

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR-10-515
REM - KEN - 3/30/2011

STATE OF MAINE

v.

**ORDER DENYING
MOTION TO STRIKE**

RYAN WHITTEN,

Defendant

Defendant filed his "Motion to Strike Prior" on February 14, 2011, and the court heard argument from counsel on that motion on March 9, 2011. Although defendant's written motion contends that defendant did not adequately waive counsel with respect to a prior conviction in the Lewiston District Court (CR-07-477), at oral argument, counsel for the defendant indicated that it was waiving that basis for the pending motion. Instead, defendant contends the motion to strike should be granted based upon the court's failure to properly advise the defendant of the range of possible sentence that could have been imposed in connection with the 2007 conviction for operating under the influence in the Lewiston District Court.

A transcript of the April 11, 2007 proceeding at the Lewiston District Court was presented to the court for its consideration in regard to the pending motion. In that proceeding, the defendant pled guilty to the charge of operating under the influence of intoxicants (OUI), a Class D criminal offense. This offense, as with any Class D criminal offense, could result in the imposition of a sentence of incarceration of up to 364 days. During the colloquy associated with the plea in the prior OUI conviction, the court did not expressly indicate to the defendant that the possible range of sentences for that offense could involve a jail sentence of up to 364 days. Before accepting the defendant's

guilty plea, the court did fully explain that there was a mandatory minimum jail sentence of forty-eight hours associated with that offense. The court also went on, at some length, describing the alternative sentencing option that would be available to the defendant, and in fact offered that specific alternative to the defendant in that matter. The defendant instead selected to serve the forty-eight hours in jail after he was given assurance that his request for a stay of execution of that sentence would be granted. The forty-eight hour jail sentence was, in fact, the sentence imposed as a result of that prior conviction in the Lewiston District Court.

Defendant contends in the pending matter that, despite having received the exact forty-eight hour jail sentence that he was instructed would be mandatory and was instructed would be imposed for the prior conviction, that that prior conviction should be stricken in this case because he was not advised that the potential maximum sentence that could have been imposed for that prior conviction was a jail sentence of up to 364 days. Defendant now contends that because the court in the prior conviction failed to specifically indicate the range of allowable punishments, that that conviction should be stricken because the plea provided by him was not knowingly and voluntarily made.

Defendant contends the United State Supreme Court in *Iowa v. Tovar*, 541 U.S. 77 (2004), lends support for his proposition that the prior conviction should be stricken. In *Tovar*, the trial court accepted the defendant's guilty plea at an arraignment session and subsequently had a sentencing hearing the following month and imposed the minimum two-day jail sentence and fine for the charge of operating a motor vehicle under the influence of alcohol (OWI). Tovar was subsequently charged for a later OWI which was enhanced to a felony offense based upon the earlier OWI conviction. The Iowa Supreme Court determined that the colloquy preceding the acceptance of the earlier

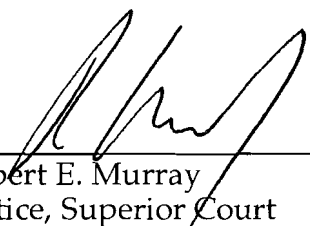
Tovar guilty plea was constitutionally inadequate because it failed to contain certain specific warnings to *Tovar*. The U.S. Supreme Court reversed and remanded, holding that the specific warnings ordered by the Iowa Supreme Court were not specifically mandated by the constitution. Setting forth the reasons for rejecting the specific admonitions required by the Iowa Supreme Court, the U.S. Supreme Court noted, in pertinent part to the issues presented in this pending matter, “In a case so straight forward . . . the admonitions at issue might confuse or mislead a defendant more than they would inform him” *Tovar*, U.S. at 93.

Similarly, in this case, the court concludes that the particular facts and circumstances surrounding the colloquy between the court and the defendant regarding the sentence to be imposed in the prior conviction (namely, the imposition of the forty-eight hour jail sentence) could have similarly confused the defendant had there been a further requirement that the Court, nonetheless, instruct the defendant of a possible jail sentence of up to 364 days as the maximum allowable range.

