State of New Hampshire
Supreme Court

NO. 96-

1997 TERM

NOVEMBER SESSION

STATE OF NEW HAMPSHIRE

v.

GARY KENNEDY

RULE 7 APPEAL FROM FINAL DECISION OF DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT, GARY KENNEDY

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QUESTIONS PRESENTED

1. Did the state offer evidence to prove beyond a reasonable doubt that the material the defendant transported was a controlled drug?

2. Was Gary Kennedy, who was a juvenile, wrongly tried as an adult for transportation of a controlled drug when the crime with which he was charged had nothing to do with the operation of a motor vehicle.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On October 4, 1995, Gary Kennedy, who was then 17 years old, agreed to drive his friends and a recent acquaintance from their environs in Massachusetts to the rest area on Route 93 in Salem, New Hampshire. Unbeknownst to Gary Kennedy, one of his passengers had arranged a drug transaction there with, it turned out, a police officer. Upon arriving, police descended upon Gary Kennedy's car, and they found in the back seat a duffle bag full of what they thought was marijuana. Gary Kennedy and his passengers were arrested. Gary Kennedy was convicted by the Salem District Court (*Marshal,* J.) of misdemeanor transportation of a controlled drug.

Before trial, the defendant requested that the charge against him be dropped because he was a minor being charged with an adult crime. The motion was denied. (The defendant filed an interlocutory appeal, *State v. Kennedy*, N.H. Sup. Ct. 96-454, which was declined by this court.)

This appeal followed.

SUMMARY OF ARGUMENT

The defendant first argues that because the state neglected to produce admissible evidence that the material he transported was a controlled drug, his conviction must be reversed.

The defendant next argues that because he was a juvenile at the time of his alleged crime, and because the motor vehicle exception to the juvenile procedure statute applies only to offenses that have to do with the operation of a motor vehicle, his conviction for transporting a controlled drug must be reversed.

ARGUMENT

I. The State Failed to Offer Any Evidence That the Material the Defendant Transported Was a Controlled Drug

To sustain a conviction in a criminal case the state must prove every element of the crime beyond a reasonable doubt. *State v. Donovan*, 120 N.H. 603 (1980). For the crime of transporting a controlled drug, the state must prove that the material the defendant transported was a controlled drug. RSA 265:80 (referencing RSA 318-B for definition of controlled drug).

RSA 318-B:26-a, I allows the state to prove the "controlled drug" element by either of two methods. *State v. Christensen*, 135 N.H. 583 (1992); *see also State v. Marcano*, 138 N.H. 643 (1994). The state can produce the laboratory technician who conducted tests upon the material and who determined the material was a controlled drug within the definition of the statute. Alternatively, in lieu of the analyst (if the defendant does not timely object), the state can introduce a certificate signed by the laboratory technician attesting to the result of the analysis. The statute directs that the certificate is competent evidence of

> "the type of analysis performed; the result achieved; any conclusions reached based upon that result; that the subscriber is the person who performed the analysis and made the conclusions; the subscriber's training or experience to perform the analysis; and the nature and condition of the equipment used."

RSA 318-B:26-a, I. The certificate is deemed to "be admissible evidence of the composition, quality, and quantity of the substance submitted to the laboratory for analysis." *Id.*

In this case, the state employed neither method. The state neglected to prove that the substance Gary Kennedy transported was a controlled drug. The trial transcript contains but a single reference to the analysis allegedly performed on the material. *T.Tr*: at 35. During trial, Trooper Brad Card testified on various matters. While on the stand he offered to display to the

court the allegedly six pounds of material he said police found stowed in a duffle bag in Gary Kennedy's car. Defense counsel, thinking of the prejudice that might attach if the court viewed the large quantity, objected on the grounds that quantity was not relevant. The court then asked defense counsel if he was waiving identification of it. Counsel replied, "No, I'm not," *T.Tr.* at 35, and went on to explain that his objection was based only the absence of a reason for the court to view the entire quantity. The court overruled the defendant's objection, but suggested to Trooper Card that there was no need to remove the material from the duffle bag. *Id.*

Trooper card then testified:

> "There's five bags in this bag, your Honor, one bag in this – in the bag which was carried by Mr. Ruth. For the record, your Honor, those bags of marijuana have been analyzed by the State of New Hampshire and found to be marijuana."

