

STATE OF MAINE  
CUMBERLAND, ss.

UNIFIED CRIMINAL COURT  
DOCKET NO. CR-15-4462

STATE OF MAINE,

Plaintiff

v.

STEFAN HAMILTON,

Defendant

STATE OF MAINE  
Cumberland, SS. Clerk's Office  
OCT 15 2015

RECEIVED

**DEFENDANT'S MOTION TO STRIKE  
SURPLUSAGE 7(d)(e)**

The Defendant, Stefan Hamilton, by and through undersigned counsel, and hereby moves this Court to strike from the indictment the allegation that Mr. Hamilton has a suspension for failing to submit to a test on October 25, 2008. Defendant further requests that this allegation become a Class D Criminal OUI because it does not have the sufficient number of prior offenses to be a Class C OUI as a matter of law.

**ARGUMENT**

This issue can be explained through how the legislature has defined an "OUI offense" and "failure to submit to a test" under 29-A M.R.S.A. chapter 23. § 2401 (11) defines an OUI offense as an OUI conviction or suspension for failure to submit to a test. § 2401(5) defines failure to submit to a test as failing to comply with the duty to submit to and complete a chemical test *under section 2521 or 2525*. It does not mention §2472 (4). §2525 is defined as a drug test if a drug-recognition expert believes the driver is under the influence of an intoxicant other than alcohol or a combination of a drug and alcohol. § 2521 is the implied consent law: " If there is probable cause to believe a person has operated a motor vehicle while under the influence of intoxicants, that person shall submit to and complete a test to determine an alcohol level and drug concentration by analysis of blood, alcohol or urine."

On October 25, 2008, Defendant was twenty years old and was subject to a zero tolerance standard pursuant to 29-A M.R.S.A. § 2472 (4). Defendant's suspension was based on § 2472 (4), which is in Article 2 of the Provisional license section of 29-A. The legislature specifically did not include §2472 in its definition of failure to submit to a test because 2472 is related to any amount of alcohol and not impairment. Defendant's suspension was not for an OUI offense because it was not pursuant to §2521 or 2525, but §2472(4).

Wherefore, Defendant requests that the reference to a suspension for failing to submit to a test on October 25, 2008 be stricken from the indictment and the charge be reduced to a Class D OUI.

Dated this 13 day of October 2015, at Brunswick, Maine.

Respectfully submitted,



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Matthew D. Bowe, Esq., Bar No. 9852  
Attorney for Defendant

Law Office of Matthew D. Bowe  
18 Pleasant St., Suite 107  
Brunswick, Maine 04011  
(207) 373-9314

STATE OF MAINE  
CUMBERLAND, ss.

STATE OF MAINE  
CUMBERLAND, SS  
CLERK OF COURSE

UNIFIED CRIMINAL COURT  
PORTLAND  
Docket No. CR-15-4462

STATE OF MAINE )

2015 NOV 12 PM 1 30

Plaintiff )

v. )

ORDER ON DEFENDANT'S MOTION TO STRIKE

STEFAN HAMILTON )

Defendant )

By Motion filed October 15, 2015, Defendant seeks to strike from the indictment the allegation regarding his license suspension for failing to submit to a test on October 25, 2008, without which the offense charged must be classified as a Class D OUI rather than as a Class C OUI. The court has considered counsel's oral argument as well as the State's Response to Defendant's Motion to Strike, filed October 28, 2015, and Defendant's Reply Memorandum, filed November 10, 2015.

29-A M.R.S. § 2411(5)(C) sets forth the applicable penalties "[f]or a person having 2 previous OUI offenses within a 10-year period, which is a Class C crime." The indictment alleges that Defendant committed two such previous OUI offenses within a 10-year period: an OUI conviction dated September 27, 2013, and an OUI suspension for failure to submit to a test on October 25, 2008. The question at issue is whether those two offenses constitute "2 previous OUI offenses" within the meaning of 24-M.R.S. § 2411(5)(C).

