THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

6th Circuit - District Division - Hillsborough
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Hillsborough NH 03244

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NOTICE OF DECISION

GEORGE E. WATTENDORF, ESQ
HILLSBORO NH POLICE DEPARTMENT
OFFICE OF THE PROSECUTOR
22 MUNICIPAL DR
HILLSBORO NH 03244

Case Name: **State v. JOSEPH HART**
Case Number: **444-2024-CR-00109**

Enclosed please find a copy of the Court's Order dated May 16, 2024 relative to:

Order on Pending Motions

May 16, 2024

Melanie M. Oliver
Clerk of Court

(445)
C: JOSEPH HART; Bradley Jardis

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State v. JOSEPH HART

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ORDER ON PENDING MOTIONS

This case is scheduled for Trial on May 21, 2024. The Defendant has filed three motions which are currently pending before the Court:

1. Motion to Dismiss # 1, filed March 28, 2024.
2. Motion to Compel the Release of Criminal Records, filed April 29, 2024.
3. Motion to Dismiss # 2, filed May 13, 2024.

The State has not responded to any of the motions. Therefore, the State is deemed to have waived the right to request a hearing on Motion to Dismiss # 1 and the Motion to Compel Release of Criminal Records and the Court may act on those motions. See Dist. Div. R. 1.8(D) Ten days has not yet elapsed since the filing of Motion to Dismiss # 2. See id.

However, the Court has reviewed all three motions and determined that they raise solely legal questions and do not require a hearing to be decided. In order to provide for the orderly conduct of proceedings and provide the parties certainty about the scope of the trial in advance, the Court finds good cause to waive the ten-day requirement with respect to Motion to Dismiss # 2 and rule on all three motions at this time. See Dist. Div. R. 1.1; see also Buzzard v. F.F. Enterprises, 161 N.H. 28, 29 (2010) (court has "broad discretion" in managing the proceedings before it).

Based upon its review of the pleadings and the applicable law, the Court rules as follows.

Motion to Dismiss # 1

The Defendant moves to dismiss the complaint alleging Disorderly Conduct (Charge ID: 2177042C) on the grounds that the State has not identified by name any civilian witnesses who were disturbed by the Defendant's alleged conduct. Therefore, the Defendant argues that the State cannot prove that someone other than the arresting officer was disturbed by the Defendant's conduct, as required by State v. Murray, 135 N.H. 369, 372 (1992).

It is "axiomatic" that a criminal complaint must allege some criminal activity, State v. Vaillancourt, 122 N.H. 1153, 1154 (1982), and Part I, Article 15 of the State Constitution provides that

"[n]o subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him." N.H. CONST. pt. I, art. 15. "To meet this constitutional standard, [a complaint] must inform a defendant of the offense with which he is charged with sufficient specificity to enable him to prepare for trial and at the same time protect him from being put in jeopardy a second time for the same offense." State v. Bisbee, 165 N.H. 61, 64 (2013) (internal citation and quotation omitted). To be constitutionally sufficient, a complaint must "include the elements of the offense with sufficient allegations to identify the offense in fact." Id. However, a complaint "generally is sufficient if it recites the language of the relevant statute; it need not specify the means by which the crime was accomplished or other facts that are not essential to the elements of the crime." Id. Moreover, there is no summary judgment procedure in criminal cases and the Court is limited to determining the sufficiency of a complaint on its face. See id. citing United States v. Critzer, 951 F.2d 306, 307 (11th Cir.1992). Any issues of factual sufficiency must be determined at trial. Accordingly, the Court's consideration of the Defendant's motion is limited to whether the complaint, on its face, adequately alleges an offense.

The Defendant is charged with a violation of RSA 644:2, III which provides that a person is guilty of disorderly conduct if "[h]e purposely causes a breach of the peace... by...[m]aking loud or unreasonable noises in a public place...which noises would disturb a person of average sensibilities; or..." See also Murray, 135 N.H. at 371 (describing elements of this variant of disorderly conduct). The statute provides that the offense is a misdemeanor if it continues after a request by another person to desist; otherwise it is a violation. RSA 644:2, VI. The Murray case does not modify the basic elements of the offense, but instead circumscribes how the State may prove that the peace was breached, namely requiring proof that someone other than the arresting officer was disturbed. See id. at 372 (holding that State must prove that "someone other than the arresting officer must be disturbed for there to be a public disturbance within the meaning of RSA 644:2, III(a)").

Here, the Disorderly Conduct complaint alleges that the Defendant did:

> ...purposely cause a breach of the peace, to wit the defendant continued to yell profanities outside a public place, to wit, the Hillsboro 6th Circuit Court, after being told to cease and desist by Officer Tyler Davy of the Hillsboro Police Department

On its face, the complaint does not clearly allege each element of the offense. Specifically, it omits an allegation that the Defendant's noise was "loud or unreasonable" or that the noises would "disturb a person of average sensibilities." While a complaint need not allege the statutory elements word for word, as a whole it must be fairly understood to charge all the elements. See State v. Cheney, 165 N.H. 677, 679 (2013). Here, the allegation that the Defendant "continued to yell profanities" does not fairly capture the requirement that his conduct be both "loud and unreasonable" and disturbing to a "person of average sensibilities." Because the complaint fails to allege each element of the office, it is defective. See In Re Alex C., 158 N.H. 525, 528 (2009) (noting "well-settled rule that a charging document failing to allege all the elements of an offense cannot provide sufficient notice").