T.Tr. at 35-36. This testimony is the entire extent of the State's effort to identify the material as a controlled drug.

The State neither produced the laboratory technician who performed the analysis, nor the analyst's report that the statute allows to stand in for the technician. Rather, the State attempted to enter the analysis through the testimony of a trooper who had no knowledge of "the type of analysis performed," the technicians's "training or experience to perform the analysis," or "the nature and condition of the equipment used" upon which the defendant might have liked to conduct cross examination. The State merely offered the trooper's conclusory hearsay opinion that the material was tested and that it was marijuana.

This court has already determined that this sort of evidence is not sufficient to sustain a conviction for a controlled drug offense. In *State v. Russell*, 114 N.H. 222 (1974), this court wrote that:

> "The only evidence at the trial of the character of the material seized from defendant consisted of a letter to the chief of police . . . purporting to be from the supervisor of the State police laboratory. This letter recited that it was a summary report on the contents of a plastic bag . . . and that the bag contained 4.9 grams of vegetative matter that upon examination was found to be . .. marijuana."

Russell, 114 N.H. at 223 (decided before legislature deemed analyst's report sufficient proof of analysis). This court correctly noted that the letter produced in *Russell* had insufficient indicia of trustworthiness, did not provide the defendant with an opportunity to confront the tester, and did not show whether the test was correctly administered or that the chain of custody was intact. The court accordingly held that the conviction must be reversed.

Here in Gary Kennedy's case, the state produced even less evidence than in *Russell*. At least in *Russell* there was a piece of paper purporting to be from the laboratory. Here there was only the testimony of a state trooper. Like in *Russell*, the testimony had no guarantee of trustworthiness, did not give Gary Kennedy an opportunity to confront the technician who allegedly performed the test, and was not capable of demonstrating to the defendant or to the court that the test was administered correctly or that there was an adequate chain of evidence.

Likewise, in *State v. Rodriguez*, 127 N.H. 496 (1985), the defendant was arrested in possession of a significant amount of marijuana, only a small amount of which the laboratory analyzed. This Court allowed the state to introduce more of the material than it actually tested, as long as there was some evidence that the tested and untested samples were reasonably likely to be the same, and as long as the analysis showed that the tested portion was in fact a controlled drug. In *Rodriguez*, there was properly proffered proof that the threshold material was analyzed and that it was a controlled drug.

Unlike *Rodriguez*, where there was no dispute as to the analysis of the sample, in Gary

Kennedy's case the State did not produce sufficient evidence of the analysis upon even a small portion of the material he transported.

Accordingly, as the State failed to prove that the material Gary Kennedy transported was a controlled drug, this court must reverse.

II. The Defendant Did Not Commit a Motor Vehicle Law and Should Have Been Tried as a Juvenile

A. The Motor Vehicle Exception to the Juvenile Procedure Statute Applies Only to Crimes that Involve the Operation of a Motor Vehicle

Although he was 17 years old at the time of the alleged crime, Gary Kennedy was charged as an adult. The defendant filed a motion to dismiss the charges, which the Salem District Court denied. It cited RSA 169-B:32, which is an exception to the juvenile procedure statute. It provides that the juvenile procedure statute "shall not be construed as applying to persons 16 years of age or over who are charged with the violation of a motor vehicle law," or other laws having to do with minors who engage in adult activities such as boating, flying, hunting and fishing. Thus, the question for this court is whether transportation of a controlled drug is a "motor vehicle law."

If the drugs were removed from the factual situation in the this case, the defendant would not be charged with anything because his operation of the motor vehicle was at all times appropriate. However, if the car were similarly disregarded, Gary Kennedy could still be prosecuted for possession of a controlled drug under the juvenile laws. Doing this judicial subtraction, possession of the drugs is the substantive violation. Use of the motor vehicle is only incidental. RSA 169-B:32 is intended to apply to those crimes the essence of which is the improper physical operation of a motor vehicle, not those crimes that may be committed even without the use of a motor vehicle and to which a motor vehicle is only incidentally related.

