

STATE OF MAINE
KENNEBEC, ss.

RECEIVED AND FILED
KENNEBEC SUPERIOR COURT
SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-05-538
2005 DEC -1 P 3: 10
SKS-KEN-11/30/05

STATE OF MAINE

v.

DWAYNE STEVENS,

Defendant

JUSTICE DESJARDIN
SUPERIOR COURT

DECISION ON MOTION

This matter is before the court on the defendant's motion to dismiss the charge against him brought by indictment. That charge alleges that defendant Stevens violated 29-A M.R.S.A. § 2411(1-A)(D)(2), which provides, in pertinent part:

§ 2411. Criminal OUI

1-A. Offense. A person commits OUI if that person:

A. Operates a motor vehicle:

- (1) While under the influence of intoxicants; or
- (2) While having a blood-alcohol level of 0.08% or more;

D. (2) . . . Has . . . a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood-alcohol level of 0.08% or greater.

Proof of the OUI plus the prior homicide conviction while under the influence would constitute a class C crime with a minimum mandatory sentence including not less than six months incarceration.

Facts

For purposes of the motion to dismiss, the parties agree that the defendant has a prior criminal homicide conviction involving or resulting from operating a motor vehicle while under the influence of intoxicating liquor or drugs, i.e., conviction for vehicular manslaughter on February 26, 1986. Since the offense date of the new alleged OUI is June 10, 2005, there wERE approximately 19 years between these dates. Defendant moves to dismiss the indictment, arguing that the prior conviction cannot be

used for purposes of the enhancement of the classification and sentence if it was beyond 10 years prior to the offense date in issue. The court will grant the motion in part.

Discussion

Subsections (B) and (C) of section 2411 specifically limit aggravating prior convictions as occurring, “within a 10-year period.”, but subsection (D) at issue does not specify a certain “look back” period. The defendant points to 17-A M.R.S.A. § 9-A, which states, “Prior convictions may be considered for purposes of enhancing a present sentence if the date of each prior conviction precedes the commission of the offense being enhanced by no more than 10 years, except as otherwise provided by law.” (Emphasis provided). The question is whether subsection (D) contains an “otherwise provided by law” exception to the 10-year limit. The defendant argues that an exception cannot be implied from silence and if the anomaly in the subsection does nothing more than create ambiguity, that ambiguity must be resolved in favor of the defendant. The State argues as a matter of legislative history and context that the legislature must have intended that the enhancement set forth in subsection (D) would not be subject to the 10-year general limitation. After weighing both arguments, the court agrees with the defendant’s analysis and holds, as a matter of law, that a prior conviction sufficient to trigger the enhancement of subsection (D) must have occurred within 10 years prior to the date of the current offense to be considered.

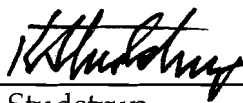
Although the court agrees with the defendant’s analysis, it will not dismiss the entire indictment at the present time. Since a class C allegation of operating under the influence pursuant to section 2411(1-A)(D)(2) includes within it the lesser included offense of class D OUI pursuant to section 2411(1-A)(A), i. e. without the enhancement for the prior criminal homicide conviction, it appears that the indictment could be effectively amended by eliminating the conviction language. Alternatively, the State

may simply choose to bring a new charge of operating under the influence class D by way of complaint. Since the court should be allowed an opportunity to make this choice, the court will allow 30 days for the State to notify the defendant and the court as to how it wishes to proceed. If no notice is given, the motion will be granted and the indictment will be dismissed.

The entry will be:

Motion GRANTED IN PART and the State is given 30 days within which to decide on its response.

Dated: November 30, 2005



S. Kirk Studstrup
Justice, Superior Court

STATE OF MAINE
vs
DWAYNE STEVENS
23 WINDSOR STREET #1
RANDOLPH ME 04346

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CR-2005-00538

DOCKET RECORD

DOB: 03/17/1964

Attorney: SHERRY TASH
HAINKE & TASH
PO BOX 192
WHITEFIELD ME 04353
APPOINTED 09/08/2005

State's Attorney: EVERT FOWLE

Filing Document: INDICTMENT
Filing Date: 09/08/2005

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

Charge (s)

1 OPERATING UNDER INFLUENCE-INJURY OR DEATH, 06/10/2005 AUGUSTA
PRIOR
Seq 9887 29-A 2411(1-A)(D)(2) Class C
MILLS / AUG

Docket Events:

09/08/2005 FILING DOCUMENT - INDICTMENT FILED ON 09/08/2005

TRANSFER - BAIL AND PLEADING GRANTED ON 09/08/2005

TRANSFER - BAIL AND PLEADING REQUESTED ON 09/08/2005

09/09/2005 Party(s): DWAYNE STEVENS
ATTORNEY - APPOINTED ORDERED ON 09/08/2005

Attorney: SHERRY TASH

09/13/2005 Charge(s): 1
HEARING - ARRAIGNMENT HELD ON 09/13/2005
S KIRK STUDSTRUP , JUSTICE
Attorney: SHERRY TASH
DA: ALAN KELLEY
Defendant Present in Court

READING WAIVED. DEFENDANT INFORMED OF CHARGES. COPY OF INDICTMENT/INFORMATION GIVEN TO DEFENDANT. 21 DAYS TO FILE MOTIONS

09/13/2005 Charge(s): 1
PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 09/13/2005

