

State of New Hampshire
Supreme Court

NO. 2021-0002

2021 TERM

MAY SESSION

State of New Hampshire

v.

Bernard Halligan

RULE 7 APPEAL OF FINAL DECISION OF THE
SALEM DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT, BERNARD HALLIGAN

May 22, 2021

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

TABLE OF CONTENTS

TABLE OF AUTHORITIES [3](#)

QUESTION PRESENTED [7](#)

STATEMENT OF FACTS & STATEMENT OF THE CASE [8](#)

 I. Halligan’s Medical Issues [9](#)

 II. Halligan Got Lost and Paused to Find his Way. [11](#)

 III. Traffic Stop and Field Sobriety Tests [12](#)

 IV. Inexact FSTs Misinterpreted by Inexperienced
 Officer [15](#)

 V. Arrest and Conviction. [17](#)

SUMMARY OF ARGUMENT [20](#)

ARGUMENT [21](#)

 I. Non-Alcoholic Beer Is Not an “Intoxicating
 Liquor”. [22](#)

 II. Insufficient Evidence of Impairment by Alcohol [25](#)

 III. Insufficient Evidence of Impairment by
 Combination of O’Doul’s and Prescription
 Trazodone [26](#)

 IV. Insufficient Evidence of Impairment by
 Trazodone Alone [27](#)

 V. Halligan Was Not Impaired by Any Substance,
 But Was Disoriented by Medical Conditions and
 Unfamiliar Territory. [28](#)

CONCLUSION. [31](#)

REQUEST FOR ORAL ARGUMENT. [32](#)

CERTIFICATIONS [32](#)

ADDENDUM [32](#)

 1. Disposition and Sentencing Form (Dec. 9, 2020) [33](#)

 2. Transcript (Dec. 9, 2020), pp. 139-40 (court’s bench ruling).. [35](#)

TABLE OF AUTHORITIES

Federal Cases

<i>Clift v. United States</i> , 22 F.2d 549 (6th Cir. 1927)	22
<i>United States v. Davis</i> , 427 F. App'x 795 (11th Cir. 2011)	23
<i>United States v. Eilert Brewing & Beverage Co.</i> , 278 F. 659 (N.D. Ohio 1921)	22
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	29
<i>Kenny v. Snow</i> , 401 F.3d 1359 (Fed. Cir. 2005).	23
<i>Premier-Pabst Sales Co. v. McNutt</i> , 17 F. Supp. 708 (S.D. Ind. 1935)	24
<i>United States v. Steele</i> , 2020 WL 4726704 (W.D. Wash. Aug. 13, 2020).	28, 29

New Hampshire Cases

<i>State v. Arsenault</i> , 115 N.H. 109 (1975)	29
<i>State v. Clyde</i> , 145 N.H. 388 (2000)	30
<i>State v. Ducharme</i> , 167 N.H. 606 (2015)	21, 30
<i>State v. Hull</i> , 149 N.H. 706 (2003)	30
<i>State v. Kelley</i> , 159 N.H. 449 (2009)	30
<i>State v. Lager Beer & Whisky</i> , 70 N.H. 454 (1901)	21

<i>State v. Lorton</i> , 149 N.H. 732 (2003)	14, 30
<i>State v. MacDonald</i> , 156 N.H. 803 (2008)	21, 30
<i>State v. Parker</i> , 142 N.H. 319 (1997)	30
<i>State v. Parmenter</i> , 149 N.H. 40 (2002)	30
<i>State v. Slater</i> , 109 N.H. 279 (1969)	21
<i>State v. Sliz</i> , 124 N.H. 389 (1983)	21, 30
<i>State v. Taylor</i> , 132 N.H. 314 (1989)	21
<i>State v. Wiggin</i> , 151 N.H. 305 (2004)	30

Other States' Cases

<i>State v. Dannenberg</i> , 66 S.E. 301 (N.C. 1909).	22
<i>Department of Highway Safety & Motor Vehicles v. Pitts</i> , 815 So. 2d 738 (Fla. Dist. Ct. App. 2002).	22
<i>People v. Elfechtali</i> , 2015 WL 6847600 (Mich. Ct. App. Nov. 3, 2015).	29
<i>Fankhauser v. Hestad</i> , 939 N.W.2d 885 (Wis.Ct. App. 2020)	29
<i>Lajoie v. Milliken</i> , 136 N.E. 419 (Mass. 1922)	8
<i>Mastec North America, Inc. v. Sandford</i> , 765 S.E.2d 420 (Ga. App. 2014).	29

<i>People v. Moja</i> , 2020 WL 1225091 (Cal. Ct. App. Mar. 13, 2020)	29
<i>State v. Nealon</i> , 1999 WL 22598 (Ohio Ct. App. Jan. 11, 1999)	23
<i>Plaster v. Commissioner of Public Safety</i> , 490 N.W.2d 904 (Minn. Ct. App. 1992)	22, 23
<i>Resner v. Commissioner of Public Safety</i> , 1998 WL 727351 (Minn. Ct. App. Oct. 20, 1998)	24
<i>State v. Walder</i> , 93 N.E. 531 (Ohio 1910)	22

New Hampshire Statutes & Rules

RSA 175:1, VIII	22, 25
RSA 265-A:2, I(a)	21, 25
N.H. R. Ev. 201	8

Secondary Legal Authority

48 C.J.S. <i>Intoxicating Liquors</i> §6 (2021)	24
---	----

Medical & Professional Journals

Jackowski & Trusek, <i>Non-alcoholic Beer Production - an Overview</i> , 20 POLISH J. OF CHEMICAL TECH. (Dec. 2018)	22
Lin, Kuehl, Sching, & Hechi, <i>Understanding “Death by GPS”: A Systematic Analysis of Catastrophic Incidents Associated with Personal Navigation Technologies</i> , PROC. OF THE INT’L CONF. ON HUM. FACTORS IN COMPUTING SYSTEMS (May 2017)	29
Schaefer, <i>On the Potential Health Effect of Consuming “Non-Alcoholic” or “De-Alcoholized” Beverages</i> , 4 ALCOHOL 87 (1987)	23, 24
Ward, Macpherson, Peek, Bailey, & Peters, <i>The ‘Topping-up’ Effect: Differences Between Low-and Non-alcoholic Lager on Blood Ethanol</i> , 26 ALCOHOL AND ALCOHOLISM 399	24

