” of obtaining consent to search Socci’s residence. T. 6, 31. The police lacked probable cause to obtain a search warrant. App. A8.

Johnson explained the plan as follows: two police vehicles carried four law enforcement officers onto the Soccis’ property, while other officers remained offsite “to assist us, if we did, in fact, get consent.” T. 6, 31-32. When Melissa looked out her kitchen window, she saw Johnson, accompanied by Officer St. Onge, park his cruiser in between the residence and the garage and proceed on foot directly to the porch on the left side of the house. T. 32, 33-34, 57. Meanwhile,

Wickson, accompanied by Officer Pelletier, parked “in close proximity to the garage” and began inspecting the garage, “traversing” completely around it, such that Melissa lost sight of them. T. 8-9, 11-13, 21, 58-59.

The Socci’s garage stands to the right of the driveway as one travels towards the house, but the driveway pavement as described by the trial court “covers a sizeable area ... completely enveloping the garage.” App. A3. An overhead view of the property, admitted into evidence as an exhibit and shown below, shows that a person walking all the way around the garage would have been hidden from view of the house at some point during the circuit. App. A11.



State’s Exhibit 1 – Overhead View (App. A11)

Melissa testified that guests and salespeople ordinarily come all the way down her

driveway and go straight to her porch and slider door. T. 34, 59; see App. A16-A17 (Exhibit A7-A10). She said that it would not be ordinary, and in fact would be alarming, if a stranger arrived on her property and began walking around her garage. T. 60.

Wickson testified that he immediately smelled the strong odor of “fresh growing marijuana,” saw that the windows of the garage were covered, and observed that there was mildew on the doors and windows of the garage. T. 10-11.



Defendant's Exhibit A2 (Front of Garage) (App. A13)

Wickson walked around the left side of the garage, an area within plain view of the house, and observed that the power meter on the garage was spinning rapidly, indicating substantial electrical usage. T. 11. On the back of the garage, a smokestack and a blower drew his attention because the latter was “humming like a plane.” T. 11, 25-26.



Defendant's Exhibit A28 (Left Side and Back of Garage) (App. A11)

All of these observations were consistent, in Wickson's experience, with a marijuana growing operation. T. 11. Wickson radioed his findings to Officer Johnson. T. 12.

Melissa Socci testified that during this inspection of the garage, one of the officers tried to open the side door next to the overhead doors, but it was kept locked. T. 58. Officer Johnson denied that he attempted to open the door to the garage, T. 21, but didn't see if Pelletier had tried the door. T. 22. Officer Pelletier, the other to inspect the garage, did not testify.

As Wickson and Pelletier inspected the garage, Officer Johnson, who was a Kingston Police Officer and a Deputy Sheriff for the RCDTF, walked up the steps of a porch and knocked on a "slider" door, accompanied by Deputy St. Onge. T. 30, 34-35, 48. After "a little less than two minutes," Melissa Socci answered the door. T. 35. Both officers wore plain clothes, a

visible badge, firearms holstered at their sides, and Johnson held a radio in his hand. T. 35.

Johnson introduced himself, asked if they could come in, and Melissa allowed them to enter. T. 36.

Johnson told Melissa that they had information from the DEA on a possible marijuana growing operation. T. 36, 49. In her testimony, Melissa elaborated that the officers said they were looking for Socci, as they had pictures of him at a store that sold growing equipment, and were there to find out if he was growing marijuana. T. 59.

Johnson testified that just as he asked Melissa to give consent to search, Wickson reported over the radio that he could smell a “strong odor of marijuana” coming from the garage. T. 26, 36, 63. According to Johnson, Melissa stood just three or four feet away when this report came over his radio and the radio transmission could be heard by anyone standing next to him. T. 36. Melissa appeared concerned from the time they arrived, but became increasingly nervous, especially after Wickson’s audible report. T. 37; see App. A12. Melissa testified that she could hear the report, and also heard an officer say that the back door to the garage was locked. T. 63.

In response to Johnson’s request, Melissa stated that she could not consent to a search in the absence of her husband. T. 36. She also stated that she did not go in the garage, and that it was always locked. T. 38, 60. Melissa testified that she had never noticed the odor of marijuana on the property and did not know that her husband had been growing marijuana in the garage. T. 61.

Johnson asked Melissa to get in touch with her husband. T. 37. Melissa telephoned her husband, and then handed the phone to St. Onge, who had gone to school with Socci when they were younger. T. 37-38. Johnson testified that St. Onge took the telephone “to ask [Socci] to respond to the house or explain[] why [the police] were here,” and Socci arrived at the house

twenty minutes later. T. 38.

Melissa testified that when she telephoned her husband, one of the officers took the phone and told Socci “that they had pictures of him, they believed that he was growing marijuana, they could smell marijuana, and he should get home.” T. 62. Socci testified that officers told him on the telephone that they were seeking his consent to search the home, and that Socci told them he would not give consent, but he would come home. T. 72. The trial court found that Socci refused consent to search during this telephone call. Add. A10.

Johnson testified that during the twenty minute wait for Socci, Wickson walked Johnson around the garage, showed him the area where one could smell growing marijuana, and took him around to the other side of the garage to show him the spinning meter. T. 38. As they conducted this investigation, Melissa remained in the house. T. 38. The State did not claim in the hearing that any officer sought or obtained Melissa’s consent to walk around the property and continue their inspection of the exterior of the garage.

When Socci arrived, Johnson and St. Onge told him that they were investigating a marijuana grow, and were “looking to get his consent to search the residence based upon the smell.” T. 39. Socci testified that when he arrived home, Johnson told him that they knew he was growing marijuana, they could smell it, they could see the electric meter running, and they needed his consent to search the house. T. 73.

Johnson told Socci that he had two options: he could consent to a search, or they would apply for a search warrant. T. 52. Socci did not give consent. T. 52. At that point, Socci asked to speak with St. Onge. T. 73, App. A12.

St. Onge then spoke to Socci out of earshot of Wickson and the other officers. T. 39-40. Wickson testified that he could see them having a conversation and that both acted “calm” and

“professional,” exhibiting no “excitement.” T. 40. However, Wickson acknowledged that he could not hear any part of their conversation. T. 40, 52. After about five minutes, St. Onge and Socci both went to speak with Melissa. T. 41.

The parties’ version of events diverges at this point. According to Johnson, St. Onge returned, told Johnson that they were going to consent, and prepared a consent form. T. 41, 53. Wickson was not present for these events. T. 27. Johnson testified that no threats or promises were made at any time. T. 46.

According to Socci, in their private meeting, St. Onge told Socci that he could either sign the consent form, or the police would leave an officer at the house and get a search warrant. T. 74. , Subsequently, Johnson rejoined them, and stated:

We need a decision. We need it now. Your choices are you sign a consent or you don't sign a consent, and we leave an officer here on the premises, we'll come back and we'll (sic) sledgehammers, crowbars, people will be getting arrested, it will get messy. As of right now, we don't want to arrest anybody. We're not looking to take anyone down, we're just looking to see what's in your garage.

T. 74. Stephen testified that the “final straw” that led him to consent was

[t]he sledgehammers and crowbars, and that people would be getting arrested. They said ‘As of now, no one's getting arrested.’

T. 75.

According to Melissa, when Socci returned from the private meeting with St. Onge, an officer who did not go to school with Socci (e.g., not St. Onge) told Socci that he “needed to make a decision,” and that he “needed to unlock the garage or he was going to leave an officer on the premises and he would go get a search warrant and he would come back with sledgehammers and crowbars, and that things would get messy, people would be arrested.” T. 65.