09/13/2005 BAIL BOND - \$50,000.00 CASH BAIL BOND SET BY COURT ON 09/13/2005
S KIRK STUDSTRUP , JUSTICE
OR \$250,000 SURETY W/CONDITIONS OF NO USE/POSSESSION OF DRUGS/ALCOHOL AND SUBMIT RANDOM SEARCH/TEST FOR SAME; COMPLY WITH CURFEW OF 6 P.M. TO 6 A.M.; NOT TO BE IN ANY ESTABLISHMENT WHICH SERVES LIQUOR OR ON-PREMISES CONSUMPTION

09/13/2005 BAIL BOND - CASH BAIL BOND COND RELEASE ISSUED ON 09/13/2005
S KIRK STUDSTRUP , JUSTICE

09/30/2005 MOTION - MOTION FOR BAIL RECONSID. FILED BY DEFENDANT ON 09/30/2005

10/03/2005 HEARING - BAIL HEARING SCHEDULED FOR 10/21/2005 @ 8:15

NOTICE TO PARTIES/COUNSEL

10/03/2005 HEARING - BAIL HEARING NOTICE SENT ON 10/03/2005

10/05/2005 MOTION - MOTION EXPERT WITNESS REPORT FILED BY DEFENDANT ON 10/03/2005

10/05/2005 MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 10/03/2005

10/05/2005 MOTION - MOTION TO DISMISS FILED BY DEFENDANT ON 10/03/2005

10/05/2005 MOTION - MOTION TO COMPEL FILED BY DEFENDANT ON 10/03/2005

10/06/2005 HEARING - MOTION TO DISMISS SCHEDULED FOR 10/21/2005 @ 8:15

NOTICE TO PARTIES/COUNSEL

10/06/2005 HEARING - MOTION TO COMPEL SCHEDULED FOR 10/21/2005 @ 8:15

NOTICE TO PARTIES/COUNSEL

10/06/2005 HEARING - MOTION EXPERT WITNESS REPORT SCHEDULED FOR 10/21/2005 @ 8:15

10/11/2005 ORDER - TRANSCRIPT ORDER FILED ON 10/11/2005

COPY SENT TO ELECTRONIC RECORDING DIVISION; DEFENSE ATTORNEY SHERRY TASH IS REQUESTING A COPY OF THE TRANSCRIPT OF PROBABLE CAUSE HEARING IN AUGUSTA DISTRICT COURT

10/25/2005 HEARING - MOTION TO COMPEL HELD ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

Attorney: SHERRY TASH

DA: ALAN KELLEY

Reporter: JANETTE COOK

Defendant Present in Court

10/25/2005 HEARING - MOTION EXPERT WITNESS REPORT HELD ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

Attorney: SHERRY TASH

DA: ALAN KELLEY

Reporter: JANETTE COOK

Defendant Present in Court

10/25/2005 HEARING - MOTION TO DISMISS HELD ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

Attorney: SHERRY TASH

DA: ALAN KELLEY

Reporter: JANETTE COOK

Defendant Present in Court

10/25/2005 MOTION - MOTION EXPERT WITNESS REPORT GRANTED ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

IF STATE INTENDS TO CALL AN EXPERT THEY WILL HAVE TO PROVIDE A REPORT TO DEFENSE COUNSEL

10/25/2005 MOTION - MOTION TO COMPEL GRANTED ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

COPY TO PARTIES/COUNSEL MS. TASH TO CONTACT DEPARTMENT WITH #1; DA TO PROVIDE LOG AS REQUESTED IN #2; DA WILL PROVIDE COPIES OF ANY CERTIFICATES REQUESTED IN #3,4,3,4; DA TO PROVIDE DATES OF COURSES FOR #5,6,3; MOTION DENIED AS TO #8, BUT MS. TASH MAY CALL THE OFFICER.

10/25/2005 HEARING - BAIL HEARING HELD ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

Attorney: SHERRY TASH

DA: ALAN KELLEY Reporter: JANETTE COOK

Defendant Present in Court

10/25/2005 MOTION - MOTION FOR BAIL RECONSID. GRANTED ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

COPY TO PARTIES/COUNSEL

10/25/2005 BAIL BOND - \$20,000.00 CASH BAIL BOND SET BY COURT ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

10/25/2005 BAIL BOND - \$200,000.00 SURETY BAIL BOND SET BY COURT ON 10/21/2005

S KIRK STUDSTRUP , JUSTICE

11/01/2005 OTHER FILING - TRANSCRIPT FILED ON 11/01/2005

PROBABLE CAUS HEARING IN THE DISTRICT COURT

11/03/2005 MOTION - MOTION FOR ENLARGEMENT OF TIME FILED BY DEFENDANT ON 11/03/2005

11/03/2005 MOTION - MOTION FOR ENLARGEMENT OF TIME GRANTED ON 11/03/2005

S KIRK STUDSTRUP , JUSTICE

COPY TO PARTIES/COUNSEL

11/03/2005 OTHER FILING - MEMORANDUM OF LAW FILED ON 11/02/2005

FILED BY STATE

11/18/2005 OTHER FILING - MEMORANDUM OF LAW FILED ON 11/18/2005

Attorney: SHERRY TASH

ISSUED JUSTICE STUDSTRUP

12/01/2005 MOTION - MOTION TO DISMISS GRANTED ON 11/29/2005

S KIRK STUDSTRUP , JUSTICE

COPY TO PARTIES/COUNSEL GRANTED IN PART AND THE STATE IS GIVEN 30 DAYS WITHIN WHICH TO
DECIDE ON ITS RESPONSE

12/01/2005 ORDER - COURT ORDER ENTERED ON 11/29/2005

S KIRK STUDSTRUP , JUSTICE

DECISION ON MOTION TO DISMISS

A TRUE COPY

ATTEST:

Clerk