The phrase "OUI offense" is statutorily defined. 24-A M.R.S. § 2401(11) expressly provides that "'OUI offense' means an OUI conviction or suspension for failure to submit to a test."

"OUI conviction" and "Failure to submit to a test" are each also statutorily defined. *See id.* §§ 2401(9) (defining "OUI conviction")<sup>1</sup> & 2401(5) ("Failure to submit to a test," "fails to submit to a test" or "failed to submit to a test" means failure to comply with the duty to submit to and complete a chemical test under section 2521 or 2525.").

Because Section 2401(5)'s definition of "failure to submit to a test" expressly references §§ 2521 ("Implied consent to chemical tests") and 2525 ("Drug impairment assessment") but fails to reference § 2472 ("Juvenile provisional license"), Defendant argues that his October 25, 2008 failure to submit to a test does not constitute an "OUI offense" as a matter of law. According to Defendant, because he was under 21 on October 25, 2008, he was a juvenile at the time his license was suspended for failure to submit to a test, and as a juvenile his suspension

<sup>1</sup> As a matter of statutory construction, Defendant does not dispute that the indictment's allegations regarding his 2013 OUI conviction qualify as an "OUI offense" within the meaning of §§ 2401(9), 2401(11) & 2411(5)(C).

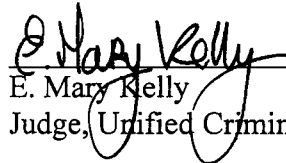
was governed by the juvenile provisional license suspension provision set forth in § 2472(4). Since § 2401(5)'s definition fails to reference § 2472, Defendant argues that his 2008 suspension does not constitute an "OUI offense", and that accordingly he should not have been charged with a Class C OUI as a matter of law.

As a matter of statutory construction, the court agrees with Defendant: the absence of a reference to §2472 in § 2401(5)'s definition of "failure to submit to a test" means that a suspension pursuant to § 2472(4) is not an "OUI offense" within the scope of § 2411(5)(C). Defendant's argument, however, does not take him as far as he contends it does, since it is not clear on this record whether Defendant's October 25, 2008 suspension *was in fact made pursuant to § 2472(4)*. Defendant's status as a juvenile in 2008 did not preclude the suspension of his license pursuant to § 2521,<sup>2</sup> and it may well be that Defendant's license was suspended pursuant to § 2521, either along with or instead of a suspension pursuant to § 2472(4).

Accordingly, because the basis upon which Defendant's license was suspended for failure to submit to a test is not clear on this record, Defendant is not entitled to have the allegations regarding his 2008 suspension stricken from the indictment.

It is accordingly hereby ORDERED that Defendant's Motion to Strike is DENIED.

DATED: 11/12/2015

  
\_\_\_\_\_  
E. Mary Kelly  
Judge, Unified Criminal Court

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<sup>2</sup> Section 2501 speaks of probable cause to believe that "a person" has operated a motor vehicle while under the influence of intoxicants, and provides that "that person shall submit to and complete a test to determine an alcohol level ...." See 29-A M.R.S. § 2521(1). Pursuant to § 2521(5), "The Secretary of State shall immediately suspend the license of a person who fails to submit to and complete a test."

STATE OF MAINE  
vs  
STEFAN A HAMILTON  
102 VICTORIA DRIVE  
WESTBROOK ME 04092

CRIMINAL DOCKET  
CUMBERLAND, ss.  
Docket No CUMCD-CR-2015-04462

**DOCKET RECORD**

DOB: 07/04/1988

Attorney: MATTHEW BOWE  
LAW OFFICE MATTHEW D BOWE  
18 PLEASANT STREET  
BRUNSWICK ME 04011-2201  
APPOINTED 08/03/2015

State's Attorney: STEPHANIE ANDERSON

Filing Document: CRIMINAL COMPLAINT  
Filing Date: 07/31/2015

Major Case Type: FELONY (CLASS A,B,C)