Melissa testified that she then looked at St. Onge, holding her baby in her arms, and said:

“Are they going to take the babies?” T. 65. St. Onge responded: “Just as long as you cooperate, no one's (sic) wants to take your kids.” T. 66. Socci then looked at Melissa and said: “I have to do this.” T. 66.

After the meeting with St. Onge, Socci signed a consent form to search the home, garage and vehicles on the property. T. 41, App. A8. According to Johnson, Socci had no questions while executing the form, and only expressed one concern, whether he would be arrested. T. 42-43. Johnson testified that he told Socci that he would not be arrested, even if they found a marijuana grow; instead, they would obtain an indictment later. T. 43. The consent form acknowledged that Socci had been advised of the right to refuse consent, and concluded: “This consent is given voluntarily, and without threats of (sic) promises of any kind.” App. A8.

Thereafter, the police searched both the garage and the Socci's home, finding an “extensive marijuana grow” in the garage. App. A22. Inside the home, the police found “marijuana shake, seeds and buds....” Id.

The Trial Court's Ruling

The trial court first determined that the investigative walk around the garage did not constitute an unlawful search. App. A15. The court ruled that because the driveway pavement wrapped around the garage, and because Socci “took no measures to block or discourage access to any portion of the detached garage,” Socci “had no reasonable expectation of privacy in the exterior of the garage.” Id. Accordingly, the officers did not exceed their implied invitation to the property by walking around the building. Id.

The court went on to address the issue of consent to search. In doing so, the trial court addressed a hearing in which there were significant factual discrepancies between the testimony

of the State's witnesses, and the testimony of Melissa and Stephen Socci, regarding what was said between the officers and Stephen in the conversation at the house immediately before Socci gave consent to search. However, although it noted that it found "the testimony of the State's witnesses more credible than that of the defendant and his wife," Add. 16, the trial court did not resolve those factual discrepancies in its ruling.

Instead, the court "assum[ed] the truth of [the Soccis'] testimony regarding the threats of arrest and use of sledgehammers," but held that the defendant's consent was not induced by intimidated or coercion. Id. The court reasoned that "providing the defendant with viable alternatives to consent does not necessarily vitiate consent," and that the officers' statements about use of sledgehammers, and threats of arrest, merely presented Socci with viable alternatives to consent. Id.

The court did not make a factual finding with respect to Melissa's testimony that St. Onge said "[j]ust as long as you cooperate, no one's (sic) wants to take your kids." T. 66. However, the trial court assumed that the officers made threats of arrest, and if both Socci and Melissa were arrested, a temporary loss of the children into State custody would have been a potential consequence.

SUMMARY OF ARGUMENT

The search of the exterior of the garage violated Part I, Article 19 because this area was part of the curtilage of Socci's home, and Socci had a reasonable expectation of privacy in that part of the curtilage. Further, the search violated the Fourth Amendment, under the Court's recent precedents which focus on the common law of trespass, because the police purpose in searching the exterior of Socci's garage was to investigate crime, and the implicit license granted to visitors, guests and salespersons, did not extend to that purpose. The unlawful search tainted Socci's consent. The primary purpose of the exclusionary rule is to deter unlawful police conduct, a purpose which would be furthered by suppression of the evidence here.

In the alternative, even if the garage search was not unlawful, when the totality of the circumstances is considered, Socci's consent was not given freely, knowingly and voluntarily. Instead, his consent was coerced, a conclusion dictated by the number of officers, their conduct in asserting dominion over the property, and the coercive and deceptive statements they made to the Soccis. Their statements did not merely describe viable alternatives to consent but rather misled the Socci's regarding the search warrant process. Their overall conduct should be considered in the light of cautionary statements made by this Court regarding 'knock and talk' consent searches.

Accordingly, the trial court erred in denying Socci's motion to suppress.

ARGUMENT

I. THE COURT ERRED IN DENYING SOCCI'S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS GARAGE SEARCH VIOLATED THE STATE AND FEDERAL CONSTITUTIONS.

This appeal raises two related issues, which are examined separately because the standards of review are different, and because either issue alone justifies reversal without consideration of the other. The first issue is whether officers working with the RCDTF violated Socci's right to be free of unreasonable warrantless searches by inspecting the entire perimeter of his garage without consent and without even identifying themselves prior to the search, and whether this unlawful search and its fruits vitiated Socci's consent. The second issue is whether Socci's consent to search his home was given freely, knowingly and voluntarily, or rather was the product of any type of intimidation, coercion or other unlawful police action apart from the garage search.

A. THE SEARCH OF THE ENTIRE EXTERIOR OF SOCCI'S GARAGE VIOLATED PART I, ARTICLE 19.

Part I, Article 19 provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." Under the State Constitution, warrantless entries by the police are *per se* unreasonable and illegal unless the entry falls within one of the exceptions to the warrant requirement. State v. Seavey, 147 N.H. 304, 306 (2001).

"Our State Constitution particularly protects people from unreasonable police entries into their private homes, because of the heightened expectation of privacy given to one's dwelling." State v. Orde, 161 N.H. 260, 264 (2010)(quotations omitted). These heightened protections apply here, where the RCDTF relied on consent to search not only the garage, but the entire

residence. App. A8, A22.

1. Standard of Review

The standard of review on appeal requires this Court to accept the trial court's factual findings unless they lack support in the record or are clearly erroneous. Orde, 161 N.H. at 264. However, the Court applies *de novo* review to the trial court's conclusions of law. Id.

Socci makes independent claims under both Part I, Article 19 of the State Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution. Because the State Constitution provides a greater scope of protection as to the reasonable expectation of privacy doctrine, State v. Goss, 150 N.H. 46, 47 (2003), this Court in the first instance analyzes Socci's claims under Part I, Article 19, "look[ing] to federal cases merely for guidance." State v. Diaz, 134 N.H. 662, 664 (1991).

2. Governing Legal Standards

"[C]ertain property surrounding a home, often described as curtilage, deserves the same protection against unreasonable searches and seizures as the home itself." Orde, 161 N.H. at 264. "The curtilage includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." State v. Hanson, 113 N.H. 689, 690-91 (1973).

However, such areas are "only protected if there is a reasonable expectation of privacy in the curtilage." Id. Thus, this Court first determines whether the defendant exhibited an expectation of privacy in the particular area of the property at issue, and then determines if that expectation was one that "society is prepared to recognize as reasonable." Orde, 161 N.H. at 265.

Socci exhibited an expectation of privacy in the garage itself. He blocked the windows so that a person outside the garage could not see in. T. 11. He locked the door. T. 60. Even his own wife did not have a key. Id.

Socci did not exhibit an expectation of privacy in the section of his driveway, that constituted, “the access route to the home typically used by neighbors, ... salespersons, and other visiting members of the public.” State v. Pinkham, 141 N.H. 188, 191 (1996). When invitees, including police officers, “have a legitimate reason for entering the property, they have an implied invitation to use the driveway....” Id.

The trial court erred, however, in placing the entire perimeter of the garage within the same category as the driveway. The implied invitation presented by a driveway and pathway to the entry doors of a residence, does not create an unlimited right to satisfy one’s curiosity by inspecting garages, outbuildings and other features. “[T]he direct access routes to the house, including parking areas, driveways and pathways are areas to which the public is impliedly invited, and ... police officers restricting their activity to such areas are permitted the same intrusion and the same level of observation as would be expected from a reasonably respectful citizen.” Orde, 161 N.H. at 266 (quoting State v. Cada, , 923 P.2d 469, 477, review denied (Idaho App. 2006)(quotations omitted)).

