

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

The State of New Hampshire

v.

Kenneth Bouffard

No. 97-S-106

ORDER

On May 21, 1998, the defendant pled guilty to one count of Operating While Deemed An Habitual Offender. The Court (Manias, J.) sentenced him to not more than 9 nor less than 4 years¹ in the New Hampshire State Prison, stand committed. Before the Court is the defendant's Motion for Dismissal of Felony Conviction/Resentencing, in which the defendant asks the Court to: 1) resentence him to a misdemeanor; 2) hold a hearing on the matter; and 3) issue a written finding of fact and rulings of law. The State objects. After considering the parties' written arguments, the Court finds and rules as follows.

The basis for the defendant's motion is that the indictment charged him with a misdemeanor because it did not contain an allegation that he had previously been convicted of a misdemeanor

¹ RSA 262:23, I, authorizes a sentence of not less than one year nor more than five years. The defendant's sentence is higher because he was sentenced pursuant to the Extended Term Statute, RSA 651:6.

or felony motor vehicle conviction, and thus, the Court did not have jurisdiction to sentence him on a felony. Before it addresses the defendant's claims, the Court notes that it is assuming for the purposes of this case that the prior conviction is an element of the habitual offender offense, which must be pled. This issue has not been decided by the New Hampshire Supreme Court but does not affect the outcome of this case and thus, need not be addressed in this order.

As a general matter, "a guilty plea . . . waives all claims of constitutional violation occurring before the plea" U.S. v. Spinner, 180 F.3d 517 (3rd. Cir. 1999) (quoting U.S. v. Caperell, 938 F.2d 975 (9th Cir. 1991)). Jurisdictional claims are an exception to the general rule. Id. If an indictment fails to state an offense, a defendant's guilty plea to the indictment does not waive a later jurisdictional challenge. Id. In Spinner, the government failed to include the interstate commerce element of the offense. Without this element, the indictment failed to allege a federal crime over which the court would have jurisdiction. This is not the case here where, on its face, the indictment states an offense that allowed the State to hale the defendant into court. See U.S. v. Montilla, 870 F.2d 549, 552 (9th Cir. 1989).

Nor it is in any way unfair to let the defendant's conviction stand. The indictment in this case charged the defendant with "driving while deemed an habitual offender, contrary to RSA

626:23, a special felony." (emphasis added). Under the habitual offender statute, all persons convicted of driving while deemed an habitual offender are subject to a minimum sentence of one year. RSA 262:23, I. An exception exists, however, if the person has not previously been convicted of DWI or any misdemeanor or felony motor vehicle offense. RSA 262:23, III. In such cases, the habitual offender offense is a Class A misdemeanor with a maximum sentence of twelve months and no minimum sentence. Id. The indictment in this case, by charging the defendant with a "special felony," gave him adequate notice that the minimum mandatory sentence of one year applied to him.

Moreover, the defendant's plea colloquy demonstrates that he knew he was facing a felony charge. When asked if he knew the maximum penalty for the habitual offender charge, the defendant responded: "On the habitual offender, it's two and a half to five years" Such a sentence would not be applicable to a misdemeanor charge. Moreover, the defendant signed the form entitled "Acknowledgment and Waiver of Rights: Felony." During the plea colloquy, the defendant indicated that before he signed the form, he reviewed it with his lawyer and understood it. He further indicated that he signed the form of his own free will. See State v. Thornton, 140 N.H. 532, 537-8 (1995) (explaining how plea colloquy addresses issue of whether a defendant understands elements of offense with which defendant is charged).

Finally, the defendant challenges his sentence because the

State did not explicitly reference RSA 651:6 in the indictment and the Court did not reference it in the mittimus. A defendant may be sentenced to an extended prison term if: 1) it is authorized by RSA 651:6, I; and 2) notice of the possible application of the extended term is given to the defendant prior to commencement of trial. RSA 651:6, II. The first component was satisfied because the defendant had twice previously been imprisoned on sentences in excess of one year. See RSA 651:6, I(c). The second component was satisfied when the State filed its Notice of Possible Application of RSA 651:6 Extended Term of Imprisonment on April 22, 1997. Also, during the plea colloquy, the defendant indicated that he understood that the extended term was ten to thirty years. Accordingly, the Court is not persuaded that the lack of statutory reference in the indictment and the mittimus renders the defendant's sentence invalid.

For all of the above reasons, the defendant's Motion for Dismissal of Felony Conviction/Resentencing is **DENIED**.

So Ordered.

Dated: February 21, 2002

KATHLEEN A. McGUIRE,
Presiding Justice