Warrington, Ankier, & Turner, *Evaluation of Possible Interactions Between Ethanol and Trazodone or Amitriptyline*, 15 NEUROPSYCHOBIOLOGY Suppl. 1 (1986) 26

Newspapers & Popular Journals

Authorities: Trucker Following GPS Drives Onto, Tips Semi on Heritage Trail, DUBUQUE [Iowa] TELEGRAPH HERALD (July 16, 2014) 28

Chris Brooke, *'I Was Only Following Satnav Orders' Is No Defence: Driver Who Ended up Teetering on Cliff Edge Convicted of Careless Driving*, DAILY MAIL (Sept. 16, 2009) 28

Krissy Clark, *The GPS: A Fatally Misleading Travel Companion*, NPR (July 26, 2011) 28

Dermot Cole, *Iphone Map App Directs Fairbanks Drivers onto Airport Taxiway*, ANCHORAGE [Alaska] DAILY NEWS (Sept. 24, 2013) 28

Martin, *How (and Why) GPS Directions Lead You Astray*, CIO MAGAZINE (Feb. 19, 2015) 29

Milner, *Death by GPS: Why Do We Follow Digital Maps into Dodgy Places?* ARSTECHNICA (May 3, 2016) 29

Joseph S. Pete, *Police: GPS May Have Told Couple to Drive off Cline Avenue Bridge*, NORTHWEST INDIANA TIMES (June 20, 2017) 28

Women Trust GPS, Drive SUV into Mercer Slough, Seattle Times (June 15, 2011) 28

QUESTION PRESENTED

- I. Whether there was sufficient evidence proving driving while intoxicated beyond a reasonable doubt, where there was minimal evidence of impairment, no breath test, and the appellant consumed only non-alcoholic O'Doul's and medication as prescribed, and where the evidence did not exclude all reasonable conclusions except guilt.

Preserved: Transcript, *passim*.

STATEMENT OF FACTS & STATEMENT OF THE CASE

In July 2019, Bernard Halligan, a 57-year-old husband and father from Connecticut with a 35-year career in driver-training for the trucking and livery industries, *Trn.* at 27, 73, 112-13, enjoyed a short visit with a high school friend in Wolfeboro, New Hampshire. Halligan was unfamiliar with the area, and used his GPS to get there. *Trn.* at 20, 34, 59, 78-79, 113. He drove to Wolfeboro in his SUV on Monday July 29, had dinner with his friend and the friend's family, and stayed overnight at their lake house. *Trn.* at 113-14.

The next day, they set out on the friend's boat and went jet-skiing on Lake Winnepesaukee in the hot sun.¹ *Trn.* at 113, 121. During the four or five hours on the boat, Halligan had three or four O'Doul's non-alcoholic beers. *Trn.* at 59, 114, 119, 121. While Halligan is not a teetotaler, he didn't want to be perceived as someone who doesn't drink. *Trn.* at 88, 97-98, 119.

¹There is nothing in the record about the weather. However, historical weather data shows that in Wolfeboro, New Hampshire on the afternoon of July 30, 2019, it was over 90 degrees, with a clear sky, no precipitation and no wind. See <<https://darksy.net/details/43.5845,-71.2103/2019-7-30/us12/en>>; N.H. R. EV. 201 (judicial notice); *Lajoie v. Milliken*, 136 N.E. 419, 423 (Mass. 1922) (appellate court taking judicial notice of "heavy fall of snow and extreme cold weather lasting for several weeks during the winter of 1917-1918").

I. Halligan's Medical Issues

Halligan suffered from several medical issues in July 2019.

First, for an anxiety condition, he was on a prescription antidepressant, trazodone. *Trn.* at 85, 87, 88, 97.

Second, Halligan had been experiencing difficulty sleeping for about five years, and had been seeing a sleep specialist to address the problem. *Trn.* at 84-85, 87, 123, 126. An expert neurologist, who reviewed Halligan's medical records, testified that although Halligan's sleep problems were relatively mild, *Trn.* at 82-84, 103, 105, 109, he had been prescribed sedatives for the condition. *Trn.* at 85. Halligan testified that he had gotten little sleep in the three days before his Wolfeboro trip. *Trn.* at 118, 122.

Third, Halligan has vertigo, which is a "balance disorder"; it varies when and how much it affects him. *Trn.* at 120, 125, 132. According to the neurologist, Halligan is "chronically vertiginous.... He's chronically dizzy. He ... chronically has vertigo." *Trn.* at 93-94.

Fourth and most acutely in July 2019, Halligan was suffering from a deviated nasal septum, "delineating a chronic condition of severe sinusitis that was very, very fulminant," *Trn.* at 84, and for which he was taking steroids and antibiotics. *Trn.* at 85, 109, 118. The effect of the condition, before it was later treated with surgery, is a "swollen nasal turbinate blocking the drainage of normal mucus and fluid from ... deep up in the nasal cavity, ... [and] earwax." *Trn.* at 86. Vertigo is a common symptom of this condition. *Id.*

Whether from his chronic condition, his deviated septum, or something else, Halligan reported that he had previously experienced temporary confusions and a sense of being lost.

I think what happened is prior to this incident, I have found myself in certain places, and I don't know how I got there. Initially, I dismissed it. I thought maybe – I was a little afraid I was having Alzheimer's, but basically I'd be on the road and I felt – I'd all of a sudden wake up and be a mile or half-a-mile down the road. I don't even know how I got there.... It happened twice.

It's like you're disoriented. You wake up, and you don't know you are.... Your memory is not right – not there right away. It takes a couple of minutes to get back and realize where you are.