The Defendant's motion to dismiss Charge ID: 2177042C is therefore GRANTED but without prejudice to the State's ability to amend and refile the complaint. See N.H. R. Crim. Proc. 3(a); see also State v. Howell, 158 N.H. 717, 721 (2009).

Motion to Dismiss # 2

The Defendant also moves to dismiss the complaint alleging Criminal Trespass (Charge ID: 2177043C) on the grounds of so-called "entrapment by estoppel." At the outset, the Court notes that it has not located, nor has the Defendant cited, an authority for an "entrapment by estoppel" defense under New Hampshire law. Indeed, the elements of the defense proffered by the Defendant appear to run counter to New Hampshire statutory mistake of law defense, which provides that a mistake of law is only a defense when the mistake is "founded in such reliable sources as legal enactments, administrative orders, judicial decisions or official written interpretations of the law." State v. Stratton, 132 N.H. 451, 458 (1989) citing RSA 626:3, II.

Even assuming, without deciding, that an "entrapment by estoppel" defense is available under New Hampshire law, merely raising the defense would not warrant dismissal of the complaint prior to trial. Instead, as the Defendant notes, the Courts which have recognized "entrapment by estoppel" have characterized it as an affirmative defense, meaning the Defendant has the burden to prove the elements of the defense at trial. See United States v. Villafane-Jimenez, 410 F.3d 74, 80 (1st Cir. 2005) (noting that "[d]efendants have the burden of proof to establish at trial their defense of estoppel by entrapment"); United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004) (same and collecting cases). As noted above, there is no pre-trial summary judgment procedure for deciding factual issues in criminal cases. Therefore, to the extent the Defendant is entitled to raise an "entrapment by estoppel," the issue of whether he has established the defense can only be decided at trial.

Turning to the wording of the complaint, it alleges that the Defendant committed Criminal Trespass when he did:

> ...Knowingly remain unlawfully in any public place, to wit, the Hillsboro 6th Circuit Court, in defiance of an order to leave which was personally communicated to him by an authorized person, to wit, a court bailiff...

This complaint does not exactly match the language of the relevant statue. See RSA 635:2 ("A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place"). However, "an element need not be stated in precise statutory language, if the indictment as a whole may fairly be understood to charge it." Cheney, 165 N.H. at 679 (citation and quotation omitted). Here, the complaint clearly notifies the defendant that the State is required to prove that he was not permitted to be in the courthouse, making his presence unlawful. See N.H. Bar Assoc. Criminal Jury Instructions 2.18 (1985) (defining elements of criminal trespass and providing that "A person who has permission to enter or remain in a place is not guilty of criminal trespass. The permission does not have to be explicit. A person has permission to enter or remain in a place if he would naturally be expected to be in the lace after or in the normal course of his habits or duties. The permission to enter or remain may be limited to a time when he would reasonabl[y] be expected to be in the place. The permission may also be limited to part of the place."; see also State v. McMillan, 158 N.H. 753, 757 (2009) (discussing definition of "privileged" in context of burglary statute to mean "to mean whether a person may naturally be expected to be on the premises often and in the normal course of his duties or habits. Further, "a person who is privileged may still commit burglary if he

enters at a time when he would not reasonably be expected to be present or if he goes into a room as to which his privilege does not extend." (citation and quotation omitted)). Because the complaint adequately alleges the elements of the offense and provides sufficient notice to the Defendant as to the charge which he must defend against, Motion to Dismiss # 2 is DENIED.

Motion to Compel the Release of Criminal Records

The Defendant also moves for an order to compel the State to produce a complete copy of the Defendant's own criminal record. He avers that the State has indicated that it does not intend to introduce or rely on the Defendant's record at trial or in sentencing.

Discovery in criminal cases in the District Division is governed by Rule of Criminal Procedure 12(a). That rule does not require the production of a Defendant's criminal record unless it would be exculpatory. The Court also has the inherent authority to order discovery based on a particularized showing of necessity. See State v. Laux, 167 N.H. 698, 703-04 (2015). Here, the Defendant has not made the requisite showing of necessity, where there is nothing to suggest that the Defendant's record would be material to the issue of his guilt or innocence and where the State has specifically disavowed any intention to rely on the Defendant's record in making any sentencing request. Additionally, the Defendant has not demonstrated that ordering the State to produce his record is necessary where alternative means – namely a request to the State Police for a copy of his own record, see RSA 106-B:14, I(b) – of obtaining the same information are available to him. Accordingly, the Defendant's Motion to Compel is DENIED.

So Ordered.

May 16, 2024
Date

Signature of Judge

Hon. Ryan C. Guptill
Printed Name of Judge

(1084)