Accordingly, the court finds that the failure to expressly set forth that allowable range of sentence during the colloquy leading up to the acceptance of the defendant’s guilty plea in that prior conviction did not yield a constitutionally deficient conviction. Therefore, the court concludes that the defendant’s motion to strike in the pending matter must be denied.

DATED:

3/30/11



Robert E. Murray
Justice, Superior Court

STATE OF MAINE
vs
RYAN V WHITTEN
BOX 415 RT 133
WINTHROP ME 04364

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CR-2010-00515

DOCKET RECORD

DOB: 11/06/1980

Attorney: MATTHEW NICHOLS
NICHOLS WEBB & LORANGER PA
477 CONGRESS ST., SUITE 800
PORTLAND ME 04101
RETAINED 09/09/2010

State's Attorney: EVERT FOWLE

Charge (s)

1 OPERATING UNDER THE INFLUENCE-2 PRIORS 07/20/2010 WINTHROP
Seq 11519 29-A 2411(1-A)(B)(2) Class C

2 OPERATE VEHICLE WITHOUT LICENSE- 07/20/2010 WINTHROP
COND/RESTRIC
Seq 9868 29-A 1251(1)(B) Class E Charged with COMPLAINT on Suppleme

Docket Events:

07/21/2010 FILING DOCUMENT - CASH BAIL BOND FILED ON 07/21/2010

07/21/2010 Charge(s): 1
HEARING - INITIAL APPEARANCE SCHEDULED FOR 09/28/2010 @ 8:30

NOTICE TO PARTIES/COUNSEL

07/21/2010 BAIL BOND - \$1,000.00 CASH BAIL BOND FILED ON 07/21/2010

Bail Receipt Type: CR
Bail Amt: \$1,000

Date Bailed: 07/21/2010 Receipt Type: CK
Prvdr Name: RYAN WHITTEN
Rtrn Name: RYAN WHITTEN

09/09/2010 MOTION - OTHER MOTION FILED BY DEFENDANT ON 09/09/2010

Attorney: MATTHEW NICHOLS
MOTION FOR PREPARATION OF REPORTS BY EXPERT WITNESS.