Trn. at 115-16. The neurologist postulated that Halligan:

probably has rare and behavioral disorders. He acts out his dreams at night, which is associated with – rarely, over time – we don't know – many patients in my academic practice go on to get subtleties of incoordination, movement disorders, and Parkinson's, and sleep apnea.

Trn. at 85.

Halligan testified that his general health in July 2019 was “[h]orrible. [The condition] changes your personality.... You don't sleep. You get groggy and irritable.” *Trn.* at 119. Fortunately, Halligan was able to have the problem surgically resolved that September. *Trn.* at 84-86, 118-19, 135. His “dizziness was better after the surgery,” and by the time of trial in 2020, he was in much better health. *Trn.* at 110.

II. Halligan Got Lost and Paused to Find his Way

Halligan testified he left his friend's house in Wolfeboro at around 2:30 or 3:00PM on July 30, but was unsure about the time. *Trn.* at 114, 121-22. He navigated toward Connecticut using his dashboard GPS, listened to music, and stopped for lunch. He didn't think he was having problems driving, and was in no particular hurry. *Trn.* at 20, 34, 59, 114, 116, 121-22.

At some point, Halligan got lost following his GPS, and believes the device guided him wrongly. *Trn.* at 20, 37, 59, 77, 116.

In any event, at around 6:30 in the evening, he came to be "stopped at the end – the beginning of the ramp" at the intersection of Interstate 93 and Route 111 in Windham, New Hampshire, such that he was facing "southbound on the exit 3 northbound on-ramp." *Trn.* at 13, 37; VIOLATION COMPLAINT (July 30, 2019), *Appx.* at 3.

While Halligan "couldn't explain how he managed to turn his car in the opposite direction and be facing the wrong direction," *Trn.* at 21, 36-37, 78-79, he thinks he might of been having one of the confusion episodes he had experienced twice before. *Trn.* at 115-16. Nevertheless, the police noted that Halligan was parked "motionless" "in a safe and reasonable manner," in a place where there was the "ability for a car to pull to one side," and that would not "cause any cars to veer." *Trn.* at 28-30.

Halligan said he had been there for only a few moments, manipulating his GPS and trying to find his way home, and that if the police had not interceded, he would have shortly figured out his location and been on his way. *Trn.* at 127. The police acknowledge that when they encountered him, Halligan was preoccupied with his dashboard GPS. *Trn.* at 27-29, 35, 60-61, 116.

III. Traffic Stop and Field Sobriety Tests

When Halligan was parked at the bottom of the ramp, New Hampshire State Police Sergeant Grealy, a patrol sergeant with more than 30 years at the State Police, happened to be waiting at a red light near the top of the northbound Exit-3 on-ramp, intending to turn left and get on Interstate 93 north. *Trn.* at 13-18; GOOGLE MAP, Exh. 1 (Dec. 7, 2020), *Appx.* at 11; GOOGLE MAP, Exh. 2 (Dec. 7, 2020), *Appx.* at 12.

Sergeant Grealy noticed Halligan's car at the bottom of the ramp, and waved her arms to get his attention, which Halligan saw. *Trn.* at 14, 18-19, 127-28. Grealy put on her police lights, and motioned Halligan to move his car. Halligan drove non-erratically up the ramp as directed, took a right, and "pulled over in a safe and reasonable manner" on Route 111 where Grealy indicated. *Trn.* at 18-19, 29-30, 116.

Grealy approached Halligan's car and asked him where he was coming from and going to; Halligan answered and cooperatively furnished his license and registration. Halligan told the sergeant that he was "extremely nervous" and repeatedly apologized for his predicament. *Trn.* at 27, 116. Because she was the patrol supervisor with other responsibilities, she radioed for Trooper Patterson, who she knew was in the area, to take over; she parked her cruiser behind Patterson's and remained at the scene. *Trn.* at 19-22, 51, 117.

When Patterson arrived, Grealy relayed to him what she knew, and gave Halligan's documents to Patterson. *Trn.* 21, 33-34. Although she noticed Halligan's "eyes were bloodshot and glassy or watery," Grealy made no conclusions about his condition. *Trn.* at 21, 26-27.

Upon approaching Halligan's car, Patterson saw Halligan "had red glassy eyes, and ... smell[ed] the distinct odor of a consumed alcoholic beverage emanating from his breath," *Trn.* at 37, and from his vehicle, which Halligan proposed was from the O'Doul's. *Trn.* at 35-37. There was a plastic

cup in the car's console, which had in it a non-bubbly liquid with a sliced lime which to the police did not look like beer; they took pictures, dumped the contents, did not preserve the potentially exculpatory evidence, and do not know what it was. *Trn.* at 23-25.

Patterson asked Halligan to get out, which he politely and cooperatively did. As Halligan moved to the front of the cruiser as directed, and also later as Patterson administered field sobriety tests (FST), Patterson noted that Halligan had nothing "out of the ordinary in ... his walking pattern." *Trn.* at 64. He was not "stepping out of position or having a visible sway," *Trn.* at 70, and was not "exhibiting any indicia of impairment." *Trn.* at 36, 38, 55, 62-64, 128-29. Although Patterson testified that he could not fully understand what Halligan was muttering under his breath, *Trn.* at 57, he determined that Halligan was "a little bit dismissive of the process." *Trn.* at 55. As he answered Patterson's questions, Halligan's speech was normal and not slurred. *Trn.* at 35-36, 56-57, 78-79. Halligan again expressed how nervous he was and again apologized, although he thinks the officer was focused on the FSTs, and not on what he was saying. *Trn.* at 79, 117-18, 131.

For the first FST, Patterson administered nystagmus tests in a competent fashion, and Halligan exhibited nystagmus. The officer noted that during the 3 to 5 minutes Halligan was standing for administration of the test, he was not moving or swaying on his feet. *Trn.* at 39, 44-45, 68-72, 90.