Under these principles, the police can make an unannounced visit to a homeowner, in order to conduct a “knock and talk” investigation. State v. Johnston, 150 N.H. 448, 455 (2004). However, Officers Wickson and Pelletier did not use the driveway to access the house and visit the homeowner, nor did they exhibit the behavior that would be expected of a ‘reasonably respectful citizen.’ Instead, after parking a police cruiser in front of the garage, they walked around the garage and inspected its exterior, disappearing from Melissa’s view. They did so on a

path that, while paved, does not fall along the ordinary and customary pathway from the street to the home; T. 60; the photographic exhibits introduced at the hearing make this clear. App. A11-A18. This was a garage on a rural property, set off from the road, surrounded by trees. As Wickson and Pelletier conducted this criminal investigation upon the Socci's property, they radioed their observations to Officers Johnson and St. Onge. They did all of these things, without first asking permission of the homeowner.

This is not the ordinary and customary behavior of the neighbor or business invitee, and indeed, such behavior by strangers would cause alarm for the typical homeowner. T. 60. The fact that Wickson and Pelletier were police officers does not give them a special right of access to the curtilage of the Soccis' property. See Orde, 161 N.H. at 266 (an officer "has no greater right to intrude onto another person's property than any other stranger would have.").

The court, however, ruled that because Socci did not post signs, build walls, or otherwise "block or discourage" the public from walking around his garage, that he exhibited no expectation of privacy in the exterior of his garage. App. A18, A19. However, the simple fact that Socci chose to live in a rural home, on land surrounded by trees, at the end of a long driveway, amply demonstrates that he exhibited an expectation of privacy in all areas of curtilage that are not within the direct pathway used by invitees to access the home. United States v. Jenkins, 124 F3d 768, 773 (6th Circ. 1997) (In finding that backyard constituted protected curtilage, Court states: "It is also important to remember that defendants live in a remote and sparsely populated rural area where they would have had no particular reason to believe that they needed to construct a high impenetrable fence around the backyard in order to ensure their privacy.")

Further, the trial court determined, under the same reasoning, that Socci did not have a

reasonable expectation of privacy in the exterior of his garage. However, if our State's conception of a reasonable expectation of privacy prohibits the police from inspecting our garbage bags left at the end of the driveway, then it must prohibit the police from conducting investigations of a garage located far down the driveway and close to the residence. State v. Goss, 150 N.H. 46 (2003) (under State constitution, homeowner had reasonable expectation of privacy in contents of opaque garbage bags left at end of driveway for garbage collector).

B. THE SEARCH OF THE ENTIRE EXTERIOR OF SOCCI'S GARAGE VIOLATED THE FOURTH AMENDMENT.

The United States Supreme Court has recently refocused its analysis of the Fourth Amendment upon the common law of trespass, in addition to examining whether the defendant had a reasonable expectation of privacy in the place searched. Florida v. Jardines, ___ U.S. ___, 133 S. Ct. 1409 (2013); Jones v. United States, 565 U.S. ___, 132 S. Ct. 945 (2012). Thus, in Jardines, the Court held that a dog sniff of the front door of a house, from the porch of the house, violated the Fourth Amendment, even though the front porch is the means of entry for invitees, because bringing a drug-sniffing dog onto residential property was akin to a trespass. 133 S. Ct. at 1417; see also Jones, 132 S. Ct. at 949 (installation of a GPS device onto defendant's vehicle, for purpose of tracking its movements, constituted a search even when vehicle traveled in full public view on public roads, simply because the government "physically occupied private property for the purpose of obtaining information.").

In Jardines, the Court explained its property-rights-focused analysis as follows: "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." 133 S. Ct. at 1414 (quotations omitted). With respect to curtilage, the Court stated: "This area around the home is 'intimately linked to the home, both physically and

psychologically,’ the place “where ‘privacy expectations are most heightened.’” Id. at 1415 (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)).

Just as the distinction between the home and the open fields is ‘as old as the common law,’ [Hester v. United States, 265 U.S. 57, 59 (1924)], so too is the identity of home and what Blackstone called the ‘curtilage or homestall,’ for the ‘house protects and privileges all its branches and appurtenants.’ 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769).

Jardines, 133 S. Ct. at 1414-15.

Under the Court’s analysis in Jardines, as soon as a police officer steps off the “public thoroughfare” and enters private property, the issue becomes not merely where on the curtilage the law enforcement officer stood, but whether the officer’s conduct within the curtilage, and whether the officer’s purpose in engaging in that conduct, fell within an “implicit license” granted by the homeowner. Id. at 1415.

Thus, the Court in Jardines explained, a police officer can walk up to the front door and knock, linger briefly, and then leave if there is no response, because this is the implicit license we grant to the public by having a knocker or door bell, and because that is “no more than any private citizen might do.” Id. at 1416 (quoting Kentucky v. King, 563 U.S. —, —, 131 S. Ct. 1849, 1862 (2011)). However, “[t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.” Id. at 1416. Thus, bringing a trained police dog onto the curtilage transgressed the Fourth Amendment, simply because “[t]here is no customary invitation to do *that*.” Id. (Emphasis in original).

The question before the court is precisely whether the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

Id. at 1416-17.

Thus, under Jardines, the question in this case is whether something about the Socci's rural home provided an implicit license for strangers to walk around and inspect their garage and other outbuildings, without asking permission first, and without so much as introducing themselves to the homeowner. The question practically answers itself. There was no dispute that the officers' purpose in walking around and inspecting the garage was to search for evidence of crime. Add. 8 (lower court finds that as Johnson and St. Onge initially approached the residence, Wickson and Pelletier "remained in the driveway to inspect the detached garage where the marijuana was believed to be."). Thus, just as in Jardines, "[h]ere, [the officers'] behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." Id. at 1417. Further, the fact that the garage meter is made accessible to a public utility meter reader does not dilute Socci's reasonable expectation of privacy. United States v. Diehl, 276 F.3d 32, 38 (1st Cir. 2002)("[H]omeowners throughout the country would be astonished to learn that they had abandoned all curtilage protection by allowing meters to be affixed to the sides of their houses.").

In conclusion, because their purpose was to investigate crime, Officers Wickson and Pelletier transgressed the Fourth Amendment when they undertook their exploratory search of the exterior of the garage.

C. UNDER EITHER THE STATE OR FEDERAL CONSTITUTIONS, CONSENT WAS TAINTED BY THE UNCONSTITUTIONAL SEARCH.

In determining whether a consent was tainted by an unconstitutional search or seizure, under either the State or federal constitution, courts apply a three prong test examining: 1) the "temporal proximity" between the unlawful search or seizure and the consent to search, 2) "the presence of intervening circumstances," and 3) the "purpose and flagrancy of the official misconduct." State v. Szczerbiak, 148 N.H. 352, 356 (2002); Brown v. Illinois, 422 U.S. 590,

603 (1975).

Here, the police obtained consent to search a short time after the unlawful garage search, as it took Socci approximately twenty minutes to come home after speaking on the telephone with police officers, and his consent came within perhaps five minutes of arriving home. There were no intervening circumstances. To the contrary, the police exploited the illegality by informing both Melissa and Stephen Socci of their incriminating discoveries around the area of the garage. T. 26, 36, 63, 72-73.

Finally, the purpose and flagrancy of the official misconduct factor weighs in Socci's favor because the trial court found that the officers' purpose in circling the garage was to "inspect the ... garage where the marijuana was believed to be." App. A12. Thus, this is not a case where the intrusion onto curtilage arose out of an attempt to further a non-investigative goal such as locating the homeowner or officer safety. United States v. Raines, 243 F.3d 419, 421 (8th Cir. 2001) ("Recognizing that law enforcement officers must sometimes move away from the front door when attempting to contact the occupants of a residence.") Further, the police misconduct was flagrant given that this Court previously cautioned that knock and talk investigations present the "potential for abuse." Johnston, 150 N.H. at 453.

