

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR-10-875
M.M. - KEN - 10-2011

STATE OF MAINE

v.

**ORDER DENYING
MOTION TO DISMISS**

ALAN F. HARDING,

Defendant

I. PROCEDURAL BACKGROUND

The complaint before this court was initially filed in the Augusta District Court on or about November 1, 2010. On November 16, 2010, counsel for the defendant entered an appearance, a waiver of the reading of the complaint, and an entry of a plea of not guilty to all counts in the complaint. Defendant submitted a timely jury trial request on or about December 3, 2010.

No motions were filed in the District Court prior to transfer to the Superior Court. The matter was initially scheduled for a docket call in the Superior Court on January 4, 2011. At the request of the defendant, the matter was continued to the March docket call date. Again in March, the matter was continued, at the defendant's request, to the June 7, 2011 docket call. On June 7, 2011, counsel for the defendant appeared, and the defendant was ordered to appear June 10 for jury selection for the pending matter.

On June 9, 2011, defendant filed the pending motion to dismiss. The motion to dismiss asserts that the defendant's right to equal protection was violated by the initiation of the pending criminal complaint by the Attorney General. Defendant's motion alleges, in part, "Upon information and belief, criminal prosecution is reserved

for taxpayers who have failed to acknowledge their duties to file returns and pay taxes or fail to cooperate with the tax examiners assigned to their case by the Maine Revenue Service.” Defendant’s motion further alleges, “Defendant is being prosecuted as a consequence of his political affiliations and statements which conflicted with Assistant District Attorney John Pluto.”¹

The morning after the motion was filed, on the day of jury selection on June 10, 2011, the State filed a written objection to the defendant’s motion to dismiss. The State’s objection disputed the assertions raised in the defendant’s motion and further argued that the defendant’s motion failed to demonstrate the elements necessary to show discriminatory prosecution as set forth in *State v. Heald*, 382 A.2d 290, 300-01 (Me. 1978).

II. ANALYSIS

Without addressing the substantive issues raised by the defendant’s motion to dismiss or the State’s opposition thereto, the court denies the defendant’s motion to dismiss based upon its failure to comply with the provisions of Rules 12(b)(2) & (3) of the Maine Rules of Criminal Procedure. The issues raised within the defendant’s motion to dismiss, filed the day before jury selection, would squarely fit within the type of defense or objection, based upon an alleged defect in the institution of the prosecution, that is contemplated by Rule 12(b)(2). That subsection of the Rule goes on to note, in pertinent part: “Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.”

¹ The defendant’s motion was accompanied by no supporting affidavit, nor was any request for a hearing included with the motion. In a chamber conference at the time of jury selection on June 10, 2011, counsel for the defendant referred to wanting an evidentiary hearing on the issues raised in the defendant’s pending motion to dismiss.

Rule 12(b)(3) of the Maine Rules of Criminal Procedure clearly requires that all motions shall be filed within twenty-one days after entry of a plea unless the court specifies a different time. As noted, the defendant's plea was entered in this matter on November 16, 2010, almost seven months before the filing of the motion to dismiss. The motion was not accompanied by any request for late filing, nor was there any demonstration of any cause for which such late filing would be justified.²

For the reasons stated, the defendant's motion to dismiss is DENIED.

DATED:

6/13/11



Robert E. Murray
Justice, Superior Court

² The purported bases for the motion to dismiss relates to information of which defendant was purportedly aware at the time the complaint itself was filed rather than the eve of jury selection.