For the second FST, Patterson described and demonstrated a "walk-and-turn." Halligan complied, but not exactly as Patterson expected. Halligan began with his feet aligned heel to toe rather than next to each other, started before Patterson said go, took 8 steps rather than 9, hung his arms more (in Patterson's estimation) than 6 inches from his body, left more (in Patterson's estimation) than ½ inch between his heel and toe on several of the 18 separate steps, turned in one motion rather than in "a series of short small steps," and

“on steps two and three, I observed him to walk off-line” – which line did not exist but Patterson had asked Halligan to “imagine an imaginary straight line.” *Trn.* at 45. Though from Patterson’s descriptions it appears Halligan was largely able to perform the tasks, Patterson documented that Halligan failed 7 of the 8 clues on the test. *Trn.* at 45-49, 72-76, 135; *see, e.g., State v. Lorton*, 149 N.H. 732, 734 (2003) (describing FSTs and how police use “clues” to subjectively evaluate them).

For the third FST, a one-leg-stand, Patterson asked Halligan to stand on one foot, with the other out front, for an indefinite period of time. Halligan swayed and hopped on his foot once, held his arms more (in Patterson’s estimation) than 6 inches from his body, and put his foot on the ground momentarily after about 25 seconds. Though from Patterson’s descriptions it appears Halligan largely performed, Patterson documented that Halligan failed all 4 of the clues on the test. *Trn.* at 49-50, 76-77, 135.

Halligan “thought I did okay” on the FSTs, *Trn.* at 135, but believes that his medical conditions and lack of sleep may have caused the appearance of poor performance. *Trn.* at 120. Halligan refused to take a portable breath test (PBT), which police sometimes administer at the scene, because

I owned a driving school that teaches habitual drivers in Connecticut for 10 years. . . . The law is [in Connecticut] you get an attorney before you take that because the reliability of those tests are sometimes in question.

Trn. at 133.

IV. Inexact FSTs Misinterpreted by Inexperienced Officer

Failure of FSTs can have many causes. *Trn.* at 91-92. While nystagmus and FSTs can indicate alcohol, they are “not specific for alcohol intoxication.” *Trn.* at 106. The State conceded that red eyes can be caused by numerous medical conditions, including fatigue and medication. *Trn.* at 65.

The neurologist testified that nystagmus can be caused by numerous conditions, and does not necessarily indicate alcohol use or intoxication. Some people can have nystagmus generally, but would be unaware unless specifically tested. *Trn.* at 92, 102. Halligan’s nystagmus could have been caused by the “chronic vestibular problem from the sinusitis” he was suffering, and by several of the medications he was taking, including the steroids used to alleviate symptoms, as well as by the trazodone he had been prescribed. *Trn.* at 88-90.

The neurologist testified that “[i]t’s significantly possible” that “the prescribed medications that Mr. Halligan was on and his pre-diagnosed medical conditions that he had ... may have impacted his performance on the field sobriety tests,” and would not necessarily correlate with impaired driving. *Trn.* at 89-90, 91-92. Halligan’s vertigo alone could have caused FST failure. *Trn.* at 91.

The expert noted that neurologists use tests similar to FSTs and many of his patients fail even though they are not intoxicated. *Trn.* at 89. “There’s a danger to overdiagnose in many cases,” because the tests are “very sensitive for something affecting [the neural] system.” *Trn.* at 88. Thus, he opined that “beyond a reasonable degree of medical certainty ... it’s highly likely that ... those were significant factors that could cause a test to be failed in that manner.” *Trn.* at 91.

The state conceded there are significant error rates for FSTs, and that Halligan’s medical conditions or medications may have side effects that could have caused nystagmus and affected his abilities on the FSTs. *Trn.* at 66-72.

Before administering FSTs, police routinely ask motorists questions designed to minimize such errors. Patterson had thus asked Halligan:

If he had any recent head injuries, if he was under any prescription medications. Obviously, he had no head injuries. He said that he was on an anxiety medication that he'd been prescribed in the last two months.... He didn't recall the name of it.... I asked him if he had any issues walking ... or balancing normally on any given day, which he said he did not.

Trn. at 38, 55. Halligan acknowledges that he told Patterson he was on anti-anxiety medication, but could not recall the name, and that despite his lifelong vertigo, he neglected to mention it because he didn't think it affected his ability to walk a line. *Trn.* at 130-31. Due to his nervousness with the situation, the complexity of his medical issues, and the private nature of them, Halligan did not disclose the extent of his conditions:

It's private. I – you know, it's a spur of the moment. What am I supposed to do?... Hand him the medical file?... [O]n the side of the main highway, with the traffic flying everywhere, I'm not sure what I'm supposed to say, quite honestly.

Trn. at 129-31.

Patterson acknowledged that Halligan told him he had consumed O'Doul's non-alcoholic beers that day. *Trn.* at 37. Patterson also acknowledged that ethyl alcohol is odorless, and it is the other ingredients in beer that create its odor. However, Patterson had never had an O'Doul's, had never smelled one, and had no experience with non-alcoholic beer. *Trn.* at 66-68.

Moreover, Patterson had been a state trooper for less than a year, and had no apparent training in recognizing complex medical conditions. *Trn.* at 32-33, 58-59. Consequently, the neurologist testified that “the trooper may have ... mistaken [Halligan's] medical condition and the prescription drugs he was on for impairment through alcohol consumption.” *Trn.* at 90.

V. Arrest and Conviction

Patterson concluded Halligan was impaired and arrested him. *Trn.* at 51; DWI COMPLAINT (July 30, 2019), *Appx.* at 4; VIOLATION COMPLAINT (July 30, 2019), *Appx.* at 3. Grealy, who had remained parked at the scene, inventoried his car and had it towed. *Trn.* at 23, 51.

At the barracks, Halligan refused a blood alcohol test, *Trn.* at 52; ALS FORM (July 30, 2019), Exh. 3, *Appx.* at 10, even though he knew his driving privileges would be suspended. *Trn.* at 134. Halligan had “owned a habitual [offender] driving school, which included DUI.” He believed that “[i]n Connecticut, you have an attorney ... before you actually take the test,” or “[m]aybe too many Law & Order shows.” *Trn.* at 135. Halligan said by

this particular point, I didn’t know what to do. I’ve never been pulled over. I don’t have anything on my license, like, perfectly clean criminal history.... So I didn’t know what to do, so I just kind of froze.