Thus, this is an appropriate case for application of the exclusionary rule, because it will serve to deter law enforcement agencies from conducting such investigations in a coercive manner in the future. Courts "require the government to demonstrate that any taint of an illegal search or seizure has been purged or attenuated not only because [it is] concerned that the illegal seizure may affect the voluntariness of the defendant's consent, but also to effectuate the purpose of the exclusionary rule.'" State v. Hight, 146 N.H. 746, 749 (2001)(quoting United States v. Melendez-Garcia, 28 F.3d 1046, 1054 (10th Cir.1994)). Accordingly, this Court must reverse.

II. UNDER THE TOTALITY OF THE CIRCUMSTANCES, SOCCI'S CONSENT WAS THE PRODUCT OF COERCION AND DECEPTION, RENDERING IT INVOLUNTARY.

Even if their search of the exterior of the garage did not offend the State or Federal Constitutions, the police did not obtain a valid consent to support their warrantless search of Socci's home and garage. The consent was not given free of duress and coercion, particularly considering the number of police officers involved, their conduct in searching the exterior of the garage and thereby asserting dominion over the property, and an officer's statements to the effect that property damage and custodial arrests would be the alternative to consent. Accordingly, the trial court erred in its determination that Socci's consent was given freely, knowingly and voluntarily.

A. STANDARD OF REVIEW

"A voluntary consent free of duress and coercion is a recognized exception to the need for both a warrant and probable cause." State v. Watson, 151 N.H. 537, 540 (2004); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). The State bore the burden of proving by the preponderance of the evidence that the consent was free, knowing, and voluntary." State v. Tarasuik, 160 N.H. 323, 328 (2010). "(W)hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." State v. Radziewicz, 122 N.H. 205, 211 (1982)(quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973))(emphasis added). This Court has overturned a trial court's finding of consent in cases where the court's finding "is not supported by the record." Watson, 151 N.H. at 540. The Court analyzes the issue under Part I, Article 19 in the first instance. State v. Patch, 142 N.H. 453, 458 (1997).

B. A VALID CONSENT CANNOT BE THE PRODUCT OF COERCION, EXPRESS OR IMPLIED

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court explained that “two competing concerns must be accommodated in determining the meaning of a ‘voluntary’ consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.” Id. at 227 (Emphasis added). The Court explained:

But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Id. at 228 (Emphasis added); see State v. McGann, 124 N.H. 101, 105 (1983)(consent is invalid if “the product of coercion, express or implied”); Patch, 142 N.H. at 458 (finding that consent to search was not rendered involuntary by “any type of intimidation, coercion, or other unlawful police action”).

Here, the totality of the circumstances demonstrates that Socci’s consent was the product of coercion and deception, such that the trial court’s decision lacks support in the record. First, his consent must be evaluated in its context, which is a knock and talk investigation. In State v. Johnston, 150 N.H. 448, 455 (2004), this Court pronounced that it was “cognizant of the potential for abuse inherent in the knock and talk procedure.” The Court explained: “One problem with the knock and talk procedure is that the police may attempt to obtain consent by minimizing the seriousness of the situation or by acting in a deceptive manner.” Id. Further, the Court noted that the Washington Supreme Court had characterized the procedure as “inherently coercive to some degree.” Id. (quoting State v. Ferrier, 960 P.2d 927, 933 (Wash. 1998)). See also Watson, 151 N.H. at 541 (In upholding a consent search of a hotel room, the Court contrasted the scenario to that posed by the “knock and talk procedure,” stating: “Nor is this a

case where the procedure used by the police to obtain consent had a “potential for abuse.”)(citing Johnston, 150 N.H. at 455)).

Here, the police carried out a knock and talk procedure in a coercive manner. Four police officers in two separate cruisers arrived with the intent to seek to conduct a consent search of a private home, and sufficient confidence in their objective that they stationed additional officers offsite. The investigation targeted people in a “potentially vulnerable subjective state,” United States v. Twomey, 884 F.2d 46, 51 (1st Cir. 1989), parents with young children in the home, including an infant. Two officers created a coercive atmosphere by searching the exterior of the garage, including areas not visible from the residence, making it appear to a reasonable person that the police had asserted dominion and control over the property. When Melissa declined to consent, saying she could not do so with her husband’s involvement, the officers then sought consent from Stephen and continued to do so even after he refused consent on the telephone.

Finally, and most importantly, an officer made statements that absent consent, the police would bring out sledgehammers and crowbars, “things would get messy,” and “people will be arrested.” T. 74. The officer’s statements amounted, at the very least, to an implied threat of significant adverse consequences that would follow if Socci persisted in refusing consent. See United States v. Capps, 716 F.3d 494, 497 (8th Cir. 2013)(factors to be considered in determining voluntariness of consent include whether the officers “threatened the defendant”); cf. McGann, 124 N.H. at 106 (rejecting trial court’s determination of consent in a situation where defendant’s “consent” consisted of unlocking the door to his car to avoid damage to his auto by the investigating officer). Thus, the police utilized inherently coercive tactics; indeed, few homeowners would decline consent after hearing government agents imply that they will be more likely to inflict property damage, and more likely to haul off the homeowner in handcuffs,

if forced to comply with the warrant requirement.

The implied threat that “people will be arrested” would have had a particularly coercive impact on the Soccis, parents of young children, because of the potential for the State to take custody of their children if both were to be arrested at the same time. See United States v. Ivy, 165 F.3d 397, 402 (6th Cir.1998)(consent to search house not voluntary where police threatened to take defendant's child into custody and arrest girlfriend); United States v. Waupekenay, 973 F.2d 1533, 1536 (10th Cir.1992)(defendant's wife's consent to search not voluntary where police warned her she would be jailed if she didn't cooperate); United States v. Multer, 1993 WL 434081, Slip Op. at 4 (D. Me. Oct. 22, 1993)(finding consent to be search to be involuntary, where consent given after “being threatened that, if he failed to do so, his wife would be arrested and his 2-1/2 year old son would be placed in the custody of the State.”); cf. State v. Belonga, 163 N.H. 343, 352 (2012)(providing examples of confessions held involuntary, including those induced by “police threats to arrest a suspect’s family members.”).

C. IMPLIED THREATS OF PROPERTY DAMAGE, AND IMPLIED THREATS TO ARREST THE HOMEOWNER, DO NOT CONSTITUTE VIABLE ALTERNATIVES TO CONSENT.

The trial court erred in determining that the officer’s statements as to use of sledgehammers and regarding the possibility of arrest merely informed the Socci’s of “viable alternatives” to consent, such that the statements were “explanatory rather than coercive” in nature. Add. A17. In advancing this argument, Socci acknowledges that the police may inform a suspect of “viable alternatives” to consent without necessarily creating an atmosphere of coercion such that the consent is tainted. Patch, 142 N.H. at 459. For example, the police may make clear that they will apply for a search warrant and secure the property during the application process, and still obtain voluntary consent, as long as obtaining a search warrant is a

viable alternative (e.g., the police have probable cause to search). Id.; United States v. Lee, 317 F.3d 26, 33 (1st Cir. 2003).

Other courts have held that the police can provide truthful information about the warrant process, e.g., tell the home owner that “it would take a while” to get the warrant. United States v. Welch, 683 F.3d 1304, 1309 (11th Cir. 2012). If the subject of the search is a vehicle, the police can tell the suspect that the car will be towed during the warrant application process. State v. Prevost, 141 N.H. 647 (1997). These are all viable alternatives, because they constitute merely a statement of the reality of the situation – it does take a while to get a search warrant, the place to be search must be secured in the interim, and vehicles may have to be towed to a secure location for officer safety or to protect the suspect’s property.