This court upheld the motor vehicle violation exception, on a constitutional challenge, on the basis that there is a rational distinction between minors who violate the motor vehicle laws and minors who violate the criminal laws because the state licenses drivers who are 16 years old.

State v. Deflorio, 128 N.H. 309, 315 (1986).

In *Deflorio*, the defendant was charged with operating after license suspension and operating in disobedience of a police officer – charges that are uniquely related to driving. But because the charges in Gary Kennedy's case have nothing to do with the licensing of drivers, or even driving, the principles recognized in *Deflorio* do not apply.

Similarly, this court found in *State v. Doe*, 116 N.H. 646 (1976), that the purpose of the motor vehicle exception to the juvenile procedure statute was that it

> "reflected the legislative policy of subjecting *all* persons who operate motor vehicles to the same penal sanctions, the same rules of the road, and the same civil standard of care. Driving was an adult activity, and juveniles engaging in that activity were treated as adults."

Id. 116 N.H. at 648 (emphasis in original).

Thus, the exception is designed to apply to crimes that have to do with how motor vehicles are operated, not a crime unrelated to operation of a motor vehicle that happens to take place inside a car. The defendant in *Doe* was charged with DWI, a charge clearly related to how a motor vehicle is operated. The defendant here is charged with a drug crime that happened to occur in his car.

Moreover, this court has noted in construing a "motor vehicle law," that "to handle a serious motor vehicle offense in the same manner as a *minor traffic offense* is inappropriate." *State v. Smith*, 124 N.H. 509, 514 (1984) (emphasis added). Thus, this court considered the juvenile exception to apply only to minor traffic offenses. Minor traffic offenses are those occurring in the course of driving a car and have to do with the method of operation. Because transportation of drugs is not a "minor traffic offense," the juvenile exception does not apply.

Under the district court's theory, the legislature could virtually nullify the juvenile procedure law by simply making a motor vehicle cousin to every law in the criminal code. For instance, if the legislature created a crime called "theft using a motor vehicle," it could turn every juvenile shoplifting where the juvenile drove off with the merchandise into an adult crime. In such a case, like here, the driving off in a motor vehicle would be incidental to the infraction. Nullifying the juvenile procedure statute in such a way is a policy shift best left to the legislature and not to this court.

B. The Policies of the Juvenile Statute Require That Offenses Committed by Juveniles That Do Not Involve the Operation of a Motor Vehicle Be Handled by the Juvenile Justice System

The purposes of the juvenile procedure statute is to rehabilitate juveniles, and not to punish them. *State v. Oxley*, 127 N.H. 407 (1985). It is to shield children from the environment in which adult offenders are tried and incarcerated, to maintain confidentiality for the juvenile's protection rather than publicize adult criminal conduct for the purpose of adult punishment, and to remove the stigma of adult criminal procedure and sanctions for conduct that may result from merely immature judgment. *State v. Smith*, 124 N.H. 509 (1984)

In *State v. Smith*, the defendant was charged as an adult for reckless driving which caused a death. This court found that "[t]he grave consequences to a young offender facing a felony charge as an adult are precisely those from which the statute seeks to protect the child." *Smith*, 124 N.H. at 514. This court thus ruled that because of the differing purposes of the adult criminal code and the juvenile statute, the case should have been handled by the juvenile justice system.

Gary Kennedy was charged with an A misdemeanor for which a year in jail is a lawful sentence. He thus suffers from precisely the kind situations, pressures, and stigmas which the legislature and this court have stated is inappropriate for a juvenile. Accordingly, application of adult processes and sanctions are inappropriate and Gary Kennedy's case should be reversed.

CONCLUSION

Based on the foregoing, the defendant requests that his conviction be reversed.

Respectfully submitted,

Gary Kennedy
By his Attorney,

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Dated: December 30, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Gary Kennedy requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on December 30, 2000, a copy of the foregoing will be forwarded to Ann Rice, Esq., Assistant Attorney General.

Dated: December 30, 2000

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