Trn. at 133, 135.

Halligan pleaded not guilty, and a bench trial was held on December 9, 2020. ENTRY OF NOT GUILTY PLEA (Aug. 8, 2020), *Appx.* at 5. The Salem District Court (*Michael Alfano, J.*) heard testimony from both officers, the expert neurologist, and Halligan. The state’s exhibits were two maps of Exit-3. The court took judicial notice that O’Doul’s contains “0.4 percent alcohol, and you need .5 percent to be a[n] ... alcoholic beverage under federal law.”² *Trn.* at 67.

Halligan testified that on July 30, 2019, he was not impaired by consumption of alcohol or any medication. *Trn.* at 120. He argued that during the traffic stop, he walked and talked normally and did the FSTs mostly right,

²Regular beer has “about 5% alcohol.” See <<https://www.niaaa.nih.gov/alcohols-effects-health/overview-alcohol-consumption/what-standard-drink>>.

despite his medical conditions, and that he was deserving of help and directions, not arrest and conviction.³ *Trn.* at 139-39.

Nonetheless the court held:

So on the first charge, which is a Class B misdemeanor of DUI impairment, I do find, based on the totality of the circumstances, the State has met its burden of proof, and I do find you guilty.

I think it's interesting to note the statute says you can be under the influence of just a prescription drug that impairs your ability to drive. That alone is enough for the conviction. I find in this case, though, that the combination of the O'Doul's and trazodone – that by itself explains a lot of what happened here, is that combination.

And I think there may be a misunderstanding. I can't believe that you can drink three or four O'Doul's and not know that there's alcohol in it because there is significant alcohol in it. It's just less than a regular beer. So I do find you guilty of that.

And I also take note that you refused to take the breathalyzer at the station. I am not holding it against you to not take the one on the roadside against you at all. That one is, in my view, probably not reliable, but the one at the station would be.

Trn. at 139-40, *Addendum* at [35](#).

From the court's oral order, it is apparent that it credited Halligan's testimony that he drank three or four O'Doul's non-alcoholic beers earlier in the day on the boat. *Id.*

Although the court convicted Halligan, it is unclear what substance the court considered the intoxicating factor. The court's oral order does not clearly

³Halligan does not contest the violation conviction for driving the wrong direction on the ramp. VIOLATION COMPLAINT (July 30, 2019), *Appx.* at 3.

specify whether Halligan was convicted for impairment by alcohol, by prescription drugs, or by a combination.

Following conviction, the court sentenced Halligan to the mandatory minimum fines and license suspension. DWI FIRST OFFENSE SENTENCING ORDER (Dec. 9, 2020), *Appx.* at 6; BENCH RULING, *Trn.* at 139-42, *Addendum* at [33](#).

SUMMARY OF ARGUMENT

Bernard Halligan first notes that, although he consumed three or four O'Doul's non-alcoholic beers several hours before he became confused on the highway, he could not have been impaired, because O'Doul's is not an "intoxicating liquor" within the DWI statute.

He then points out that, because one cannot become impaired by consuming non-alcoholic beer, there was no evidence of impairment by alcohol. He also argues that he is not guilty of impairment by prescription drugs, whether alone or in combination with alcohol, because there was no evidence that he took a dose in the time period of his drive through New Hampshire, or that the prescription's effects could be heightened by the minimal amount of alcohol present in an O'Doul's.

Halligan shows, rather, that his disorientation was reasonably caused by bad GPS directions and his medical conditions. Because the State did not rebut this explanation, this court should reverse.

ARGUMENT

New Hampshire's Driving While Intoxicated statute provides:

No person shall drive ... a vehicle upon any way ... [w]hile such person is under the influence of intoxicating liquor or any controlled drug, [or] prescription drug, ... *which impairs* a person's ability to drive or any combination of intoxicating liquor and controlled drugs, [or] prescription drugs ... *which impair* a person's ability to drive.

RSA 265-A:2, I(a).

To be guilty of DWI, the liquor or drug must "impair[]to any degree" the person's ability to drive. *State v. Taylor*, 132 N.H. 314, 316 (1989); *State v. Slater*, 109 N.H. 279, 280 (1969); *see also State v. Ducharme*, 167 N.H. 606, 617 (2015) ("To prove that the defendant was 'under the influence of intoxicating liquor,' the State needed only to prove beyond a reasonable doubt that the defendant was impaired to any degree.").

"[T]he State may introduce evidence indicating that the driver's performance was adversely affected by intoxicating liquor." *State v. Sliz*, 124 N.H. 389, 391 (1983). The State may also offer evidence to prove that the alleged beverage is an "intoxicating liquor." *State v. Lager Beer & Whisky*, 70 N.H. 454 (1901) ("whether [lager beer] is intoxicating may be shown by evidence").

Halligan challenges the sufficiency of the evidence upon which he was convicted. To prevail on appeal, Halligan:

must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt. When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt.

State v. MacDonald, 156 N.H. 803, 804 (2008).

I. **Non-Alcoholic Beer Is Not an “Intoxicating Liquor”**

“Non-alcoholic” beer is made by either starting with brewed beer and removing the alcohol through a variety of available processes, or by modifying the brewing process so that fermentation is limited and little alcohol is produced. *Clift v. United States*, 22 F.2d 549, 550 (6th Cir. 1927); *United States v. Eilert Brewing & Beverage Co.*, 278 F. 659 (N.D. Ohio 1921); Jackowski & Trusek, *Non-alcoholic Beer Production - an Overview*, 20 POLISH J. OF CHEMICAL TECH. 4 (Dec. 2018), <www.researchgate.net/publication/329520460_Non-alcoholic_beer_production_-_An_overview>.