1. The Implied Threat of Property Damage is not a Viable Alternative

Telling the homeowner that absent consent, property damage will occur – that the police will resort to use of “sledgehammers and crowbars” and “things may get messy” - goes beyond explaining a viable alternative. The unmistakable message conveyed by these statements is that substantial property damage will occur during the search if pursuant to a search warrant. The constitutional law of criminal procedure, however, does not grant the police more leeway to damage property during execution of a search warrant, then during a consent search. To the contrary, the Court has stated that when officers execute a search warrant, “[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression.” United States v. Ramirez, 523 U.S. 65, 71 (1998). Even with a search warrant, the police generally must knock and announce before entry into a private home. Wilson v. Arkansas, 514 U.S. 927, 933-34 (1995).

Thus, the statements made by the police to Socci to the effect that absent consent, they would resort to use of “sledgehammers and crowbars” and that “things would get messy” were inherently coercive not only because of the implication of property damage, but because these statements were misleading. “Besides evidence of police coercion or intimidation, the totality-of-the-circumstances test would require consideration of any evidence that law enforcement officers' fraud, deceit, trickery or misrepresentation prompted defendant's acquiescence to the search.” United States v. Vanvliet, 542 F.3d 259, 264 (1st Cir. 2008); State v. Hastings, 137 N.H. 601, 607 (1993) (upholding trial court’s finding of consent where “nothing coercive or deceptive occurred in the police conduct” that brought about defendant’s consent); cf. State v. Laro, 106 N.H. 500, 503 (1965)(upholding trial court’s finding of consent to search where defendant’s testimony at suppression hearing disclosed “not even a hint of coercion or intimidation or deception on the part of the police officers toward the defendant.”) (emphasis added).

In justifying its ruling, the trial court conjectured that the officer’s comments constituted “merely an explanation of what would happen if the defendant refused consent and did not provide a key to the locked garage.” Add. 17. This hypothesized scenario, however, has no support in the record. No witness testified that a law enforcement officer threatened to use a sledgehammer only to enter the garage should Mr. Socci refuse to provide a key, nor did any witness imply that Mr. Socci might refuse to provide a key even if presented with a warrant.

To the contrary, the facts as found by the trial court are that Mr. Socci promptly came home to meet the officer’s, had a “calm” conversation with St. Onge, and gave the police a key to the garage after he gave consent. App. A15-16. There was absolutely no basis to speculate that the same person who voluntarily gave over a garage key as part of the ‘consent’ process, would have refused to turn over a key if the police had obtained a warrant.

2. The Implied Threat that People will be Getting Arrested is Not a Viable Alternative

Similarly, the statement that absent consent, ‘people will getting arrested,’ does not constitute a ‘viable alternative’ to obtaining a search warrant. It is true that the police may exercise their discretion to make a warrantless arrest upon probable cause that a felony has been committed, or alternatively go through the grand jury process first. That the police and prosecutors have this discretion does not mean, however, that the police can wield their power to extract consent from a homeowner and thereby bypass the warrant requirement. Indeed, the trial court below identified no case decision from any State or federal court supporting the proposition that police can obtain voluntary, uncoerced consent to search by threatening to arrest the homeowner if the homeowner declines to consent and requires the police to obtain a warrant. Add. 17. Particularly where arrest would separate parents from their young children, such statements are intimidating and coercive, and have no legitimate place in the knock and talk procedure.

Here, the RCDTF used an investigative procedure identified by this Court as having the potential for abuse, and then obtained consent by “acting in a deceptive manner,” precisely the concern identified by this Court in the Johnston decision. 150 N.H. at 455. Their entry onto the Socci’s property was not an isolated investigation, but rather was part of a broader effort in which government agents had systematically gone to other homes of customers of the marijuana grow equipment retailer and had obtained consent to make warrantless searches of those homes as well, T. 20, further underscoring the need to deter abuse of this tactic by applying the exclusionary rule here.

In conclusion, because the police used inherently coercive tactics, because the case law does not support the use of such tactics, and because this case implicates the core concerns with

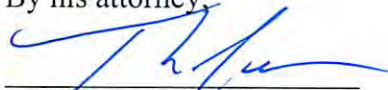
knock and talk investigations previously identified by this Court, the trial court erred in denying Socci's motion to suppress. This Court must reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand.

Undersigned counsel will argue the case and requests fifteen minutes oral argument before the full Court.

Respectfully submitted,
Stephen Socci
By his attorney,



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CERTIFICATE OF SERVICE

This 31st day of July, 2013, I filed the original and eight copies of this brief and separately-bound Appendix, along with a CD-ROM with a pdf version of the brief. I hereby certify that two copies of this brief, Appendix and CD-ROM with pdf have been mailed to Stephen Fuller, Esq., Attorney General's Office, 33 Capitol Street, Concord, New Hampshire 03301. I further certify that a paper copy of the brief has been mailed to the Clerk of the Rockingham County Superior Court with cover referencing the docket number of the proceedings below; and a copy has been provided to Mr. Stephen Socci and to trial counsel below.


Theodore M. Lothstein

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: (603) 642-5256
TTY/TDD Relay: (800) 735-2964
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RETURN FROM SUPERIOR COURT – HOUSE OF CORRECTIONS

Case Name: **State v. Stephen Socci**
Case Number: **218-2011-CR-01007**

Name: **Stephen Socci**, 32 Wilson Rd Londonderry NH 03053
DOB:

Charging document: Indictment

Offense: Acts Prohibited; Controlled Drug Act	Charge ID: 579909C	RSA: 318-B:2	Date of Offense: August 10, 2011
Disposition: Guilty/Chargeable By: Jury T/N: _____			

A finding of GUILTY/CHARGEABLE is entered.

Conviction: Felony

Sentence: see attached Sentence is stayed pending appeal.

February 20, 2013
Date

N. William Delker
Presiding Justice

Raymond W. Taylor
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **Rockingham County House of Corrections**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Date Attest: _____
 Clerk of Court

SHERIFF'S RETURN

I DELIVERED THE DEFENDANT TO THE **Rockingham County House of Corrections** and gave a copy of this order to the Superintendent.

_____ Date	_____ Sheriff
C: <input checked="" type="checkbox"/> State Police <input type="checkbox"/> DMV <input checked="" type="checkbox"/> Dept. of Corr. <input type="checkbox"/> Offender Recs <input type="checkbox"/> Sheriff	
<input type="checkbox"/> Defendant <input checked="" type="checkbox"/> Pros. Atty <input checked="" type="checkbox"/> Defense Attorney Richard N. Foley, ESQ	
<input type="checkbox"/> Office of Cost Cont. <input type="checkbox"/> Sex Offender Registry <input type="checkbox"/> Other _____ <input checked="" type="checkbox"/> Derry Dist Ct. _____	

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

http://www.courts.state.nh.us

Court Name: Rockingham Superior Court

Case Name: State v. Stephen Sacci

Case Number: 2011-CR-1007
(if known)

Charge ID Number: 579909C

HOUSE OF CORRECTIONS SENTENCE

Plea/Verdict: <u>Guilty</u>	Clerk:
Crime: <u>Manufacturing A Controlled Drug</u>	Date of Crime: <u>8/10/2011</u>
Monitor:	Judge: <u>Decker</u>

A finding of GUILTY is entered.