09/09/2010 MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 09/09/2010

Attorney: MATTHEW NICHOLS

09/09/2010 Party(s): RYAN V WHITTEN
ATTORNEY - RETAINED ENTERED ON 09/09/2010

Attorney: MATTHEW NICHOLS

09/23/2010 Charge(s): 1,2
SUPPLEMENTAL FILING - COMPLAINT FILED ON 09/22/2010

09/28/2010 BAIL BOND - CASH BAIL BOND CONTINUED AS POSTED ON 09/28/2010

M MICHAELA MURPHY , JUSTICE

Date Bailed: 07/21/2010

09/28/2010 Charge(s): 1

HEARING - INITIAL APPEARANCE HELD ON 09/28/2010

M MICHAELA MURPHY , JUSTICE

Reporter: JANETTE COOK

09/28/2010 Charge(s): 1,2

HEARING - STATUS CONFERENCE SCHEDULED FOR 11/30/2010 @ 8:30

09/28/2010 Charge(s): 1,2

PLEA - NO ANSWER ENTERED BY DEFENDANT ON 09/28/2010

09/29/2010 Charge(s): 1,2

HEARING - STATUS CONFERENCE NOTICE SENT ON 09/29/2010

11/30/2010 Charge(s): 1,2

MOTION - MOTION TO STRIKE FILED BY DEFENDANT ON 11/30/2010

12/01/2010 Charge(s): 1,2

HEARING - STATUS CONFERENCE HELD ON 11/30/2010

ROBERT E MURRAY JR, JUSTICE

Attorney: MATTHEW NICHOLS

DA: BRAD GRANT Reporter: JANETTE COOK

Defendant Present in Court

12/01/2010 Charge(s): 1,2

HEARING - STATUS CONFERENCE SCHEDULED FOR 02/08/2011 @ 10:00

12/01/2010 Charge(s): 1,2

HEARING - STATUS CONFERENCE NOTICE SENT ON 12/01/2010

12/20/2010 Charge(s): 1,2

SUPPLEMENTAL FILING - INDICTMENT FILED ON 12/17/2010

12/20/2010 Charge(s): 1,2

HEARING - STATUS CONFERENCE NOT HELD ON 12/20/2010

12/20/2010 Charge(s): 1,2

HEARING - ARRAIGNMENT SCHEDULED FOR 01/25/2011 @ 8:30

12/20/2010 Charge(s): 1,2

HEARING - ARRAIGNMENT NOTICE SENT ON 12/20/2010

01/25/2011 Charge(s): 1,2

HEARING - ARRAIGNMENT HELD ON 01/25/2011

ROBERT E MURRAY JR, JUSTICE

DA: BRAD GRANT

Defendant Present in Court

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

01/25/2011 Charge(s): 1,2

PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 01/25/2011

01/25/2011 HEARING - MOTION TO STRIKE SCHEDULED FOR 03/09/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

01/25/2011 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 03/09/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

02/17/2011 MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 02/16/2011

02/17/2011 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 03/09/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

02/17/2011 MOTION - MOTION TO STRIKE FILED BY DEFENDANT ON 02/16/2011

02/17/2011 HEARING - MOTION TO STRIKE SCHEDULED FOR 03/09/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

03/07/2011 OTHER FILING - TRANSCRIPT FILED ON 03/07/2011

COPY OF TRANSCRIPT OF PRIOR CONVICTION

03/11/2011 Charge(s): 1,2

TRIAL - JURY TRIAL SCHEDULED FOR 03/15/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

03/22/2011 Charge(s): 1,2

TRIAL - JURY TRIAL CONTINUED ON 03/15/2011

03/22/2011 Charge(s): 1,2

TRIAL - DOCKET CALL SCHEDULED FOR 04/05/2011 @ 8:30

03/22/2011 Charge(s): 1,2

TRIAL - DOCKET CALL NOTICE SENT ON 03/22/2011

03/22/2011 HEARING - MOTION TO STRIKE HELD ON 03/09/2011

03/22/2011 MOTION - MOTION TO STRIKE UNDER ADVISEMENT ON 03/09/2011

03/22/2011 HEARING - MOTION TO SUPPRESS CONTINUED ON 03/09/2011

03/22/2011 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 04/05/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

03/24/2011 OTHER FILING - OTHER DOCUMENT FILED ON 03/24/2011

Attorney: MATTHEW NICHOLS

EXPERT WITNESSES: ROBERT MORGNER AND PATRICK DEMERS

03/31/2011 MOTION - MOTION TO STRIKE DENIED ON 03/30/2011

ROBERT E MURRAY JR, JUSTICE

COPY TO PARTIES/COUNSEL

03/31/2011 HEARING - MOTION TO SUPPRESS CONTINUED ON 03/09/2011

03/31/2011 HEARING - MOTION TO STRIKE HELD ON 03/09/2011

ROBERT E MURRAY JR, JUSTICE

Defendant Present in Court

03/31/2011 Charge(s): 1,2

MOTION - MOTION TO STRIKE UNDER ADVISEMENT ON 03/09/2011

03/31/2011 Charge(s): 1,2

MOTION - MOTION TO STRIKE DENIED ON 03/30/2011

ROBERT E MURRAY JR, JUSTICE

COPY TO PARTIES/COUNSEL

03/31/2011 ORDER - COURT ORDER FILED ON 03/30/2011

ROBERT E MURRAY JR, JUSTICE

ACCORDINGLY, THE COURT FINDS THAT THE FAILURE TO EXPRESSLY SET FORTH THAT ALLOWABLE RANGE OF SENTENCE DURING THE COLLOQUY LEADING UP TO THE ACCEPTANCE OF THE DEFENDANT'S GUILTY PLEA IN THAT PRIOR CONVICTION DID NOT YIELD A CONSTITUTIONALLY DEFICIENT CONVICTION. THEREFORE, THE COURT CONCLUDES THAT THE DEFENDANT'S MOTION TO STRIKE IN THE PENDING MATTER MUST BE DENIED.

03/31/2011 ORDER - COURT ORDER FILED ON 03/30/2011

ROBERT E MURRAY JR, JUSTICE

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A TRUE COPY

ATTEST: _____
Clerk