The purpose, and the result, is that “non-alcoholic” beer looks, tastes, and smells like regular beer. See *Dep’t of Highway Safety & Motor Vehicles v. Pitts*, 815 So. 2d 738, 739 (Fla. Dist. Ct. App. 2002); *Plaster v. Comm’r of Pub. Safety*, 490 N.W.2d 904, 907 (Minn. Ct. App. 1992); *State v. Dannenberg*, 66 S.E. 301, 303 (N.C. 1909); *State v. Walder*, 93 N.E. 531, 532 (Ohio 1910); O’Doul’s, Anheuser-Busch, Rating, <<https://www.beeradvocate.com/beer/profile/29/5727>> (“O’Doul’s and O’Doul’s Amber are brewed as traditional premium beers The alcohol is then removed through the use of low temperature, low-pressure distillation. This . . . process allows the alcohol to be removed without heating or cooking the beer, which retains the full . . . flavor and balance of our non-alcohol brews.”).

“Non-alcoholic” beer actually has some alcohol in it. As the trial court recognized, O’Doul’s contains “0.4 percent alcohol, and you need 0.5 percent to be a[n] . . . alcoholic beverage under federal law.” *Trn.* at 67. New Hampshire law defines an alcoholic “beverage” the same:

[A]ny beer, wine, similar fermented malt or vinous liquors and fruit juices, and any other liquid intended for human consumption as a beverage having an alcoholic content of not less than 1/2 of one percent by volume.

RSA 175:1, VIII.

O'Doul's actually has slightly less alcohol than the trial court assumed; the label says it "contains less than 0.3% by volume." See O'Doul's, Anheuser-Busch, Rating, <<https://www.beeradvocate.com/beer/profile/29/5727/>>. It is unclear whether the "non-alcoholic" moniker is ambiguous, see *Kenny v. Snow*, 401 F.3d 1359 (Fed. Cir. 2005), or whether possessing a bottle of a non-alcoholic beverage is a basis for search and seizure. Compare *United States v. Davis*, 427 F. App'x 795 (11th Cir. 2011) (motion to suppress denied) with *State v. Nealon*, 1999 WL 22598 (Ohio Ct. App. Jan. 11, 1999) (motion to suppress granted). From its marketing and labeling, it is reasonable to believe that O'Doul's does not contain *any* alcohol – its label prominently says "non-alcoholic brew." O'Doul's, Anheuser-Busch, Rating, <<https://www.beeradvocate.com/beer/profile/29/5727/>>; *Plaster v. Comm'r of Pub. Safety*, 490 N.W.2d at 907 ("Nonalcoholic beer is labeled, marketed, and sold as 'nonalcoholic.'... It is reasonable for people to conclude that 'nonalcoholic' beer is not an intoxicant, is not a controlled substance, and is not an alcoholic beverage within the common sense meaning of these terms as people understand them.").

While the State could have theoretically offered evidence to prove that O'Doul's is an "intoxicating liquor," no such evidence exists. It is not reasonably possible to get intoxicated by drinking O'Doul's, because the body metabolizes the small amount of alcohol faster than a person could drink enough to substantially raise their blood-alcohol level. "It would take 24 drinks of non-alcoholic wine to equal the impact of one standard drink on the human body." Schaefer, *On the Potential Health Effect of Consuming "Non-Alcoholic" or "De-Alcoholized" Beverages*, 4 ALCOHOL 87, 88 (1987), *Appx.* at 13.

The trace amounts of ethanol in a single drink at 0.5% ethanol by volume in a typical 5oz serving would not be sufficient to register a chemically induced change for any of the cognitive senses.

That is, the usual ethanol induced relaxation, feeling of slight euphoria and increased sociability associated with the consumption of a standard alcoholic drink would not be stimulated by a single drink of a nonalcoholic beverage. *It is estimated that in order for the average, healthy, 160 pound individual to sense the cognitively registered alcohol induced reactions, 8 to 11, five ounce “non-alcoholic” ... drinks at 0.5%, would need to be consumed within 10-15 minutes.* Only in this manner could the accumulation of sufficient ethanol for sensation occur. The social aspects of drinking 8 to 11 non-alcoholic drinks in rapid succession would be considered abnormal behavior in most social circles.

Id. (emphasis in original); Ward, Macpherson, Peek, Bailey, & Peters, *The ‘Topping-up’ Effect: Differences Between Low-and Non-alcoholic Lager on Blood Ethanol*, 26 ALCOHOL AND ALCOHOLISM 399, 400 (“After 3 pints of non-alcohol lager, there were no measurable levels of alcohol in the blood of any of the subjects.”), *Appx.* at 22; *Premier-Pabst Sales Co. v. McNutt*, 17 F. Supp. 708, 714 (S.D. Ind. 1935) (“A beverage may be alcoholic in that it contains some alcohol, and yet be far from intoxicating.”); *Resner v. Comm’r of Pub. Safety*, 1998 WL 727351 (Minn. Ct. App. Oct. 20, 1998) (person “would have to drink at least 30 bottles of nonalcoholic beer to register a 0.06 PBT reading”); 48 C.J.S. *Intoxicating Liquors* §6 (2021) (“[A] beverage may be alcoholic in that it contains some alcohol and yet not be intoxicating.”).

The trial court order appears to have based Halligan’s conviction on his consumption of O’Doul’s, whether alone or in combination with a prescription drug. Because O’Doul’s does not cause intoxication or impairment, and is not an “intoxicating liquor” within New Hampshire law, there is insufficient evidence to sustain a finding of guilt. The conviction must therefore be reversed.

II. Insufficient Evidence of Impairment by Alcohol

The court appears to have found Halligan guilty on the basis of impairment by alcohol alone. It held, in part:

I think there may be a misunderstanding. I can't believe that you can drink three or four O'Doul's and not know that there's alcohol in it because there is significant alcohol in it. It's just less than a regular beer. So I do find you guilty of that.

Trn. at 140.

The court's findings are without support for three reasons.

First, it is not true that there is "significant alcohol" in O'Doul's. The amount of alcohol is so small that it is impossible to get intoxicated unless one drank a preposterous amount in a very short time.

Second, there is nothing remarkable in drinking "three or four O'Doul's" and not knowing there is any alcohol in it; the label indicates it is "non-alcoholic," and inebriation by drinking three or four is impossible.