STATE OF MAINE
vs
ALAN F HARDING
5 BARTON STREET
PRESQUE ISLE ME 04769

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CR-2010-00875

DOCKET RECORD

DOB: 07/13/1953

Attorney: WALTER MCKEE
LIPMAN & KATZ & MCKEE, PA
227 WATER STREET
PO BOX 1051
AUGUSTA ME 04332-1051
RETAINED 11/16/2010

State's Attorney: GREGG BERNSTEIN

Filing Document: CRIMINAL COMPLAINT
Filing Date: 11/01/2010

Major Case Type: MISDEMEANOR (CLASS D,E)

Charge(s)

1	FAILURE TO PAY TAX OR FILE RETURN	04/16/2005 AUGUSTA
Seq 9977 36	5332(1) Class D	
2	FAILURE TO PAY TAX OR FILE RETURN	04/19/2006 AUGUSTA
Seq 9977 36	5332(1) Class D	
3	FAILURE TO PAY TAX OR FILE RETURN	04/18/2007 AUGUSTA
Seq 9977 36	5332(1) Class D	
4	FAILURE TO PAY TAX OR FILE RETURN	04/16/2008 AUGUSTA
Seq 9977 36	5332(1) Class D	
5	FAILURE TO PAY TAX OR FILE RETURN	04/16/2009 AUGUSTA
Seq 9977 36	5332(1) Class D	
6	FAILURE TO PAY TAX OR FILE RETURN	04/16/2010 AUGUSTA
Seq 9977 36	5332(1) Class D	
7	FAILURE TO PAY TAX OR FILE RETURN	04/16/2005 AUGUSTA
Seq 9977 36	5332(1) Class D	
8	FAILURE TO PAY TAX OR FILE RETURN	04/19/2006 AUGUSTA
Seq 9977 36	5332(1) Class D	
9	FAILURE TO PAY TAX OR FILE RETURN	04/18/2007 AUGUSTA
Seq 9977 36	5332(1) Class D	
10	FAILURE TO PAY TAX OR FILE RETURN	04/16/2008 AUGUSTA

Seq 9977 36 5332(1) Class D

11 FAILURE TO PAY TAX OR FILE RETURN 04/16/2009 AUGUSTA
Seq 9977 36 5332(1) Class D

12 FAILURE TO PAY TAX OR FILE RETURN 04/16/2010 AUGUSTA
Seq 9977 36 5332(1) Class D

Docket Events:

12/06/2010 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRANSFER - TRANSFER FOR JURY TRIAL EDI ON 12/06/2010 @ 18:00

TRANSFERRED CASE: SENDING COURT CASEID AUGDCCR201002039
FILING DOCUMENT - CRIMINAL COMPLAINT FILED ON 11/01/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
HEARING - ARRAIGNMENT SCHEDULED FOR 11/17/2010 @ 10:00 in Room No. 1

NOTICE TO PARTIES/COUNSEL
Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
HEARING - ARRAIGNMENT WAIVED ON 11/17/2010

Party(s): STATE OF MAINE
ATTORNEY - RETAINED ENTERED ON 11/01/2010

Attorney: GREGG BERNSTEIN
Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
SUMMONS/SERVICE - SUMMONS TO APPEAR FOR ARRAIGN ISSUED FOR 11/01/2010

Party(s): STATE OF MAINE
ATTORNEY - RETAINED ENTERED ON 11/01/2010

Attorney: EVERT FOWLE
Party(s): ALAN F HARDING
ATTORNEY - RETAINED ENTERED ON 11/16/2010

Attorney: WALTER MCKEE
Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 11/17/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
MOTION - MOTION FOR DISCOVERY FILED BY DEFENDANT ON 11/16/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRIAL - BENCH SCHEDULED FOR 01/04/2011 @ 8:30 in Room No. 1

NOTICE TO PARTIES/COUNSEL
Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - BENCH NOT HELD ON 12/06/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRIAL - BENCH NOTICE SENT ON 11/18/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
HEARING - MOTION FOR DISCOVERY SCHEDULED FOR 01/04/2011 @ 8:30 in Room No. 1

NOTICE TO PARTIES/COUNSEL
Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
HEARING - MOTION FOR DISCOVERY NOT HELD ON 12/06/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
HEARING - MOTION FOR DISCOVERY NOTICE SENT ON 11/18/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRANSFER - TRANSFER FOR JURY TRIAL REQUESTED ON 12/06/2010

Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
FINDING - TRANSFER FOR JURY TRIAL TRANSFERRED ON 12/06/2010

AUGSC

12/07/2010 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRANSFER - TRANSFER FOR JURY TRIAL RECVD BY COURT ON 12/06/2010

AUGDCCR20102039

12/07/2010 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRIAL - DOCKET CALL SCHEDULED FOR 01/04/2011 @ 10:00

12/07/2010 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRIAL - DOCKET CALL NOTICE SENT ON 12/07/2010

12/28/2010 MOTION - MOTION TO CONTINUE FILED BY DEFENDANT ON 12/28/2010

Attorney: WALTER MCKEE

12/30/2010 MOTION - MOTION TO CONTINUE GRANTED ON 12/29/2010
M MICHAELA MURPHY, JUSTICE
COPY TO PARTIES/COUNSEL

12/30/2010 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRIAL - DOCKET CALL CONTINUED ON 12/30/2010

12/30/2010 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRIAL - DOCKET CALL SCHEDULED FOR 03/09/2011 @ 2:00

02/18/2011 MOTION - MOTION TO CONTINUE FILED BY DEFENDANT ON 02/18/2011

02/22/2011 MOTION - MOTION TO CONTINUE GRANTED ON 02/18/2011
ROBERT E MURRAY JR, JUSTICE
COPY TO PARTIES/COUNSEL

02/22/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12
TRIAL - DOCKET CALL CONTINUED ON 02/18/2011

02/22/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - DOCKET CALL SCHEDULED FOR 04/05/2011 @ 2:00

02/22/2011 HEARING - MOTION FOR DISCOVERY SCHEDULED FOR 04/05/2011 @ 1:00

NOTICE TO PARTIES/COUNSEL

04/06/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - DOCKET CALL CONTINUED ON 04/05/2011

04/06/2011 HEARING - MOTION FOR DISCOVERY NOT HELD ON 04/05/2011

04/06/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

MOTION - MOTION FOR DISCOVERY GRANTED ON 04/05/2011

M MICHAELA MURPHY , JUSTICE

COPY TO PARTIES/COUNSEL

04/06/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - DOCKET CALL SCHEDULED FOR 06/07/2011 @ 1:00

06/07/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - DOCKET CALL HELD ON 06/07/2011

06/07/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - JURY TRIAL SCHEDULED FOR 06/10/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

06/09/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

MOTION - MOTION TO DISMISS FILED BY DEFENDANT ON 06/09/2011

06/10/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - JURY TRIAL NOT HELD ON 06/10/2011

06/10/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

REQUEST - WAIVER OF JURY TRIAL FILED ON 06/10/2011

06/10/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

REQUEST - WAIVER OF JURY TRIAL APPROVED ON 06/10/2011

ROBERT E MURRAY JR, JUSTICE

06/10/2011 OTHER FILING - OTHER DOCUMENT FILED ON 06/10/2011

DA: GREGG BERNSTEIN

STATE'S OBJECTION TO MOTION TO DISMISS

06/10/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

TRIAL - BENCH SCHEDULED FOR 06/21/2011 @ 8:30

NOTICE TO PARTIES/COUNSEL

06/13/2011 OTHER FILING - OTHER DOCUMENT FILED ON 06/11/2011

DA: GREGG BERNSTEIN

STATE'S OBJECTION TO MOTION TO DISMISS

06/13/2011 ORDER - COURT ORDER FILED ON 06/13/2011

ROBERT E MURRAY JR, JUSTICE

ORDER DENYING MOTION TO DISMISS

06/13/2011 Charge(s): 1,2,3,4,5,6,7,8,9,10,11,12

MOTION - MOTION TO DISMISS DENIED ON 06/13/2011

ROBERT E MURRAY JR, JUSTICE
COPY TO PARTIES/COUNSEL

A TRUE COPY

ATTEST: _____

Clerk