**Charge(s)**

1	OUI (ALCOHOL)-NO TEST, 2 PRIORS	07/29/2015	YARMOUTH
Seq 12954	29-A 2411(1-A)(C)(3)	Class C	
MILES	/ YAR		
2	FAILING TO STOP FOR OFFICER	07/29/2015	YARMOUTH
Seq 1233	29-A 2414(2)	Class E	
MILES	/ YAR		
3	FAILURE TO REGISTER VEHICLE	07/29/2015	YARMOUTH
Seq 9142	29-A 351(1)(B)	Class E	
MILES	/ YAR		
4	OPERATING WHILE LICENSE SUSPENDED OR REVOKED-OUI	07/29/2015	YARMOUTH
Seq 9889	29-A 2412-A(1-A)(B)	Class E	
MILES	/ YAR		
5	OBSCURING MOTOR VEHICLE PLATES MARKS	07/29/2015	YARMOUTH
Seq 1167	29-A 2104(2)	Class E	
MILES	/ YAR		

**Docket Events:**

07/31/2015 FILING DOCUMENT - CRIMINAL COMPLAINT FILED ON 07/31/2015

07/31/2015 Charge(s): 1,2,3,4,5  
HEARING - INITIAL APPEARANCE SCHEDULED FOR 07/31/2015 at 01:00 p.m. in Room No. 1

NOTICE TO PARTIES/COUNSEL

08/04/2015 Charge(s): 1,2,3,4,5  
HEARING - INITIAL APPEARANCE HELD ON 08/03/2015  
THOMAS D WARREN , JUSTICE  
DA: MEGAN ELAM  
Defendant Present in Court

FTR1

08/04/2015 Charge(s): 1,2,3,4,5  
CR\_200

PLEA - NO ANSWER ENTERED BY DEFENDANT ON 08/03/2015  
THOMAS D WARREN , JUSTICE

08/04/2015 BAIL BOND - \$5,000.00 CASH BAIL BOND SET BY COURT ON 08/03/2015  
THOMAS D WARREN , JUSTICE  
NO THIRD PARTY, DRUG, ALCOHOL, MV KEYS CONDITIONS

08/04/2015 MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 08/03/2015

08/04/2015 MOTION - MOTION FOR APPOINTMENT OF CNSL GRANTED ON 08/03/2015  
THOMAS D WARREN , JUSTICE  
COPY TO PARTIES/COUNSEL

08/04/2015 Party(s): STEFAN A HAMILTON  
ATTORNEY - APPOINTED ORDERED ON 08/03/2015

Attorney: MATTHEW BOWE

08/04/2015 HEARING - DISPOSITIONAL CONFERENCE SCHEDULED FOR 10/15/2015 at 08:30 a.m. in Room No. 7

08/04/2015 Charge(s): 1,2,3,4,5  
TRIAL - JURY TRIAL SCHEDULED FOR 12/14/2015 at 08:30 a.m. in Room No. 11

NOTICE TO PARTIES/COUNSEL

08/17/2015 MOTION - MOTION TO AMEND BAIL FILED BY DEFENDANT ON 08/14/2015

Attorney: MATTHEW BOWE

08/17/2015 HEARING - MOTION TO AMEND BAIL SCHEDULED FOR 08/25/2015 at 01:00 p.m. in Room No. 1

NOTICE TO PARTIES/COUNSEL

08/17/2015 HEARING - MOTION TO AMEND BAIL NOTICE SENT ON 08/17/2015

08/25/2015 HEARING - MOTION TO AMEND BAIL HELD ON 08/25/2015  
LANCE WALKER , JUDGE  
Attorney: MATTHEW BOWE  
DA: MATTHEW TICE  
Defendant Present in Court