Third, New Hampshire law provides that O'Doul's is not an alcoholic beverage, RSA 175:1, VIII, and therefore consumption of it cannot form the basis for a DWI conviction, which requires impairment due to an "intoxicating liquor." RSA 265-A:2, I(a).

Further, the police did not preserve the liquid in the plastic cup, which, when analyzed, may have provided Halligan additional exculpatory evidence.

Accordingly, no rational trier of fact could have found guilt beyond a reasonable doubt based on impairment by alcohol, and this court must reverse.

III. Insufficient Evidence of Impairment by Combination of O'Doul's and Prescription Trazodone

The court did not clearly indicate that it found Halligan guilty of impairment by “the combination of the O'Doul's and trazodone.” *Trn.* at 139.

In its bench order, it said:

I find in this case, though, that the combination of the O'Doul's and trazodone – that by itself explains a lot of what happened here, is that combination.

Trn. at 139-40. The court indicated that the alleged alcohol/trazodone combination “explains a lot of what happened here,” but did not explicitly say that it made a finding of guilt based on the combination. Therefore, the court did not find guilt based on the combination.

Even if it did, the finding is without support for five reasons.

First, there is nothing in the record regarding whether trazodone and alcohol cannot be safely mixed. At most, the neurologist testified that he “would advise a patient” who has been prescribed trazodone that he “shouldn't have alcohol.” *Trn.* at 98.

Second, the record is silent on what might be side-effects of mixing trazodone and alcohol, or whether driving is unsafe or impaired when they are mixed. Moreover, there probably are no such effects. Warrington, Ankier, & Turner, *Evaluation of Possible Interactions Between Ethanol and Trazodone or Amitriptyline*, 15 NEUROPSYCHOBIOLOGY Suppl. 1 at 31-37 (1986) <<https://pubmed.ncbi.nlm.nih.gov/3725002/>>.

Third, there is nothing in the record regarding whether the small amount of alcohol in an O'Doul's beer, or even three or four of them consumed over a boating afternoon, followed by a sandwich, is sufficient to produce whatever those side-effects might be. Moreover because O'Doul's is not an “intoxicating liquor,” there is insufficient evidence for conviction, even if

O'Doul's and the medication combined somehow resulted in impairment.

Fourth, even if trazodone and alcohol should not mix, there is nothing in the record about how long after taking a dose of trazodone that consumption of alcohol would be unsafe, or how long one should wait before driving.

Finally, while Halligan had been prescribed trazodone, there is no indication in the record of when he took a dose, or whether a dose was taken in any temporal proximity to when he drank three or four O'Doul's or when he was driving home.

Accordingly, no rational trier of fact could have found guilt beyond a reasonable doubt for DWI based on impairment by a mix of trazodone and alcohol, and this court must reverse.

IV. Insufficient Evidence of Impairment by Trazodone Alone

The court did not finding Halligan guilty based on trazodone alone. Its oral order said:

I think it's interesting to note the statute says you can be under the influence of just a prescription drug that impairs your ability to drive. That alone is enough for the conviction. I find in this case, *though*, that the combination of the O'Doul's and trazodone – that by itself explains a lot of what happened here, is that combination.

Trn. at 139-40 (emphasis added). Because of the court's use of the disjunctive word "though," it appears that Halligan's conviction was not based on prescription drugs alone.

If it was, however, there is insufficient evidence of impairment by prescription drugs. There is no evidence in the record that trazodone alone can cause impairment, and as noted, no evidence that Halligan took a dose in a medically significant temporal proximity to when he was driving home.

V. Halligan Was Not Impaired by Any Substance, But Was Disoriented by Medical Conditions and Unfamiliar Territory

Despite Trooper Patterson's belief that GPS navigation systems could not "send people in the wrong direction," or "down the wrong lane," *Trn.* at 61, GPSs have misdirected drivers into a lake,⁴ over an unfinished bridge,⁵ off a cliff,⁶ athwart an international border,⁷ onto a footpath,⁸ across an airport runway,⁹ and to their death in Death Valley.¹⁰ The federal government runs a national reporting system for GPS errors,¹¹ and "death by GPS" has become a

⁴*Women Trust GPS, Drive SUV into Mercer Slough*, Seattle Times (June 15, 2011), <www.seattletimes.com/seattle-news/women-trust-gps-drive-suv-into-mercero-slough/>.

⁵Joseph S. Pete, *Police: GPS May Have Told Couple to Drive off Cline Avenue Bridge*, Northwest Indiana Times (June 20, 2017), <www.nwitimes.com/news/local/lake/police-gps-may-have-told-couple-to-drive-off-cline-avenue-bridge/article_cbd32cd1-bb19-5adb-83a9-ee1e09bd4592.html>.

⁶Chris Brooke, *'I Was Only Following Satnav Orders' Is No Defence: Driver Who Ended up Teetering on Cliff Edge Convicted of Careless Driving*, Daily Mail (Sept. 16, 2009), <www.dailymail.co.uk/news/article-1213891/Driver-ended-teetering-cliff-edge-guilty-blindly-following-sat-nav-directions.html>.

⁷*United States v. Steele*, 2020 WL 4726704 (W.D. Wash. Aug. 13, 2020).

⁸*Authorities: Trucker Following GPS Drives Onto, Tips Semi on Heritage Trail*, Dubuque [Iowa] Telegraph Herald (July 16, 2014) <www.telegraphherald.com/news/tri-state/article_cbce246a-0d3e-11e4-b1c0-001a4bcf6878.html>.

⁹Dermot Cole, *Iphone Map App Directs Fairbanks Drivers onto Airport Taxiway*, Anchorage [Alaska] Daily News (Sept. 24, 2013), <www.adn.com/aviation/article/iphone-map-app-directions-fairbanks-drivers-airport-taxiway/2013/09/24/>.

¹⁰Krissy Clark, *The GPS: A Fatally Misleading Travel Companion*, NPR (July 26, 2011), <www.npr.org/2011/07/26/137646147/the-gps-a-fatally-misleading-travel-companion>.

