

State of New Hampshire
Supreme Court

NO. 2002-0753

2003 TERM

DECEMBER SESSION

PETITION OF THE STATE OF NEW HAMPSHIRE
(STATE OF NEW HAMPSHIRE v. STEVEN SUMMA)

ON WRIT OF CERTIORARI FROM A FINAL DECISION OF THE
SENTENCE REVIEW DIVISION OF THE SUPERIOR COURT

BRIEF OF DEFENDANT/RESPONDENT STEVEN SUMMA

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QUESTIONS PRESENTED

1. Did the Sentence Review Division properly exercise its authority to reject the State's application for review of Mr. Summa's sentence on the ground that it lacked jurisdiction to hear the matter?
2. Did the Sentence Review Division properly exercise its authority to reject the State's application for review of Mr. Summa's sentence on the ground that any relief it could afford to the State would violate Mr. Summa's due process rights?
3. May the Sentence Review Division's decision to abstain from hearing the State's appeal of Mr. Summa's sentence be sustained on the alternate ground that review of the sentence would violate Mr. Summa's rights against retrospective laws because the statute purporting to give the State authority to appeal became effective after the date of Mr. Summa's crime, arrest, and indictment?
4. May the Sentence Review Division's decision to abstain from hearing the State's appeal of Mr. Summa's sentence be sustained on the alternate ground that review of the sentence would violate Mr. Summa's right to avoid double jeopardy?
5. Is the provision of the statute purporting to give the State the authority to apply to the Sentence Review Division facially unconstitutional because it gives the State the power to waive Mr. Summa's right to a determinate sentence?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On March 21, 2000, the Hillsborough County Grand Jury issued indictments alleging that on January 31, 2000 Steven Summa showed up at a drug sale with a gun. After a trial, on July 3, 2002, the Hillsborough County Superior Court (*William J. Groff, J.*) sentenced Mr. Summa to a term of five to ten years for the sale, one to five years consecutive for felonious use of a firearm, and two additional concurrent suspended sentences for possession and conspiracy. The State then filed a petition for sentence review with the Sentence Review Division of the Superior Court, which was denied.

Because all the other facts contained in the other parties' briefs are accurate as they apply to Mr. Summa's case, it would be superfluous to restate them here.

STATE'S BRIEF at 2; *EVANS BRIEF* at 2-4; *CULLEN BRIEF* at 2-4.

SUMMARY OF ARGUMENT

Mr. Summa first argues that the Sentence Review Division had the power and duty to investigate its own jurisdiction, and that it was justified in determining it had no jurisdiction and thus abstaining from hearing the State's appeal of Mr. Summa's sentence because to do so would necessarily deprive Mr. Summa of his constitutional rights. Mr. Summa then adopts by reference his co-respondents' arguments that the Sentence Review Division acted properly in dismissing the State's appeal because Mr. Summa was not properly apprized of the possibility of an appeal by the State which could result in a greater sentence.

Mr. Summa next alleges that the recent provision of the law allowing the State to appeal to his sentence to the Sentence Review Division is facially unconstitutional because it give the State power to effectively waive Mr. Summa's right to a determinate sentence.

By reference to his co-respondents' briefs, Mr. Summa argues that any relief that could be afforded to the State would violate his rights to due process, against retrospective laws, and to avoid double jeopardy.

ARGUMENT

I. Sentencing Review Division Has Duty to Question its Own Jurisdiction, and Acted Properly in Abstaining from Ruling on the State's Appeal

The Sentencing Review Division appropriately exercised its authority to dismiss the State's appeal as a threshold matter.

Courts have a duty to ensure their own jurisdiction. *Texas & Pac. Ry. v. Gulf, C. & S.F. Ry.*, 270 U.S. 266, 274 (1926) (“Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.”). Issues of jurisdiction are separate and preliminary, and must be decided before other matters are addressed. *Barton v. Hayes*, 141 N.H. 118 (1996); *Morel v. Marable*, 120 N.H. 192 (1980). “It is a well-established principle of law that a court lacks power to hear or determine a case concerning subject matters over which it has no jurisdiction.” *In re Matheisel's Appeal*, 107 N.H. 479, 479 (1966), citing *Pokigo v. International Brotherhood of Electrical Workers*, 106 N.H. 384 (1965), and *Beausoleil v. United Furniture Workers*, 107 N.H. 437 (1966).

If there is doubt about jurisdiction, courts have a duty to question it on their own motion. *In re Matheisel's Appeal*, 107 N.H. 479 (1966). “Whenever it appears that a court has no jurisdiction of the subject-matter of the suit, the proceeding is dismissed even if no objection is made.” *Burgess v. Burgess*, 71

N.H. 293 (1902).

This duty extends to courts and adjudicative bodies of limited jurisdiction. For instance, in *Kimball v. Fisk*, 39 N.H. 110 (1859), the Court ruled that the Probate Court must ensure its own jurisdiction before proceeding to the merits of a case. Likewise for administrative agencies. *See Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327-28 (1999).

The Sentencing Review Division is, in effect, a court of (very) limited jurisdiction. *See Petition of Turgeon*, 140 N.H. 52 (1988). It is composed of judicial officers, RSA 651:57, it adjudicates disputes, *see Opinion of the Justices*, 87 N.H. 492 (1935); *American Motorists Ins. Co. v. Garage*, 86 N.H. 362 (1933), and its jurisdiction is severely limited by statute, RSA 651:59. It is an adjudicative body, and thus has the duty to determine its jurisdiction before it decides the merits of any matter before it.