This conviction is for a ☒ Felony ☐ Misdemeanor

☐ If this box is checked, the conviction is for a misdemeanor crime of domestic violence which is defined in federal law as, "...the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim." The defendant is prohibited from possessing, receiving or purchasing a firearm including a rifle, pistol or revolver, or ammunition according to federal law.

☐ If this box is checked, the defendant is a member or veteran of the armed forces.

☒ The presentence investigation report prepared under RSA 651:4 was considered by the Court.

☐ A presentence investigation report was waived by: ☐ Defendant and State ☐ Court

☒ 1. The defendant is sentenced to the House of Corrections for a period of 12 months

☒ 2. This sentence is to be served as follows:

☒ Stand committed ☒ Commencing Upon affirmance of conviction after appeal.

☐ Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____

☐ _____ of the sentence is suspended during good behavior and compliance with all terms and conditions of this order.

Any suspended sentence may be imposed after hearing at the request of the State brought within _____ year(s).

☐ _____ of the sentence is deferred for a period of _____
conditioned upon good behavior and compliance with all the terms of this sentence.

Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

☐ Other: _____

☐ 3. The sentence is ☐ consecutive to _____

☐ concurrent with _____

☐ 4. Pretrial confinement credit: _____ days.

☒ 5. The court recommends to the county correctional authority:

A. ☐ Work release consistent with administrative regulations.

B. ☒ Drug and alcohol treatment and counseling.

C. ☐ Sexual offender program.

D. ☐ _____

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

PROBATION OR CONDITIONAL DISCHARGE

- ☒ 6. The defendant is placed on probation for a period of 2 year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.
Effective: ☐ Forthwith ☒ Upon Release _____
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- ☒ 7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 5 days in response to a violation of a condition of probation.
- ☐ 8. A conditional discharge is entered for a period of _____ year(s). As a condition of the discharge, the defendant shall comply with all terms of this sentencing order. Successful completion of the discharge period does not annul this record. Defendant must petition the Court for annulment of any conviction and sentence entered herein.
- ☒ 9. **Violation of probation, conditional discharge or any of the terms of this sentence may result in revocation of probation or discharge and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

- ☒ 10. Other conditions of this sentence are:
- A. ☒ The defendant is fined \$ 5000, plus statutory penalty assessment of \$ _____
☐ The defendant shall also pay the time payment fee of \$25.00.
☒ The fine, penalty assessment and any fees shall be paid:
☐ Now ☐ By _____ ☒ Through the Department of Corrections as directed by the Probation/Parole Officer.
- ☐ \$ _____ of the fine is suspended.
☐ \$ _____ of the statutory penalty assessment is suspended.
- B. ☐ The defendant is ordered to make restitution of \$ _____ plus statutory 17% administrative fee.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer
☐ Through the Department of Corrections on the following terms:

☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____
- C. ☒ The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- D. ☐ The defendant's ☐ license ☐ privilege to operate in New Hampshire is revoked for a period of _____ effective _____.
- E. ☐ Under the direction of the Probation/Parole Officer, the defendant shall tour the
☐ New Hampshire State Prison ☐ House of Corrections
- F. ☐ The defendant shall perform _____ hours of community service under the direction of Probation/Parole Officer.
- G. ☒ The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- H. ☒ Other: Obtain a LADAC + mental health evaluation and
comply with all recommended treatment + counseling

2/20/2013
Date Sentenced

[Signature]
Presiding Justice

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

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RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Stephen Socci**

Case Number: **218-2011-CR-01007**

Name: **Stephen Socci, 32 Wilson Rd Londonderry NH 03053**

DOB:

Charging document: Indictment

Offense:	Charge ID:	RSA:	Date of Offense:
Acts Prohibited; Controlled Drug Act	579910C	318-B:2	August 10, 2011
Disposition: Guilty/Chargeable By:	Jury	T/N: _____	

A finding of GUILTY/CHARGEABLE is entered.

Conviction: Felony

Sentence: see attached

February 20, 2013
Date

N. William Delker
Presiding Justice

Raymond W. Taylor
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Date

Attest: _____
Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

C: ☒ State Police ☐ DMV ☒ Dept. of Corr. ☐ Offender Recs ☐ Sheriff ☒ Sentence Review Board
☐ Defendant ☒ Pros. Atty ☒ Defense Attorney Richard N. Foley, ESQ
☐ Office of Cost Cont. ☐ Sex Offender Registry ☒ Other RCHC ☒ Derry Dist Ct. _____

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Rockingham Superior Court
 Case Name: State v. Stephen Socci
 Case Number: 2011-CR-1007 Charge ID Number: 579910C
 (if known)

STATE PRISON SENTENCE

Plea/Verdict: <u>Guilty</u>	Clerk:
Crime: <u>Possession of a Firearm with Intent</u>	Date of Crime: <u>8/10/2011</u>
Monitor:	Judge: <u>Decker</u>

A finding of GUILTY is entered.

- ☐ If this box is checked, the defendant is a member or veteran of the armed forces.
- ☒ The presentence investigation report prepared under RSA 651:4 was considered by the Court.
- ☐ A presentence investigation report was waived by: ☐ Defendant and State ☐ Court

- ☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than 10 year(s) (~~months~~), nor less than 5 year(s) (~~months~~). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

- ☐ 2. This sentence is to be served as follows: ☐ Stand committed ☐ Commencing _____

- ☒ 3. ALL of the minimum sentence is suspended
ALL of the maximum sentence is suspended

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within 5 years of today's date.

- ☐ 4. _____ of the sentence is deferred for a period of _____.
 Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

- ☐ 5. _____ of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

- ☒ 6. The sentence is ☒ consecutive to Charge ID 579909C if imposed
☒ concurrent with _____

- ☐ 7. Pretrial confinement credit: _____ days.

- ☒ 8. The Court recommends to the Department of Corrections:

- ☒ A. Drug and alcohol treatment and counseling
☐ B. Sexual offender program
☐ C. Sentence to be served at the House of Corrections
☐ D. _____

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: _____

Case Number: _____

STATE PRISON SENTENCE

PROBATION

- ☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release _____
☐ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- ☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 5 days in response to a violation of a condition of probation.
- ☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

- ☐ 12. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence.
- ☐ A. The defendant is fined \$ _____ plus statutory penalty assessment of \$ _____
☐ The defendant shall also pay the time payment fee of \$25.00.
☐ The fine, penalty assessment and any fees shall be paid:
☐ Now ☐ By _____ ☐ Through the Department of Corrections as directed by the Probation/Parole Officer.
☐ \$ _____ of the fine is suspended
☐ \$ _____ of the penalty assessment is suspended.
- ☐ B. The defendant is ordered to make restitution of \$ _____ plus statutory 17% administrative fee
☐ Through the Department of Corrections as directed by the Probation/Parole Officer
☐ Through the Department of Corrections on the following terms:

☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____
- ☒ C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- ☐ D. Under the direction of the Probation/Parole Officer, the defendant shall tour the
☐ New Hampshire State Prison ☐ House of Corrections
- ☐ E. The defendant shall perform _____ hours of community service under the direction of the Probation/Parole Officer.
- ☐ F. The defendant has waived sentence review in writing or on the record.
- ☒ G. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- ☒ H. Other: Obtain LADAC w/in 60 days of release on 579909C + comply w/
+ mental health evaluation

Date

2/20/2013

W. William Dea
Presiding Justice

Follow-up
treatment +
counseling.

**The State of New Hampshire
Superior Court**

Rockingham, SS.

COPY

STATE OF NEW HAMPSHIRE

V.