¹¹*See* <www.gps.gov/support/user/mapfix/devices-and-maps/>; <www.gps.gov/support/user/mapfix/own-device/>.

topic of general¹² and academic¹³ interest. Criminal and civil cases have turned on wrong GPS turns.¹⁴ It is therefore reasonable to believe that Halligan, who was unfamiliar with the area, was misguided into his predicament by his GPS.

Halligan also suffered from several ailments causing disorientation – a history of vertigo, and a deviated septum that affected balance until corrected by surgery. Though Patterson subjectively failed Halligan on the FSTs, the trooper’s descriptions of Halligan’s performance reveal that he mostly performed. When Patterson observed Halligan walking, talking, and conducting himself outside of the context of the FSTs, he didn’t falter or slur, but walked and talked in a normal fashion.

Regardless of whether Halligan announced his medical conditions, the neurologist testified that “beyond a reasonable degree of medical certainty ... it’s highly likely” that Halligan’s medical issues “were significant factors that could cause a [field sobriety] test to be failed.” *Trn.* at 91. While the FSTs were admissible, they need not be given much evidential weight, *State v. Arsenault*, 115 N.H. 109 (1975), because evaluation of performance is subjective, *State v. Lorton*, 149 N.H. 732, 734 (2003), and not entirely reliable in circumstances

¹²Milner, *Death by GPS: Why Do We Follow Digital Maps into Dodgy Places?* ARSTECHNICA (May 3, 2016), <arstechnica.com/cars/2016/05/death-by-gps/>; Martin, *How (and Why) GPS Directions Lead You Astray*, CIO MAGAZINE (Feb. 19, 2015), <www.cio.com/article/2886112/how-and-why-gps-directions-lead-you-astray.html>.

¹³Lin, Kuehl, Sching, & Hechi, *Understanding “Death by GPS”: A Systematic Analysis of Catastrophic Incidents Associated with Personal Navigation Technologies*, PROC. OF THE INT’L CONF. ON HUM. FACTORS IN COMPUTING SYSTEMS (May 2017), <www.researchgate.net/publication/312936003_Understanding_Death_by_GPS_A_Systematic_Analysis_of_Catastrophic_Incidents_Associated_with_Personal_Navigation_Technologies>.

¹⁴*See, e.g., People v. Moja*, 2020 WL 1225091 (Cal. Ct. App. Mar. 13, 2020); *Mastec North America, Inc. v. Sandford*, 765 S.E.2d 420, 424 (Ga. App. 2014); *People v. Elfechtali*, 2015 WL 6847600 (Mich. Ct. App. Nov. 3, 2015); *United States v. Steele*, 2020 WL 4726704 (W.D. Wash. Aug. 13, 2020); *Fankhauser v. Hestad*, 939 N.W.2d 885 (Wis.Ct. App. 2020); *see also United States v. Jones*, 565 U.S. 400 (2012) (police affixed GPS unit to undercarriage of suspect’s car).

here where an undertrained or inexperienced officer was misled by complex medical issues.

Moreover, FST evidence is “solely circumstantial,” *State v. MacDonald*, 156 N.H. 803, 804 (2008), and therefore “must exclude all reasonable conclusions except guilt.” *State v. Ducharme*, 167 N.H. 606, 617 (2015). Because Halligan’s medical conditions and his GPS reasonably explain his disorientation, the State has failed to exclude “all reasonable conclusions except guilt.”

Although the court was justified in taking into account Halligan’s refusal to take a breath test, *State v. Hull*, 149 N.H. 706, 712 (2003); *State v. Parker*, 142 N.H. 319, 322-24 (1997), Halligan’s situation is not comparable to cases where defendants admitted consuming alcohol, *State v. Kelley*, 159 N.H. 449 (2009) (conviction sustained); *State v. Parmenter*, 149 N.H. 40 (2002) (conviction sustained), *State v. Sliz*, 124 N.H. 389 (1983) (conviction sustained), or were obviously drunk. *State v. MacDonald*, 156 N.H. 803 (2008) (conviction sustained); *State v. Wiggan*, 151 N.H. 305 (2004) (conviction sustained).

Rather, this case is similar to those where this court reversed – the evidence is muddled, subjective, and susceptible of other reasonable explanations. *State v. Clyde*, 145 N.H. 388 (2000) (conviction reversed); *State v. Lorton*, 149 N.H. 732 (2003) (conviction reversed).

The trial court credited Halligan’s testimony that he had three or four O’Doul’s, during a hot day on the lake, and that they were consumed at least three hours before he became confused by his GPS on the way home. The presence of complex medical conditions was undisputed. There are reasonable, non-criminal explanations for Halligan’s misadventure, and this court should accordingly reverse.

CONCLUSION

Bernard Halligan drank three or four O'Doul's non-alcoholic beers several hours before he got lost on the highway. He could not have been impaired by alcohol, because O'Doul's is not an "intoxicating liquor" within the DWI statute, and because it is not feasible for one to become intoxicated by consuming non-alcoholic beer. There was also no impairment by prescription drugs, whether alone or in combination with alcohol, because there was no evidence that Halligan took a dose proximate to his drive, that the medication would have impaired his ability to drive, or that the prescription was affected by the small amount of alcohol in an O'Doul's.

Halligan was lost and disoriented, not drunk or impaired; he needed aid and directions, not arrest and conviction. The trial court's erroneous assumptions should not be allowed to mar the good driving record of a man who did nothing wrong.

REQUEST FOR ORAL ARGUMENT

Because the issue raised in this appeal is of concern to all drivers in New Hampshire, and raises a novel issues about non-alcoholic beer, this court should entertain oral argument.

Respectfully submitted,

Bernard Halligan
By his Attorney,
Law Office of Joshua L. Gordon

Dated: May 22, 2021

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on May 22, 2021, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: May 22, 2021

Joshua L. Gordon, Esq.

ADDENDUM

- 1. Disposition and Sentencing Form (Dec. 9, 2020) [33](#)
- 2. Transcript (Dec. 9, 2020), pp. 139-40 (court’s bench ruling) [35](#)