FTR CR#1

08/25/2015 MOTION - MOTION TO AMEND BAIL GRANTED ON 08/25/2015  
LANCE WALKER , JUDGE  
COPY TO PARTIES/COUNSEL

08/25/2015 BAIL BOND - \$5,000.00 CASH BAIL BOND SET BY COURT ON 08/25/2015  
LANCE WALKER , JUDGE  
OR \$500 W/ MPTC

09/17/2015 Charge(s): 1,2,3,4,5  
SUPPLEMENTAL FILING - INDICTMENT FILED ON 09/11/2015  
JIM PAUL TURCOTTE , ASSISTANT CLERK

09/17/2015 Charge(s): 1,2,3,4,5  
HEARING - ARRAIGNMENT SCHEDULED FOR 09/25/2015 at 01:00 p.m. in Room No. 1

09/17/2015 Charge(s): 1,2,3,4,5  
HEARING - ARRAIGNMENT NOTICE SENT ON 09/17/2015  
JIM PAUL TURCOTTE , ASSISTANT CLERK

09/29/2015 Charge(s): 1,2,3,4,5  
HEARING - ARRAIGNMENT HELD ON 09/25/2015 at 01:00 p.m. in Room No. 1  
PAUL E EGGERT , JUDGE

Attorney: MATTHEW BOWE  
DA: ANGELA CANNON  
Defendant Present in Court

DEFENDANT INFORMED OF CHARGES.

FTR 1

09/29/2015 Charge(s): 1,2,3,4,5

PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 09/25/2015 at 01:00 p.m. in Room No. 1

PAUL E EGGERT , JUDGE

Attorney: MATTHEW BOWE

DA: ANGELA CANNON

Defendant Present in Court

10/15/2015 HEARING - DISPOSITIONAL CONFERENCE HELD ON 10/15/2015

JOYCE A WHEELER , JUSTICE

Attorney: MATTHEW BOWE

DA: NICHOLAS WALSH

CONF HELD, OFFER MADE.

MOTION FILED.

HEARING DATE CHANGED BY AGREEMENT TO 11-3-15

10/15/2015 MOTION - OTHER MOTION FILED BY DEFENDANT ON 10/15/2015

Attorney: MATTHEW BOWE

MOTION TO STRIKE SURPLUSAGE

10/15/2015 HEARING - OTHER MOTION SCHEDULED FOR 11/03/2015 at 01:00 p.m. in Room No. 1

MOTION TO STRIKE SURPLUSAGE

10/15/2015 HEARING - OTHER MOTION NOTICE SENT ON 10/15/2015

MOTION TO STRIKE SURPLUSAGE

10/30/2015 OTHER FILING - OTHER DOCUMENT FILED ON 10/28/2015

STATE'S RESPONSE TO DEFENDANTS'S MOTION TO STRIKE

FILED BY ADA NATE WALSH

11/03/2015 HEARING - OTHER MOTION HELD ON 11/03/2015

MARY KELLY , JUDGE

Attorney: MATTHEW BOWE

Defendant Present in Court

MOTION TO STRIKE SURPLUSAGE

FTR CR#1

ADA WALSH

11/03/2015 MOTION - OTHER MOTION UNDER ADVISEMENT ON 11/03/2015

MARY KELLY , JUDGE

MOTION TO STRIKE SURPLUSAGE

11/03/2015 CASE STATUS - CASE FILE LOCATION ON 11/03/2015

WITH J. KELLY FOR MOTION UNDER ADVISEMENT

11/12/2015 CASE STATUS - CASE FILE RETURNED ON 11/12/2015

DANIELLE MERRILL , ASSISTANT CLERK

11/12/2015 MOTION - OTHER MOTION DENIED ON 11/12/2015

MARY KELLY , JUDGE

MOTION TO STRIKE SURPLUSAGE

11/12/2015 OTHER FILING - MEMORANDUM OF LAW FILED ON 11/10/2015

DEFENDANTS REPLY MEMORANDUM ON MOTION TO STRIKE SURPLUSAGE

A TRUE COPY

ATTEST: \_\_\_\_\_

Clerk