STEPHEN SOCCI

NO. 218-2011-CR-1007

ORDER ON MOTION TO SUPPRESS

The defendant, Stephen Socci, is charged with one count of Manufacturing a Controlled Drug and one count of Possession of a Controlled Drug With Intent to Sell, in violation of RSA 318-B:2, I. Both charges originate from an event that occurred on August 10, 2011, whereby the defendant consented to a search of his garage and home by members of the Rockingham County Sheriff's Department, who discovered a marijuana grow operation.

The defendant moves to suppress all evidence resulting from the search of his garage and home. In his barebones Motion, the defendant asserts that none of the officers involved in the search had authorization to enter upon his land, and that the search was not authorized by any warrant or any exception to the warrant requirement. The State objects. The Court held a hearing on August 1, 2012. At the hearing, the defendant elaborated on his Motion and argued that his consent to the search was not voluntary. In addition to the defendant, the Court heard the testimony of Detective

George Wickson, Deputy Sheriff Joel Johnson, and the defendant's wife. Based on the parties' arguments, submissions, and applicable law, the Court finds as follows.

FACTS

On August 10, 2011, officers assigned to a Task Force working through the Rockingham County Sheriff's Department (the "Task Force") went to the defendant's residence to follow up on information received from the Drug Enforcement Agency ("DEA"). A DEA agent had been investigating a company in Massachusetts that was suspected of selling equipment and chemicals used to grow marijuana. During the course of that investigation, investigators learned that the defendant had been making purchases of equipment used in the growing of marijuana from the store. The Task Force did not have enough information to establish probable cause to apply for a search warrant so the investigators planned to conduct a standard "knock and talk" with the defendant, with the intent of securing his consent to a search of the premises. Investigators had conducted "knock and talk" encounters with other customers purchasing similar equipment from the Massachusetts store and had discovered marijuana grow operations from those encounters.

On August 10, 2011, four officers driving two separate vehicles arrived at the defendant's residence. Two of the officers, Kingston Police Lt. Joel Johnson and Rockingham County Sheriff Deputy Chris St. Onge, approached one of the doors to the house while Detective George Wickson and another officer remained in the driveway to inspect the detached garage where the marijuana was believed to be. All of the officers testified that they had specialized training in the investigation and detection of drugs, grow operations, and other activities relating to illegal narcotics, including marijuana.

The officers also testified that, as a result of their training and experience, they were familiar with the smell of both burnt and growing marijuana. [NWD1] When Detective Wickson exited his vehicle, he immediately smelled the strong odor of fresh marijuana. He also observed that the windows on the front of the garage were covered and that there was mildew on the doors and windows. Detective Wickson then walked toward the left side of the garage and observed the power meter spinning very quickly, indicating a large amount of electricity was being used. He continued to walk around the garage. At the back of the garage, he observed a smoke stack and a blower, which were consistent with a system designed to filter the air. He relayed his discoveries to the other officers at the scene. All of these observations were consistent, in Detective Wickson's experience, with a marijuana grow operation.

It is important to note that the defendant's driveway covers a sizeable area, all of which is paved. The pavement extends between the house and the detached garage and beyond, completely enveloping the garage. Detective Wickson testified that all of the observations he made were made from the pavement that surrounded the garage. He testified that there were no signs or any objects that blocked or impeded access to the pavement around the garage or gave any indication that the area was off limits to anyone visiting the home. Further, he testified that even while walking around the left side of the garage, he was in plain view of the house. At the hearing, the State also introduced photographs of the garage.

While Detective Wickson was examining the garage, Deputies Johnson and St. Onge approached the house and knocked on the door. Both officers were wearing street clothes and had their weapons holstered. The defendant's wife, Melissa Socci,

answered and the officers identified themselves and asked to enter the residence. Mrs. Socci allowed them in, at which point they asked about the defendant. Mrs. Socci informed them that the defendant was at work. The officers asked for consent to a search of the property. While the officers were talking to Mrs. Socci, Detective Wickson radioed to them that he smelled marijuana. The officers testified that Mrs. Socci may well have overheard the radio transmission. She was visibly nervous while speaking to the police, and this increased after Detective Wickson relayed his observations. Mrs. Socci told the police that she would not give consent without first speaking with the defendant; he was the only one who used the garage and only he had the key.

Mrs. Socci called the defendant and informed him of the police presence. Deputy St. Onge, who had gone to school with the defendant when they were younger, spoke to the defendant on the telephone and asked for his consent to a search of the premises. The defendant declined to give consent at that time and said he was on his way home.

Approximately twenty minutes later, the defendant arrived and Deputies Johnson and St. Onge introduced themselves to him while they were outside in the driveway. Lt. Johnson told the defendant that one of the officers could smell marijuana and asked the defendant for consent to search the garage. He explained to the defendant that he could either consent to the search or the police could apply for a search warrant.

Deputy St. Onge, who did not testify at the hearing, then stepped away and spoke to the defendant alone at the defendant's request. According to Lt. Johnson, the conversation appeared calm and unremarkable. When they returned to Lt. Johnson's

location, Deputy St. Onge informed Lt. Johnson that the defendant had consented to a search.

Lt. Johnson testified that officers gave the defendant a form requesting his consent to search. Lt. Johnson told the defendant that he had the right to refuse to consent to the search. The defendant then read and signed the form. He had no questions, and the only concern he expressed was whether he would be arrested. The officers told him that he would not be arrested that day, even if the police found a grow operation. They explained to him that they would seek an indictment at a later time if they found evidence of a crime.

Mrs. Socci testified that she had no idea what went on in the garage, had never gone in there, could not look inside because the windows were blocked, and never smelled marijuana. She also claimed she never discussed her husband's activities in the garage with him and had no suspicion that he was growing marijuana.

She testified that when the police arrived, they introduced themselves and told her that they had a photograph of her husband buying equipment and supplies at the grow shop. She said during the course of the conversation, she overheard the radio dispatch from an officer saying that he smelled marijuana. As a result, she called her husband and told him to come home.

She testified that when the defendant arrived home, he spoke to Deputy St. Onge, whom he knew from school. She could not over hear this conversation. She said that when they returned to her presence, Lt. Johnson told the defendant that if he did not consent, they would leave an officer at the house, get a search warrant, and come back with a sledgehammer. According to her, Lt. Johnson said that if that

happened things would get messy and someone would get arrested. She also claims that the officer said something to the effect that as long as the defendant cooperates, no one wants to take your kids.

The defendant also testified to his version of events. He said that after getting the call from his wife he came home from work. Lt. Johnson told him that they could smell marijuana and saw the meter running. The defendant then asked to speak to Deputy St. Onge alone. The defendant asked Deputy St. Onge what they were doing. St. Onge told him that he could either consent or they would get a warrant. When they returned to Lt. Johnson's presence, the defendant claims that Lt. Johnson said that he had to make a decision because otherwise they would leave an officer on site and come back with sledgehammers, crowbars, people would get arrested and it would get messy. Lt. Johnson said that as of that moment no one was going to get arrested. The defendant testified that he then went over to talk to his wife and told her that he had to do this and he signed the consent form. The defendant testified that he only gave consent because he did not want to put his family through a raid or risk his wife's arrest.

After approximately ten minutes of discussion, the defendant ultimately gave consent and was read his Miranda rights. He signed forms indicating his consent to the search and his willingness to answer questions. He provided the officers with the key to the garage, the search of which revealed a marijuana grow operation. Additional incriminating evidence was found within the residence.

ANALYSIS

The defendant argues that all of the evidence that was obtained by the Task Force during and after their search of his residence should be suppressed. In his

motion, the defendant asserts that the officers were not lawfully on his property and unlawfully searched his curtilage. At the hearing, the defendant added that his consent was not voluntary in light of the officers' conduct.