The Sentencing Review Division apparently realized that simply hearing Mr. Summa's case would involve a violation of his due process rights because he hadn't been apprized of the State's ability to seek a review of his sentence. It was reasonable for the Sentencing Review Division to question its own jurisdiction in these circumstances. Thus, the Division acted appropriately in abstaining from hearing the State's application for review of Mr. Summa's sentence.

For the remainder of the issues concerning the Sentencing Review Division's threshold authority to hear his case, Mr. Summa relies on the arguments presented by his co-respondent. *Evans Brief* at 6-11.

II. The Statute Allowing the State to Appeal to the Sentencing Review Division is Facially Unconstitutional, and the Sentencing Review Division's Dismissal of the State's Appeal Was Proper

The statute allowing convicts to appeal their sentence to the Sentencing Review Division was amended effective January 1, 2002, to allow the State to likewise appeal to the Sentencing Review Division. RSA 651:58 (2002); 2001 LAWS § 45:1. On its face the statute appears fair – why should the defendant, but not the State, be allowed an appeal?

But criminal defendants have a right to finality of sentences. *Stapleford v. Perrin*, 122 N.H. 1083, 1087 (1982) (“At the conclusion of the sentencing proceeding, a defendant . . . must know in plain and certain terms what punishment has been exacted . . . as well as the extent to which the court retained discretion to impose punishment at a later date and under what conditions the sentence may be modified.”). By filing an appeal to the Sentencing Review Division, the defendant in effect waives his right to finality. Accordingly this Court held that defendants have a concomitant due process right to notice of the availability of a Sentencing Review Division appeal, and also notice regarding the possibility that the Division will increase their sentence. *State v. Burgess*, 141 N.H. 51 (1996).

Thus there is a *quid pro quo*. The can waive his right to finality, in

exchange for the chance at a lesser sentence but also the risk of a greater one.

When constitutional rights are in play, such a *quid pro quo* is appropriate. *See Petition of Abbott*, 139 N.H. 412 (1995) (workers' compensation allows employees to waive constitutional right to sue for work-place injuries but only in exchange for adequate alternative remedy).

When the *State* appeals to the Sentencing Review Division, however, there is no *quid pro quo*. The *State* waives the defendant's right to finality, and the defendant gets nothing in return. Thus, there is no finality of sentencing until after the time for the State's appeal to the Sentencing Review Division has expired. And because the Sentencing Review Division has discretion to waive the 30-day filing deadline, SUPER. CT. SENTENCE REV. DIV. RULE 8 ("Division may, for good cause shown, consider any late request for review of sentence and may grant such request"), the defendant has no assurance that there is finality even after the filing deadline has passed. This unlawfully leaves "the defendant's vulnerability to confinement . . . up in the air." *State v. White*, 131 N.H. 555, 559 (1989).

Accordingly, the amendment allowing the State to appeal to the Sentencing Review Division is facially unconstitutional, regardless of whether Mr. Summa was given notice of the possibility of a State's appeal to the Sentencing Review Division. For this reason, the Sentencing Review Division acted properly in dismissing the State's appeal.

III. Mr. Summa Relies on Additional Arguments Made by Chad Evans and Allan Cullen

The Sentencing Review Division correctly determined that Mr. Summa's due process rights required the sentencing court to inform him of the State's right to seek an increase in his sentence. Mr. Summa relies on the arguments presented by his co-respondents, and has no need to restate them here. *EVANS BRIEF* at 11-14; *CULLEN BRIEF* at 6-14.

The Sentencing Review Division's decision is sustainable on the alternate ground that allowing the State to appeal to the Sentencing Review Division violates Mr. Summa's rights against retrospective laws. N.H. CONST. pt. I, art. 23; U.S. CONST. art. I § 10. Mr. Summa relies on the arguments presented by his co-respondents, and has no need to restate them here. *EVANS BRIEF* at 15-18; *CULLEN BRIEF* at 15-17. He notes only that like Messrs. Evans and Cullen, his crime, arrest, and indictment all occurred before the effective date of the statute which purports to allow a State's appeal to the Sentencing Review Division.

The Sentencing Review Division's decision is also sustainable on the alternate ground that the State's appeal to the Sentencing Review Division violates Mr. Summa's due process and double jeopardy rights. N.H. CONST. pt. I, art. 15 & 16. Mr. Summa relies on the arguments presented by his co-respondents, and has no need to restate them here. *EVANS BRIEF* at 19-23; *CULLEN BRIEF* at 18-19.

CONCLUSION

Mr. Summa requests that this Court deny the State's request for a writ of certiorari, and thus affirm the judgment of the Sentencing Review Division.

Respectfully submitted,

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By his Attorney,

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Dated: July 28, 2003

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Mr. Steven Summa requests that his counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on July 28, 2003, copies of the foregoing will be forwarded to Philip D. Cross, Esq., Landya McCafferty, Esq., John Wolkowski, Esq., Terrance Kennedy, Esq., and N. William Delker, Senior Assistant Attorney General.

Dated: July 28, 2003

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