Part I, Article 19 of the New Hampshire Constitution provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." "Unless a warrantless search [or seizure] falls within one of the few specifically established and well-delineated exceptions, it is *per se* unreasonable." State v. Pinkham, 141 N.H. 188, 189 (1996) (quoting State v. Ball, 124 N.H. 226, 234 (1983)).

A. Curtilage

The longstanding rule in this country is that "certain property surrounding the home deserves the same protection against unreasonable searches and seizures as the home itself." Pinkham, 141 N.H. at 190 (citing United States v. Dunn, 480 U.S. 294 (1987)). "[C]urtilage is only protected if there is a reasonable expectation of privacy in the curtilage." State v. Orde, 161 N.H. 260, 265 (2010) (citing State v. Johnston, 150 N.H. 448 (2004)). In New Hampshire, "[t]he curtilage includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." State v. Hanson, 113 N.H. 689, 690-91 (1973).

While the New Hampshire Supreme Court has held that a driveway clearly falls within this description, it has nevertheless stated that certain driveways are semi-private, and not deserving of traditional curtilage protection. Pinkham, 141 N.H. at 190-

91. This is because “[t]he driveway, like a walkway, is an access route to the house typically used by neighbors, mail carriers, salespersons, and other visiting members of the public.” Id. at 191. “So long as these people have a legitimate reason for entering the property, they have an implied invitation to use the driveway.” Id. “Police officers have the same right to enter the driveway on legitimate business as other members of the public.” Id. Here, as in Pinkham, the defendant's driveway is at no point obstructed by any gate, plant, sign, or anything else indicating that the general public is not welcome on any portion of the driveway, including the area surrounding the garage. Thus, because it is only semi-private, it is not deserving of traditional curtilage protection.

Further, the defendant has no reasonable expectation of privacy in the exterior of his garage. In Orde, a police officer discovered marijuana growing on the side porch of the defendant's residence. Although the porch itself was visible from the side door that the officer had lawfully approached, both access to it and visibility of its contents were obstructed by large lilac bushes. Id. at 341. There was also no path leading around the bushes to the porch; the officer had squeezed through a small gap in the lilacs. Id. The New Hampshire Supreme Court held that the defendant had a reasonable expectation of privacy in the porch due to the bushes and lack of a pathway, and that the officer's “departure from the obvious paths on the property and entrance onto the defendant's deck exceeded his implied invitation onto the property.” Id. at 266.

The Court noted that while a police officer has a right to enter a person's curtilage, the right is not unlimited, and an officer “has no greater right to intrude onto another person's property than any other stranger would have.” Id. (brackets and

internal quotations omitted). "The direct access routes to the house, including parking areas, driveways and pathways are areas to which the public is impliedly invited, and police officers restricting their activity to such areas are permitted the same intrusion and the same level of observation as would be expected from a 'reasonably respectful citizen.'" *Id.* (brackets and ellipsis omitted) (quoting *State v. Cada*, 923 P.2d 469, 477 (Idaho 1996)). "Accordingly, there can be no reasonable expectation of privacy as to observations made from such areas." *Id.* (quoting *State v. Clark*, 859 P.2d 344, 349 (Idaho App. 1993)).

Unlike in *Orde*, the defendant in this case took no measures to block or discourage access to any portion of the detached garage. Moreover, the garage was surrounded by the paved area of the driveway. Accordingly, the Court finds that the defendant had no reasonable expectation of privacy in the exterior of the garage, and the officers did not exceed their implied invitation to the property by walking around the building. *See Nikolas v. City of Omaha*, 605 F.3d 539, 546 (8th Cir. 2010) (finding city official's actions in walking around exterior of detached garage and looking through windows to be "minimally invasive" and "constitutionally reasonable" even if garage deserved curtilage protection). The observations made by the officers while doing so were therefore lawful.

B. Consent

"[V]oluntary consent free of duress and coercion is a recognized exception to the need of both a warrant and probable cause." *State v. Sorrell*, 120 N.H. 472, 475 (1980). The burden is on the State to demonstrate by a preponderance of the evidence that the defendant's consent was free, knowing, and voluntary. *State v. Patch*, 142 N.H. 453,

458 (1997). Whether the defendant validly consented to the search of his home is a question of fact determined by examining the totality of circumstances. State v. Jones, 131 N.H. 726, 728 (1989).

In this case, the defendant provided consent after an approximately ten minute discussion with Deputy St. Onge and Lt. Johnson. According to Lt. Johnson, this conversation was calm and measured, and the defendant gave consent after being informed of some of the observations the officers had made around the garage. The Court finds the testimony of the State's witnesses more credible than that of the defendant and his wife. Nevertheless, even assuming the truth of their testimony regarding the threats of arrest and use of sledgehammers, the Court does not find that the defendant's consent was induced by intimidated or coercion.

As noted by the State, providing the defendant with viable alternatives to consent does not necessarily vitiate consent. Patch, 142 N.H. at 459. In Patch, the defendant gave consent to a search of his vehicle after initially refusing once police officers informed him that they knew there was marijuana in the vehicle. Id. at 458. The officer then asked if the defendant would accompany them to search another residence where they believed the defendant had stored additional marijuana. Id. at 454. When the defendant asked what would happen if he refused, the officers said they would contact the residence's owner and obtain a search warrant, at which point the defendant consented. Id. at 454-55. The Supreme Court held the officer was within his rights to so inform the defendant, as obtaining a warrant was a "realistic alternative available to [the police]." Id. Similar statements by police to defendants have been upheld as long

as they are “explanatory rather than coercive in nature.” See State v. Prevost, 141 N.H. 647 (1997) (informing defendant that officers would tow her car and apply for a warrant).

In this case, as in Patch, Deputy St. Onge informed the defendant that he knew there was marijuana in the garage. Moreover, Deputy St. Onge informed the defendant that they would obtain a search warrant if the defendant refused consent. This was a realistic alternative available to the officers at the time, based on their lawful observations of the garage. Even assuming that the officers mentioned getting into the garage with sledgehammers, the Court finds that this does not constitute a threat or coercion. Rather, it was merely an explanation of what would happen if the defendant refused consent and did not provide a key to the locked garage. For the same reason, informing the defendant that he, and possibly his wife, could be arrested if the officers returned with a warrant is not coercive. See United States v. Nash, 910 F.2d 749, 752-53 (11th Cir. 1990) (officer’s discussion of realistic penalties for cooperative and non-cooperative defendants did not render confession involuntary); United States v. Tutino, 883 F.2d 1125, 1138 (2nd Cir. 1989) (“[Law enforcement] agents were free to discuss with [the defendant] the evidence against him and the reasons why he should cooperate.”). The officers simply answered the defendant’s questions fully and without reservation. The Court cannot find that telling the defendant the truth about the consequences of his criminal activity rises to the level of coercion.

Thus, informing the defendant that the officers would seek a search warrant if he failed to consent to the search did not violate his rights or undermine his ability to give free, knowing, and voluntary consent to the search of his home. Further, while the defendant testified that he and his family were threatened, he has not presented the

Court with any reliable evidence suggesting that his consent was coerced through intimidation or deceit. Although there were four officers on site, the defendant was confronted only by two, one of whom he knew from school. All officers were in street clothes with their weapons holstered. The defendant was informed of his right to refuse consent both verbally and in writing on the waiver he signed. Moreover, the Court finds that the defendant was calmly informed of the evidence against him while standing in his driveway over the course of ten minutes. Accordingly, the Court finds that the defendant's consent was given freely, knowingly, and voluntarily.

For the foregoing reasons, the Defendant's Motion to Suppress is **DENIED**.

SO ORDERED.

9/10/2012
DATE

N. William Delker
N. William Delker
Presiding Justice